



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

HARVARD LAW LIBRARY

THE
SOUTHWESTERN REPORTER,
VOLUME 78,

CONTAINING ALL THE CURRENT DECISIONS OF THE

SUPREME AND APPELLATE COURTS OF ARKANSAS,
KENTUCKY, MISSOURI, TENNESSEE, TEXAS,
AND INDIAN TERRITORY.

PERMANENT EDITION.

FEBRUARY 10—MARCH 23, 1904.

WITH TABLE OF WRITS OF ERROR DENIED BY THE SUPREME COURT OF TEXAS IN CASES IN THE COURT
OF CIVIL APPEALS.

ALSO, TABLES OF SOUTHWESTERN CASES PUBLISHED IN VOLS. 176, MISSOURI REPORTS; 99, 100,
MISSOURI APPEAL REPORTS; 96, TEXAS REPORTS; 29, 30, TEXAS CIVIL APPEALS REPORTS.

ALSO, ADDITIONAL TABLES FOR VOLS. 176, MISSOURI REPORTS; 99, 100, MISSOURI APPEAL REPORTS; 96,
TEXAS REPORTS; 29, 30, TEXAS CIVIL APPEALS REPORTS.

A TABLE OF STATUTES CONSTRUED IS GIVEN
IN THE INDEX.

ST. PAUL:
WEST PUBLISHING CO.
1904.

KF
135
.57
56
V. 78

**COPYRIGHT, 1904,
BY
WEST PUBLISHING COMPANY.**

JUDGES

OF THE

COURTS REPORTED DURING THE PERIOD COVERED BY THIS VOLUME.

ARKANSAS—Supreme Court.

HENRY G. BUNN, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

BURRILL B. BATTLE
SIMON P. HUGHES

CARROLL D. WOOD.
JAMES E. RIDDICK.

INDIAN TERRITORY—Court of Appeals.

JOSEPH A. GILL, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

HOSEA TOWNSEND.

CHARLES W. RAYMOND.

WM. H. H. CLAYTON.

KENTUCKY—Court of Appeals.

A. R. BURNAM, CHIEF JUSTICE.

JUDGES.

THOMAS H. PAYNTER.
J. P. HOBSON.
ED. C. O'REAR.

HENRY S. BARKER.
W. E. SETTLE.
T. J. NUNN.

MISSOURI—Supreme Court.

W. M. ROBINSON, CHIEF JUSTICE.

Division No. 1.

THEODORE BRACE, PRESIDING JUDGE.

ASSOCIATE JUSTICES.

W. M. ROBINSON.

WILLIAM C. MARSHALL.

LEROY B. VALLIANT.

Division No. 2.

JAMES B. GANTT, PRESIDING JUDGE.

ASSOCIATE JUSTICES.

GAVON D. BURGESS

JAMES D. FOX.

Court of Appeals at Kansas City.

JACKSON L. SMITH, PRESIDING JUDGE.

ASSOCIATE JUSTICES.

E. J. BROADDUS

JAMES ELLISON.

Court of Appeals at St. Louis.

CHARLES C. BLAND, PRESIDING JUDGE.

ASSOCIATE JUSTICES.

RICHARD L. GOODE

VALLE REYBURN.

TENNESSEE—Supreme Court.**W. D. BEARD, CHIEF JUSTICE.**

ASSOCIATE JUSTICES.

**JOHN S. WILKES
W. K. McALISTER****JOHN K. SHIELDS.
M. M. NEIL****TEXAS—Supreme Court.****REUBEN R. GAINES, CHIEF JUSTICE.**

ASSOCIATE JUSTICES.

THOMAS J. BROWN.**F. A. WILLIAMS****Court of Criminal Appeals.****W. L. DAVIDSON, PRESIDING JUDGE.**

JUDGES.

JOHN N. HENDERSON.**M. M. BROOKS****Courts of Civil Appeals.***First District.***C. C. GARRETT, CHIEF JUSTICE.**

ASSOCIATE JUSTICES.

R. A. PLEASANTS.**W. H. GILL***Second District.***T. H. CONNER, CHIEF JUSTICE.**

ASSOCIATE JUSTICES.

I. W. STEPHENS**OCIE SPEER.***Third District.***H. C. FISHER, CHIEF JUSTICE.**

ASSOCIATE JUSTICES.

W. M. KEY.**SAM STREETMAN.***Fourth District.***J. H. JAMES, CHIEF JUSTICE.**

ASSOCIATE JUSTICES.

W. S. FLY.**H. H. NEILL.***Fifth District.***ANSON RAINEY, CHIEF JUSTICE.**

ASSOCIATE JUSTICES.

JOHN BOOKHOUT.**J. M. TALBOT.**

COURT RULES.

SUPREME COURT OF TEXAS.

Prescribing a Course of Study and Regulations Governing the Mode of Examination for Admission to the Bar.

In pursuance of an act of the Twenty-Eighth Legislature entitled "An act to provide for and regulate the granting of license to practice as attorney and counsellor at law in all the courts of the state of Texas and to repeal all laws and parts of laws in conflict therewith," approved March 19, 1903, we, the undersigned, Chief Justice and Associate Justices of the Supreme Court of the state of Texas, do hereby prescribe the following course of study to be pursued as a condition to admission to the bar, and the following rules to govern the Board of Legal Examiners in examining applicants as required by that act:

I.

Elements of the Common Law.

Blackstone's Commentaries, Vols. 1, 2 and 3.

II.

Real Property.

Tiedeman or Kent, Vol. 4.

Revised Statutes, Title XX, "Conveyances"; Title LXIII, "Landlord and Tenant"; Title CX, "Wills."

III.

Contracts.

1. Anson or Clark.
2. Sales—Tiffany.
3. Bills and Notes—Bigelow, Daniel or Story. Revised Statutes, Title XIII, "Bills, Notes and Other Written Instruments"; Title LXXXIV, "Principal and Surety."
4. Carriers—Hutchison. Revised Statutes, Title XIV, "Carriers."
5. Partnership—Mechem.
6. Corporations—Clark.
7. Agency—Story.
8. Revised Statutes, Title L, "Frauds and Fraudulent Conveyances."

IV.

Torts.

1. Cooley.
2. Revised Statutes, Title LVII, "Injuries Resulting in Death"; Revised Statutes, Title XCIV, Chapter 12b (Sayles), "Railroads."

78 S.W.

V.

Equity Jurisprudence.

1. Bispham or Eaton.
2. Revised Statutes, Title LVI, "Injunction."

VI.

Pleading, Practice and Evidence.

1. Townes' Pleading.
2. Story's Equity Pleading; Revised Statutes, Title X, "Attachment and Garnishment"; Title XXVII, "Courts—Supreme, of Civil Appeals and Criminal Appeals"; Title XXVIII, "Courts—District"; Title XXIX, "Courts—County"; Title XXX, "Courts—District and County—Practice In"; Title XXXIII, "Courts—Justices"; Title C, "Sequestration"; Title CVI, "Trespass to Try Title"; Title CVII, "Trial of Right of Property."
3. Greenleaf's Evidence, especially Vol. 1.
4. Revised Statutes, Title XL, "Evidence, with Sayles' Notes."
5. Revised Statutes, Title LXVII, "Limitations."
6. Revised Statutes, Title XCIII, "Quo Warranto."
7. Rules of the Supreme Court for the government of that court, the Court of Criminal Appeals, the Courts of Civil Appeals and the trial courts.

VII.

Domestic Relations and Administration of Decedents' Estates.

- 2 Kent's Commentaries, Lectures XXVIII, XXIX, XXX, XXXI and XXXII; Revised Statutes, Title LV, "Husband and Wife"; Revised Statutes, Chapters 1, 4, 8, 9, 10, 12, 14, 18 of Title LI, "Guardian and Ward"; Revised Statutes, Articles 1867, 1869 and 1879 of Chapter 3, and Chapters 4, 5, 11, 12, 14, 17, 18, 19, 20, 22, 23, 25, 26, 28, of Title XXXIX, "Estates of Decedents"; Revised Statutes, Title XXXV, "Descent and Distribution."

VIII.

Constitutional and Statutory Law.

1. Cooley's Elements of Constitutional Law.
2. Cooley's Constitutional Limitations.

3. Bishop on the Written Laws.
4. Constitution of the United States.
5. Constitution of Texas.
6. Revised Statutes, Title LXIV, "Laws," and Final Title, "General Provisions."

IX.

Criminal Law.

1. 4 Vol. of Blackstone or Bishop.
2. Penal Code of Texas.
3. Code of Criminal Procedure.

It is recommended that in connection with the topics in the Revised Civil Statutes, specified above, the student read Batts' or Sayles' Notes; also White or Willson's Notes upon the Penal Code and the Code of Criminal Procedure.

In prescribing the course of study, it is not intended to require the applicant to read any particular book. Any equivalent will be sufficient. Nor is it intended to require a very close study of the statutes. A general acquaintance with the provisions upon the topics indicated will be sufficient.

Each of the divisions in the foregoing course of study, numbered from I to IX, inclusive, shall be deemed a branch within the meaning of section 5 of the act before mentioned.

Since some general education is necessary

to a practice of law, it shall be the duty of the Board of Examiners to reject any applicant who, in their opinion, may show himself so deficient in that respect as not to be capable of performing the duties of an attorney.

It is further ordered that in addition to the certificate of the commissioners court, as to the moral character and honorable deportment of the applicant, the Board of Examiners shall require him to present also a certificate, of the like effect, from two reputable practicing attorneys, who have known him for the preceding six months.

In case the Board for any reason shall not be satisfied as to the moral character of the applicant, by the proof required by the statute and the rule, they may resort to such other evidence or source of information as they may deem proper.

Given under our hands at Austin, Texas, this the 15th day of July, 1903.

R. R. GAINES,
Chief Justice.

T. J. BROWN,
F. A. WILLIAMS,

Associate Justices of the Supreme Court
of Texas.

A true copy.

Attest:

F. T. CONNERLY, Clerk.

CASES REPORTED.

	Page		Page
Abbott v. State (Tex. Cr. App.).....	510	Belcher Land Mōrtg. Co. v. Norris (Tex. Civ. App.)	390
Abce v. San Antonio Brewing Ass'n (Tex. Civ. App.)	973	Belt v. State (Tex. Cr. App.).....	933
Abney, Jordan v. (Tex. Sup.).....	486	Bemis & Co., W. T. Richards & Co. v. (Tex. Civ. App.)	239
A. Booth & Co. v. Bethel (Ky.).....	868	Ben C. Jones & Co., Gammel Book Co. v. (Tex. Civ. App.).....	21
Adams v. State (Tex. Cr. App.).....	935	Benedict v. Chicago Great Western R. Co. (Mo. App.)	60
Adams, Harris' Adm'r v. (Ky.).....	158	Bennett v. Ryan (Ky.).....	892
Adams, Kelley & Lysle Mill. Co. v. (Ark.)	49	Bennison v. Galveston (Tex. Civ. App.) ..	1089
Adams, State v. (Mo. Sup.).....	588	Bernero, Hadley v. (Mo. App.).....	64
Adkins v. Williams (Ky.).....	870	Berry, State v. (Mo. Sup.).....	611
Ætna Ins. Co. v. Fitze (Tex. Civ. App.)..	370	Bethel, A. Booth & Co. v. (Ky.).....	868
Ætna Life Ins. Co., Bean v. (Tenn.).....	104	Beyers v. State (Ark.).....	748
Allison v. State (Tex. Cr. App.).....	1065	Beyer, Burton-Lingo Co. v. (Tex. Civ. App.)	248
Altgelt v. Campbell (Tex. Civ. App.).....	967	B. F. Beard & Co. v. Goodman (Ky.).....	191
American Brass & Mfg. Co., Philippi v. (Mo. App.)	77	Bickett, Hale v. (Tex. Civ. App.).....	531
Ancient Order of Pyramids, Hunt v. (Mo. App.)	649	Biggers, Oity of Lebanon v. (Ky.).....	213
Ancient Order of Pyramids, Weber v. (Mo. App.)	650	Bilby, Clay v. (Ark.).....	749
Anderson, Cameron Mill & Elevator Co. v. (Tex. Civ. App.).....	8	Binion v. Woolery (Ky.).....	898
Anderson, Cameron Mill & Elevator Co. v. (Tex. Civ. App.).....	971	Birdseye, Tennent Shoe Co. v. (Mo. App.)..	1036
Anderson, City of Corsicana v. (Tex. Civ. App.)	261	Bishop v. Matney (Ky.).....	856
Anderson, Stark v. (Mo. App.).....	340	Bitzer, United Loan & Deposit Bank v. (Ky.)	183
Anderson, Western Union Tel. Co. v. (Tex. Civ. App.)	84	Black v. Golden (Mo. App.)	301
Andrews v. Erwin (Ky.).....	902	Black v. Pool (Tex. Sup.).....	922
Arbuckle Bros., Borches & Co. v. (Tenn.)	266	Blackerby, Ellis' Adm'r v. (Ky.).....	181
Arnold, Orawford v. (Tex. Civ. App.).....	244	Blain v. State (Tex. Cr. App.).....	518
Asbury, Pendleton v. (Mo. App.).....	651	Blank v. Robertson (Tex. Civ. App.).....	564
Ascarete v. Pfaff (Tex. Civ. App.).....	974	Blanks v. Craig (Ark.).....	764
Asmus, Metropolitan Life Ins. Co. v. (Ky.)	204	Blanton, Tyler v. (Tex. Civ. App.).....	564
Atchison, T. & S. F. R. Co., Frazier v. (Mo. App.)	679	Board of Councilmen of City of Harrodsburg v. Mitchell (Ky.)	210
Atchison, T. & S. F. R. Co., Moorman v. (Mo. App.)	1080	Board of Councilmen of Frankfort, Twyman's Adm'r v. (Ky.).....	446
Aultman & Taylor Machinery Co., Standefer v. (Tex. Civ. App.).....	552	Board of Education of Methodist Church, Pullins v. (Ky.).....	457
Bailey, Dennis v. (Mo. App.).....	669	Board of Valuation & Assessments of Kentucky, Jefferson County v. (Ky.).....	443
Bailey, Pacific Mut. Life Ins. Co. v. (Ky.)	119	Bogard v. Tyler's Adm'r (Ky.).....	138
Baldrige, McNealey v. (Mo. App.).....	1081	Bohannon v. Clark (Ky.).....	479
Ball v. State (Tex. Cr. App.).....	508	Bonner v. Bonner (Tex. Civ. App.).....	535
Bank of Seneca v. First Nat. Bank (Mo. App.)	1092	Bonnie & Co. v. Perry's Trustee (Ky.).....	208
Barber Asphalt Pav. Co. v. Muchenberger (Mo. App.)	280	Booth v. Clark (Tex. Civ. App.).....	392
Barbour v. Huber's Ex'r (Ky.).....	869	Booth & Co. v. Bethel (Ky.).....	868
Bardstown & L. Turnpike Co. v. Nelson County (Ky.)	851	Borches & Co. v. Arbuckle Bros. (Tenn.)..	266
Bardstown & L. Turnpike Co., Nelson County v. (Ky.)	856	Bosley, Eddy v. (Tex. Civ. App.).....	565
Barlow's Adm'r v. Comstock's Adm'r (Ky.)	475	Boswell v. Terrell (Tex. Sup.).....	4
Barnett, Braly v. (Tex. Civ. App.).....	965	Bowman, Pecos & N. T. R. Co. v. (Tex. Civ. App.)	22
Bates, State v. (Mo. App.).....	682	Box, State v. (Tex. Civ. App.).....	982
Bates, State v. (Mo. App.).....	1132	Boyd v. Boyd (Tex. Civ. App.).....	39
Bath v. Houston & T. O. R. Co. (Tex. Civ. App.)	993	Boyer, State v. (Mo. Sup.).....	601
Baxter v. St. Louis Transit Co. (Mo. App.)	70	Braly v. Barnett (Tex. Civ. App.).....	965
Beakley v. Rainier (Tex. Civ. App.).....	702	Bratcher, Texas & P. R. Co. v. (Tex. Civ. App.)	531
Bean v. Ætna Life Ins. Co. (Tenn.).....	104	Braun, Trippensee v. (Mo. App.).....	674
Bean, State v. (Mo. App.).....	640	Bray v. State (Tex. Cr. App.).....	345
Beard v. State (Tex. Cr. App.).....	348	Breathitt Coal, Iron & Lumber Co. v. Gregory (Ky.)	148
Beard, Missouri, K. & T. R. Co. of Texas v. (Tex. Civ. App.).....	253	Brent v. Chipley (Mo. App.)	270
Beard & Co. v. Goodman (Ky.)	191	Brewer v. State (Ark.).....	773
Beattyville Bank v. Roberts (Ky.).....	901	Brewster, F. Groos & Co. v. (Tex. Civ. App.)	359
Beever & Hindea, Talley v. (Tex. Civ. App.)	23	Briggs v. Morgan (Mo. App.)	295
	78 S.W.	Brookfield Pressed Brick & Tile Mfg. Co., Powell v. (Mo. App.).....	646
	(vii)	Broughton, Illinois Cent. R. Co. v. (Ky.)..	876
		Brown v. Commonwealth (Ky.).....	1126
		Brown v. Missouri, K. & T. R. Co. (Mo. App.)	273

	Page		Page
Brown v. State (Tex. Cr. App.).....	507	City of Lexington v. Hayman (Ky.).....	910
Brown v. State (Tex. Cr. App.).....	936	City of Lexington v. Woolfolk (Ky.).....	910
Brugger, Walter v. (Ky.).....	419	City of Louisiana v. McAllister (Mo. App.).....	314
Buckner v. Vancleave (Tex. Civ. App.).....	541	City of Louisiana v. Shaffner (Mo. App.).....	287
Bull v. San Antonio & A. P. R. Co. (Tex. Civ. App.).....	525	City of Ludlow v. Richie (Ky.).....	190
Buren v. St. Louis Transit Co. (Mo. App.).....	680	City of Marlin v. Green (Tex. Civ. App.).....	704
Burge v. Duden (Mo. App.).....	653	City of Richmond v. Martin (Ky.).....	219
Burnam v. Terrell (Tex. Sup.).....	500	City of San Antonio v. Talerico (Tex. Civ. App.).....	28
Burnett County, Poole v. (Tex. Civ. App.).....	1135	City of Sedalia v. Scott (Mo. App.).....	276
Burriss & Haynie v. Missouri Pac. R. Co. (Mo. App.).....	1042	City of Tarkio v. Loyd (Mo. Sup.).....	797
Burton, Cosgrove v. (Mo. App.).....	667	City of Tyler v. L. L. Jester & Co. (Tex. Sup.).....	1058
Burton-Lingo Co. v. Beyer (Tex. Civ. App.).....	248	Clark v. Elmendorf (Tex. Civ. App.).....	538
Butchek, Galveston, H. & S. A. R. Co. v. (Tex. Civ. App.).....	740	Clark v. State (Tex. Cr. App.).....	1078
Bybee, Meyer Bros. Drug Co. v. (Mo. Sup.).....	579	Clark, Bohannon v. (Ky.).....	479
Cable v. Jones (Mo. Sup.).....	780	Clark, Booth v. (Tex. Civ. App.).....	392
Callender, Holder & Co. v. Short (Tex. Civ. App.).....	366	Clark, Goldsmith v. (Ky.).....	405
Cameron Mill & Elevator Co. v. Anderson (Tex. Civ. App.).....	8	Clay v. Bilby (Ark.).....	749
Cameron Mill & Elevator Co. v. Anderson (Tex. Civ. App.).....	971	Clements v. Carpenter (Tex. Civ. App.).....	360
Campbell v. Stanberry (Mo. App.).....	292	Clemons, Hagan v. (Ky.).....	899
Campbell, Altgelt v. (Tex. Civ. App.).....	967	Clifton, Methodist Episcopal Church South v. (Tex. Civ. App.).....	732
Campbell, Elliott v. (Ky.).....	1122	Cloyd, Galveston, H. & S. A. R. Co. v. (Tex. Civ. App.).....	43
Campbell, Monongahela River Consol. Coal & Coke Co. v. (Ky.).....	405	Coe v. Louisville & N. R. Co. (Ky.).....	439
Cantwell, State v. (Mo. Sup.).....	569	Cole v. Ducktown Sulphur, Copper & Iron Co. (Tenn.).....	93
Carlisle, St. Louis, I. M. & S. R. Co. v. (Tex. Civ. App.).....	553	Collum, Sanger Bros. v. (Tex. Civ. App.).....	401
Carpenter v. Rice's Adm'r (Ky.).....	458	Columbia Paper Stock Co. v. Fidelity & Casualty Co. of New York (Mo. App.).....	320
Carpenter, Clements v. (Tex. Civ. App.).....	369	Colvin, Hilton v. (Ky.).....	890
Carroll's Adm'r v. Louisville (Ky.).....	1117	Commonwealth v. Morehead (Ky.).....	1105
Carthage, Harding v. (Mo. App.).....	654	Commonwealth v. Moren (Ky.).....	432
Case v. Cordell Zinc & Lead Min. Co. (Mo. App.).....	62	Commonwealth, Brown v. (Ky.).....	1126
Cassidy v. Willis & Connally (Tex. Civ. App.).....	40	Commonwealth, Cornett v. (Ky.).....	858
Cassinelli & Co., Galveston, H. & S. A. R. Co. v. (Tex. Civ. App.).....	247	Commonwealth, Cox v. (Ky.).....	423
C. D. Young & Co., Pennsylvania Fire Ins. Co. v. (Ky.).....	127	Commonwealth, Dean v. (Ky.).....	1112
Center Creek Min. Co. v. Frankenstein (Mo. Sup.).....	785	Commonwealth, Dodson v. (Ky.).....	874
Central Trust Co. of Kansas City, People's Nat. Bank v. (Mo. Sup.).....	618	Commonwealth, Gaddie v. (Ky.).....	162
C. E. Slayton & Co. v. Horsey (Tex. Sup.).....	919	Commonwealth, Kincaid v. (Ky.).....	433
Chambers v. Haskell (Ky.).....	478	Commonwealth, Knuckles v. (Ky.).....	469
Chappell, State v. (Mo. Sup.).....	585	Commonwealth, Louisville & N. R. Co. v. (Ky.).....	124
Chattanooga Machinery Co. v. Hargraves (Tenn.).....	105	Commonwealth, Louisville & N. R. Co. v. (Ky.).....	167
Onesapeake & O. R. Co. v. Topping (Ky.).....	135	Commonwealth, Martin v. (Ky.).....	1104
Chess & Wymond Co., Wilson v. (Ky.).....	453	Commonwealth, O'Rear v. (Ky.).....	407
Chicago Great Western R. Co., Benedict v. (Mo. App.).....	60	Commonwealth, Peacock Distillery Co. v. (Ky.).....	893
Chinn v. Shackelford (Ky.).....	908	Commonwealth, Pearson v. (Ky.).....	1128
Chiple, Brent v. (Mo. App.).....	270	Commonwealth, Strater Bros. Tobacco Co. v. (Ky.).....	871
Chism v. State (Tex. Cr. App.).....	949	Commonwealth, Tipton v. (Ky.).....	174
Chouteau Land & Lumber Co., Martin v. (Mo. App.).....	673	Commonwealth, Williams v. (Ky.).....	134
Chowning v. Parker (Mo. App.).....	677	Comstock's Adm'r, Barlow's Adm'r v. (Ky.).....	475
Christensen, Western Union Tel. Co. v. (Tex. Civ. App.).....	744	Conkey, Strode v. (Mo. App.).....	678
Cincinnati, N. O. & T. P. R. Co. v. Halcomb (Ky.).....	205	Connerton, McLean v. (Tex. Civ. App.).....	238
Cincinnati, N. O. & T. P. R. Co. v. Vaught (Ky.).....	859	Continental Casualty Co., Jamison v. (Mo. App.).....	812
Cincinnati Southern R. Co.'s Trustees v. Society of Shakers' Trustees (Ky.).....	130	Continental Fire Ins. Co. v. Cummings (Tex. Civ. App.).....	378
Cincinnati Tobacco Warehouse Co. v. Leslie & Whitaker's Trustee (Ky.).....	413	Continental Ins. Co. v. Daniel (Ky.).....	866
Citizens' Nat. Bank, Cumberland Valley Bank's Assignee v. (Ky.).....	889	Convent of Good Shepherd, Wilhite v. (Ky.).....	138
Citizens' R. Co., Crow v. (Tex. Civ. App.).....	13	Cook, Stone v. (Mo. Sup.).....	801
City Nat. Bank, Ferguson-McKinney Dry Goods Co. v. (Tex. Civ. App.).....	265	Cooper v. Lankford (Ky.).....	197
City of Bardstown v. Nelson County (Ky.).....	169	Cooper v. State (Tex. Cr. App.).....	346
City of Corsicana v. Anderson (Tex. Civ. App.).....	261	Cordell Zinc & Lead Min. Co., Case v. (Mo. App.).....	62
City of Corsicana v. Zorn (Tex. Sup.).....	924	Cornett v. Commonwealth (Ky.).....	858
City of Lebanon v. Biggers (Ky.).....	213	Corson v. Waller (Mo. App.).....	656
City of Lexington v. Crosthwaite (Ky.).....	1130	Cosgrove v. Burton (Mo. App.).....	667
		Costigan, Rogers v. (Ky.).....	121
		Coulter, Nail v. (Ky.).....	1110
		Coulter, Pratt v. (Ky.).....	1131
		Covington, Having v. (Ky.).....	431
		Cox v. Commonwealth (Ky.).....	423
		Cox v. State (Ark.).....	756
		Craddock Grocery Co., Perry-Rice Grocery Co. v. (Tex. Civ. App.).....	966
		Craig v. Welsh-Hackley Coal & Oil Co. (Ky.).....	1122
		Craig, Blanks v. (Ark.).....	764
		Crane v. Noel (Mo. App.).....	826

	Page		Page
Crawford v. Arnold (Tex. Civ. App.).....	244	Duffy v. St. Louis Transit Co. (Mo. App.).....	831
Criswell, Missouri, K. & T. R. Co. of Texas v. (Tex. Civ. App.).....	888	Dunham & Nelson, Deutsch v. (Ark.).....	767
Cronley's Trustee, Stallcup v. (Ky.).....	441	Dunlap v. Kelly (Mo. App.).....	664
Crooker Shoe Co. v. Fry (Mo. App.).....	313	Dunlap, Ellison v. (Ky.).....	155
Crosthwaite, City of Lexington v. (Ky.).....	1130	Dunn, Gulf, C. & S. F. R. Co. v. (Tex. Civ. App.).....	1080
Crow v. Citizens' R. Co. (Tex. Civ. App.).....	13	Dunnaway, Zollinger v. (Mo. App.).....	666
Cudahy Packing Co. v. Dorsey (Tex. Civ. App.).....	20	Early, Wimp v. (Mo. App.).....	343
Culp, Davis v. (Tex. Civ. App.).....	554	Eastern Texas R. Co. v. Scurlock (Tex. Sup.).....	490
Cumberland Telephone & Telegraph Co. v. Foster (Ky.).....	150	East Tennessee & W. N. O. R. Co. v. Lindamood (Tenn.).....	99
Cumberland Valley Bank's Assignee v. Citizens' Nat. Bank (Ky.).....	889	Eddy v. Bosley (Tex. Civ. App.).....	563
Cummings, Continental Fire Ins. Co. v. (Tex. Civ. App.).....	378	Edina, Spalding v. (Mo. App.).....	302
Cummings, Peacock v. (Tex. Civ. App.).....	1002	Edwards v. Merchants' Bank (Mo. App.).....	1132
Cummings, Virginia Fire & Marine Ins. Co. v. (Tex. Civ. App.).....	716	Edward Thompson Co. v. Fenley (Ky.).....	416
Cunningham v. State (Tex. Cr. App.).....	930	Eggers, Walling v. (Ky.).....	428
Curry v. Kentucky Western R. Co. (Ky.).....	435	Elliott v. Campbell (Ky.).....	1122
Curtis, Judge v. (Ark.).....	746	Elliott v. Sheppard (Mo. Sup.).....	627
		Ellis v. Riddick (Tex. Civ. App.).....	719
Dallas, Houston & T. O. R. Co. v. (Tex. Civ. App.).....	525	Ellis, O'Neill v. (Tex. Civ. App.).....	1083
Dallas Consol. Electric St. R. Co. v. Ruth-erford (Tex. Civ. App.).....	558	Ellis' Adm'r v. Blackerby (Ky.).....	181
Dallas Rapid Transit R. Co. v. Payne (Tex. Civ. App.).....	1085	Ellison v. Dunlap (Ky.).....	155
Dallas Terminal Ry. & Union Depot Co., Parks v. (Tex. Civ. App.).....	533	Elmendorf, Clark v. (Tex. Civ. App.).....	538
Dalmazzo v. Simmons (Ky.).....	179	Elmore v. State (Tex. Cr. App.).....	520
Daniel, Continental Ins. Co. v. (Ky.).....	866	El Paso Electric R. Co. v. Galliher (Tex. Civ. App.).....	7
Davidson v. Dockery (Mo. Sup.).....	624	El Paso Electric R. Co. v. Kendall (Tex. Civ. App.).....	1081
Davis v. Culp (Tex. Civ. App.).....	554	Equitable Life Assur. Soc. v. Maverick (Tex. Civ. App.).....	560
Davis, Nashville & K. R. Co. v. (Tenn.).....	1050	Erwin, Andrews v. (Ky.).....	902
Dawson v. Wombles (Mo. App.).....	823	E. S. Bonnie & Co. v. Perry's Trustee (Ky.).....	208
Dawson, Texas & P. R. Co. v. (Tex. Civ. App.).....	235	Eubank, Secrist v. (Mo. App.).....	315
Day v. Exchange Bank (Ky.).....	132	Evans v. Motley (Ky.).....	877
Dean v. Commonwealth (Ky.).....	1112	Everett, Tucson Land & Live Stock Co. v. (Tex. Civ. App.).....	535
Dearing v. Moran (Ky.).....	217	Ewing's Adm'r, Louisville & N. R. Co. v. (Ky.).....	460
De Berry, Houston & T. O. R. Co. v. (Tex. Civ. App.).....	736	Exchange Bank, Day v. (Ky.).....	132
Deering & Co. v. Veal (Ky.).....	886	Exchange Bank, King v. (Mo. App.).....	1038
Democrat Pub. Co. v. Patterson (Ky.).....	131	Exchange Real Estate & Building Co. v. Schuchman Realty Co. (Mo. App.).....	75
Denison & S. R. Co., Pelly v. (Tex. Civ. App.).....	542	Fanning v. St. Louis Transit Co. (Mo. App.).....	62
Dennis v. Bailey (Mo. App.).....	669	Faris, Steele v. (Ky.).....	808
Dennison v. Keasbey (Mo. App.).....	1041	Farmers' Bank, Gray Tie & Lumber Co. v. (Ky.).....	207
Denny Bros., Texas Cotton Products Co. v. (Tex. Civ. App.).....	557	Farrell v. St. Louis Transit Co. (Mo. App.).....	312
Deposit Bank, Sparks v. (Ky.).....	171	Fast v. Gray (Mo. App.).....	1048
Deutsch v. Dunham & Nelson (Ark.).....	767	Fellows v. King (Ky.).....	468
Dewey, Travelers' Protective Ass'n of America v. (Tex. Civ. App.).....	1087	Fenderson v. Missouri Tie & Timber Co. (Mo. App.).....	819
Dick, Louisville & N. R. Co. v. (Ky.).....	914	Fenley, Edward Thompson Co. v. (Ky.).....	416
Dickerson, George S. Howell & Co. v. (Mo. App.).....	655	Fenwick, Texas & P. R. Co. v. (Tex. Civ. App.).....	548
Dina v. State (Tex. Cr. App.).....	229	Ferguson-McKinney Dry Goods Co. v. City Nat. Bank (Tex. Civ. App.).....	265
Dixon v. Labry (Ky.).....	430	F. Groos & Co. v. Brewster (Tex. Civ. App.).....	359
Dockery, Davidson v. (Mo. Sup.).....	624	Fidelity Trust Co. v. Lloyd (Ky.).....	896
Dodson v. Commonwealth (Ky.).....	874	Fidelity Trust & Safety Vault Co., Georgetown Water Co. v. (Ky.).....	113
Dodson v. State (Tex. Cr. App.).....	514	Fidelity Trust & Safety Vault Co., Mont-gomery v. (Ky.).....	113
Dodson v. State (Tex. Cr. App.).....	940	Fidelity & Casualty Co. of New York, Columbia Paper Stock Co. v. (Mo. App.).....	320
Doerhoefer's Ex'r, Southern Planing Mill & Lumber Co. v. (Ky.).....	882	Fidler, Harper v. (Mo. App.).....	1034
Dohmen v. Schief (Mo. Sup.).....	799	Fields v. State (Tex. Cr. App.).....	932
Donnelly v. Donnelly (Ky.).....	182	Finks, Hollis v. (Tex. Civ. App.).....	555
Dooley v. Jackson (Mo. App.).....	330	First Nat. Bank v. Lampasas (Tex. Civ. App.).....	42
Dorsey, Cudahy Packing Co. v. (Tex. Civ. App.).....	20	First Nat. Bank v. Wright (Mo. App.).....	686
Doty, Monumental Bronze Co. v. (Mo. App.).....	850	First Nat. Bank, Bank of Seneca v. (Mo. App.).....	1092
Dowell v. Workman (Ky.).....	857	Fisher, Leonard v. (Mo. Sup.).....	1020
Doyle v. State, two cases (Tex. Cr. App.).....	347	Fitch v. Duckwall (Ky.).....	185
Drake v. Holbrook (Ky.).....	158	Fitze, Aetna Ins. Co. v. (Tex. Civ. App.).....	370
Drew, State v. (Mo. Sup.).....	594	Fitzgerald v. Smith (Tenn.).....	1050
D. Sullivan & Co. v. Owens (Tex. Civ. App.).....	373	Flanagan, O'Mahoney v. (Tex. Civ. App.).....	245
Ducktown Sulphur, Copper & Iron Co., Cole v. (Tenn.).....	93	Fleming v. State (Ark.).....	766
Duckwall, Fitch v. (Ky.).....	185	Follis v. State (Tex. Cr. App.).....	1069
Duddy, Reagan v. (Ky.).....	430	Ft. Worth Stockyards Co. v. Whittenburg (Tex. Civ. App.).....	363
Duden, Burge v. (Mo. App.).....	653		
Duff, Vaughn v. (Ky.).....	164		

	Page		Page
Ft. Worth & D. C. R. Co. v. Roberts (Tex. Civ. App.)	1000	Goldsmith v. Clark (Ky.)	405
Ft. Worth & D. O. R. Co., Garlington v. (Tex. Civ. App.)	868	Goodman, B. F. Beard & Co. v. (Ky.)	191
Ft. Worth & R. G. R. Co. v. Swan (Tex. Sup.)	920	Gordy, Keas v. (Tex. Civ. App.)	385
Foster v. Roseberry (Tex. Civ. App.)	701	Gorman v. Glenn (Ky.)	873
Foster, Cumberland Telephone & Telegraph Co. v. (Ky.)	150	Grand Lodge A. O. U. W., Lavin v. (Mo. App.)	325
Foster, Missouri, K. & T. R. Co. of Texas v. (Tex. Civ. App.)	1134	Grant County Building, Loan & Savings Ass'n v. Lemmon (Ky.)	874
Fox, Patton v. (Mo. Sup.)	804	Gray, Fast v. (Mo. App.)	1048
Frankenstein, Center Creek Min. Co. v. (Mo. Sup.)	785	Grayson, St. Louis Southwestern R. Co. v. (Ark.)	777
Franklin v. State (Tex. Cr. App.)	934	Gray Tie & Lumber Co. v. Farmers' Bank (Ky.)	207
Franklin v. Tracey (Ky.)	1112	Green, City of Marlin v. (Tex. Civ. App.)	704
Frazier v. Atchison, T. & S. F. R. Co. (Mo. App.)	679	Greencastle, Vaughn v. (Mo. App.)	50
Freedman, Ex parte (Tex. Cr. App.)	503	Green's Adm'r v. Maysville & B. S. R. Co. (Ky.)	439
Friend v. Means (Ky.)	164	Gregory, Breathitt Coal, Iron & Lumber Co. v. (Ky.)	148
Fry, H. W. Oorooker Shoe Co. v. (Mo. App.)	313	Griffith v. State (Tex. Or. App.)	347
Fugate, Gill v. (Ky.)	188	Groos & Co. v. Brewster (Tex. Civ. App.)	359
Fuller, Wood v. (Tex. Civ. App.)	230	Gulf, C. & S. F. R. Co. v. Dunn (Tex. Civ. App.)	1080
Fulton v. State (Tex. Cr. App.)	227	Gulf, C. & S. F. R. Co. v. Johnson (Tex. Sup.)	224
Furth v. State (Ark.)	759	Gulf, C. & S. F. R. Co. v. State (Tex. Sup.)	495
Gable, United States Cast Iron Pipe & Foundry Co. v. (Ky.)	485	Gulf, C. & S. F. R. Co. v. Ware & Walker (Tex. Civ. App.)	961
Gaddie v. Commonwealth (Ky.)	162	Guthrie v. Guthrie (Ky.)	474
Gaff, Kyle v. (Mo. App.)	1047		
Gaines v. State (Tex. Cr. App.)	1076	Hadley v. Bernero (Mo. App.)	64
Gaither v. State (Tex. Cr. App.)	234	Hagan v. Clemons (Ky.)	899
Gallihier, El Paso Electric R. Co. v. (Tex. Civ. App.)	7	Halcomb, Cincinnati, N. O. & T. F. R. Co. v. (Ky.)	205
Galloway v. San Antonio & G. R. Co. (Tex. Civ. App.)	32	Hale v. Bickett (Tex. Civ. App.)	531
Galveston, Bennison v. (Tex. Civ. App.)	1089	Hale, Parker v. (Tex. Civ. App.)	555
Galveston, H. & S. A. R. Co. v. Butchek (Tex. Civ. App.)	740	Hall v. Hall (Ky.)	1127
Galveston, H. & S. A. R. Co. v. Cassinelli & Co. (Tex. Civ. App.)	247	Hall, Nowlin v. (Tex. Civ. App.)	1079
Galveston, H. & S. A. R. Co. v. Cloyd (Tex. Civ. App.)	48	Halley v. Scott County Fiscal Court (Ky.)	149
Galveston, H. & S. A. R. Co. v. Schlather (Tex. Civ. App.)	953	Hallford, Miller v. (Tex. Civ. App.)	239
Galveston, H. & S. A. R. Co., Powell v. (Tex. Civ. App.)	975	Ham v. State (Tex. Cr. App.)	929
Galveston, H. & S. A. R. Co., Stewart v. (Tex. Civ. App.)	979	Hammer, Missouri, K. & T. R. Co. of Texas v. (Tex. Civ. App.)	708
Galveston, H. & S. A. R. Co., Williams v. (Tex. Civ. App.)	45	Hanheide v. St. Louis Transit Co. (Mo. App.)	820
Gammel Book Co. v. Ben C. Jones & Co. (Tex. Civ. App.)	21	Hanna's Assignees v. Gay (Ky.)	915
Gardner v. T. J. Winter & Co. (Ky.)	143	Harding v. Carthage (Mo. App.)	654
Gardner, Stinson v. (Tex. Sup.)	492	Harding, Hey v. (Ky.)	136
Garlington v. Ft. Worth & D. C. R. Co. (Tex. Civ. App.)	368	Hardy's Adm'r, Marks & Stix v. (Ky.)	864
Gawronski, State ex rel. Flentge v. (Mo. Sup.)	807	Hardy's Adm'r, Marks & Stix v. (Ky.)	1105
Gay, Hanna's Assignees v. (Ky.)	915	Hargadine-McKittrick Dry Goods Co. v. Sappington (Mo. App.)	1049
Gee v. Van Natta-Lynds Drug Co. (Mo. App.)	288	Hargraves, Chattanooga Machinery Co. v. (Tenn.)	105
Gentry, Illinois Cent. R. Co. v. (Ky.)	1130	Harper v. Fidler (Mo. App.)	1034
Geo. B. Peck Dry Goods Co., Miller v. (Mo. App.)	682	Harrington v. Wabash R. Co. (Mo. App.)	662
George S. Howell & Co. v. Dickerson (Mo. App.)	655	Harris v. Scrivener (Tex. Civ. App.)	705
Georgetown Water Co. v. Fidelity Trust & Safety Vault Co. (Ky.)	113	Harris, Sharp v. (Ky.)	1131
Gerhart, Wishart v. (Mo. App.)	1004	Harris' Adm'r v. Adams (Ky.)	156
German Washington Mut. Fire Ins. Co. v. Louisville (Ky.)	472	Harrison v. State (Ark.)	763
Gettys v. St. Louis Transit Co. (Mo. App.)	82	Hartford Fire Ins. Co. v. Trimble (Ky.)	462
Ghio v. Stephens (Tex. Civ. App.)	1084	Haskell, Chambers v. (Ky.)	478
Gibbs v. St. Louis & S. F. R. Co. (Mo. App.)	835	Having v. Covington (Ky.)	431
Gibbs, Metropolitan Life Ins. Co. v. (Tex. Civ. App.)	398	Hayden v. State (Tex. Cr. App.)	1133
Gilford v. State (Tex. Cr. App.)	692	Hayman, City of Lexington v. (Ky.)	910
Gill v. Fugate (Ky.)	188	Haynes, Stovall v. (Ky.)	895
Glass v. State (Tex. Cr. App.)	1068	Hazel, Mattingly's Adm'r v. (Ky.)	178
Gleason v. Kentucky Title Co. (Ky.)	170	Hazelwood v. Webster (Ky.)	123
Glenn, Gorman v. (Ky.)	873	Headrick, State v. (Mo. Sup.)	630
Glover, Washington Life Ins. Co. v. (Ky.)	146	Heather v. Thompson (Ky.)	194
Goldberg, Sorrells v. (Tex. Civ. App.)	711	Heineman, Supreme Council Knights of Equity of the World v. (Ky.)	406
Golden, Black v. (Mo. App.)	301	Helms, State v. (Mo. Sup.)	592
		Heman Const. Co. v. Loevy (Mo. Sup.)	613
		Henderson, Keachele v. (Tex. Civ. App.)	1082
		Henne & Meyer v. Moultrie (Tex. Civ. App.)	11
		Henry v. O'Rear (Mo. App.)	283
		Herman, Lippincott, Johnson & Co. v. (Mo. Sup.)	1132
		Hermann v. Parsons (Ky.)	125
		Herr, Nevian v. (Ky.)	137
		Hesselbach v. St. Louis (Mo. Sup.)	1009
		Hey v. Harding (Ky.)	136
		Heyman, Ex parte (Tex. Cr. App.)	349
		Hibbs, Illinois Cent. R. Co. v. (Ky.)	1116

	Page		Page
Hieatt, Kephart v. (Ky.).....	425	Jennings v. Kansas City (Mo. App.).....	1041
Higgins v. Higgins (Ky.).....	1124	Jester & Co., City of Tyler v. (Tex. Sup.).....	1058
Hightower v. State (Tex. Cr. App.).....	1133	J. H. Bemis & Co., W. T. Rickards & Co. v. (Tex. Civ. App.).....	239
Hilton v. Colvin (Ky.).....	890	J. H. Peter & Co., Pfisterer v. (Ky.).....	450
Hinkle, Ex parte (Mo. App.).....	317	Johnson v. Metropolitan St. R. Co. (Mo. App.).....	275
Hirt v. Kinealy (Mo. Sup.).....	1020	Johnson v. State (Tex. Cr. App.).....	1133
Hodges v. Metcalf County Court (Ky.).....	177	Johnson, Gulf, C. & S. F. R. Co. v. (Tex. Sup.).....	224
Hodges v. Metcalfe County Court (Ky.).....	460	Johnson's Ex'r, Liter v. (Ky.).....	905
Holbrook, Drake v. (Ky.).....	158	Johnston, Row v. (Ky.).....	906
Holcomb v. State (Tex. Cr. App.).....	231	Jolly, Illinois Cent. R. Co. v. (Ky.).....	476
Hollis v. Finks (Tex. Civ. App.).....	555	Jones v. Horn (Mo. App.).....	638
Holman v. Klatt (Tex. Civ. App.).....	1088	Jones v. State (Tex. Cr. App.).....	226
Holman v. Patterson (Tex. Civ. App.).....	989	Jones v. State (Tex. Cr. App.).....	227
Holmes, Pitman v. (Tex. Civ. App.).....	961	Jones, Cable v. (Mo. Sup.).....	780
Home Ins. Co., Ritchie v. (Mo. App.).....	341	Jones & Co., Gammel Book Co. v. (Tex. Civ. App.).....	21
Hooberry, Mattison v. (Mo. App.).....	642	Jones & Oglebay v. Kansas City Board of Trade (Mo. App.).....	843
Hooks & Hines v. Pafford (Tex. Civ. App.).....	991	Jordan v. Abney (Tex. Sup.).....	496
Hord, New York Life Ins. Co. v. (Ky.).....	207	Jordan v. Vaughn (Mo. App.).....	810
Horn, Jones v. (Mo. App.).....	638	Jordan, Illinois Cent. R. Co. v. (Ky.).....	426
Horsey, C. E. Slaton & Co. v. (Tex. Sup.).....	919	Joseph's Adm'r v. Lapp's Adm'r (Ky.).....	1119
Hottle, State v. (Mo. App.).....	311	Judge v. Curtis (Ark.).....	746
Hough, Schubach v. (Mo. Sup.).....	1020	Justice, Vaughn v. (Ky.).....	424
Hough, Wasserman & Co. v. (Mo. Sup.).....	1020	J. W. Kellum & Co., Missouri, K. & T. R. Co. of Texas v. (Tex. Civ. App.).....	1135
Houston & T. C. R. Co. v. Dallas (Tex. Civ. App.).....	525	Kalbach v. Mathis (Mo. App.).....	684
Houston & T. C. R. Co. v. De Berry (Tex. Civ. App.).....	736	Kallmeyer, Rodgers v. (Mo. App.).....	334
Houston & T. C. R. Co. v. Shults (Tex. Civ. App.).....	45	Kansas City, Jennings v. (Mo. App.).....	1041
Houston & T. C. R. Co. v. Turner (Tex. Civ. App.).....	712	Kansas City, Farman v. (Mo. App.).....	1046
Houston & T. C. R. Co., Bath v. (Tex. Civ. App.).....	993	Kansas City, Quinlan v. (Mo. App.).....	660
Howard v. McNeil (Ky.).....	142	Kansas City, Stealey v. (Mo. Sup.).....	599
Howard, Nashville R. v. (Tenn.).....	1098	Kansas City Board of Trade, Jones & Ogle- bay v. (Mo. App.).....	843
Howe v. State (Tex. Cr. App.).....	1064	Kansas City Southern R. Co., Marsh v. (Mo. App.).....	284
Howell & Co. v. Dickerson (Mo. App.).....	655	Keachele v. Henderson (Tex. Civ. App.).....	1082
Huber's Ex'r, Barbour v. (Ky.).....	869	Keas v. Gordy (Tex. Civ. App.).....	385
Huckaby v. State (Tex. Cr. App.).....	942	Keasbey, Dennison v. (Mo. App.).....	1041
Huff, Missouri, K. & T. R. Co. of Texas v. (Tex. Civ. App.).....	249	Keel, Parlin & Orendorff Co. v. (Tex. Civ. App.).....	1082
Hunt v. Ancient Order of Pyramids (Mo. App.).....	649	Kelley & Lysle Mill. Co. v. Adams (Ark.).....	49
Hunziker v. Supreme Lodge K. P. (Ky.).....	201	Kellum & Co., Missouri, K. & T. R. Co. of Texas v. (Tex. Civ. App.).....	1135
H. W. Crooker Shoe Co. v. Fry (Mo. App.).....	313	Kelly, Dunlap v. (Mo. App.).....	664
Hyatt v. Van Riper (Mo. App.).....	1043	Kelly, Texas & P. R. Co. v. (Tex. Civ. App.).....	372
Hyatt, State v. (Mo. Sup.).....	601	Kendall, El Paso Electric R. Co. v. (Tex. Civ. App.).....	1081
Illinois Cent. R. Co. v. Broughton (Ky.).....	876	Kennedy v. St. Louis Transit Co. (Mo. App.).....	77
Illinois Cent. R. Co. v. Gentry (Ky.).....	1130	Kenton Water Co., South Covington Dist. v. (Ky.).....	420
Illinois Cent. R. Co. v. Hibbs (Ky.).....	1116	Kentucky Land & Immigration Co. v. Sloan (Ky.).....	175
Illinois Cent. R. Co. v. Jolly (Ky.).....	476	Kentucky Lumber Co., Smith v. (Ky.).....	120
Illinois Cent. R. Co. v. Jordan (Ky.).....	426	Kentucky Title Co., Gleason v. (Ky.).....	170
Illinois Cent. R. Co. v. Watson's Adm'r (Ky.).....	175	Kentucky Western R. Co., Curry v. (Ky.).....	435
Indiana Road Mach. Co. v. Lebanon Car- riage & Implement Co. (Ky.).....	861	Kentucky Western R. Co., Mooney v. (Ky.).....	1131
International & G. N. R. Co. v. Ives (Tex. Civ. App.).....	36	Keown, Wade v. (Ky.).....	900
International & G. N. R. Co. v. Mercer (Tex. Civ. App.).....	562	Kephart v. Hieatt (Ky.).....	425
International & G. N. R. Co. v. Mills (Tex. Civ. App.).....	11	Ketter v. State (Ark.).....	758
International & G. N. R. Co. v. Wiegrieffe (Tex. Civ. App.).....	704	Killian v. State (Ark.).....	766
International & G. N. R. Co., Newbold v. (Tex. Civ. App.).....	1079	Kincaid v. Commonwealth (Ky.).....	433
International & G. N. R. Co., Smith v. (Tex. Civ. App.).....	556	Kinealy, Hirt v. (Mo. Sup.).....	1020
Irrington v. State (Tex. Cr. App.).....	928	King v. Exchange Bank (Mo. App.).....	1038
Isaacs, Smith v. (Ky.).....	434	King, Fellows v. (Ky.).....	468
Ives, International & G. N. R. Co. v. (Tex. Civ. App.).....	36	Kingsbury, State ex rel. Dike v. (Mo. App.).....	641
Jabine v. Sawyer (Ky.).....	140	Kinney v. State (Tex. Cr. App.).....	225
Jackson v. Missouri, K. & T. R. Co. of Texas (Tex. Civ. App.).....	724	Kinney v. State (Tex. Cr. App.).....	226
Jackson, Dooley v. (Mo. App.).....	330	Kirkland v. State (Ark.).....	770
Jahn's Adm'r v. Wm. H. McKnight & Co. (Ky.).....	862	Klatt, Holman v. (Tex. Civ. App.).....	1088
James v. State (Tex. Cr. App.).....	951	Knoxville Woolen Mills, Wallace v. (Ky.).....	192
Jamison v. Continental Casualty Co. (Mo. App.).....	812	Knuckles v. Commonwealth (Ky.).....	469
Jefferson County v. Board of Valuation & Assessment of Kentucky (Ky.).....	443	Kube v. St. Louis Transit Co. (Mo. App.).....	55
Jenkins, Ownes v. (Ky.).....	212	Kyle v. Gaff (Mo. App.).....	1047
		Labry, Dixon v. (Ky.).....	430
		Lackawanna Min. Co., Weston v. (Mo. App.).....	1044

	Page		Page
Lampasas, First Nat. Bank v. (Tex. Civ. App.)	42	McCord v. Nabours (Tex. Sup.)	223
Lankford, Cooper v. (Ky.)	197	McCreedy v. Stepp (Mo. App.)	671
Lapp's Adm'r, Joseph's Adm'r v. (Ky.)	1119	McDonald, Schubach v. (Mo. Sup.)	1020
Lapsley v. Merchants' Bank (Mo. App.)	1095	McGee v. Smith (Mo. App.)	305
Lavin v. Grand Lodge A. O. U. W. (Mo. App.)	325	McKnight & Co., Jahn's Adm'r v. (Ky.)	862
Lawler & Son, Smith v. (Ky.)	851	McLean v. Connerton (Tex. Civ. App.)	238
Lawrence, Ex parte (Tex. Cr. App.)	346	McNairy, Western Union Tel. Co. v. (Tex. Civ. App.)	969
Leak's Ex'r, Leak's Heirs v. (Ky.)	471	McNealey v. Baldrige (Mo. App.)	1031
Leak's Heirs v. Leak's Ex'r (Ky.)	471	McNeil, Howard v. (Ky.)	142
Lebanon Carriage & Implement Co., Indiana Road Mach. Co. v. (Ky.)	861	McWilliams, Sulek v. (Ark.)	769
Lemmon, Grant County Building, Loan & Savings Ass'n v. (Ky.)	874	Magner v. St. Louis (Mo. Sup.)	782
Leonard v. Fisher (Mo. Sup.)	1020	Maguire v. St. Louis Transit Co. (Mo. App.)	838
Leslie & Whitaker's Trustee, Cincinnati Tobacco Warehouse Co. v. (Ky.)	413	Mallory Commission Co., Phipps v. (Mo. App.)	1097
Lewis v. Sizemore (Ky.)	122	Manning, Texas & P. Coal Co. v. (Tex. Civ. App.)	545
Lewis, Snelling's Adm'r v. (Ky.)	1124	Manny v. National Surety Co. of New York (Mo. App.)	69
Libby, Warder, Bushnell & Glessner Co. v. (Mo. App.)	338	Marion County v. Louisville & N. R. Co. (Ky.)	437
Lightfoot v. State (Tex. Cr. App.)	1075	Marks v. State (Tex. Cr. App.)	512
Lillie, Nashville, C. & St. L. R. Co. v. (Tenn.)	1055	Marks & Stix v. Hardy's Adm'r (Ky.)	864
Lindamood, East Tennessee & W. N. C. R. Co. v. (Tenn.)	99	Marks & Stix v. Hardy's Adm'r (Ky.)	1105
Lippincott, Johnson & Co. v. Herman (Mo. Sup.)	1132	Maroney v. State (Tex. Cr. App.)	696
Liter v. Johnson's Ex'r (Ky.)	905	Marsh v. Kansas City Southern R. Co. (Mo. App.)	284
Lithgow v. Sweedberg (Tex. Civ. App.)	248	Marshall, Robinson v. (Ky.)	904
L. L. Jester & Co., City of Tyler v. (Tex. Sup.)	1058	Martin v. Chouteau Land & Lumber Co. (Mo. App.)	673
Lloyd, Fidelity Trust Co. v. (Ky.)	896	Martin v. Commonwealth (Ky.)	1104
Lockett v. State (Tex. Cr. App.)	234	Martin v. Witty (Mo. App.)	829
Loevy, Heman Const. Co. v. (Mo. Sup.)	613	Martin, City of Richmond v. (Ky.)	219
Logan County Bank's Assignee, Lyon's Ex'r v. (Ky.)	454	Martinez & Bros., Peterson v. (Tex. Civ. App.)	401
Logsdon's Adm'r, Louisville & N. R. Co. v. (Ky.)	409	Mast, State ex rel. Mills v. (Mo. App.)	833
London Guarantee & Accident Co. v. Scott Wilson Coal Co. (Mo. App.)	1132	Masterson v. Ribble (Tex. Civ. App.)	358
London Guaranty & Accident Co. v. Missouri & I. Coal Co. (Mo. App.)	306	Mathew v. Wabash R. Co. (Mo. App.)	271
Lone Acre Oil Co. v. Swayne (Tex. Civ. App.)	380	Mathis, Kalbach v. (Mo. App.)	684
Longacre, Whiteside v. (Mo. App.)	1133	Matney, Bishop v. (Ky.)	856
Lopez v. Vogis (Tex. Civ. App.)	239	Matthews v. Wallace (Mo. App.)	296
Louisville, Carroll's Adm'r v. (Ky.)	1117	Mattingly's Adm'r v. Hazel (Ky.)	178
Louisville, German Washington Mut. Fire Ins. Co. v. (Ky.)	472	Mattison v. Hooberly (Mo. App.)	642
Louisville R. Co. v. Meglemery (Ky.)	217	Maverick, Equitable Life Assur. Soc. v. (Tex. Civ. App.)	580
Louisville R. Co. v. Teekin (Ky.)	470	Maxwell v. State (Tex. Cr. App.)	516
Louisville Water Co., Specht v. (Ky.)	142	Mayer v. Mayer (Ky.)	883
Louisville & N. R. Co. v. Commonwealth (Ky.)	124	Maysville & B. S. R. Co., Green's Adm'r v. (Ky.)	439
Louisville & N. R. Co. v. Commonwealth (Ky.)	167	Maysville & B. S. R. Co., Patterson v. (Ky.)	870
Louisville & N. R. Co. v. Dick (Ky.)	914	Meadows v. State (Ark.)	761
Louisville & N. R. Co. v. Ewing's Adm'r (Ky.)	460	Means, Friend v. (Ky.)	164
Louisville & N. R. Co. v. Logsdon's Adm'r (Ky.)	409	Meglemery, Louisville R. Co. v. (Ky.)	217
Louisville & N. R. Co. v. Smith (Ky.)	160	Meiners v. Meiners (Mo. Sup.)	795
Louisville & N. R. Co., Coe v. (Ky.)	439	Mendez, Texas Mexican R. Co. v. (Tex. Civ. App.)	25
Louisville & N. R. Co., Marion County v. (Ky.)	437	Menzing v. State (Tex. Cr. App.)	935
Louisville & N. R. Co., Parish v. (Ky.)	186	Menzing v. State (Tex. Cr. App.)	1133
Louisville & N. R. Co., Sights v. (Ky.)	172	Mercer v. Woods (Tex. Civ. App.)	15
Love v. State (Tex. Cr. App.)	691	Mercer, International & G. N. R. Co. v. (Tex. Civ. App.)	562
Love, Oliver v. (Mo. App.)	335	Merchants' Bank, Edwards v. (Mo. App.)	1132
Love, Smallwood v. (Tex. Civ. App.)	400	Merchants' Bank, Lapsley v. (Mo. App.)	1095
Low v. State (Tenn.)	110	Merideth, Owens v. (Ky.)	145
Lowrie, Trevey v. (Tex. Civ. App.)	18	Metcalfe County Court, Hodges v. (Ky.)	177
Lowry & Goebel, Rhodes v. (Ky.)	459	Metcalfe County Court, Hodges v. (Ky.)	460
Lowry & Goebel, Rhodes v. (Ky.)	883	Methodist Episcopal Church South v. Olif-ton (Tex. Civ. App.)	732
Loyd, City of Tarkio v. (Mo. Sup.)	797	Metropolitan Life Ins. Co. v. Asmus (Ky.)	204
Lyon's Ex'r v. Logan County Bank's Assignee (Ky.)	454	Metropolitan Life Ins. Co. v. Gibbs (Tex. Civ. App.)	398
McAdams & Morford v. Norton's Assignee (Ky.)	880	Metropolitan St. R. Co., Johnson v. (Mo. App.)	275
McAllister, City of Louisiana v. (Mo. App.)	314	Meyer Bros. Drug Co. v. Bybee (Mo. Sup.)	579
McCaleb v. Rector (Tex. Civ. App.)	956	Meyerson Printing Co., Rogers v. (Mo. App.)	79
McCarty v. State (Tex. Cr. App.)	506	Miller v. Geo. B. Peck Dry Goods Co. (Mo. App.)	682
McClintock, Pierson v. (Tex. Civ. App.)	706	Miller v. Halford (Tex. Civ. App.)	239
		Miller v. Miller (Tex. Civ. App.)	1085
		Miller v. State (Tex. Cr. App.)	511
		Miller, State v. (Mo. App.)	643
		Mills, International & G. N. R. Co. v. (Tex. Civ. App.)	11

	Page		Page
Missouri, K. & T. R. Co., Brown v. (Mo. App.)	273	Nelson County, Bardstown & L. Turnpike Co. v. (Ky.)	851
Missouri, K. & T. R. Co. of Texas v. Beard (Tex. Civ. App.)	253	Nelson County, City of Bardstown v. (Ky.)	169
Missouri, K. & T. R. Co. of Texas v. Oriswell (Tex. Civ. App.)	388	Neuman v. Herr (Ky.)	137
Missouri, K. & T. R. Co. of Texas v. Foster (Tex. Civ. App.)	1134	Newbold v. International & G. N. R. Co. (Tex. Civ. App.)	1079
Missouri, K. & T. R. Co. of Texas v. Hammer (Tex. Civ. App.)	708	Newnum, Western Union Tel. Co. v. (Tex. Civ. App.)	700
Missouri, K. & T. R. Co. of Texas v. Huff (Tex. Civ. App.)	249	New York Life Ins. Co. v. Hord (Ky.)	207
Missouri, K. & T. R. Co. of Texas v. J. W. Kellum & Co. (Tex. Civ. App.)	1135	New York Life Ins. Co., Wilton v. (Tex. Civ. App.)	403
Missouri, K. & T. R. Co. of Texas v. O'Connor (Tex. Civ. App.)	374	Nix v. State (Tex. Cr. App.)	227
Missouri, K. & T. R. Co. of Texas v. Stinson (Tex. Civ. App.)	986	Noel, Crane v. (Mo. App.)	826
Missouri, K. & T. R. Co. of Texas v. Woods (Tex. Civ. App.)	1135	Norris, W. C. Belcher Land Mortg. Co. v. (Tex. Civ. App.)	390
Missouri, K. & T. R. Co. of Texas, Jackson v. (Tex. Civ. App.)	724	North v. Rogers (Ky.)	165
Missouri Pac. R. Co., Burriss & Haynie v. (Mo. App.)	1042	Norton's Assignee, McAdams & Morford v. (Ky.)	880
Missouri Real Estate Syndicate v. Sims (Mo. Sup.)	1006	Nowlin v. Hall (Tex. Civ. App.)	1079
Missouri Tie & Timber Co., Fenderson v. (Mo. App.)	819	Nutter v. Southern Ry. Co. in Kentucky (Ky.)	470
Missouri & I. Coal Co., London Guaranty & Accident Co. v. (Mo. App.)	306	Oberdorfer v. White (Ky.)	438
Mitchell, Board of Councilmen of City of Harrodsburg v. (Ky.)	210	O'Connor, Missouri, K. & T. R. Co. of Texas v. (Tex. Civ. App.)	374
M. J. Lawler & Son, Smith v. (Ky.)	851	Oliver v. Love (Mo. App.)	335
Monehan v. South Covington & C. St. R. Co. (Ky.)	1106	Oliver, Prentice v. (Ky.)	469
Monongahela River Consol. Coal & Coke Co. v. Campbell (Ky.)	405	O'Mahoney v. Flanagan (Tex. Civ. App.)	245
Montgomery v. Fidelity Trust & Safety Vault Co. (Ky.)	113	O'Neill v. Ellis (Tex. Civ. App.)	1063
Montgomery v. Montgomery (Ky.)	465	O'Rear v. Commonwealth (Ky.)	407
Monumental Bronze Co. v. Doty (Mo. App.)	850	O'Rear, Henry v. (Mo. App.)	283
Mooney v. Kentucky Western R. Co. (Ky.)	1131	Otis' Admr', Southern R. Co. in Kentucky v. (Ky.)	480
Moore v. Moore (Ky.)	141	Owens v. Jenkins (Ky.)	212
Moorman v. Atchison, T. & S. F. R. Co. (Mo. App.)	1089	Owens v. Merideth (Ky.)	145
Moran, Dearing v. (Ky.)	217	Owens, D. Sullivan & Co. v. (Tex. Civ. App.)	373
Morehead, Commonwealth v. (Ky.)	1106	Owensboro & N. R. Co., Shemwell v. (Ky.)	448
Moren, Commonwealth v. (Ky.)	432	Pacific Mut. Life Ins. Co. v. Bailey (Ky.)	110
Morgan, Briggs v. (Mo. App.)	295	Paddock-Hawley Iron Co. v. Rice (Mo. Sup.)	634
Morris, Rivers v. (Ky.)	196	Pafford, Hooks & Hines v. (Tex. Civ. App.)	991
Morrison Mfg. Co. v. Roach & Green (Mo. App.)	644	Page v. Roberts, Johnson & Rand Shoe Co. (Mo. App.)	52
Mort, Wolfsberger v. (Mo. App.)	817	Page v. Southern Const. Co. (Ky.)	879
Motley, Evans v. (Ky.)	877	Palms, Tiboldi v. (Tex. Civ. App.)	726
Moultrie, Henne & Meyer v. (Tex. Civ. App.)	11	Parish v. Louisville & N. R. Co. (Ky.)	186
Moynihan, Snoqualmi Realty Co. v. (Mo. Sup.)	1014	Parker v. Hale (Tex. Civ. App.)	555
Muchenberger, Barber Asphalt Pav. Co. v. (Mo. App.)	280	Parker, Chowning v. (Mo. App.)	677
Muir v. Thixton, Millett & Co. (Ky.)	466	Parks v. Dallas Terminal Ry. & Union Depot Co. (Tex. Civ. App.)	533
Mumford v. State (Tex. Cr. App.)	1063	Parks, Watts v. (Ky.)	1125
Murphy, Underhill v. (Ky.)	482	Parlin & Orendorff Co. v. Keel (Tex. Civ. App.)	1062
Murray v. State (Tex. Cr. App.)	927	Parman v. Kansas City (Mo. App.)	1046
Murtishaw, Texas & P. R. Co. v. (Tex. Civ. App.)	953	Parsons, Ex parte (Tex. Cr. App.)	502
Nabours, McCord v. (Tex. Sup.)	223	Parsons v. State (Tex. Cr. App.)	1073
Nall v. Coulter (Ky.)	1110	Parsons, Hermann v. (Ky.)	125
Nashville, C. & St. L. R. Co. v. Lillie (Tenn.)	1055	Patrick v. State (Tex. Cr. App.)	947
Nashville, O. & St. L. R. Co. v. Wither- spoon (Tenn.)	1052	Patterson v. Maysville & B. S. R. Co. (Ky.)	870
Nashville R. R. v. Howard (Tenn.)	1098	Patterson, Democrat Pub. Co. v. (Ky.)	131
Nashville & K. R. Co. v. Davis (Tenn.)	1050	Patterson, Holman v. (Tex. Civ. App.)	989
National Biscuit Co., Sharp v. (Mo. Sup.)	787	Patton v. Fox (Mo. Sup.)	804
National Cash Register Co., Watts v. (Ky.)	118	Payne v. State (Tex. Cr. App.)	984
National Surety Co. of New York, Manny v. (Mo. App.)	69	Payne, Dallas Rapid Transit R. Co. v. (Tex. Civ. App.)	1065
Neal, St. Louis, I. M. & S. R. Co. v. (Ark.)	220	Payne, Snell v. (Ky.)	885
Neighbors, State v. (Mo. Sup.)	591	Peacock v. Cummings (Tex. Civ. App.)	1002
Nelson County v. Bardstown & L. Turnpike Co. (Ky.)	856	Peacock Distillery Co. v. Commonwealth (Ky.)	893
		Pearson v. Commonwealth (Ky.)	1128
		Peaslee v. Walker (Tex. Civ. App.)	980
		Peck Dry Goods Co., Miller v. (Mo. App.)	682
		Pecos & N. T. R. Co. v. Bowman (Tex. Civ. App.)	22
		Pecos & N. T. R. Co. v. Williams (Tex. Civ. App.)	5
		Pelly v. Denison & S. R. Co. (Tex. Civ. App.)	542
		Pendleton v. Asbury (Mo. App.)	651
		Pennsylvania Fire Ins. Co. v. C. D. Young & Co. (Ky.)	127
		People's Nat. Bank v. Central Trust Co. of Kansas City (Mo. Sup.)	618

	Page		Page
Perkins v. State (Tex. Cr. App.).....	346	Rodgers v. Kallmeyer (Mo. App.).....	334
Perrin v. State (Tex. Cr. App.).....	930	Rogers v. Costigan (Ky.).....	121
Perry v. State, two cases (Tex. Cr. App.)..	513	Rogers v. Samuel Meyerson Printing Co.	
Perry-Rice Grocery Co. v. W. E. Crad-		(Mo. App.).....	79
dock Grocery Co. (Tex. Civ. App.).....	966	Rogers, North v. (Ky.).....	165
Perry's Trustee, E. S. Bonnie & Co. v.		Roseberry, Foster v. (Tex. Civ. App.).....	701
(Ky.).....	208	Ross v. State (Tex. Cr. App.).....	503
Peterson v. W. J. Martinez & Bros. (Tex.		Ross v. State (Tex. Cr. App.).....	514
Civ. App.).....	401	Row v. Johnston (Ky.).....	906
Peter & Co., Pfisterer v. (Ky.).....	450	Rudolph v. Sneed (Tex. Civ. App.).....	1001
Petty v. St. Louis & M. R. R. Co. (Mo.		Ruohs v. Traders' Fire Ins. Co. (Tenn.)...	85
Sup.).....	1003	Russell, Taylor v. (Ky.).....	411
Pfaff, Ascarete v. (Tex. Civ. App.).....	974	Rutherford, Dallas Consol. Electric St. R.	
Pfaff, Purdy v. (Mo. App.).....	824	Co. v. (Tex. Civ. App.).....	558
Pfisterer v. J. H. Peter & Co. (Ky.).....	450	Ryan, Bennett v. (Ky.).....	892
Pharis, West Kentucky Tel. Co. v. (Ky.)...	917		
Philippi v. American Brass & Mfg. Co.		St. Louis, Hesselbach v. (Mo. Sup.).....	1009
(Mo. App.).....	77	St. Louis, Magner v. (Mo. Sup.).....	782
Phipps v. Mallory Commission Co. (Mo.		St. Louis, Wheat v. (Mo. Sup.).....	790
App.).....	1097	St. Louis, I. M. & S. R. Co. v. Carlisle	
Pierson v. McClintock (Tex. Civ. App.)...	706	(Tex. Civ. App.).....	553
Pike, Morgan & Co. v. Wathen (Ky.).....	137	St. Louis, I. M. & S. R. Co. v. Neal (Ark.)	
Pitman v. Holmes (Tex. Civ. App.).....	961	St. Louis, I. M. & S. R. Co. v. Stephens	
Pool, Black v. (Tex. Sup.).....	922	(Ark.).....	766
Poole v. Burnet County (Tex. Civ. App.)...	1135	St. Louis Southwestern R. Co. v. Grayson	
Posay v. State (Tex. Cr. App.).....	689	(Ark.).....	777
Powell v. Brookfield Pressed-Brick & Tile		St. Louis Southwestern R. Co. of Texas v.	
Mfg. Co. (Mo. App.).....	646	Swinney (Tex. Civ. App.).....	547
Powell v. Galveston, H. & S. A. R. Co.		St. Louis Transit Co., Baxter v. (Mo. App.)	
(Tex. Civ. App.).....	975	St. Louis Transit Co., Buren v. (Mo. App.)	
Powell, Tahet v. (Tex. Civ. App.).....	997	St. Louis Transit Co., Duffy v. (Mo. App.)	
Powers, Little & Co., Scott v. (Ky.).....	408	St. Louis Transit Co., Fanning v. (Mo.	
Powers, Powers' Ex'r v. (Ky.).....	152	App.).....	62
Powers' Ex'r v. Powers (Ky.).....	152	St. Louis Transit Co., Farrell v. (Mo. App.)	
Pratt v. Coulter (Ky.).....	1131	St. Louis Transit Co., Gettys v. (Mo. App.)	
Prentice v. Oliver (Ky.).....	469	St. Louis Transit Co., Hanheide v. (Mo.	
Price v. Price (Ky.).....	888	App.).....	820
Pulaski County v. Sears (Ky.).....	123	St. Louis Transit Co., Kennedy v. (Mo.	
Pulliam, State ex rel. McKinney v. (Mo.		App.).....	77
App.).....	315	St. Louis Transit Co., Kube v. (Mo. App.)	
Pullins v. Board of Education of Methodist		St. Louis Transit Co., Maguire v. (Mo.	
Church (Ky.).....	457	App.).....	838
Purdy v. Pfaff (Mo. App.).....	824	St. Louis Transit Co., Shareman v. (Mo.	
Purvis v. State (Tex. Cr. App.).....	1134	App.).....	846
		St. Louis & H. R. Co., Whitecotton v. (Mo.	
Quinlan v. Kansas City (Mo. App.).....	660	App.).....	318
		St. Louis & M. R. R. Co., Petty v. (Mo.	
Ragan, Thompson v. (Ky.).....	485	Sup.).....	1003
Rainier, Beakley v. (Tex. Civ. App.).....	702	St. Louis & S. F. R. Co., Gibbs v. (Mo.	
Ralls County v. Stephens (Mo. App.).....	291	App.).....	835
Randle v. State (Tex. Cr. App.).....	512	St. Louis & S. F. R. Co., Woody v. (Mo.	
Ratliff v. State (Tex. Cr. App.).....	936	App.).....	658
Reagan v. Duddy (Ky.).....	430	Sampson v. State (Tex. Cr. App.).....	926
Rector, McCaleb v. (Tex. Civ. App.).....	956	Samuel Meyerson Printing Co., Rogers v.	
Redden v. State (Tex. Cr. App.).....	929	(Mo. App.).....	79
Reed v. Taylor (Ky.).....	892	San Antonio Brewing Ass'n, Abree v. (Tex.	
Reese v. State (Tex. Cr. App.).....	511	Civ. App.).....	973
Reinhardt, Simmons v. (Ky.).....	890	San Antonio Traction Co. v. Williams	
Renfro, Spence v. (Mo. Sup.).....	597	(Tex. Civ. App.).....	977
Rhodes v. Lowry & Goebel (Ky.).....	459	San Antonio & A. P. R. Co. v. Turney (Tex.	
Rhodes v. Lowry & Goebel (Ky.).....	883	Civ. App.).....	256
Ribble, Masterson v. (Tex. Civ. App.).....	358	San Antonio & A. P. R. Co. v. Turnham	
Rice, Paddock-Hawley Iron Co. v. (Mo.		(Tex. Civ. App.).....	1086
Sup.).....	634	San Antonio & A. P. R. Co., Bull v. (Tex.	
Rice's Adm'r, Carpenter v. (Ky.).....	458	Civ. App.).....	525
Richie, City of Ludlow v. (Ky.).....	199	San Antonio & G. R. Co., Galloway v.	
Richardson & Co. v. J. H. Bemis & Co. (Tex.		(Tex. Civ. App.).....	32
Civ. App.).....	239	Sanchez v. State (Tex. Cr. App.).....	504
Riddick, Ellis v. (Tex. Civ. App.).....	719	Sanders v. State (Tex. Cr. App.).....	518
Riddle, State v. (Mo. Sup.).....	606	Sanger Bros. v. Collum (Tex. Civ. App.)...	
Ritchie v. Home Ins. Co. (Mo. App.).....	341	Sappington, Hargadine-McKittrick Dry	
Rivers v. Morris (Ky.).....	196	Goods Co. v. (Mo. App.).....	1049
Roach & Green, Morrison Mfg. Co. v. (Mo.		Sauls, Ex parte (Tex. Cr. App.).....	1073
App.).....	644	Sawyer, Jabine v. (Ky.).....	140
Roberts, Beattyville Bank v. (Ky.).....	901	Schlather, Galveston, H. & S. A. R. Co. v.	
Roberts, Ft. Worth & D. C. R. Co. v. (Tex.		(Tex. Civ. App.).....	953
Civ. App.).....	1000	Schlier, Dohmen v. (Mo. Sup.).....	799
Roberts, Johnson & Rand Shoe Co., Page		Schneider, Wetz v. (Tex. Civ. App.).....	394
v. (Mo. App.).....	52	School Dist. No. 27 v. Wheat (Ark.).....	755
Roberts, Western Union Tel. Co. v. (Tex.		Schubach v. Hough (Mo. Sup.).....	1020
Civ. App.).....	522	Schubach v. McDonald (Mo. Sup.).....	1020
Robertson v. State (Tex. Cr. App.).....	517	Schuchman Realty Co., Exchange Real Es-	
Robertson, Blank v. (Tex. Civ. App.).....	564	tate & Building Co. v. (Mo. App.).....	75
Robinson v. Marshall (Ky.).....	904	Scott v. Powers, Little & Co. (Ky.).....	408
Robinson v. Talbot, two cases (Ky.).....	1108	Scott, City of Sedalia v. (Mo. App.).....	276
		Scott County Fiscal Court, Halley v. (Ky.)	

	Page		Page
Scottish Security Co.'s Receiver v. Starks (Ky.)	455	Standefer v. Aultman & Taylor Machinery Co. (Tex. Civ. App.)	552
Scott Wilson Coal Co., London Guarantee & Accident Co. v. (Mo. App.)	1132	Stark v. Anderson (Mo. App.)	340
Scrivener, Harris v. (Tex. Civ. App.)	705	Starks, Scottish Security Co.'s Receiver v. (Ky.)	455
Seurlock, Eastern Texas R. Co. v. (Tex. Sup.)	490	State v. Adams (Mo. Sup.)	588
Sears, Pulaski County v. (Ky.)	123	State v. Bates (Mo. App.)	682
Secrist v. Eubank (Mo. App.)	315	State v. Bates (Mo. App.)	1132
Shackelford, Chinn v. (Ky.)	908	State v. Bean (Mo. App.)	640
Shaffner, City of Louisiana v. (Mo. App.)	287	State v. Berry (Mo. Sup.)	611
Shankles v. State (Tex. Cr. App.)	234	State v. Box (Tex. Civ. App.)	982
Shareman v. St. Louis Transit Co. (Mo. App.)	846	State v. Boyer (Mo. Sup.)	601
Sharp v. Harris (Ky.)	1131	State v. Cantwell (Mo. Sup.)	569
Sharp v. National Biscuit Co. (Mo. Sup.)	787	State v. Chappell (Mo. Sup.)	585
Shemwell v. Owensboro & N. R. Co. (Ky.)	448	State v. Drew (Mo. Sup.)	594
Sheppard, Elliott v. (Mo. Sup.)	627	State v. Headrick (Mo. Sup.)	630
Short, Callender, Holder & Co. v. (Tex. Civ. App.)	366	State v. Helms (Mo. Sup.)	592
Shoun v. State (Tenn.)	91	State v. Hottle (Mo. App.)	311
Shrack, State ex rel. Miller v. (Mo. Sup.)	808	State v. Hyatt (Mo. Sup.)	601
Shults, Houston & T. O. R. Co. v. (Tex. Civ. App.)	45	State v. Miller (Mo. App.)	643
Shy v. Shy (Mo. App.)	299	State v. Neighbors (Mo. Sup.)	591
Sights v. Louisville & N. R. Co. (Ky.)	172	State v. Riddle (Mo. Sup.)	606
Simmons v. Reinhardt (Ky.)	890	State v. Texas Land & Cattle Co. (Tex. Civ. App.)	957
Simmons, Dalmazzo v. (Ky.)	179	State v. Vette (Mo. App.)	1133
Sinupkins, Spriggs v. (Ky.)	900	State v. Woodson (Mo. Sup.)	603
Sims v. State (Tex. Cr. App.)	1134	State, Abbott v. (Tex. Cr. App.)	510
Sims, Missouri Real Estate Syndicate v. (Mo. Sup.)	1006	State, Adams v. (Tex. Cr. App.)	935
Sisson v. Supreme Court of Honor (Mo. App.)	297	State, Allison v. (Tex. Cr. App.)	1065
Sizemore, Lewis v. (Ky.)	122	State, Ball v. (Tex. Cr. App.)	508
Slayton & Co. v. Horsey (Tex. Sup.)	919	State, Beard v. (Tex. Cr. App.)	348
Sloan, Kentucky Land & Immigration Co. v. (Ky.)	175	State, Belt v. (Tex. Cr. App.)	933
Smallwood v. Love (Tex. Civ. App.)	400	State, Bevers v. (Ark.)	748
Smith v. International & G. N. R. Co. (Tex. Civ. App.)	556	State, Blain v. (Tex. Cr. App.)	518
Smith v. Isaacs (Ky.)	434	State, Bray v. (Tex. Cr. App.)	345
Smith v. Kentucky Lumber Co. (Ky.)	120	State, Brewer v. (Ark.)	773
Smith v. M. J. Lawler & Son (Ky.)	851	State, Brown v. (Tex. Cr. App.)	507
Smith v. Smith (Ky.)	884	State, Brown v. (Tex. Cr. App.)	936
Smith v. State (Tex. Cr. App.)	516	State, Chism v. (Tex. Cr. App.)	949
Smith v. State (Tex. Cr. App.)	517	State, Clark v. (Tex. Cr. App.)	1078
Smith v. State (Tex. Cr. App.)	519	State, Cooper v. (Tex. Cr. App.)	346
Smith v. State (Tex. Cr. App.)	694	State, Cox v. (Ark.)	756
Smith v. State (Tex. Cr. App.)	937	State, Cunningham v. (Tex. Cr. App.)	930
Smith v. Stratton (Tex. Civ. App.)	4	State, Dina v. (Tex. Cr. App.)	229
Smith, Fitzgerald v. (Tenn.)	1050	State, Dodson v. (Tex. Cr. App.)	514
Smith, Louisville & N. R. Co. v. (Ky.)	160	State, Dodson v. (Tex. Cr. App.)	940
Smith, McGee v. (Mo. App.)	305	State, Doyle v., two cases (Tex. Cr. App.)	347
Smith, White v. (Mo. App.)	51	State, Elmore v. (Tex. Cr. App.)	520
Sneed, Rudolph v. (Tex. Civ. App.)	1001	State, Fields v. (Tex. Cr. App.)	932
Snell v. Payne (Ky.)	885	State, Fleming v. (Ark.)	766
Snelling's Adm'r v. Lewis (Ky.)	1124	State, Folis v. (Tex. Cr. App.)	1069
Snoqualmi Realty Co. v. Moynihan (Mo. Sup.)	1014	State, Franklin v. (Tex. Cr. App.)	934
Society of Shakers' Trustees, Cincinnati Southern R. Co.'s Trustees v. (Ky.)	130	State, Fulton v. (Tex. Cr. App.)	227
Sorrells v. Goldberg (Tex. Civ. App.)	711	State, Furth v. (Ark.)	759
South Covington Dist. v. Kenton Water Co. (Ky.)	420	State, Gaines v. (Tex. Cr. App.)	1076
South Covington & C. St. R. Co., Monehan v. (Ky.)	1106	State, Gaither v. (Tex. Cr. App.)	234
South Covington & C. St. R. Co., Stroh v. (Ky.)	1120	State, Gilford v. (Tex. Cr. App.)	692
South Covington & C. St. R. Co., Thiel v. (Ky.)	206	State, Glass v. (Tex. Cr. App.)	1068
Southern Const. Co., Page v. (Ky.)	879	State, Griffith v. (Tex. Cr. App.)	347
Southern Planing Mill & Lumber Co. v. Doerhoefer's Ex'r (Ky.)	882	State, Gulf, C. & S. F. R. Co. v. (Tex. Sup.)	495
Southern R. Co. in Kentucky v. Otis' Adm'r (Ky.)	480	State, Ham v. (Tex. Cr. App.)	929
Southern R. Co. in Kentucky, Nutter v. (Ky.)	470	State, Harrison v. (Ark.)	763
Spalding v. Edina (Mo. App.)	302	State, Hayden v. (Tex. Cr. App.)	1133
Sparks v. Deposit Bank (Ky.)	171	State, Hightower v. (Tex. Cr. App.)	1133
Specht v. Louisville Water Co. (Ky.)	142	State, Holcomb v. (Tex. Cr. App.)	231
Spence v. Renfro (Mo. Sup.)	597	State, Howe v. (Tex. Cr. App.)	1064
Sprague, Vaile v. (Mo. Sup.)	609	State, Huckaby v. (Tex. Cr. App.)	942
Spriggs v. Simpkins (Ky.)	900	State, Irvington v. (Tex. Cr. App.)	928
Stallcup v. Cronley's Trustee (Ky.)	441	State, James v. (Tex. Cr. App.)	951
Stanberry, Campbell v. (Mo. App.)	292	State, Johnson v. (Tex. Cr. App.)	1133
		State, Jones v. (Tex. Cr. App.)	226
		State, Jones v. (Tex. Cr. App.)	227
		State, Ketter v. (Ark.)	758
		State, Killian v. (Ark.)	766
		State, Kinney v. (Tex. Cr. App.)	225
		State, Kinney v. (Tex. Cr. App.)	226
		State, Kirkland v. (Ark.)	770
		State, Lightfoot v. (Tex. Cr. App.)	1075
		State, Lockett v. (Tex. Cr. App.)	234
		State, Love v. (Tex. Cr. App.)	691
		State, Low v. (Tenn.)	110
		State, McCarty v. (Tex. Cr. App.)	506
		State, Marks v. (Tex. Cr. App.)	512
		State, Maroney v. (Tex. Cr. App.)	696
		State, Maxwell v. (Tex. Cr. App.)	516

	Page		Page
State, Meadows v. (Ark.).....	761	Sulek v. McWilliams (Ark.).....	769
State, Menzing v. (Tex. Cr. App.).....	935	Sullivan & Co. v. Owens (Tex. Civ. App.)..	373
State, Menzing v. (Tex. Cr. App.).....	1133	Supreme Council, A. L. H. v. Story (Tex. Sup.)	1
State, Miller v. (Tex. Cr. App.).....	511	Supreme Council A. L. H. v. Taylor (Tex. Sup.)	1133
State, Mumford v. (Tex. Cr. App.).....	1063	Supreme Council Knights of Equity of the World v. Heineman (Ky.).....	406
State, Murray v. (Tex. Cr. App.).....	927	Supreme Court of Honor, Sisson v. (Mo. App.)	297
State, Nix v. (Tex. Cr. App.).....	227	Supreme Lodge K. P., Hunziker v. (Ky.)..	201
State, Parsons v. (Tex. Cr. App.).....	1073	Swain v. Tennessee Copper Co. (Tenn.)...	93
State, Patrick v. (Tex. Cr. App.).....	947	Swan, Ft. Worth & R. G. R. Co. v. (Tex. Sup.)	920
State, Payne v. (Tex. Cr. App.).....	934	Swayne, Lone Acre Oil Co. v. (Tex. Civ. App.)	380
State, Perkins v. (Tex. Cr. App.).....	346	Swearingin, Western Union Tel. Co. v. (Tex. Sup.)	491
State, Perrin v. (Tex. Cr. App.).....	930	Sweatt, Valentine v. (Tex. Civ. App.)....	385
State, Perry v., two cases (Tex. Cr. App.)	513	Sweedberg, Lithgow v. (Tex. Civ. App.)...	246
State, Posey v. (Tex. Cr. App.).....	689	Sweeney, Tinkle v. (Tex. Civ. App.)....	248
State, Purvis v. (Tex. Cr. App.).....	1134	Swinney, St. Louis Southwestern R. Co. of Texas v. (Tex. Civ. App.).....	547
State, Randle v. (Tex. Cr. App.).....	512	Tabet v. Powell (Tex. Civ. App.).....	997
State, Ratliff v. (Tex. Cr. App.).....	936	Talbot, Robinson v., two cases (Ky.).....	1108
State, Redden v. (Tex. Cr. App.).....	929	Talerico, City of San Antonio v. (Tex. Civ. App.)	28
State, Reese v. (Tex. Cr. App.).....	511	Talley v. Beaver & Hindes (Tex. Civ. App.)	23
State, Robertson v. (Tex. Cr. App.).....	517	Tardy v. State (Tex. Cr. App.).....	1076
State, Ross v. (Tex. Cr. App.).....	503	Taylor v. Russell (Ky.).....	411
State, Ross v. (Tex. Cr. App.).....	514	Taylor, Reed v. (Ky.).....	892
State, Sampson v. (Tex. Cr. App.).....	926	Taylor, Supreme Council A. L. H. v. (Tex. Sup.)	1133
State, Sanchez v. (Tex. Cr. App.).....	504	Taylor, Texas & P. R. Co. v. (Tex. Civ. App.)	1135
State, Sanders v. (Tex. Cr. App.).....	518	Teekin, Louisville R. Co. v. (Ky.).....	470
State, Shankles v. (Tex. Cr. App.).....	234	Tennent Shoe Co. v. Birdseye (Mo. App.)..	1036
State, Shoun v. (Tenn.).....	91	Tennent Shoe Co. v. Stovall & Brand (Ky.)	417
State, Sims v. (Tex. Cr. App.).....	1134	Tennessee Copper Co., Swain v. (Tenn.)...	93
State, Smith v. (Tex. Cr. App.).....	516	Terrell, Boswell v. (Tex. Sup.).....	4
State, Smith v. (Tex. Cr. App.).....	517	Terrell, Burnam v. (Tex. Sup.).....	500
State, Smith v. (Tex. Cr. App.).....	519	Terry v. Warder (Ky.).....	154
State, Smith v. (Tex. Cr. App.).....	694	Texas Cotton Products Co. v. Denny Bros. (Tex. Civ. App.).....	557
State, Smith v. (Tex. Cr. App.).....	937	Texas Land & Cattle Co., State v. (Tex. Civ. App.)	957
State, Stayton v. (Tex. Cr. App.).....	1071	Texas Mexican R. Co. v. Mendez (Tex. Civ. App.)	25
State, Stermer v. (Tex. Cr. App.).....	1072	Texas & P. Coal Co. v. Manning (Tex. Civ. App.)	545
State, Strickland v. (Tex. Cr. App.).....	689	Texas & P. R. Co. v. Bratcher (Tex. Civ. App.)	531
State, Tardy v. (Tex. Cr. App.).....	1076	Texas & P. R. Co. v. Dawson (Tex. Civ. App.)	235
State, Thompson v. (Tex. Cr. App.).....	691	Texas & P. R. Co. v. Fenwick (Tex. Civ. App.)	548
State, Thompson v. (Tex. Cr. App.).....	941	Texas & P. R. Co. v. Kelly (Tex. Civ. App.)	372
State, Thurman v. (Tex. Cr. App.).....	937	Texas & P. R. Co. v. Murtishaw (Tex. Civ. App.)	953
State, Townsell v. (Tex. Cr. App.).....	938	Texas & P. R. Co. v. Taylor (Tex. Civ. App.)	1135
State, Vowell v. (Ark.).....	762	Thiel v. South Covington & O. St. R. Co. (Ky.)	206
State, Wallis v. (Tex. Cr. App.).....	231	Thixton, Millett & Co., Muir v. (Ky.).....	466
State, Wallis v. (Tex. Cr. App.).....	1134	Thompson v. Ragan (Ky.).....	485
State, Watson v. (Tex. Cr. App.).....	504	Thompson v. State (Tex. Cr. App.).....	691
State, White v. (Tex. Cr. App.).....	1066	Thompson v. State (Tex. Cr. App.).....	941
State, Williams v. (Tex. Cr. App.).....	928	Thompson v. Thompson (Ky.).....	418
State, Willyard v. (Ark.).....	765	Thompson, Heather v. (Ky.).....	194
State, Wilson v. (Tex. Cr. App.).....	232	Thompson Co. v. Fenley (Ky.).....	416
State, Wilson v. (Tex. Cr. App.).....	235	Thomson, Weisman v. (Tex. Civ. App.)..	728
State ex rel. Brown v. Stiff (Mo. App.)...	675	Thornton, Willis v. (Ky.).....	215
State ex rel. Dike v. Kingsbury (Mo. App.)	641	Thurman v. State (Tex. Cr. App.).....	937
State ex rel. Flentge v. Gawronski (Mo. Sup.)	807	Tiboldi v. Palms (Tex. Civ. App.).....	726
State ex rel. McKinney v. Pulliam (Mo. App.)	315	Tinkle v. Sweeney (Tex. Civ. App.)	248
State ex rel. Miller v. Shryack (Mo. Sup.)	803	Tipton v. Commonwealth (Ky.).....	174
State ex rel. Mills v. Mast (Mo. App.).....	833	T. J. Winter & Co., Gardner v. (Ky.)....	143
Stayton v. State (Tex. Cr. App.).....	1071	Topping, Chesapeake & O. R. Co. v. (Ky.)	135
Stealey v. Kansas City (Mo. Sup.).....	599	Townsell v. State (Tex. Cr. App.).....	938
Steele v. Faris (Ky.).....	848	Tracey, Franklin v. (Ky.).....	1112
Steiner v. Wood (Mo. Sup.).....	1020	Traders' Fire Ins. Co., Ruohs v. (Tenn.)..	85
Stephens, Ghio v. (Tex. Civ. App.).....	1084	Travelers' Protective Ass'n of America v. Dewey (Tex. Civ. App.).....	1087
Stephens, Ralls County v. (Mo. App.).....	291	Trevey v. Lowrie (Tex. Civ. App.).....	19
Stephens, St. Louis, I. M. & S. R. Co. v. (Ark.)	766	Trimble, Hartford Fire Ins. Co. v. (Ky.)..	462
Stepp, McCready v. (Mo. App.).....	671		
Stermer v. State (Tex. Cr. App.).....	1072		
Stewart v. Galveston, H. & S. A. R. Co. (Tex. Civ. App.).....	970		
Stiff, State ex rel. Brown v. (Mo. App.)...	675		
Stinson v. Gardner (Tex. Sup.).....	492		
Stinson, Missouri, K. & T. R. Co. of Texas v. (Tex. Civ. App.).....	936		
Stone v. Cook (Mo. Sup.).....	801		
Story, Supreme Council, A. L. H. v. (Tex. Sup.)	1		
Stovall v. Haynes (Ky.).....	895		
Stovall & Brand, Tennent Shoe Co. v. (Ky.)	417		
Strater Bros. Tobacco Co. v. Commonwealth (Ky.)	871		
Stratton, Smith v. (Tex. Civ. App.).....	4		
Strickland v. State (Tex. Cr. App.).....	690		
Strode v. Conkey (Mo. App.).....	678		
Stroh v. South Covington & C. St. R. Co. (Ky.)	1120		

	Page		Page
Trippensee v. Braun (Mo. App.).....	674	Western Union Tel. Co. v. Newnum (Tex. Civ. App.)	700
Tucson Land & Live Stock Co. v. Everett (Tex. Civ. App.).....	535	Western Union Tel. Co. v. Roberts (Tex. Civ. App.).....	522
Turner, Houston & T. C. R. Co. v. (Tex. Civ. App.).....	712	Western Union Tel. Co. v. Swearingin (Tex. Sup.).....	491
Turner, Western Union Tel. Co. v. (Tex. Civ. App.).....	362	Western Union Tel. Co. v. Turner (Tex. Civ. App.)	362
Turney, San Antonio & A. P. R. Co. v. (Tex. Civ. App.).....	256	West Kentucky Tel. Co. v. Pharis (Ky.)....	917
Turnham, San Antonio & A. P. R. Co. v. (Tex. Civ. App.).....	1086	Weston v. Lackawanna Min. Co. (Mo. App.)	1044
Twyman's Adm'r v. Board of Councilmen of Frankfort (Ky.).....	446	Wetz v. Schneider (Tex. Civ. App.).....	394
Tyler v. Blanton (Tex. Civ. App.).....	564	Wheat v. St. Louis (Mo. Sup.).....	790
Tyler's Adm'r, Bogard v. (Ky.).....	138	Wheat, School Dist. No. 27 v. (Ark.).....	755
Underhill v. Murphy (Ky.).....	482	White v. Smith (Mo. App.).....	51
United Loan & Deposit Bank v. Bitzer (Ky.).....	183	White v. State (Tex. Cr. App.).....	1066
United States Cast Iron Pipe & Foundry Co. v. Gable (Ky.).....	485	White v. Watson (Tex. Civ. App.)	237
Vaile v. Sprague (Mo. Sup.).....	609	White, Oberdorfer v. (Ky.).....	436
Valentine v. Sweatt (Tex. Civ. App.).....	385	Whitcotton v. St. Louis & H. R. Co. (Mo. App.)	318
Vanceleave, Buckner v. (Tex. Civ. App.)..	541	Whiteside v. Longacre (Mo. App.).....	1133
Van Natta-Lynds Drug Co., Gee v. (Mo. App.)	288	Whittenburg, Ft. Worth Stockyards Co. v. (Tex. Civ. App.).....	363
Van Riper, Hyatt v. (Mo. App.).....	1043	Wiegrieffe, International & G. N. R. Co. v. (Tex. Civ. App.).....	704
Vaughn v. Duff (Ky.).....	164	Wilhite v. Convent of Good Shepherd (Ky.)	138
Vaughn v. Greencastle (Mo. App.).....	50	Wilhite v. Wolf (Mo. Sup.).....	793
Vaughn v. Justice (Ky.).....	424	Williams v. State (Tex. Cr. App.).....	928
Vaughn, Jordan v. (Mo. App.).....	316	Wm. Deering & Co. v. Veal (Ky.).....	886
Vaught, Cincinnati, N. O. & T. P. R. Co. v. (Ky.).....	859	Wm. H. McKnight & Co., Jahn's Adm'r v. (Ky.)	862
Veal, Wm. Deering & Co. v. (Ky.).....	886	Williams v. Commonwealth (Ky.).....	134
Vette, State v. (Mo. App.).....	1133	Williams v. Galveston, H. & S. A. R. Co. (Tex. Civ. App.).....	45
Virginia Fire & Marine Ins. Co. v. Cummings (Tex. Civ. App.).....	716	Williams, Adkins v. (Ky.).....	870
Vogis, Lopez v. (Tex. Civ. App.).....	239	Williams, Pecos & N. T. R. Co. v. (Tex. Civ. App.)	5
Vowell v. State (Ark.).....	762	Williams, San Antonio Traction Co. v. (Tex. Civ. App.).....	977
Wabash R. Co., Harrington v. (Mo. App.)	662	Willis v. Thornton (Ky.)	215
Wabash R. Co., Mathew v. (Mo. App.).....	271	Willis & Connally, Cassidy v. (Tex. Civ. App.)	40
Wade v. Keown (Ky.).....	900	Willyard v. State (Ark.).....	765
Walker, Peaslee v. (Tex. Civ. App.).....	980	Wilson v. Chess & Wymond Co. (Ky.)....	453
Wallace v. Knoxville Woolen Mills (Ky.)..	192	Wilson v. State (Tex. Cr. App.).....	232
Wallace, Matthews v. (Mo. App.).....	296	Wilson v. State (Tex. Cr. App.).....	235
Waller, Corson v. (Mo. App.).....	656	Wilson Coal Co., London Guarantee & Accident Co. v. (Mo. App.).....	1132
Walling v. Eggers (Ky.).....	428	Wilton v. New York Life Ins. Co. (Tex. Civ. App.).....	403
Wallis v. State (Tex. Cr. App.).....	231	Wimp v. Early (Mo. App.).....	343
Wallis v. State (Tex. Cr. App.).....	1134	Windsor, Ex parte (Tex. Cr. App.).....	510
Walter v. Brugger (Ky.).....	419	Winter & Co., Gardner v. (Ky.).....	143
Warder, Bushnell & Glessner Co. v. Libby (Mo. App.)	338	Wishart v. Gerhart (Mo. App.).....	1064
Warder, Terry v. (Ky.).....	154	Witherspoon, Nashville, C. & St. L. R. Co. v. (Tenn.)	1052
Ware & Walker, Gulf, C. & S. F. R. Co. v. (Tex. Civ. App.).....	961	Witty, Martin v. (Mo. App.).....	829
Washington Life Ins. Co. v. Glover (Ky.)..	146	W. J. Martinez & Bros., Peterson v. (Tex. Civ. App.).....	401
Wasserman & Co. v. Hough (Mo. Sup.).....	1020	Wolf, Wilhite v. (Mo. Sup.).....	793
Wathen, Pike, Morgan & Co. v. (Ky.).....	137	Wolfsberger v. Mort (Mo. App.).....	817
Watson v. State (Tex. Cr. App.).....	504	Wombles, Dawson v. (Mo. App.).....	823
Watson, White v. (Tex. Civ. App.).....	237	Wood v. Fuller (Tex. Civ. App.)	236
Watson's Adm'r, Illinois Cent. R. Co. v. (Ky.)	175	Wood, Steiner v. (Mo. Sup.).....	1020
Watts v. National Cash Register Co. (Ky.)	118	Woods, Mercer v. (Tex. Civ. App.).....	15
Watts v. Parks (Ky.).....	1125	Woods, Missouri, K. & T. R. Co. of Texas v. (Tex. Civ. App.).....	1135
W. O. Belcher Land Mortg. Co. v. Norris (Tex. Civ. App.).....	390	Woodson, State v. (Mo. Sup.).....	603
Webb v. Webb (Ky.).....	166	Woody v. St. Louis & S. F. R. Co. (Mo. App.)	658
Webber v. Ancient Order of Pyramids (Mo. App.)	650	Woolery, Binlon v. (Ky.).....	898
Webster, Hazelwood v. (Ky.).....	123	Woolfolk, City of Lexington v. (Ky.)....	910
W. E. Craddock Grocery Co., Perry-Rice Grocery Co. v. (Tex. Civ. App.).....	966	Workman, Dowell v. (Ky.).....	857
Weisman v. Thomson (Tex. Civ. App.).....	728	Wright, First Nat. Bank v. (Mo. App.).....	686
Wells, Ex parte (Tex. Cr. App.).....	928	W. T. Rickards & Co. v. J. H. Bemis & Co. (Tex. Civ. App.)	239
Welsh-Hackley Coal & Oil Co., Craig v. (Ky.).....	1122	Young & Co., Pennsylvania Fire Ins. Co. v. (Ky.)	127
Western Union Tel. Co. v. Anderson (Tex. Civ. App.)	84	Zollinger v. Dunnaway (Mo. App.).....	666
Western Union Tel. Co. v. Christensen (Tex. Civ. App.)	744	Zorn, City of Corsicana v. (Tex. Sup.)....	924
Western Union Tel. Co. v. McNairy (Tex. Civ. App.)	969		

WRITS OF ERROR
WERE DENIED BY THE
SUPREME COURT OF TEXAS
IN THE FOLLOWING CASES IN THE
COURT OF CIVIL APPEALS
PRIOR TO MARCH 31, 1904.

[Cases in which writs of error have been denied, without the rendition of a written opinion, since the publication of the original opinions in previous volumes of this reporter.]

FIRST DISTRICT.

Texas Gulf Land & Oil Co. v. Galveston-Chicago Well Boring & Drilling Co., 77 S. W. 974.

SECOND DISTRICT.

Furneaux v. Webb, 77 S. W. 828.

THIRD DISTRICT.

Western Union Tel. Co. v. Shaw, 77 S. W. 433.

FOURTH DISTRICT.

Boettler v. Tumlinson, 77 S. W. 824.
International & G. N. R. Co. v. Pina, 77 S. W. 979.
New York & T. Land Co. v. Dooley, 77 S. W. 1030.
Ostrom v. San Antonio, 77 S. W. 829.

FIFTH DISTRICT.

Farley v. Missouri, K. & T. R. Co. of Texas, 77 S. W. 1040.

See End of Index for Tables of Southwestern Cases in State Reports.

78 S.W.

(xviii)†

THE
SOUTHWESTERN REPORTER.
VOLUME 78.

**SUPREME COUNCIL A. L. H. v. STORY
et al.**

(Supreme Court of Texas. Jan. 21, 1904.)

**MUTUAL BENEFIT INSURANCE ASSOCIATION—
APPLICABILITY OF GENERAL INSURANCE
LAWS—BURDEN OF PROOF—LIABILITY FOR
ATTORNEY'S FEES AND DAMAGES.**

1. Rev. St. 1895, art. 3096, provides that the general insurance laws shall not apply to mutual relief associations which have no capital stock, and whose relief funds are created and sustained by assessments made upon the members, provided that the principal officer shall make an annual statement to the insurance department, etc. Article 3071, applicable to life insurance companies, provides that, where a company shall fail to pay a loss within the time specified, it shall be liable for 12 per cent. damages and reasonable attorneys' fees. *Held*, that a fraternal beneficiary corporation created under the laws of a sister state, whose relief funds are created by assessments on its members, which has subordinate lodges to which application is made for membership, and which issues benefit certificates, the amount payable on which is under a by-law dependent on the sum collected by assessments, is within article 3096, and is not liable under article 3071, except in case of failure of its principal officer to make the required statement.

2. The burden of showing that a mutual relief association, excepted by Rev. St. 1895, art. 3096, from the operation of the general insurance laws, provided that its principal officer shall make an annual statement to the insurance department, etc., is withdrawn from the protection of that article by a failure to make such statement, is on a beneficiary suing on a certificate.

Error from Court of Civil Appeals of the Third Supreme Judicial District.

Action by James F. Story and another against the Supreme Council American Legion of Honor. Judgment of the Court of Civil Appeals (75 S. W. 901) affirming a judgment for plaintiffs, and defendant brings error. Modified.

Monta J. Moore and John L. Terrell, for plaintiff in error. Hefley, McBride & Watson, for defendants in error.

BROWN, J. James F. Story and William A. Story instituted this suit against the Supreme Council American Legion of Honor, hereafter called "Supreme Council," to recover from them the balance of \$3,000 claim-

ed to be due by the council to plaintiffs below on a benefit certificate issued to D. M. Story, in which certificate James F. and William A. Story were named as beneficiaries. The case was tried before the court without a jury, and the judge filed conclusions of fact, from which we make the following condensed statement and extracts necessary to the decision of the questions presented in this court:

The supreme council is a fraternal beneficiary corporation created under the laws of the state of Massachusetts, and since the year 1879 has been continuously engaged in the business of issuing policies upon the lives of persons who might become members of the order; and during all of the time it had a subsidiary branch at Cameron, Tex., known as the "Hercules Chapter No. 265." On the 19th day of October, 1880, D. M. Story was regularly received as a member of Chapter No. 265 upon her application in writing, which contained the following stipulation: "I agree to make punctual payment of all dues and assessment for which I may become liable, and to conform in all respects to the laws, rules and usages of the order now in force, or which may hereafter be adopted by the same." On the 30th day of March, 1881, the supreme council issued and delivered to D. M. Story its policy of insurance or benefit certificate for \$5,000 in all respects like the one now sued upon except that the beneficiaries were different. On March 20, 1891, a benefit certificate in lieu of the first issued to D. M. Story for the same amount, containing the same stipulations, in which the defendants in error were named as beneficiaries, and on March 6, 1897, another certificate—the one here sued upon—was issued in lieu of the second certificate for the same amount, and embodying the same terms. The certificate last issued contained the following stipulations:

"This is to certify that D. M. Story is a companion of the American Legion of Honor, said companion having made application for membership to Hercules Council No. 265, A. L. of H., instituted and located at Cameron in the State of Texas, and passed the requisite medical examination, and has been duly

initiated into said council, and this certificate is issued to said companion as an evidence of the facts in it contained and as a statement of the contract existing between said companion and the Supreme Council American Legion of Honor. In consideration of the full compliance with all the by-laws of the Supreme Council A. L. of H. now existing or hereafter adopted, and the conditions herein contained, the Supreme Council A. L. of H. hereby agrees to pay Jas. F. Story and Wm. A. Story, children, one-half each, Five Thousand Dollars, upon satisfactory proof of the death while in good standing upon the books of the Supreme Council of the companion herein named, and a full receipt and surrender of this certificate. Subject, however, to the conditions, restrictions and limitation following:

"First.—That all statements made by the companion in application for membership, and all answers to the questions contained in the medical examination are in all respects true, and shall be deemed and taken to be express warranties.

"Second.—That said companion shall have paid all assessments called within the time and in the manner required by the by-laws of the Supreme Council in force at the time of the issuance of this certificate or as the same may be hereafter amended."

The certificate was duly executed and signed by the proper officers of the council. D. M. Story died December 6, 1901, and the beneficiaries, James F. Story and William A. Story, gave due notice of the death, and made satisfactory proof according to the requirements of the by-laws of the order. D. M. Story continued to be a member in good standing of the order up to the time of her death.

At a meeting of the supreme council in the year 1900 the following by-law was passed: "55.—Two thousand dollars shall be the highest amount paid by the order on the death of a member upon any benefit certificate heretofore or hereafter issued. This sum shall be paid on the death of every member holding a benefit certificate of two thousand dollars or over; and one thousand dollars on the death of every member holding a benefit certificate for that amount; and five hundred dollars on the death of every member holding a benefit certificate for that amount. Provided that if at the death of said member one full assessment upon each of the members of the order will not amount to the full sum of two thousand dollars, then the amount to be paid to the beneficiaries of said deceased member shall not exceed the amount collected by said assessments, if said member's benefit certificate is for two thousand dollars; one-half of the amount if the benefit certificate is for one thousand dollars, and one quarter of the amount if the benefit certificate is for \$500. And provided that the face value of the benefit certificate shall be paid, so long as the emergency fund of the

order has not been exhausted. And provided that the said member shall at the time of the death be a member of the order in good standing and shall have complied with all the laws, rules and regulations of the order, as they now are, or as they may hereafter from time to time be altered or amended." Neither D. M. Story nor the beneficiaries ever expressly or impliedly consented to the passage of the by-law, and there was no proof that either of them knew that the passage of the by-law was contemplated, but they learned of the fact shortly after it had been enacted. At the time the by-law was adopted, the emergency fund of the order was \$413,217.-31, and when proof of the death of D. M. Story was made that fund amounted to \$406.-334.31.

Just before the enactment of that by-law the amount of each assessment made upon this benefit certificate was \$4.80 for each \$1,000, making the sum of \$24. After the by-law went into effect, the assessments levied were \$4.80 per \$1,000 on \$2,000, making the sum of \$9.60, which assessments so reduced were paid by D. M. Story continuously thereafter up to her death. D. M. Story paid all assessments and calls that were made upon her during her lifetime punctually and in compliance with the by-laws. The assessments paid by D. M. Story after October 1, 1900, were 22 in number, at \$9.60 each. As soon as D. M. Story and the beneficiaries in the certificate learned of the passage of the by-law, James F. Story, for himself and his mother, D. M. Story, and for his brother William A. Story, protested against any attempt on the part of the council to scale the amount to be paid upon the benefit certificate here sued upon, and insisted that the said D. M. Story or himself be permitted to pay the assessments in the amount levied and required prior to the passage of the said by-law, and the said James F. Story then notified the defendant that his mother and the beneficiaries desired to pay all assessments and do all things necessary to entitle them to the full \$5,000, but the defendant declined to permit them to pay according to the original amount, and received the amount of \$9.60 at each assessment after the 1st day of October, 1900.

At the same session of the supreme council at which by-law No. 55 was enacted, the council adopted the following by-law: "'(72) An emergency fund of five per centum of the aggregate face value of all outstanding benefit certificates as recognized by the by-laws of the order is hereby established, to be created, collected, maintained and disbursed in conformity with the laws of the state of Massachusetts; and that for the establishment of said fund, there be charged against the certificate of each member of the order, five per centum of the by-law value (reduced or otherwise) thereof, provided, however, that if upon the decease of any member, any part of said charge shall

remain unpaid by said member to said fund, the same shall be deducted from the amount payable to the beneficiary. This by-law shall take effect September 1st, 1900.' Neither D. M. Story, nor the beneficiaries in the certificate, ever paid the assessment provided for in that by-law.

On August 27, 1902, the supreme council paid James F. and William A. Story \$2,000 on the benefit certificate, which they delivered to the council with the following indorsement thereon: "Undersigned beneficiaries named in the within benefit certificate, hereby acknowledge having received the amount herein agreed to be paid, and this certificate is hereby surrendered to the Supreme Council American Legion of Honor for cancellation." And at the same time James F. and William A. Story executed and delivered to the council the following release: "Release. Know all men by these presents that I, James F. Story and William A. Story, beneficiaries of the late Dottie M. Story, do hereby remise, release and forever discharge the Supreme Council American Legion of Honor, its successor and assigns, of and from all and all manner of actions and causes of actions, suits, debts, dues, accounts, bonds, covenants, contracts and agreements, judgments, claims and demands whatsoever in law or in equity which against the said Supreme Council American Legion of Honor I ever had, now have or which my heirs, executors, administrators or assigns, or any of them hereafter can, shall or may have for or by reason of any cause, matter or thing whatsoever, from the beginning of the world to the date of these presents.'" The only consideration paid for the receipt and the release recited above was the \$2,000. At the time the payment was made, and the receipt and release executed and delivered, the supreme council did not claim that it was not liable for the whole amount expressed in the benefit certificate, and at that time did not believe, and had no reasonable ground to believe, that it was not liable for the full sum of \$5,000. The defendants in error of necessity incurred in the prosecution of this suit for the services of attorneys the sum of \$400, which is a reasonable fee for the services rendered.

We copy the following additional conclusion of fact filed by the Court of Civil Appeals: "'(18) I find, as already stated in my former conclusions of fact, that the defendant is a fraternal beneficiary society; but the evidence fails to show as to whether it is an association having no capital stock, or as to whether it is conducted by lodges, a quorum of whose members meet in their respective lodgerooms at least once a month, or whether it has made to the Insurance Department of this state a report or statement such as the laws of this state require, or as to whether it has designated the Insurance Commissioner of this state as its agent, upon whom service may be had. And the evi-

dence shows that it is not such a fraternal beneficiary association as is defined by section 1, p. 195, of the Acts of this state of 1899, relating to fraternal beneficiary associations, and fails to show that it is such a beneficiary association as is relieved from the provisions of the insurance laws of this state; and hence the evidence does not show that the defendant is entitled to be relieved from the provisions of the insurance laws of this state providing for twelve per cent. penalty, and reasonable attorney's fees, and hence I hold defendant liable for both the said penalty and attorney's fees.'"

The facts found by the Court of Civil Appeals established that the plaintiff in error is "a fraternal benefit society" incorporated under the laws of the state of Massachusetts; that its relief funds are created by assessments upon its members in accordance with its by-laws. It has subordinate lodges, called "chapters," and it is shown by the findings that there was at Cameron a Chapter, No. 265, when Mrs. Story became a member thereof, which necessarily proves that there were as many as 265 lodges or chapters. Membership in the order was obtained by application to the subordinate chapter, as shown by the application of Mrs. Story to the chapter at Cameron. The order issued to the member a benefit certificate. By-law 55 makes the amount paid depend upon the sum collected by assessments upon the members, and Mrs. Story paid assessments from 1881 to her death, in 1901, from which facts no other conclusion could be reached, except that the association depended upon its assessments for a fund with which to liquidate its certificates. From these facts the conclusion necessarily arises that it was not a company that issued stock, which act would be wholly inconsistent with the other facts found in this case. We therefore conclude that the plaintiff in error comes within the provision of article 3096, Rev. St. 1895, which reads as follows: "Nothing in this title shall be construed to affect or in any way apply to mutual relief associations organized and chartered under the general incorporation laws of Texas, or which are organized under the laws of any other state, which have no capital stock, and whose relief funds are created and sustained by assessments made upon the members of said associations in accordance with their several by-laws and regulations: provided, that the principal officer of every such benevolent organization (not conducted by lodges a quorum of whose members meet in their respective lodge rooms at least once each month), shall be required to make an annual statement under oath to the Department of Agriculture, Insurance, Statistics and History on the first day of January of each year, or within sixty days thereafter. * * * And should any such benevolent organization refuse or neglect to make an annual report as above required, it shall be deemed an insurance com-

pany conducted for profit to its officers, and amenable to the laws governing such companies." The article has the effect to except the association from the operation of chapter 3 of the Revised Statutes of 1895, relating to life and health insurance companies, which chapter embraces article 3071 of the Revised Statutes of 1895, as follows: "In all cases where a loss occurs and the life or health insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, twelve per cent. damages on the amount of such loss, together with all reasonable attorney's fees for the prosecution and collection of such loss."

The plaintiffs below recovered from the supreme council 12 per cent. damages and attorney's fees because it had failed to pay the amount due to them; and the question is presented, is the association liable for the damages and the attorney's fees under article 3071? The 12 per cent. damages and the attorney's fees are in the nature of penalties imposed upon the company for a failure to perform its contract. In order for the plaintiffs to recover the damages and attorney's fees, it devolved upon them to show that the plaintiff in error was subject to the provisions of article 3071. *Sabine & East Texas Ry. Co. v. Cruse*, 83 Tex. 460, 18 S. W. 755. In that case Judge Stayton, speaking for the court, said: "One claiming a penalty given by the statute should show at least that the facts exist which entitled him to the penalty." The defendant association, not being a life or health insurance company, was not within the terms of the law which imposes the penalty, except by a failure to perform an act prescribed by the statute; and it was necessary for the plaintiffs to establish the failure to make the report, to entitle them to the penalties. The trial court found that there is no evidence upon this question. Therefore the plaintiffs below failed to establish a right to the 12 per cent. damages and the attorney's fees.

The district court erred in rendering judgment in favor of the plaintiff for the damages and the attorney's fees, and the Court of Civil Appeals erred in affirming that judgment. It is therefore ordered that the judgment of the district court be reformed so as to expunge therefrom the 12 per cent. damages and the attorney's fees. It is further ordered that James F. Story and William A. Story pay all costs of the Court of Civil Appeals and of this court.

BOSWELL v. TERRELL, Commissioner of General Land Office, et al.

(Supreme Court of Texas. Jan. 18, 1904.)

SCHOOL LANDS—NONPAYMENT OF INTEREST—SALE—STATUTES.

1. School land is not subject to sale on the same day that a prior purchase thereof is for-

feited for nonpayment of interest, in the absence of notice by the commissioner to the county clerk that the land was offered for sale, as required by Rev. St. 1895, art. 4218g.

2. Under Rev. St. 1895, art. 4218g, requiring notice to be sent by the commissioner of the land office to the county clerk that school land is offered for sale, the fact that the commissioner previously advertised the land for sale does not dispense with the statutory requirement.

Mandamus by W. A. Boswell against J. J. Terrell, commissioner of the general land office, and others. Writ denied.

James & Geisler, for relator. O. K. Bell, Atty. Gen., and T. S. Reese, Asst. Atty. Gen., for respondents.

WILLIAMS, J. Relator applied to purchase the land in controversy September 1, 1899, the same day on which the prior purchase of the co-respondent was forfeited for nonpayment of interest, and before notice had been sent by the commissioner to the county clerk that the land was offered for sale, as required by article 4218g, Rev. St. 1895. Some time afterwards, but before any further action, so far as appears, was taken upon relator's application, co-respondent applied for and secured a reinstatement of his purchase. Under the decisions of this court in *Willoughby v. Townsend*, 93 Tex. 80, 53 S. W. 581, and *Ford v. Brown*, 74 S. W. 535, 7 Tex. Ct. Rep. 522, the land was not subject to sale at the date of relator's application, and it could not take effect from its filing. It could only have effect from some action based on it after the land came upon the market, and from the date of such action. None having been taken when co-respondent applied for reinstatement, there was no intervening right to prevent such relief. The fact that the commissioner had previously advertised the land for sale on September 1st did not dispense with the necessity of compliance with the statutory requirement of notice to the county clerk.

Mandamus refused.

SMITH v. STRATTON.

(Court of Civil Appeals of Texas. Jan. 2, 1904.)

BAILMENT—INJURIES TO PROPERTY—ACTION ON CONTRACT—MEASURE OF DAMAGES—INSTRUCTIONS—PREJUDICIAL ERROR.

1. Where, in an action for injuries to a traction engine let to defendant, plaintiff sought to recover on a contract to return it in as good condition as when received, and the court charged that, if the engine had been damaged, the jury should find for plaintiff the rental value, together with the difference in the reasonable market value of the engine in the condition in which defendant received it and its reasonable market value when plaintiff received the engine from defendant, a subsequent instruction that if defendant negligently ran the engine off of a bridge and damaged it, so that it could not be repaired so as to sell for as much as it would otherwise have sold for, plaintiff was entitled to the difference between the market value of the engine immediately before and immediately after the accident, was opposed to the

first and to plaintiff's petition, and was therefore erroneous.

2. Where in an action for injuries to a traction engine, based on a contract to return it in as good condition as when it was hired to defendant, it was injured by being driven off of a bridge, but the evidence was sharply conflicting as to whether when it was repaired by defendant and returned to plaintiff it was of less value than when defendant received it, an erroneous instruction that plaintiff was entitled to recover the difference between the value of the engine immediately before and after the injury was prejudicial.

Appeal from Clay County Court; Jas. F. Carter, Judge.

Action by O. A. Stratton against E. E. Smith. From a judgment in favor of plaintiff, defendant appeals. Reversed.

W. T. Allen, for appellant. Denny & Taylor, for appellee.

CONNER, C. J. This suit was instituted by appellee to recover the rental value of a traction engine and for damages thereto. The allegations were to the effect that appellee was the owner of such an engine, and that appellant, on October 21, 1901, contracted to take it and pay for its use at the rate of \$1 per day until returned, and that appellant "agreed to return said engine to plaintiff in as good condition as when he got it." It was further alleged that shortly after appellant received said engine "he, his agents and employes, so negligently, carelessly, and recklessly manipulated, managed, and run said engine that it was run off of a bridge and into a creek," whereby it was damaged as particularly set forth. There was conflict in the evidence as to the terms of the contract, as to the proximate cause of the mishap to the engine, and as to the value of the engine after its repair by appellant, on the day of its return to appellee. Appellee, however, secured verdict and judgment for \$300, from which this appeal has been prosecuted.

We are of opinion that error was committed by the court in giving the following special instruction at appellee's request, viz.: "Gentlemen of the jury, you are charged that if you believe from the evidence that the defendant, E. E. Smith, his agents or servants, so negligently and carelessly run said engine that same was run off the bridge on Dry Fork creek, and it thereby became impaired and damaged as charged in plaintiff's petition, and that said injury and damage, if you find any was sustained by said engine, was of such a nature or character that same could not be repaired so that said engine would sell on the market for as much as it would have sold for but for same, then you will find for the plaintiff the difference between the market value of said engine immediately before and immediately after the running of the engine off the bridge on Dry Fork creek." In the court's general charge the jury were instructed that if they found for appellee, and that said engine had been damaged, they should find in appellee's favor

for the rental value as alleged, "together with the difference in the reasonable market value of said engine in the condition in which the defendant received the same and its reasonable market value at the time plaintiff received said engine upon return as alleged in plaintiff's petition." It is thus made apparent that the special instruction on the measure of damages to the engine was diametrically opposed to both the general charge and to the averments in appellee's petition. Appellee's right of recovery, if any, was upon the special contract as alleged, and the application of the rule on the measure of damages arising in cases of negligence or tort was radically erroneous. The error noted, too, seems specially harmful in this case, in that the engine undoubtedly was of less value immediately after its injury than before, while the evidence sharply conflicted as to whether after its repair and return by appellant it was of less value than when appellant received it.

The judgment is reversed, and the cause remanded.

PECOS & N. T. RY. CO. v. WILLIAMS.*

(Court of Civil Appeals of Texas. Dec. 19, 1903.)

CARRIERS—PASSENGERS—STATIONS—FAILURE TO STOP—INJURIES FROM EXPOSURE—ACTIONS—PLEADING—EVIDENCE—MORTALITY TABLES—INSTRUCTIONS.

1. Where, in an action by a passenger for damages for being carried a mile by her station, the court did not submit any elements of damage which were speculative, the fact that the petition alleged that plaintiff was a frail person unable to withstand exposure, and that as a direct result of defendant's wrongful acts she suffered from tonsillitis, etc., and "that her injuries might require a dangerous and exceedingly painful surgical operation, which might result in her death," was not prejudicial to defendant, such averments being merely descriptive of the extent of her injuries.

2. In an action by a passenger for being carried by her station in a storm, evidence that she was a person of delicate health, unprotected with sufficient wraps and clothing to withstand the storm, and that she had been afflicted with ear trouble since childhood, which was aggravated by such exposure, was admissible, though defendant had no notice of the condition of plaintiff's health.

3. Where, in an action for injuries to a passenger, it was developed by defendant on cross-examination that no physician had been employed, plaintiff was entitled to prove that she and her father were too poor to employ a physician.

4. Where injuries to a passenger were alleged to be permanent, the mortality tables were admissible in evidence, though, by reason of plaintiff's previous condition of health, she was not an insurable subject.

5. Where, in an action for injuries to a passenger from exposure by being compelled to walk back to her station in a storm after being carried by, the proof tended to show want of ordinary care on the part of the carrier, it was not prejudiced by an instruction requiring the exercise of the degree of care required in the transportation of passengers.

*Rehearing denied January 16, 1904.

6. In an action for injuries to a passenger, an instruction authorizing a recovery for exposure to inclement weather, and also for such other dangers as might result from "serious injury, etc.," from such exposure, was not erroneous as authorizing a double recovery, where the evidence tended to show temporary discomfiture and pain, and also serious injury and illness subsequently resulting from the exposure.

Appeal from District Court, Deaf Smith County; Ira Webster, Judge.

Action by Lula L. Williams against the Pecos & Northern Texas Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. W. Terry and Browning, Madden & Trulove, for appellant. Turner & Boyce and John P. Slaton, for appellee.

CONNER, C. J. This is an appeal from a judgment of \$2,000 in favor of appellee as damages for personal injuries resulting from the alleged wrongful act of appellant's servants in ejecting appellee from one of appellant's trains, whereon she was a passenger, about one mile beyond the point of her destination, whereby she was compelled, while thinly clad and unprepared, to walk through snow and storm back to her station, by reason of which she took a severe cold, suffered mental and physical pain, and received permanent injuries. Appellee alleged, among other things, that she was, and long prior to the wrongs complained of had been, a frail and delicate person, unable to withstand exposure to inclement weather, and that as a direct result of the exposure endured on account of the wrongful acts charged she took a severe cold, which resulted in tonsillitis, excruciating pains in her neck and head, and a pus discharge from her right ear; that the mastoid bone behind the right ear had pained her, a large amount of pus having formed in and near said bone, "which may require an exceedingly painful and dangerous operation to be performed, which may result in plaintiff's death."

It is first insisted that "things which may be required, may result, may come to pass in the future" are so uncertain and conjectural in nature as not to be susceptible of proof, or to constitute legal elements of damage, and that "allegations of such facts in a manner calculated to bias or prejudice the minds of the jury against the defendant against whom a verdict and judgment are rendered constitute reversible error." It is undoubtedly true that mere possible or speculative consequences of a wrongful act are too remote, and not proper elements of damage; but the court submitted no such element to the jury, nor do we find objection to any evidence of mere conjectural results of the injuries appellee establishes by her testimony, and we see nothing in the mere manner of making the averments quoted, which is the specific objection made, that could have operated to appellant's prejudice. Besides, there seems to be force in appellee's contention that said averments

are to be construed merely as descriptive of the extent of her injuries, and not as presenting the elements of damage.

What appears to be appellant's principal contention arises from the objection presented in multiplied forms to appellee's averments and proof to the effect that she was a person of delicate health, unprotected with sufficient wraps and clothing to withstand the raging storm of wind, rain, sleet, and snow described, and that she had been afflicted with an ear trouble since early childhood. The contention is, in effect, that, in the absence of notice of such condition of the person, appellant is not liable for such injuries as may have resulted to appellee "in excess of what would have resulted to a woman in a natural state of health, and clothed as one would naturally be expected to clothe herself to make such trip in such weather." The appellee in the case of *Driess v. Frederick*, 73 Tex. 460, 11 S. W. 493, had had a limb broken some 16 years prior to the injury thereto of which he complained, and our Supreme Court, in disposing of a requested charge, said: "If by the charge asked appellants desired the jury to understand that appellee would only be entitled to recover damages on account of the injury received through appellants' negligence, which would have resulted had his limb not been before fractured, then the charge, which might have been so understood, was properly refused. The damages which appellee was entitled to recover were the damages resulting to himself conditioned as he was at the time of the injury, and not such damages as he might have been entitled to had his condition been different. That the injury resulting from the negligence of appellants may have been aggravated or more easily caused by reason of the fact that the limb had received a former injury cannot affect the question of right to or measure of damages." The same question, in substance, was presented in this court in the case of *St. L. S. W. Ry. v. Ferguson*, 64 S. W. 797, and after a review of authorities we then said: "The court gave the proper standard of care; and the degree of care so prescribed, in our judgment, must be exercised by the carrier of passengers in the light of an imputed, if not actual, knowledge that the aged, the infirm, and those in delicate condition may and do constantly travel on the passenger trains of the country. Humanity is heir to many ills and destructive conditions requiring notice and peculiar care, and those commonly and constantly engaged in their transportation for hire ought not to be heard to say in excuse for their negligence, 'We were without notice of the fact.'" A writ of error was refused in *Railway v. Ferguson*, and we conclude that all assignments herein involving the question must be overruled.

The evidence to the effect that appellee and her father were too poor to employ a physician was clearly admissible in explana-

tion, as offered, of the fact developed by appellant on cross-examination, that no physician had been employed. Nor do we think the court committed error in admitting mortality tables showing appellee's life expectancy was 40.17 years. The objection was that such tables, as was shown, were based upon the average continuance of life in insurable subjects of good health; whereas appellee, as alleged and proved, was not in good health, or an insurable subject. We think the objection noted goes to the weight, and not to the admissibility, of the tables mentioned. There was evidence tending to show permanent injuries, and appellee's condition was a proper subject of consideration, in connection with the mortality tables and other evidence, in determining her life expectancy. The evidence of appellee's condition tended, of course, to show that an average continuance of her life was not to be expected, but, in the absence of a contrary showing, we must assume that the jury gave the proper effect to the evidence. What we said in *Railway v. Long*, 65 S. W. 882, 3 Tex. Ct. Rep. 631, is here applicable, viz.: "The usual and well-recognized method of proving life expectancy is by standard life tables, shown to be such by a qualified witness, to which may be added, for the purpose of varying the conclusion to be drawn from the tables, evidence that the condition of health and strength is substantially different in a given case from that usually enjoyed by persons of the same age. *Abbott's Trial Ev.* 724; *Rogers on Exp. Test.* §§ 160, 163." See, also, *Ry. Co. v. Griffith* (Ark.) 39 S. W. 550.

Objection is made to the charge in that it imposed upon appellant that high degree of care generally required of railway companies in the transportation of passengers; the contention being, to use the language of appellant's argument, that, "when a passenger has safely alighted from the train, without accident, the rule in the charge closes. * * * The rule is a protection against accidents in transporting only, and its application extends to no sort of injuries other than those resulting during transportation from defects in appliances or such accidents as result from the handling of appliances." If it be conceded—which we are by no means inclined to do—that ordinary care only was required of appellant to so fulfill its contract of carriage as to safely deposit appellee at the point of destination, and that the charge was therefore erroneous, the error is nevertheless harmless, inasmuch as we think it clear that those in charge of the train violated every rule of care that with any reason can be applied to the circumstances. Appellee's evidence, which has been established by the verdict of the jury, was to the effect that she was a passenger whose known destination was Umbarger, a regular station on appellant's line of railway; that she was transported about one mile beyond her station, at which no stop was made, and was

by the conductor required to get off, thinly clad, in a driving storm of wind, snow, and sleet, after which she was required to walk back to the station in several inches of snow with low-quartered shoes, in consequence of all which, and without contributory negligence on her part, as has also been affirmed by the verdict, she suffered great and long-continued physical and mental pain and permanent injury. The conductor must have known of the snow and of the storm and of appellee's unprepared condition, and it seems plain that his duty under the circumstances, as determined by any rule of care, was to have backed his train to the station as appellee testified she requested.

The same paragraph of the charge is also objected to on other grounds to the effect that it assumes as true an issuable fact, authorizes a double recovery, and does not require the finding of damages to be predicated on the evidence. The charge has been carefully considered, and we think none of the objections are maintainable. In authorizing a recovery for exposure to inclement weather and also for such other damages as might result from "serious" injury, etc., that might result from such exposure, the court, we think, was merely adapting the charge to the phases of the evidence tending to show temporary discomfort and pain only, and that tending also to show serious injury, etc. The charge as a whole could hardly have been misleading, and all objections thereto are overruled.

We find no error in the refusal of special charges, think the evidence supports the material allegations of appellee's petition and the verdict in amount as well as in other particulars, and the judgment is accordingly affirmed.

EL PASO ELECTRIC RY. CO. v. GALLIHER.*

(Court of Civil Appeals of Texas. Dec. 28, 1903.)

PLEA—STRIKING OUT—DISCRETION OF COURT.

1. Where defendant postponed the filing of a plea of accord and satisfaction till the second trial of the case was called, when the defense was interposed either to place plaintiff at a disadvantage, or for the purpose of delaying the case, it is no abuse of discretion to sustain a motion to strike out the plea.

Appeal from District Court, El Paso County; J. M. Goggin, Judge.

Action by Houston A. Galliher against the El Paso Electric Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Clark, Hawkins & Franklin, for appellant. Beall & Kemp, for appellee.

JAMES, C. J. This appeal involved but one question. This action for personal in-

*Rehearing denied January 20, 1904.

juries was filed March 26, 1902, was tried first in February, 1903, and the second time on June 12, 1903. It is made to appear that the case was called for trial about 11 o'clock in the forenoon of the latter date, and, the papers not being on hand, the court asked counsel for both the parties if they would announce "Ready" at the afternoon session, and they stated that they would if the papers were found; and the court called no other case, but took a recess until 2 o'clock. The papers were there at that time, whereupon defendant filed a second amended original answer. This contained, among other things, a plea of accord and satisfaction.

It appears that prior to the first trial defendant had propounded interrogatories to the plaintiff, and had asked him concerning a settlement of the matter of this suit, which settlement plaintiff, in his answers, denied. No plea on this subject was interposed at the first trial of the case, and none was filed until in the said second amended original answer, which came in under the above circumstances. The court sustained a motion to strike out the plea, among other reasons, because the case had been pending since March 26, 1902, and was once tried by a jury in February, 1903, and that accord and satisfaction had not been set up or pleaded until this date, and after the call of the case for trial, and it was now too late to plead same. It seems a reasonable conclusion that defendant postponed this defense and interposed this plea at that particular time either to place plaintiff at a disadvantage in meeting same, or for the purpose of delaying or continuing the case. The discretion of the court was not abused, and defendant has no legal right to complain of the ruling.

The judgment is affirmed. *Lewin v. Houston*, 8 Tex. 94; *Trammell v. Swan*, 25 Tex. 500.

CAMERON MILL & ELEVATOR CO. v. ANDERSON.*

(Court of Civil Appeals of Texas. Dec. 19, 1903.)

NEGLIGENCE—STREETS—EXCAVATIONS—INJURIES TO MINOR—PERSONS LIABLE—INDEPENDENT CONTRACTORS—EVIDENCE—INSTRUCTIONS.

1. Where a city authorized defendant to make an excavation in a street for the construction of underground oil-storage tanks, and plaintiff was injured by falling into the excavation in the night by reason of the pit not being guarded by barriers or lights, defendant was not relieved from liability because it had let the work by a contract under which the contractor had entire charge thereof, and had never given the contractor any instructions with regard to protecting the pit.

2. In an action for injuries to a minor sustained by falling into an excavation in a street, an instruction that if he was entitled to recover his damages should be such a sum as would

compensate him for his injuries, consisting of physical and mental pain and future suffering, if his injuries are permanent, together with a diminution of his earning capacity after majority by reason of his injuries, was not objectionable as authorizing a recovery of damages recoverable only by the parent.

3. Such instruction was not objectionable as giving undue prominence to the items of plaintiff's damage.

4. Where, in an action for injuries to a minor, the court charged that the jury should exclude from their consideration any loss or impairment of earning power during his minority, a special instruction against a recovery for plaintiff's services during minority, and against a recovery for loss of time or permanent disability during minority, was properly refused.

5. In an action for injuries to a minor, a requested instruction that plaintiff was entitled to recover only such damages as appeared from the preponderance of the evidence reasonably certain to ensue in the ordinary course of nature from plaintiff's injuries was properly refused, plaintiff being entitled to recover for such injuries as the evidence showed were reasonably probable to result from the injury.

6. An instruction that on the issue of contributory negligence the burden of proof was on the defendant, and unless the jury believed by a preponderance of the evidence that plaintiff was guilty of negligence causing or contributing to his injuries he was not guilty of such negligence, was not objectionable as misleading, in that it impliedly required the jury to look only to defendant's evidence on such issue.

7. In an action for injuries to a minor, evidence that he was obedient, industrious, economical, and sober, that he did not use tobacco in any form, or drink, was admissible as bearing on his capacity to secure and retain employment or to succeed in business.

Appeal from District Court, Tarrant County; Mike E. Smith, Judge.

Action by F. M. Anderson against the Cameron Mill & Elevator Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Geo. Thompson and R. W. Flournoy, for appellant. W. R. Parker, Capps & Cantey, and Theodore Mack, for appellee.

SPEER, J. By permission of the city council, appellant caused to be dug in one of the streets of the city of Ft. Worth, adjacent to its elevator plant, a hole some 34 feet long, 28 feet wide, and 12 or 14 feet deep. The excavation was made for the purpose of putting in some underground storage tanks for fuel oil. Into this pit appellee, a boy of 13 years, fell and was seriously injured. The accident occurred about 9 o'clock at night, at a time when none of the workmen engaged in digging the pit were in or about the place. There were no lights or barricades or signals about it, and the street was dark. Appellee, who had no previous notice of the excavation, had either just mounted, or was in the act of mounting, his bicycle, to proceed up the street, when he was precipitated into the pit and injured as aforesaid. The actual work of making the excavation was being done by one McFadden, under a contract with appellant, by the

*Rehearing denied January 16, 1904.

¶ 1. See *Master and Servant*, vol. 34, Cent. Dig. §§ 1243, 1254, 1259, 1263.

terms of which he had exclusive control of the work. Appellant did not know that the pit was not guarded or protected at night, and had never given the contractor any instructions upon that point, but understood that the contractor was competent and experienced, and took it for granted that he would do what was necessary to make the work safe. The appellee had a judgment for \$10,500, from which this appeal is prosecuted.

The question of paramount importance in the case arises out of appellant's contention that, since the work of making the excavation was that of an independent contractor, it is in no wise liable for his negligence in failing to put proper safeguards about the pit. There seems to be an absence of authority at home, and a contrariety of opinion abroad, as to the law applicable to the state of facts here presented. But we conclude that the better reason is against such contention, and requires a holding in favor of appellant's liability. Ordinarily, we know that the principle of respondeat superior does not extend to cases of independent contracts, but it is not alone upon this doctrine that we predicate liability. Indeed, it may be doubted if the doctrine of respondeat superior has any application. Appellant is not the superior of McFadden in the sense that it had any control over the men or agencies employed in the work, but its liability rests upon the broad ground that it cannot knowingly set in operation causes dangerous to the person of others without taking all reasonable precautions to anticipate, obviate, and prevent such probable consequence; in other words, that appellant cannot cause to be dug in a public street an excavation the necessary effect of which is to create an obstruction or defect which would render the street dangerous for travel, unless properly guarded, without being liable for such injuries as are the direct result of such work. In such case it is no defense that the work was in the hands of a competent independent contractor.

In *Thomas v. Harrington* (N. H.) 54 Atl. 286, Lord Cockburn is quoted as saying: "There is an obvious difference between committing work to a contractor to be executed, from which, if properly done, no injurious consequences can arise, and handing over to him work to be done, from which mischievous consequences will arise unless preventive measures are adopted. While it may be just to hold the party authorizing work in the former case exempt from liability for injury resulting from negligence which he had no reason to anticipate, there is, on the other hand, good ground for holding him liable for injury caused by an act certain to be attended with injurious consequences, if such consequences are not in fact prevented, no matter through whose default the omission to take the necessary measures for such prevention may arise." In the case cited,

which is very similar to the one before us, the Supreme Court of New Hampshire say: "Such an excavation in a street is a nuisance, because it renders public travel dangerous, and makes extra precautions necessary for the protection of travelers. Hence it became the duty of the defendants, who authorized and caused the ditch to be dug, to protect the public from the danger occasioned thereby. They knew the work could not be done, in its reasonable and proper prosecution, without increasing the danger of public travel in the highway at that point. The danger arose directly from the work which they required to be done, and not from the negligent manner of its performance. In such a case one cannot avoid responsibility for the consequences naturally to be apprehended in the course of the performance of the work by employing another to do the work as an independent contractor."

In *Robbins v. Chicago*, 4 Wall. 657, 18 L. Ed. 432—a case of an unguarded area in a public street—the Supreme Court of the United States tersely announce the rule of exemption, and its exception, in the following words: "Where the obstruction or defect caused or created in the street is purely collateral to the work contracted to be done, and is entirely the result of the wrongful acts of the contractor or his workmen, the rule is that the employer is not liable; but where the obstruction or defect which occasioned the injury results directly from the acts which the contractor agrees and is authorized to do, the person who employs the contractor and authorizes him to do those acts is equally liable to the injured party."

Chief Justice Haney, in delivering the opinion of the Supreme Court of South Dakota in *McCarrier v. Hollister*, 89 N. W. 862, said: "The contract in the case at bar contemplated an excavation in one of the principal streets of the city of Sioux Falls. The work contracted for could not be done without creating a condition in the public thoroughfare from which mischievous consequences might reasonably be expected to arise unless preventive measures were adopted. An excavation for the purpose of constructing a sewer may not be unlawful, but it is certainly intrinsically dangerous, and, unless properly guarded, liable to cause personal injuries. The nature of the work demands more than its proper performance. Digging the ditch and laying the pipe are not enough. Lights, barriers, or other safeguards are required during the progress of the work to protect persons from such accidents as the one resulting in plaintiff's injury. Where the work contemplated by the contract is of such a nature that public safety requires something more to be done than the mere construction of the improvement, we think the owner of the property owes a duty to the public to see that proper safeguards are taken, and that, where such precautions are

not taken, he should not escape liability for resulting injuries."

To the same effect is the opinion of Chief Justice Parker of the New York Court of Appeals in *Deming v. Terminal Railway*, 61 N. E. 986, 88 Am. St. Rep. 521, wherein he says: "I have thus called attention to the principal authorities relied upon by the appellant in support of his contention that *Blake v. Ferris*, 5 N. Y. 48 [55 Am. Dec. 304], is still the law for every question decided by it, and have pointed out the fact that not one of those cases presents one of the questions decided by the *Blake Case*, namely, that a party having authority to make the public streets dangerous for passers-by may be relieved from the burden of guarding the place of danger in the street by letting the work to an independent contractor. On the other hand, it has been observed that so much of the decision in *Blake v. Ferris* as so decided was distinctly overruled in the *Storrs Case* [17 N. Y. 104, 72 Am. Dec. 437], the doctrine of which, in that respect, has since been followed in several cases where the question was up for decision."

We think the principles announced in these cases control this case. We do not hold that the work undertaken by appellant constituted a nuisance per se, but we do hold that the work let to the contractor contemplated an excavation in the public street the necessary effect of which was to create an obstruction or defect therein dangerous to the public using such street, and from which injury to passers-by was reasonably to be anticipated unless the same was properly guarded or protected, and that it was the duty of appellant to see that such precautions for the public safety were taken. A sound public policy requires such a holding. There would be little protection to the public if any other rule should be adopted. In those cases where the defect, obstruction, or fault is purely collateral to the work contracted to be done, and is the result entirely of the wrongful act of the independent contractor or his workmen, the employer should not be held liable, because such act is not to be anticipated by him. Such are the cases of *Taylor v. Dunn*, 80 Tex. 652, 16 S. W. 732; *City of Independence v. Slack* (Mo.) 34 S. W. 1064; *City of Richmond v. Sitterding* (Va.) 43 S. E. 562; *Frassi v. McDonald* (Cal.) 55 Pac. 139; *Southern Oil Co. v. Church* (Tex. Civ. App.) 74 S. W. 797; *Central Coal & Iron Co. v. Grider* (Ky.) 74 S. W. 1058; *Garven v. Railway Co.* (Mo. App.) 75 S. W. 193; *Fulton County v. Railway Co.* (Ga.) 13 S. E. 828; *Chartiers Valley Gas Co. v. Waters* (Pa.) 16 Atl. 423. But here the injuries are the direct result of the very thing which the appellant authorized to be done. In addition to the authorities quoted from, the following also support the views we have here announced: *Baumelster v. Markham* (Ky.) 39 S. W. 844, 72 Am. St. Rep. 397; *Colgrove v. Smith* (Cal.) 36 Pac. 411, 27 L. R. A. 590; *Water Co. v. Ware*, 16

Wall. 566, 21 L. Ed. 485; *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 234; *Woodman v. Railroad*, 149 Mass. 335, 21 N. E. 482, 4 L. R. A. 213, 14 Am. St. Rep. 427; *Norwalk Gas Co. v. Norwalk*, 63 Conn. 495, 522, 28 Atl. 32; *Storrs v. Utica*, 17 N. Y. 104, 72 Am. Dec. 437; *Ohio South. R. Co. v. Morey* (Ohio) 24 N. E. 269, 7 L. R. A. 701; *Davis v. Summerfield* (N. C.) 45 S. E. 654; *Bonaparte v. Wiseman* (Md.) 42 Atl. 918, 44 L. R. A. 482; *Murphy v. Perlstein* (Sup.) 76 N. Y. Supp. 657; *Ann v. Herter* (Sup.) 79 N. Y. Supp. 825; *Dillon, Mun. Cor.* §§ 1029-1033. There are other cases in apparent, and probably real, conflict with the views here expressed, but we shall make no effort to review them, resting contented with the conclusion we have reached.

A number of assignments are directed to the following paragraph of the court's charge, viz.: "If you find for the plaintiff you will assess his damages at such a sum of money as in your opinion will be a reasonable and just compensation for the injuries he has sustained. In estimating the damages, you will take into consideration the physical and mental pain, if any, he has sustained by reason of such injuries, if any; and if you believe from the evidence that plaintiff has not yet recovered, and that his injuries are permanent, and that he will hereafter suffer pain and anguish therefrom, and that his ability to labor and earn money subsequent to his majority is and will be impaired by reason of said injuries, if any, then you will take this into consideration in estimating the damages; but you will exclude from your consideration any loss or impairment of earning power, if any, during his minority." It is urged that this charge did not limit the jury to a consideration of the evidence in assessing appellee's damages; that it authorized a recovery of damages that were recoverable only by his parent; that it gave undue prominence to the items of his damage; that in connection with it the court should have given the requested charge that no recovery could be had for diminished earning capacity if appellee would recover from his injuries before he reached his majority; that special instruction directing against a recovery for appellee's services during minority, for medical expenses and nurse hire, should have been given; and that the special charge directing against a recovery for loss of time or permanent disability during appellee's minority should have been given. None of these complaints is well taken. Nor should the special charge which directed the jury to allow for such results only as appeared, from the preponderance of the evidence, reasonably certain to ensue in the ordinary course of nature, have been given. This would mean such results as would follow beyond a reasonable doubt, and is putting it stronger against the plaintiff than is authorized. It is only required that the evidence should show a reasonable probability of the occurrence of future ill effects of the

injury. *Gulf, C. & S. F. Ry. Co. v. Harriett*, 80 Tex. 73, 15 S. W. 556. None of the special charges refused was necessary to be given. The main charge was ample.

Neither was the charge upon the burden of proof on the issue of contributory negligence obnoxious to the rule announced in the cases of *Texas & P. Ry. Co. v. Reed*, 88 Tex. 439, 31 S. W. 1058, and *Gulf, C. & S. F. Ry. Co. v. Hill* (Tex. Sup.) 69 S. W. 136. The language of the charge is not such as to suggest the idea that the jury were probably misled into the belief that they were to look only to the evidence introduced by the defendant upon this issue. The charge is as follows: "On the issue of contributory negligence the burden of proof is on the defendant, and unless you believe, by a preponderance of the evidence, that plaintiff was guilty of negligence causing or contributing to cause his injuries, then you will find that he was not guilty of such negligence."

We think there was no error in permitting various witnesses to testify to the effect that appellee was an obedient, industrious, economical, and sober boy; that he did not use tobacco in any form, or drink. These facts would have a bearing upon his future earning capacity by tending to show those qualities or traits, physical and moral, which aid a man in securing and retaining employment, or in a successful business career of his own.

On the whole, we have given the case a careful consideration, and conclude that while the judgment appears to be a large one, yet under the testimony we would not be justified in disturbing it for that reason, and that none of the assignments presents error calling for the reversal of the case. The judgment is therefore affirmed.

HENNE & MEYER v. MOULTRIE.

(Court of Civil Appeals of Texas. Jan. 13, 1904.)

MORTGAGES—FORECLOSURE—APPEAL—SEQUESTRATION.

1. Where, on appeal in an action on a note and to foreclose a mortgage, plaintiff is entitled to judgment and foreclosure, but it appears that a writ of sequestration was issued in the case, and it is not shown what disposition has been made of the property under the writ, the appellate court cannot render a judgment of foreclosure.

Appeal from Milam County Court; R. B. Pool, Judge.

Action by Henne & Meyer against Paul Moultrie. There was judgment for defendant, and plaintiffs appealed to the Court of Civil Appeals, which certified questions to the Supreme Court. On remand after answer to questions. 77 S. W. 607. Judgment below reversed, with instructions.

A. E. Wallace and Henderson, Morrison & Freeman, for appellants. N. H. Tracy, James Bass, and Moore & Moore, for appellee.

STREETMAN, J. Upon a former day of this term we certified to the Supreme Court certain questions arising in this case. The opinion of that court upon said questions will be found in 77 S. W. 607, 8 Tex. Ot. Rep. 758. Our certificate copied in said opinion discloses fully our views with reference to the questions arising in this case. In our opinion, the lower court should have instructed a verdict for the plaintiffs for the amount of their note, together with a foreclosure of their mortgage lien. It appears that there was a writ of sequestration issued in the case, but it does not appear what disposition has been made of the property under said writ. For this reason this court is not in position to render a judgment of foreclosure, as it cannot tell the present condition of the property covered by the mortgage. For that reason the judgment of the lower court will be reversed, with instructions to said court to render judgment in favor of the plaintiffs for the amount of their debt, and to make such order with reference to the mortgaged property as may be proper to enforce plaintiffs' lien against said property.

Reversed, with instructions.

INTERNATIONAL & G. N. R. CO. v. MILLS.*

(Court of Civil Appeals of Texas. Dec. 23, 1903.)

MASTER AND SERVANT—PERSONAL INJURIES—RAILROADS—AIR BRAKES—DEFECTIVE ANGLE COCK—EXPERT TESTIMONY—FORM OF QUESTION—INSTRUCTIONS—EVIDENCE.

1. A hypothetical question to an expert witness is not objectionable because calling for an answer drawing deductions from the facts, and bearing on a fact in issue which must be decided by the jury.

2. In an action by a brakeman against a railway company for personal injuries alleged to have been caused by the defective condition of an angle cock in an air hose, which caused the hose to be jerked from plaintiff's hands and strike him on the knee when he uncoupled it, a question as to what it would indicate in reference to an angle cock if the hose was jerked out of the workman's hand as he went in to uncouple it, after cutting off the air at the angle cock, was a proper subject for expert testimony.

3. A question to an expert witness is not objectionable because assuming issuable facts, if the testimony tends to prove such facts.

4. In an action by a brakeman against a railroad company for injuries alleged to have been caused by a defective angle cock in an air hose, an instruction that if the jury did not believe from the evidence that the angle cock was in a defective condition, and that the defendant was guilty of negligence in permitting it to be in the condition the jury should find it was in, then to find for defendant, was not misleading.

5. The failure to refer in the instruction to the questions of contributory negligence and assumed risk did not render the instruction misleading, in view of other paragraphs con-

* Rehearing denied January 20, 1904, and writ of error denied by Supreme Court.

¶ 2. See Evidence, vol. 20, Cent. Dig. § 2371.

ditioning plaintiff's recovery on freedom from contributory negligence or assumption of risk.

8. On appeal in an action for personal injuries, in which a requested charge that the court had no power to compel plaintiff to submit to a physical examination was prefaced by a recital that plaintiff's counsel had argued that defendant had not made a motion for such examination, but there was no bill of exceptions taken to the argument of counsel, it will be presumed that the judge refused the charge because no such argument was made.

7. The mere fact that plaintiff in a personal injury action is the only witness testifying to the circumstances of the injury does not preclude a recovery.

Appeal from District Court, Bexar County; S. J. Brooks, Judge.

Action by J. M. Mills against the International & Great Northern Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Hicks & Hicks, for appellant. John Sehorn, for appellee.

FLY, J. Appellee sued to recover damages arising out of an injury inflicted on his knee through a defect in an angle cock while he, in discharge of his duties as a brakeman, was endeavoring to cut off the air on a freight train. He recovered a verdict and judgment for \$7,500.

It appears from the evidence that an "angle cock" is a portion of the air-brake attachments on a train. The air travels from the locomotive through iron pipes and hose couplings to the rear of the train. The iron pipes run underneath the cars, and at each end of the pipes at the ends of the cars there is attached an angle cock, which is a kind of faucet for cutting off or turning on the air, so that it may travel through the pipes and connecting hose. The hose at one end is attached to the angle cock, and at the other is attached to the hose belonging to another car. To uncouple a car, the angle cocks on both cars are turned to cut off the air, and then the hose on the two cars are uncoupled or pulled apart. If the air is not cut off by the angle cock, the hose will whip around as one does when filled with a stream of water. Appellee attempted to cut off the air by means of the angle cocks, and if everything had been in working order that action should have cut off the air. However, the angle cocks were defective and did not cut off the air, and when appellee attempted to uncouple the hose the air in it jerked the hose out of his hands, and it struck appellee on the cap of his knee with such force as to break it. The injury stiffened the leg so as to render appellee a cripple for life. Appellee was ignorant of the defects in the angle cocks.

The first, second, third, and fourth assignments form the basis for the contention that it was error to permit the following question to be propounded to and answered by four different witnesses: "Assuming that the air is cut off at the angle cock by a

brakeman as he goes in to uncouple the hose, and it is jerked out of his hand, what does that indicate in reference to the angle cock?" The answer was: "It would indicate that there was a leak." The question, as copied in the brief, leaves it in doubt as to whether the angle cock or the hose was jerked out of the brakeman's hands, but the bills of exception show that it was the hose that the brakeman sought to uncouple, after cutting off the air at the angle cock, and that the hose was jerked violently out of his hand. The objections urged to the question and answers were that the question was not such as could properly be asked an expert witness, and did not elicit such facts as can be proved by expert testimony, and called for the opinions of witnesses on a state of facts which it is the province of the jury to decide. It is not contended in this court that the witnesses were not experts, the sole proposition being that a hypothetical question which assumes the very fact in controversy, and which would elicit an answer that would usurp the province of the jury in drawing deductions from the facts, is improper. The proper test of the admissibility of the testimony of experts is not made by appellant, for the test is not whether or not the opinion of the expert would prove the very fact to be found by the jury. The object of all testimony is to prove the very fact to be found by the jury, and it is no usurpation of the powers of a jury to prove that fact. In order to obtain a certain opinion from an expert, it is absolutely essential to assume the existence of the facts necessary to elicit the opinion; and, in order that the opinion should prove of any value, it should be the very one that it is desired the jury should form. The rule as to expert testimony is that the subject of inquiry is one of science, skill, or trade, or questions of like kind, about which the expert, by his previous training, habits, or study, has more skill and knowledge than jurors of average intelligence may be presumed generally to possess. *Ferguson v. Hubbell*, 97 N. Y. 513, 49 Am. Rep. 544. If the subject of inquiry is one that may be presumed to be within the knowledge and common experience of the average man in the ordinary walks of life, the opinions of experts are not admissible. Under such circumstances the jury is just as capable of passing upon the facts and forming proper opinions thereon as the expert. *Railway v. Sweeney* (Tex. Civ. App.) 24 S. W. 947. In this case the testimony was as to the operation of parts of a train, of which none but those who made such things a study, or who were accustomed to operating them, could possibly have any knowledge. Questions addressed to experts should be based upon a hypothetical statement of facts, and it is the privilege of the person asking the question to assume any state of facts which the facts tend to prove. An opinion given by an expert on a given statement of facts which the testimony

tends to prove goes to the jury as any other fact, and may be accepted or rejected as may be deemed proper and right by the jury.

The court charged the jury as follows: "On the other hand, if you do not believe from the evidence that said angle cock was in a defective condition, and that the defendant was guilty of negligence in permitting it to be in the condition you find it was in, you will find for the defendant." The assignment assailing this charge is that "the court erred in the third paragraph of its charge to the jury." The only proposition thereunder is: "A paragraph of a charge which may be correct as a proposition, but which is calculated to mislead the jury, is erroneous, and should not be given." That proposition may be true, but it is not apparent how a charge which informs the jury to find for appellant if certain facts are not proved could mislead them. Appellant contends that the clear inference is that if the angle cock was defective, and permitting such defect was negligence upon the part of the appellant, the jury should find for appellee. How this would mislead the jury appellant makes no attempt to show, and it is only a surmise of this court that appellant thinks it misled the jury because no reference was made to the questions of contributory negligence or assumed risk on the part of appellee. If this be the ground of complaint, we do not think it misled the jury, for when read in connection with other paragraphs of the charge, preceding and succeeding, it clearly appears that a recovery on the part of appellee is conditioned on his being free from having contributed to his injury or having assumed the risk of the defect.

The charge on the measure of damages clearly defines the elements of damages which the jury were to consider in arriving at a verdict. Appellant requested a special charge to the effect that the court had no power to compel the plaintiff to submit to a physical examination to ascertain the extent of his injuries, which was prefaced with a recital that counsel for appellee had argued that appellant had not made a motion to have appellee examined by a physician appointed by the court. There was no bill of exceptions taken to the argument of counsel, and there is nothing to indicate that such argument was made, except the recital in the rejected charge. The presumption is that the trial judge rejected the charge because there was no such argument made. If the physicians who testified for appellee are to be credited, the blow inflicted by the hose upon the knee of appellee stiffened the joint, and the injury is permanent, and will incapacitate him from the use of his leg. According to the testimony of appellant, he was confined to the house for three months, and during that time the leg was painful to him. He cannot walk without crutches. The injury was inflicted in January, 1902. Appel-

lee was at that time 36 years of age, and was earning from \$75 to \$80 a month. The verdict cannot be held to be excessive.

The case of *Railway v. Somers*, 78 Tex. 441, 14 S. W. 779, is cited by appellant as being decisive of this case, and language from that opinion is quoted as follows: "There was no evidence to support his case but his own. It seems to us, therefore, that the jury must have been controlled in their verdict more by their sympathy for a hard-working, zealous man, injured in a dangerous employment, than by the law of the case as applied to the evidence." This language was not intended as an enunciation of a general rule that a plaintiff cannot recover damages if no one testifies as to the circumstances of the injury except himself, but applies only to the facts of that case, in which a plaintiff was his sole witness, and had made contradictory statements, and had been contradicted by two disinterested witnesses. A man is not rendered unworthy of belief merely because he has no one to corroborate him as to the manner in which he received his injuries.

The judgment is affirmed.

CROW et ux. v. CITIZENS' RY. CO.*

(Court of Civil Appeals of Texas. Dec. 9, 1903.)

CARRIERS—DEATH OF PASSENGER—NEGLIGENCE—INSTRUCTION—ERROR.

1. In an action against a street railroad for the death of a passenger, it is error to charge on several acts of negligence conjunctively, either of which would have permitted a recovery, where the jury, in the last sentence of the charge, were told that it rested on the plaintiff "to establish said facts alleged to be negligence on the part of defendant by a preponderance of the evidence."

Appeal from District Court, McLennan County; Marshall Surratt, Judge.

Action by Samuel P. Crow and wife against the Citizens' Railway Company. From a judgment for defendant, plaintiffs appeal. Reversed.

Waller S. Baker and S. P. Ross, for appellants. Clark & Bolinger and J. A. Kibler, for appellee.

STREETMAN, J. This action was brought by appellants to recover damages on account of the death of their son Samuel P. Crow, Jr., alleged to have been caused by the negligence of appellee, a street car company in the city of Waco. The petition sets out the cause of action as follows: "That the defendant, while engaged in the operation of its business for the carriage of passengers, and particularly while operating a number of cars called 'trailers,' annexed to one car and propelled thereby by the use of electricity, while carrying passengers from West

*Rehearing denied January 20, 1904.

And, carelessly and negligently, and by the use of said trailers, and by the sudden stop thereof near Fourth and Austin streets, in the city of Waco, and the failure to have motormen and conductors for each car, caused Samuel P. Crow, Jr., son of plaintiffs, to be thrown from, and run over by, defendant's said trailers, which mangled the entire body of the said Samuel P. Crow, Jr., and which finally resulted in his death, to wit, on the 10th day of July, 1902. That but for the use of trailers, and the failure to have motormen and conductors for each car, and the defective construction of said trailers generally, and the allowance of too much slack in the coupling thereof, and the sudden stopping thereof, said accident of which the plaintiffs complain would not have happened."

The first assignment of error complains of the following paragraph of the court's charge, which is the only portion of the charge authorizing a recovery by appellants:

"If you believe from the evidence that the defendant, by running its said cars with trailers attached, as shown by the evidence in this case, and by the sudden stop thereof, if any, near Fourth and Austin streets, and the failure to have motormen and conductors for each car, caused the said Samuel P. Crow, Jr., to be thrown from, and to be run over by, defendant's cars, and that but for the use of trailers, and the failure to have motormen and conductors for each car, and the defective construction of the trailers generally, and the allowance of too much slack in the couplings thereof, and the sudden stopping thereof, said accident would not have happened; and you further believe from the evidence that said acts or omissions, or either of them, on the part of the defendant, constituted negligence on the part of the defendant (that is, a failure upon its part to exercise that high degree of care as above charged as its duty), and that but for such act or omission, if any, the said Samuel P. Crow, Jr., would not have been injured; and you further believe that the said Samuel P. Crow, Jr., was at the time acting as an ordinarily prudent person of his age and intelligence would have acted under the same or similar circumstances, to avoid being injured—then you will find for the plaintiffs, unless you find for the defendant under the following instructions. And the burden of proof rests upon plaintiffs to establish said facts alleged to be negligence on the part of defendant by a preponderance of the evidence."

The substance of the objections is that the charge quoted required appellants to prove all of the acts of negligence alleged, instead of authorizing a recovery upon proof of either of said acts. The charge is not as accurately framed as it might have been. The second clause of the charge, beginning with the words "and you further believe from the evidence that said acts or omissions, or ei-

ther of them," etc., would indicate that the court intended to present the acts of negligence disjunctively, but this clause of the charge is so connected with that preceding it that, upon the whole, the charge only authorizes a recovery upon proof of all the acts alleged as negligence. The petition, as above shown, charges said acts of negligence conjunctively. Appellants, however, would have been entitled to recover upon proof that any of the acts alleged was negligence, and caused the injuries resulting in death. *Kottwitz v. Bagby*, 16 Tex. 656; *Ry. Co. v. Kirk*, 62 Tex. 227; *Ry. Co. v. Hill*, 71 Tex. 451, 9 S. W. 351; *Street Railway Co. v. Muth*, 7 Tex. Civ. App. 450, 27 S. W. 752.

It is insisted, however, by appellee, that the charge quoted was correct as far as it went, and that if appellants desired further instructions, presenting separately the various acts of negligence, they should have requested such instructions, and that, having failed to make such request, they cannot complain. This contention would be sound, provided the charge complained of simply authorized a recovery upon proof of all the acts alleged, without telling the jury that they could not recover upon proof of less than all of said acts. In the case of *T. & P. Ry. Co. v. Brown*, 78 Tex. 397, 14 S. W. 1034, the court gave the following instruction: "Now, if the railroad company did provide suitable and safe approaches to their platform at Big Sandy for the egress of its passengers at such points as passengers would ordinarily or naturally go, properly lighted, and the plaintiff did not exercise proper and reasonable care, and walked off the platform in the dark at a point not provided for passengers to leave, and it was a point that passengers would not naturally or ordinarily go to get off the platform, the plaintiff cannot recover." Discussing this instruction, the Supreme Court says: "It is insisted that this charge is erroneous, 'because it made it necessary for the defendant to prove both that it was careful, and that plaintiff was negligent, before it was entitled to a recovery.' But the charge does not assert this proposition. It tells the jury that if the defendant was careful, and the plaintiff was negligent, the latter could not recover. This is correct. The proposition is not erroneous. The court might properly have gone further, and charged in the disjunctive, and have told the jury that if either the defendant was careful, or the plaintiff negligent, the defendant should have judgment. This presents an instance, not of an erroneous charge, but of a failure to give a charge which the defendant had a right to demand. If the defendant had asked a disjunctive charge, it would doubtless have been given. Not having made the request, it cannot complain of a charge which is correct, but merely defective." In the case of *Railway Co. v. Wood* (Tex. Sup.) 7 S. W. 372, the court instructed the jury that if the

appellant "constructed its roadbed or grade in such a way and in such manner as to guard against ordinary freshets, overflows, tides, etc., so as to prevent damage therefrom to adjacent property, it would not be liable for damages arising from an extraordinary or unusual rise or overflow of water, such as could not have been foreseen or anticipated by the use of the greatest care, skill, and caution in the construction of its roadbed." Judge Stayton, in passing upon the objections to this charge, says: "The charge certainly stated a correct rule, and, if the appellant was of the opinion that the exercise of a less degree of care would have relieved it from liability, a charge upon that subject should have been asked. If the charge had informed the jury that nothing less than the exercise of the highest skill, care, and caution would relieve the appellant from liability for an injury resulting from an extraordinary or unusual rise or overflow, a different question would arise." These cases are cited with approval by the Supreme Court in the case of *G., C. & S. F. Ry. Co. v. Hill*, 95 Tex. 629, 69 S. W. 138, in which the cases of *Ry. Co. v. Conroy*, 83 Tex. 214, 18 S. W. 609, *Kershner v. Latimer* (Tex. Civ. App.) 64 S. W. 237, and *Oil Co. v. Burrow*, 69 S. W. 435, 4 Tex. Ct. Rep. 867, are virtually overruled. The rule established by these decisions, however, is clearly limited to those charges which simply authorize a recovery on proof of a number of acts relied upon, but do not expressly require proof of all such acts where proof of one or more would be sufficient. If the charge complained of had omitted the last sentence, it would probably have been subject to the rule stated. But in that sentence the jury were instructed that the burden of proof rested upon plaintiffs "to establish said facts alleged to be negligence on the part of defendant by a preponderance of the evidence." From this the jury must have understood not only that plaintiffs would be entitled to recover upon proof of all said acts, but that without proof of all said acts they could not recover. It was not simply an omission, but a positive misdirection. The evidence was in such condition that the jury might have found for or against the defendant on one or more of the grounds of negligence alleged. We therefore conclude that the court committed reversible error in the instruction above quoted.

The second assignment of error complains of the refusal of a special charge requested by appellants upon the issue of contributory negligence. The charge given by the court upon that subject was sufficient as far as appellants were concerned. While it did not in express terms instruct the jury that the act of negligence upon the part of the deceased must have been a proximate cause of the injuries, yet, if the jury had found the facts required by the court in this instruction, it would have inevitably followed that

the negligence of deceased was the proximate cause of the injuries.

As the case must be reversed, it is unnecessary to discuss the assignments which relate to the sufficiency of the evidence.

Because of the error above indicated, the judgment is reversed and the cause remanded. Reversed and remanded.

MERCER et al. v. WOODS et al.*

(Court of Civil Appeals of Texas. Dec. 2, 1903.)

INTOXICATING LIQUORS—LOCAL OPTION ELECTIONS—CONTEST—NOTICE—NECESSITY—JURISDICTION OF SUBJECT-MATTER—WAIVER.

1. In order to confer jurisdiction over a statutory election contest, the requirements of the statute as to serving notice must be complied with.

2. The fact that the county attorney, who was one of the defendants in a local option election contest, had actual notice of the plaintiff's grounds of contest, did not dispense with the necessity for serving the written notice required by the statute in order to confer jurisdiction over the subject-matter.

3. The rule that jurisdiction over the person may be obtained without the service of citation, when the defendant waives such service, has no application when a question of jurisdiction over the subject-matter is involved, as jurisdiction of the latter class cannot be obtained by consent.

4. Const. art. 5, § 8, as amended in 1891, giving the district court jurisdiction over contested election cases, is not self-executing, and the district court has no jurisdiction to try such cases save in the manner prescribed by statute.

Appeal from District Court, Robertson County; J. C. Scott, Judge.

Action by John P. Mercer and another against J. W. Woods and others to annul a local option election, etc. Judgment for defendants, and plaintiffs appeal. Affirmed.

Purdum & Purdom and O. L. Stribling, for appellants. J. W. Woods, Co. Atty., B. W. Priest, and Crawford & Bartholomew, for appellees.

KEY, J. The following statement of the nature and result of this suit, contained in appellants' brief, is conceded to be correct: "On the 12th day of May, 1903, the commissioners' court of Robertson county ordered an election to be held throughout said county on the 9th day of June, 1903, for the purpose of determining whether or not the sale of intoxicating liquors should be prohibited in said county. The election was held on the day fixed, and thereafter, on the 22d day of June, the commissioners' court declared the result to be in favor of prohibition, and ordered publication to be made of the order of the court putting the local option law in force in said county. The county judge selected the Central Texan, a weekly newspaper published at Franklin, in which to make the necessary publication of the order—ap-

* Rehearing denied January 20, 1904, and writ of error denied by Supreme Court.

pellee Irvin was publisher and proprietor of the paper. The first publication was made on the — day of —, 1903. On the 10th day of June the appellants, who were lawfully engaged in the sale of intoxicating liquors in said county, presented their petition praying for a writ of injunction against appellees, and also for judgment annulling said election, to Hon. Marshall Surratt, judge of the Nineteenth Judicial District, and a temporary writ of injunction was granted by him, returnable to the district court of Robertson county. The writ enjoined appellees from publishing said order declaring the result of the election, and also from enforcing the local option law in Robertson county. The original petition was filed with the clerk of the district court of Robertson county on the 11th day of July, 1903, and the writ of injunction and citations were immediately issued and served upon all the appellees within 30 days from the return day of the local option election, which was on the 22d day of June, 1903. After the expiration of the 30 days from the return day of the election, the appellees appeared in open court and filed their answers to appellants' original petition, consisting of general and special exceptions and a plea to the jurisdiction of the court, alleging that they had not been served, as required by law, within 30 days from the return day of the election, with a written notice of appellants' intention to contest said election, together with a statement in writing of the grounds relied upon to contest said election. Appellants moved to strike out the plea to the jurisdiction, because it had not been filed and pleaded in due order of pleading, and had been waived. This motion was overruled, and the court, upon hearing testimony, sustained the plea and dismissed appellants' suit, and discharged the writ of injunction, from which this appeal is prosecuted. The court held this suit to be strictly a statutory contest of the local option election, and that contestees had not been served with the statement in writing of the grounds relied upon to contest said election within the 30 days provided by statute, and for that reason the court was without jurisdiction to further hear the cause."

Counsel for appellants contend, as grounds for reversal:

1. That the requirements of the statute as to giving written notice of the intention to contest, and statement in writing of the grounds relied on to contest, were complied with by appellants within 30 days, the time provided by the statute. In support of this contention they quote the testimony heard by the court on that issue, which is as follows:

H. B. Burt testified: "I am clerk of the district court of Robertson county. The original petition was filed in this cause on July 11, 1903, by Judge Purdom for plaintiffs. On the same day Mr. Crawford, of the law firm of Crawford & Bartholomew, at-

torneys of record in this cause for defendants, sent Miss Lella Crawford, his stenographer, to my office, with the request that I send to him by her the original petition in this cause. I delivered the petition to Miss Crawford. She is a person competent to testify. I never saw the petition again until the 23d day of July, after defendants had filed their pleas. Judge Purdom requested me to give him the petition, and I went to the office of Crawford & Bartholomew and got the petition from them. It had not been in my possession since July 11th. I issued the citations in said cause and the writs of injunction on the 11th day of July, and delivered them to the sheriff at Judge Purdom's request, both being present." Cross-examination: "I was not requested by the plaintiffs to deliver the petition to Crawford & Bartholomew, or any of the defendants. Crawford & Bartholomew, so far as the records of my office show, were not attorneys of record in said cause at that time, and do not appear as attorneys of record in said cause until the filing of said pleas, July 23d."

W. T. Bartholomew testified: "That he was a member of the law firm of Crawford & Bartholomew. The petition in this cause was delivered to us by Miss Lella Crawford, July 11, 1903. I read the petition a day or two afterwards. We were employed to represent the county judge and commissioners in this cause about 10 days before the expiration of the 30 days from the return day of the election. Don't remember the exact date. Mr. Woods, the county attorney, and one of the parties to this suit, came to my office a few days after we received the petition, and I handed him the original petition. He read it over in our office. This was within the 30 days after the return day of the election." Cross-examined: "We were not attorneys of record at the time the petition was first brought to us by Miss Crawford."

J. W. Woods, county attorney, and party to the suit, testified: "No copy of the original petition has ever been served upon me, and no other written statement of the grounds of contest has been served upon me within 30 days after the return day of said local option election, except the citation and injunction issued in this cause. Both were served within the 30 days. I never received the original petition from plaintiffs or their attorneys. I read the petition within the 30 days from the return day of election. I received it from Mr. Bartholomew, attorney of record in the cause, at his office. I could not have been given any more information of the grounds of contest relied upon by contestants than I had within the 30 days if the contestants had given me a certified copy of their original petition within the 30 days. I was present in the courtroom on July 9th, when Judge Purdom presented the original petition to Judge Scott for a temporary injunction, and at my request Judge Purdom handed me the petition to read. I examined

it at that time. I only read a part of it at that time. This was two days before it was filed with the clerk."

W. L. Purdon testified: "I am attorney of record for plaintiffs. I presented the original petition to Judge Scott in the courtroom in Franklin, on July 9th, for the purpose of securing a temporary injunction. Mr. Woods, the county attorney of Robertson county, and a party to this suit, was present while Judge Scott was considering the petition, after Judge Scott indorsed his refusal to grant the writ of injunction on the petition. Mr. Woods asked me if I had any objection to him reading it. I said 'No,' and handed it to Mr. Woods for examination. He took the petition and read it—I don't know how much of it, but had opportunity to read it all—standing at the judge's desk. On the day of issuance of process in this cause, which was July 11th, and while the clerk was issuing the same, I was present in the clerk's office, and R. W. Priest, attorney of record in this cause for contestee Irvin, came into the clerk's office and took the petition and examined it, and was reading it. I requested him to let the petition alone until we got through issuing process, and I would leave it with the clerk, and he could then read it fully. He afterwards took the petition and made a copy of Judge Surratt's fiat indorsed on the petition. I left the petition with the clerk, so that it could be read by him and other parties herein. The citation issued by the clerk to the defendants commands them to appear at next regular term of court to answer plaintiffs' original petition and contest of election filed in said court on 11th day of July, 1903—gives names of defendants, file number of suit being 5,492. The nature of plaintiffs' demand is as follows, to wit: This is a suit to contest the local option election held in and for Robertson county, Tex., on the 9th day of June, 1903. It was received by sheriff, July 11, 1903, and personally served on the county attorney and some of the other defendants July 11th, and on all said defendants within the 30 days. The writ of injunction recites that there has been filed a contest of the local option election held in Robertson county, Tex., June 9, 1903, and gives the date of filing the contest and number of the suit, with the names of the parties. This writ was served on the same date with the citations. The election was held June 9th. The return day of the election was June 22d."

On this testimony the trial judge held that the defendants had not been served with a written statement of the grounds relied upon by the plaintiffs to contest the election, within 30 days after the return day of the election, as required by law, and we think that holding was correct. It has often been held in this state that, in order to confer jurisdiction over a statutory contest, the requirements of the statute as to serving notice must be complied with. Lindsey v.

Lockett, 20 Tex. 516; Wright v. Fawcett, 42 Tex. 203; Roach v. Malotte (Tex. Civ. App.) 56 S. W. 701; Calverley v. Shank (Tex. Civ. App.) 67 S. W. 434; Norton v. Alexander (Tex. Civ. App.) 67 S. W. 787. If it be true that the notice required by the statute is essential to jurisdiction to try the contest, then the court ruled correctly in holding that it was without such jurisdiction, because the defendants were not served with written notice of the grounds of contest. It is true that the county attorney, who was one of the defendants, had actual notice of the grounds relied on by the plaintiffs to contest the election, but such actual notice could not take the place of anything required by the statute in order to confer jurisdiction of the subject-matter. Jurisdiction over the person may be obtained without the service of citation when the defendant waives such service, but that rule has no application when considering a question of jurisdiction over the subject-matter. Jurisdiction of the latter class cannot be obtained by consent, and can only exist when the law conferring such jurisdiction has been complied with. But it is contended on behalf of appellants that, inasmuch as the present Constitution confers jurisdiction on the district court to try contested elections, the rule announced in Lindsey v. Lockett, above cited, and followed in the other cases, has no application, and should not now be followed. The provision of the Constitution referred to is not self-executing, and therefore the district court has no jurisdiction to try a contested election except in the manner prescribed by statute. O'Dell v. Wharton, 87 Tex. 173, 27 S. W. 123. Hence we are of opinion that the trial court ruled correctly in holding that it was without jurisdiction to try the contested election. What has just been said disposes of the contention that, by answering the petition, appellees waived the statutory notice. Being a jurisdictional requisite, they could not waive it.

2. It is also contended on behalf of appellants that, aside from the question of contesting the election, they sought equitable relief by injunction upon the ground that the local option law is unconstitutional and void, and that its enforcement in Robertson county would result in irreparable injury to their property rights. It is true that this feature of the case is presented in the plaintiffs' petition, and the writer is of the opinion that the district court had jurisdiction to try that branch of the case, although in that respect the petition was obnoxious to a general demurrer. My views on that subject were stated in the recent case of Western Union Tel. Co. v. Arnold, 77 S. W. 249. However, all the members of this court are of the opinion that the local option law is not subject to the constitutional objection urged in the plaintiffs' petition; and therefore, if the writer's views on the subject of jurisdiction be correct, we see no reason why the case should

be remanded in order that the trial court should sustain a general demurrer to the plaintiffs' petition. Sustaining the general demurrer and rendering judgment against the plaintiffs would not place them in any better position than they now stand with their suit dismissed. Hence we conclude that no reversible error is shown, and the judgment will be affirmed.

Affirmed.

TREVEY v. LOWRIE

(Court of Civil Appeals of Texas. Nov. 28, 1903.)

STATE SCHOOL LAND—SALE—TITLE—EVIDENCE—JUDGMENT—CERTIFIED COPY—LEASE—CANCELLATION—ADDITIONAL LANDS—PERSONS ENTITLED TO PURCHASE.

1. Rev. St. 1895, art. 4218p, makes all papers relating to sales of land records of the General Land Office, and article 2308 provides that it shall be the duty of the Commissioner of the General Land Office to furnish any person with a certified copy of any record of the office which shall be admissible in any case in which the original would be. Article 2315 provides that certified copies of instruments admissible in evidence shall also be admissible. Defendant in an action involving title to a section of land claimed to have purchased it as additional to her home section. *Held*, that a certified copy by the Commissioner of the General Land Office of a certified copy of a judgment in favor of a third person against defendant for the title and possession of defendant's alleged home section was admissible as a paper relating to the sale of that section, to show that defendant had no right to purchase the land in question.

2. Under Rev. Civ. St. 1897, art. 4218f, providing that any bona fide purchaser who has purchased public lands may purchase other land in addition thereto, a mere actual occupant who is not a bona fide purchaser has no right to purchase additional land.

3. Laws 1895, p. 63, c. 47, provides for the sale of public lands, section 3 (page 63) requiring the Commissioner of the General Land Office to classify the lands, after which, by section 5 (page 64), such lands are made subject to sale to actual settlers, and it is provided that lands classified as purely pasture lands may be sold in quantities not to exceed four sections to the same settler. Section 8 (page 64) declares that any settler who purchases not to exceed one section of agricultural land may purchase three strictly pasture sections, etc. *Held*, that the right to purchase additional sections is not restricted to purchasers of agricultural sections, but that the purchaser of a section classified as grazing land is entitled to purchase additional land.

4. Rev. St. 1895, art. 4218u, relative to leases of the public lands, provides that the Commissioner of the General Land Office shall file in his office all applications and other papers relating to leases, and keep a record of all leases made, which papers shall constitute records of the office. Article 4218p makes it the duty of the commissioner to furnish a certified copy of any record of the office to any person, and both this article and article 2315 make such copies admissible in evidence in any case where the original would be admissible. In an action involving title to a section of land which plaintiff claimed to have purchased from the state under the act of 1895 it appeared that a third person had leased the section, together with others, from the state, prior to the purchase, for a term extending beyond the time at

which plaintiff purchased. *Held*, that a certified copy of a written release of the lease by the lessee, which had been filed in the commissioner's office, was admissible to show plaintiff's right to purchase.

5. The provision of the act of 1895 (Laws 1895, p. 63, c. 47) that a lease of the state school land can be canceled only by the commissioner under his hand and seal of office, did not render inadmissible the commissioner's certificate that pursuant to the release he had canceled the lease as to the section in controversy, since this did not constitute a cancellation of the lease, but a mere waiver as to the single section, authorizing the sale thereof.

Appeal from District Court, Scurry County; H. R. Jones, Special Judge.

Action by W. R. Lowrie against Mrs. M. E. Trevey. From a judgment for plaintiff, defendant appeals. Affirmed.

Ed J. Hamner, for appellant. Beall & Beall, for appellee.

CONNER, O. J. Appellee, who was plaintiff below, claims the S. W. $\frac{1}{4}$ of section 143, block 97, of state school land in Scurry county by virtue of rejected applications to purchase made August 14, 1900, and May 16, 1901. Appellant claims said section 143 by virtue of an award thereof to her on April 20, 1900, as additional to her home section, 128, in the same block, which had been awarded to her March 20, 1899. For the purpose of showing that appellant had no title to her home section at the time of the award to her of section 143, and that hence she was not a qualified purchaser of the later section, the court, over appellant's objection, admitted in evidence a certified copy by the Commissioner of the General Land Office of a certified copy of a judgment of the district court rendered September 26, 1899, in favor of one G. A. Autry and against appellant and others for the title and possession of said section 128.

We find no error in the ruling. An award of section 128 had been made to appellant, and Autry had a pending application to purchase asserting a right to the award. The suit was therefore an appropriate method of determining the conflicting claims, and the copy of the final judgment in Autry's favor was appropriate evidence in explanation of such further action, if any, as the commissioner should deem necessary to take in canceling the award to appellant and granting it on the application of Autry. In other words, said copy seems to be such instrument or paper as, under the circumstances, relates to the sale of appellant's home section 128, and hence to be within Rev. St. 1895, art. 4218p, constituting all papers relating to sales of land records of the General Land Office. If so, the copy offered was admissible by the terms of Rev. St. 1895, arts. 2308, 2315.

Appellant insists that in no event is the judgment against her admissible in behalf of appellee, who is a stranger thereto. But to this view we are unable to assent. As

shown in the record, it was in full force at the inception of appellee's claim to section 143, and has never been legally set aside. In form and legal effect it seems to have divested appellant of the title and right of possession to her said home section, and to this extent and for this purpose was admissible as one of the links or muniments of Autry's title. *Ellis et al. v. Le Bow*, 74 S. W. 528, 7 Tex. Ct. Rep. 493. In this connection appellant contends that, regardless of title, her prior applications are entitled to precedence, inasmuch as she was at the time undisputedly an actual settler on her home section. The jury, in answer to special issue submitted, found that she was not a bona fide purchaser of the same at the time she applied therefor, or at the time she applied to purchase section 143. The right to purchase additional lands is limited by the statute to "bona fide purchasers." Rev. Civ. St. 1897, art. 4218f. No such right is extended to a mere occupant of other lands. See *Boyd v. Montgomery*, 66 S. W. 243, 3 Tex. Ct. Rep. 892.

As preliminary to the introduction of the copy of the judgment in Autry's favor, his application to purchase section 128 as additional to his home section, 122, was offered. Objection is urged that, inasmuch as it appears that Autry's home section had been classified as "watered grazing," he was not a competent purchaser of additional section 128, and hence that Autry's application to purchase section 128 should have been excluded on appellant's objection on this ground; the case of *Terry v. Dale* (Tex. Civ. App.) 65 S. W. 54, being cited in support of such contention. As one of the grounds of its decision, it seems to have been held by the Court of Civil Appeals for the Third District in the case cited that the right to purchase additional lands was limited by the act of 1895 (Laws 1895, p. 63, c. 47) to such persons as were actual settlers upon and purchasers of land classified as agricultural. If such be the proper construction of the decision named, we do not feel prepared to agree therewith. Considering the act of 1895 as a whole, we think the legislative intention was manifested that, except as otherwise provided, the Commissioner of the General Land Office should sell to proper applicants all state school lands. By section 3 (page 63) of the act, it is made his duty to carefully and skillfully classify such lands as had not theretofore been classified, after which, by section 5 (page 64) of the act, such lands were made subject to sale to actual settlers; and it is therein expressly declared, among other things, that "lands classified as purely pasture lands may be sold in quantities not to exceed four sections to the same settler"; thus by plain implication, if not expressly, authorizing the commissioner to sell to a qualified person as many as four sections of land that had been classified as purely pas-

ture lands. The asserted limitation in section 8 (page 64) of the sale of pasture lands to a bona fide settler and purchaser of one section of agricultural land is rather to be considered, we think, as a limitation of the power of the commissioner to sell more than one section of agricultural land to the same person, and, inasmuch as a writ of error in the case cited may have been refused upon another ground, we feel unwilling to follow it as authority for the proposition asserted by appellant.

It further appears that upon the trial it was shown that on October 24, 1897, the Commissioner of the General Land Office leased to one A. P. Bush, Jr., for a period of five years, a number of sections of school land, including, among others, said section 143, and that on the 30th day of November, 1898, said Bush assigned or released section 143 in behalf of appellant. The waiver of lease was shown by certified copy of the original instrument on file in the General Land Office, which was neither acknowledged nor had it been recorded, to the introduction of which copy objection was made that it was not such instrument as was required or permitted to be filed with the Commissioner of the General Land Office. We think the objection must be overruled for reasons sufficiently indicated in what we have said in disposing of the assignment first treated. See, also, Rev. St. 1895, art. 4218u, and *Stokes v. Riley* (Tex. Civ. App.) 68 S. W. 705. The certificate of the Commissioner of the General Land Office to the effect that, pursuant to the release on section 143, he had canceled the lease thereon, was objected to on the ground that under the act of 1895 a lease of state school lands can be canceled only "by a writing under his hand and seal of office"; the recent case of *Anderson v. Terrell*, 76 S. W. 432, 8 Tex. Ct. Rep. 312, being cited in support of this proposition. As indicated by the record, however, we do not understand the instrument purporting to have been executed by A. P. Bush, Jr., or the act of the commissioner to have been intended to work a cancellation of the lease issued to Bush. Said lease, as stated, included other sections than 143, and it was evidently intended that it should continue to operate as to all sections not designated in the release. The instrument designated in the record as a transfer of the lease to appellant seems to be no more in legal effect than a mere waiver or transfer on Bush's part of his leasehold right to section 143 in favor of appellant, and upon presentation thereof to the commissioner for his information no reason occurs to us, under recent decisions of the Supreme Court, why he might not act thereon, and, other conditions being met, be authorized to make sale of the lands upon which said transfer or waiver operated without formal cancellation of the original lease to Bush.

As assigned, we find no error in the record, or other question we deem it necessary to discuss, and the judgment being, in our opinion, sustained by the verdict of the jury, is affirmed.

On Motion for Rehearing.

(Jan. 16, 1904.)

It is earnestly insisted that in affirming the judgment as was done on a former day of the term we brought ourselves in conflict with the cases of *Smith v. McClain* (Tex. Sup.) 74 S. W. 754, and *Pruitt v. Scrivner* (decided by this court June 20, 1903) 77 S. W. 976, and we have so concluded. As will be seen from the original opinion the land in controversy in this suit is situated in the absolute lease district, and was included within the terms of a lease issued to A. P. Bush, Jr., October 24, 1897, that was unexpired at the date of both of appellee's applications to purchase. In such instances the cases above mentioned undoubtedly establish the doctrine that the Commissioner of the General Land Office has no authority to sell save to a qualified applicant in whose favor the lessor has waived his leasehold title. In the original opinion it was held, in effect, that the objections to the commissioner's certificate of cancellation did not apply in cases where, as here, it appears that the lease as a whole has not been canceled, and where, as in the case before us, but a waiver or partial cancellation was attempted. We thought, however, that the certificate introduced in evidence, together with other evidence, at least tended to show that the Bush lease had in fact been canceled as to the land in controversy, in which respect this case is distinguishable from the cases cited, and that, in the absence of proof of the ground of cancellation, which was not shown, we would assume that the commissioner acted lawfully, and canceled the lease for an authorized cause; from which the conclusion, of course, followed that the land in controversy was subject to appellee's applications, it appearing that appellant was not a competent purchaser. But on reconsideration we have concluded that we were in error, because of the fact that appellee was the plaintiff below asserting right by virtue of rejected applications against one holding under an award. The burden was not upon appellant, as we, in effect, placed it, but upon appellee, to show, under the circumstances appearing, not only that the lease as to the section involved was canceled, but also that the Bush lease had been canceled at a time in the manner and for a cause authorized by law. See Rev. St. 1895, art. 4218v; *Bank v. Downlearn*, 94 Tex. 389, 60 S. W. 754; *Anderson v. Terrell*, 76 S. W. 432, 8 Tex. Ct. Rep. 312; *Ketner v. Rogan* (Tex. Sup.) 68 S. W. 774; *Newland v. Slaughter* (Tex. Civ. App.) 70 S. W. 102; *Davis v. Tillar* (Tex. Civ. App.) 74 S. W. 921.

It follows from these conclusions that the motion for rehearing should be granted, the judgment reversed, and the cause remanded for a new trial; and it is so ordered.

CUDAHY PACKING CO. v. DORSEY et al.*
(Court of Civil Appeals of Texas. Nov. 25, 1903.)

CARRIERS — PERISHABLE GOODS — INJURIES
— LIABILITY OF CONSIGNOR — INSTRUCTIONS —
MISJOINDER OF CAUSES OF ACTION — HARM-
LESS ERROR.

1. In an action against a packing company and a railroad company for negligence causing damages to a car load of meat, plaintiff sought also to recover from the railroad company on a contract made after the arrival of the meat, by which plaintiff was to receive it and dispose of it to the best advantage, and the railroad company was to pay whatever loss was sustained. The court, however, did not submit to the jury any issue as to the contract, and no verdict was rendered against the railroad company. Held that, even though there was a misjoinder of causes of action, the packing company was not prejudiced thereby.

2. Where a consignee of perishable goods which had been shipped over the connecting lines of several railroads sued the last carrier for injuries to the same, and the railroad impleaded the consignor, asking for judgment over against it in case the goods were damaged before they left its hands, and there was no evidence of delay by any connecting carrier, the shipment having reached the last carrier in the usual time, an instruction that the consignor would be liable if the jury should find that the goods were damaged before they were delivered to the last carrier was not erroneous.

Appeal from Hamilton County Court; J. W. Warren, Judge.

Action by R. A. Dorsey and others against the Texas Central Railroad Company, in which the Cudahy Packing Company was impleaded. From a judgment for plaintiffs, defendant packing company appeals. Affirmed.

J. Van Steewyk, for appellant. Dewey Langford, for appellees.

STREETMAN, J. This is the third appeal in this case. A statement of the nature of the suit will be found in the former opinions of this court. *Cudahy Packing Co. et al. v. Dorsey*, 63 S. W. 549; *Tex. Cent. R. R. Co. et al. v. Dorsey*, 70 S. W. 575. The plaintiff R. A. Dorsey sought to recover of the packing company and the railroad company damages to a car load of meat shipped from Omaha, Neb., to Hico, Tex. The ground of the recovery was certain alleged negligence of said defendants. By an amendment the plaintiff sought to recover of the railroad company upon the further ground of a contract made after the arrival of the meat at Hico, by which plaintiff was to receive the meat and dispose of it to the best advantage, and the railroad company was to pay whatever loss was sustained. Appellant excepted to the pleadings in this condition because of a misjoinder of causes of action. We should probably hold,

*Rehearing denied January 20, 1904.

If necessary, that there was no misjoinder of causes of action (*Ney v. Ladd* [Tex. Civ. App.] 68 S. W. 1014; *Hooks v. Fitzenrieter* [Sup.] 13 S. W. 230), but the court did not submit to the jury the issue raised by the objectionable pleading, and no verdict was rendered against the railroad company. We are unable, therefore, to see how the error, if it was error to overrule the exception, could have injured appellant.

Upon the first appeal of this case it was reversed because the court instructed the jury to find against the packing company if they should find that the meat was damaged before it was delivered to the Texas Central Railroad Company. In that record, however, "the evidence indicated some delay before it was received by the Texas Central Railroad Company." 63 S. W. 549. The same character of instruction is again assigned as error, but in the record now before us there is nothing to indicate any delay by a connecting carrier, but it is stated as a fact that the shipment reached Hico, where it was delivered by the Texas Central Railroad in the usual time. The instruction complained of was not reversible error under the circumstances.

Other assignments of error complain of the admission of certain expert testimony and the remarks of counsel in argument. The witnesses, in our opinion, were qualified as experts, and the argument referred to was not improper. The evidence was sufficient to support the verdict of the jury, and, no reversible error being shown, the judgment is therefore affirmed.

Affirmed.

GAMMEL BOOK CO. v. BEN C. JONES & CO.*

(Court of Civil Appeals of Texas. Dec. 23, 1903.)

CONTRACT — PRINTING — BREACH — DAMAGES — JUDGMENT — EVIDENCE — SUFFICIENCY — FINDING — APPEAL.

1. Where the evidence on an issue is conflicting, the findings of the trial court will not be disturbed on appeal.

2. In an action to recover damages for breach of a contract under which the defendant agreed to pay plaintiffs stipulated prices for the publication of four volumes of Texas Reports, evidence considered, and held sufficient to support a judgment for \$5,929, including \$326 on stated account.

Appeal from District Court, Travis County; R. L. Penn, Judge.

Action by Ben C. Jones & Co. against the Gammel Book Company. From a judgment for plaintiffs, defendant appeals. **Affirmed.**

D. W. Doom, D. H. Doom, and Moya Wicks, for appellant. West & Cochran and S. R. Fisher, for appellees.

KEY. J. Appellees instituted this suit against appellant, seeking to recover \$338 upon stated account, and several thousand

dollars for breach of an alleged contract by which the defendant was to pay the plaintiffs stipulated prices for the publication of certain Texas Reports. The defendant answered by demurrers, general denial, and several special pleas. There was a nonjury trial, resulting in a judgment in favor of the plaintiffs and against the defendant for the total sum of \$5,929. The court also gave judgment foreclosing a manufacturer's lien on certain Texas Reports and the electrotype plates thereof in the possession of the plaintiffs, and belonging to the defendant, under the contract sued on, and that defendant take nothing against the plaintiffs on the demands pleaded by way of counterclaim, offset, or otherwise. The defendant has appealed, and submits the case in this court on several assignments of error.

The main defense relied on by the defendant was failure of the plaintiffs to comply with the contract, the contention being that the books printed were not of the class and quality specified in the contract. On that issue the testimony was conflicting, and, the trial court having decided the issue in favor of the plaintiffs, such finding should not be disturbed by this court. In fact, the plaintiffs submitted ample testimony to the effect that they had fully complied with the contract; and, while defendant submitted testimony to the contrary, it was the peculiar province of the trial judge to determine the credibility of the witnesses, and, having decided the issue in favor of the plaintiffs, we find no reason in the record for holding that decision to be wrong.

The trial judge did not file any conclusions of fact and law, but the judgment rendered involves the following findings of fact, which find support in the testimony:

(1) That on January 1, 1902, the plaintiffs and the defendant made a settlement of former business transactions, in which settlement it was mutually agreed that the defendant was indebted to the plaintiffs in the sum of \$336.

(2) The plaintiffs and the defendant entered into a written contract, in terms as alleged in plaintiffs' petition, concerning the printing of Texas Reports, which contract had been complied with by the plaintiffs, and breached by the defendant.

(3) As a result of such breach, the plaintiffs were entitled to recover from the defendant \$487.50, with interest thereon from February 11, 1902, at the rate of 6 per cent. per annum, for the manufacture of 500 copies of volume 91 of the Texas Supreme Court Reports; \$2,076.60, with interest thereon from May 24, 1902, at the rate of 6 per cent. per annum, for the manufacture of 1,000 copies of volume 41, Texas Criminal Appeals Reports, and the electrotype plates thereof; \$2,076.60 with interest thereon from August 4, 1902, at the rate of 6 per cent. per annum, for the manufacture of 1,000 copies of volume 42, Criminal Appeals Re-

*Rehearing denied January 20, 1904.

ports of Texas, and the electrotype plates thereof; and \$600, and interest thereon from August 4, 1902, at the rate of 6 per cent. per annum, for work and labor done in the manufacture of volume 25, Texas Civil Appeals Reports, and the electrotype plates thereof.

The questions of law presented in appellant's brief are neither new nor difficult, and therefore we deem it unnecessary to discuss them in this opinion. Appellant's assignments and propositions in reference thereto have received careful consideration, but they are not regarded as tenable.

No reversible error being shown, the judgment is affirmed.

PECOS & N. T. RY. CO. v. BOWMAN.*

(Court of Civil Appeals of Texas. Dec. 19, 1903.)

RAILROADS—HIGHWAYS—FRIGHTENING ANIMALS—INJURIES TO DRIVER—HIGHWAY—USE—ESTABLISHMENT—OTHER ROUTE—CONTRIBUTORY NEGLIGENCE—ISSUES—EVIDENCE—PLEADING—INSTRUCTIONS.

1. Where plaintiff was injured by her horse becoming frightened at a stock car which was off of defendant's railroad track, and in the road along which plaintiff was traveling, which had been used by the public, with defendant's knowledge, for a long time, defendant was bound to exercise reasonable care for the safety of persons traveling along the road, though it ran across land owned by the defendant, and had never been legally established as a public road by dedication or prescription.

2. It was no defense to an action for plaintiff's injuries so sustained that she might have reached her destination by a different route, over a legally established public road.

3. Where the issues raised by the pleadings and evidence were correctly and sufficiently submitted in the charge of the court, the refusal of special requests to charge was not error.

4. Where, in an action for injuries, the facts charged in the petition showed that plaintiff's services were valuable, and that she had been permanently disabled, and claimed damages in a gross sum for physical pain, mental anguish, and permanent injuries, and permanent inability to perform future labor, evidence as to the reasonable value of plaintiff's services was not objectionable on the ground that the petition did not contain any allegation as to the reasonable value of such services.

Appeal from District Court, Deaf Smith County; Ira Webster, Judge.

Action by Nannie Bowman against the Pecos & Northern Texas Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. W. Terry and Browning, Madden & Trulove, for appellant. Witherspoon & Gough and Turner & Boyce, for appellee.

STEPHENS, J. June 18, 1901, as appellee was approaching the town of Hereford, Tex., traveling in a vehicle drawn by two horses along a public road near appellant's railway track, her team, taking fright at a stock car in an unusual position—one end being off the

track and in the road—ran away and threw her out, from which she sustained personal and other injuries. The verdict in her favor for damages in the sum of \$1,125 as compensation for these injuries was warranted by the evidence, both as to the ground and amount of recovery, and we therefore find the facts to be substantially as alleged in her petition.

Liability is, however, stoutly denied by appellant because the road appellee was traveling ran across land owned by appellant, and had never been established as a public road by the commissioners' court of Deaf Smith county, by dedication or by prescription. But while this is true, it had become public by long-continued use with the knowledge and consent of appellant, if not by its invitation, which was sufficient to impose on appellant the duty of taking a reasonable degree of care for the safety of persons permitted to travel and known to be traveling such road. This road crossed appellant's railway track near the place of the accident, and the evidence tended to show that a suitable crossing had been made there by appellant, or at least by its consent.

The further contention that appellee was not entitled to recover because she might have reached her destination by a different route, and over a legally established public road, is equally untenable.

The law covering the issues of liability raised by the pleadings and evidence was correctly and sufficiently submitted in the charge of the court, including the special charges given at the request of appellant, and there was no error in refusing the other special charges.

The only assignment of error which seems to require discussion is the thirteenth in the brief, reading: "The court erred in admitting evidence for plaintiff, over defendant's objections, as to the reasonable value of plaintiff's services, because there are no allegations in plaintiff's pleadings as to such reasonable value, as is fully complained of in defendant's bill of exceptions No. 1; and further erred in overruling defendant's motion for a new trial because of such error." While the petition did not specifically allege the value per month of appellee's services before the injury, which she was permitted, over objection, to prove, it did show by the facts alleged that the same had been valuable, and that the injury had permanently disabled her, and claimed damages in the gross sum of \$3,000 to compensate her for "physical pain and mental anguish and permanent injuries to said [her] side and wrist, and permanent inability to perform future labor." The petition, which gave a few items of expense and other loss, was not excepted to for not fully itemizing the sum sued for, or for not specifically alleging the value of appellee's services before she was injured. The assignment is therefore overruled.

Judgment affirmed.

*Rehearing denied January 16, 1904.

TALLEY v. BEEVER & HINDES.

(Court of Civil Appeals of Texas. Dec. 9, 1903.)

NEGLIGENCE — MANUFACTURED ARTICLES — CARE REQUIRED — MANUFACTURERS' LIABILITY — WARRANTIES — ENFORCEMENT — EVIDENCE — CHANGE OF MATERIAL — RES IPSA LOQUITUR.

1. Where defendants manufactured and sold a gasoline pear burner, not inherently dangerous, with directions for its use, defendants were only bound to use ordinary care to construct it of reasonable strength and fitness when used in accordance with the directions.

2. Where defendants sold plaintiff's father a gasoline pear burner, to be used by plaintiff, who was injured by the top of a gasoline cylinder blowing off while plaintiff was filling the cylinder with air in accordance with the directions, the fact of the explosion was not sufficient to create a presumption of defendants' negligence in manufacturing the burner.

3. Where, after the top of a gasoline pear burner had blown off and injured plaintiff, the manufacturers substituted brass for lead-plated iron, of which the cylinder which exploded was made, and the brass tops of the cylinders were riveted on, instead of being double-seamed, which construction was stronger than that used in the cylinder which exploded, such change did not establish that the manufacturers had not exercised reasonable care in the construction of the exploded cylinder.

4. Where, in an action for injuries by the bursting of the top of a cylinder attached to a gasoline pear burner, a witness testified that the cylinder could have been manufactured stronger, but did not testify that the material out of which the cylinder in question was constructed, and the manner in which the top was fastened, were not safe or sufficiently strong for the uses for which the machine was designed, his evidence was insufficient to establish negligence of the manufacturers in the construction of the burner.

On Rehearing.

5. Where plaintiff's father purchased a pear burner under a warranty, such warranty was enforceable only in an action by the father, and could not be made the basis of an action by plaintiff for injuries sustained by the bursting of the burner.

Error from District Court, Frio County; E. R. Lane, Judge.

Action by J. R. Talley against Beever & Hindes. From a judgment in favor of defendants, plaintiff brings error. Affirmed.

Jno. L. Little, Duval West, and I. N. Spann, for plaintiff in error. R. W. Hudson and C. A. Davies, for defendants in error.

JAMES, C. J. Plaintiff, aged 17 at the time of injury, suing by his father and next friend, J. E. Talley, alleged, in substance, that Beever & Hindes, a partnership firm, sold to J. E. Talley a "pear burner," a machine of their own manufacture, to be operated by the use of gasoline for the purpose of burning prickly pear on his ranch; that while plaintiff was pumping air into the cylinder or tank containing the gasoline, in order to form the gas, and while he was following directions for using the machine, the cylinder burst from the pressure of the gas within, and the gas expelled therefrom, becoming ignited at a fire close by, caused

plaintiff his injuries. The petition alleged among other grounds for defendants' liability that they were negligent in using weak and defective material in making the machine, and also negligent in having the top of the cylinder insecurely fastened or attached to the cylinder. Although other issues than negligence were set up in the petition, such as misrepresentations and warranty concerning the machine as to its safety for use, the trial court submitted the case on negligence alone, and plaintiff did not request any other submission. The verdict was for defendants. Under these circumstances, we must treat all other issues or grounds for defendants' liability as properly out of the case.

We have come to the conclusion that the evidence does not show that defendants were guilty of negligence, and, if this be correct, the errors assigned are immaterial.

The machine was not sold to plaintiff, but as the father testified that he informed defendants' agent of whom he bought it that he was buying it for his sons to use on his ranch, and as the court proceeded upon the theory that plaintiff was a person entitled to complain of defendants' negligence, we shall, without discussing that question, assume that defendants were liable to him for negligence.

Defendants could in this case be held to the exercise of ordinary care in the construction of the machine, but not to that high degree of care which is required of persons selling articles which are inherently, imminently, and necessarily dangerous when used. In *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455—a widely approved case—a dealer in drugs labeled a deadly poison as harmless, and he was held to be liable to all persons injured in consequence of such label, through whosoever hands the drug may have passed. The same court refused to extend this rule to a case such as the one before us. *Losee v. Chute*, 51 N. Y. 494, 10 Am. Rep. 638. The rule seems to be that one who deals with a thing which is inherently very dangerous, involving both death and bodily harm to some person as the natural and almost inevitable consequence of lack of care, owes to the public at large the duty of extreme caution. The machine in question was not a thing of that nature, and only the standard of ordinary care applies. *Reiss v. N. Y. Steam Co.*, 128 N. Y. 103, 28 N. E. 24.

It appears that on this machine there were directions for its use, and we are of opinion that when a machine is sold, accompanied by directions for its use, the maker should not be held to a greater degree of care in its construction than to construct it of reasonable strength and fitness when used in accordance with directions. Such use is contemplated, and the thing is manufactured to be so used. However, plaintiff testified that he was following the directions, with which

he was familiar, at the time he was hurt. He says he was pumping air into the cylinder which contained the gasoline, and had made the proper number of strokes, when the top blew out. He also testified that the machine had not been exposed to the heat of the fire, so that, according to his testimony and that of his brother, who was with him, the machine may be said to have burst when operated substantially in accordance with the directions, and from the pressure of the gas formed in the cylinder.

The explosion, it is contended, was evidence of the defendant's negligence. The rule is that such presumption does not arise from the fact alone. *McCray v. Ry.*, 89 Tex. 168, 34 S. W. 95; *Broadway v. Gas Co.*, 24 Tex. Civ. App. 603, 60 S. W. 270; *Reiss v. N. Y. Steam Co.*, 128 N. Y. 103, 28 N. E. 24. As explained in the *McCray* Case, the circumstances attending the occurrence may be sufficient to establish negligence without any direct proof of the fact. The only departure which plaintiff shows he made from the directions was that he did not see that the jet was open. We cannot see how this omission contributed to the explosion. The stop-cock was to be closed while the air was being pumped in. Therefore it seems that whether the jet was open or obstructed was of no consequence. There is some probability that the heat from the fire had something to do with the explosion, but not if plaintiff's testimony be accepted as true. Hence it might seem that, plaintiff having testified that he was using the appliance according to directions, and while so doing was himself not guilty of negligence, the jury would have been authorized to infer defendants' negligence from the fact of the explosion under these circumstances. This might with some reason be claimed if the further fact had been shown that the machine was in the same condition as when it left defendants' hands. There was nothing to show this. The machine had been bought for use on the ranch in procuring feed for cattle in winter. It had been on the place some time. It had been used, the evidence does not show to what extent. The father testified he did not know how many times plaintiff had used it. Plaintiff says he had used it before that morning, but says nothing more on this subject. It appears to have been turned over to the boys to use, and it is well known that boys are not ordinarily careful in handling appliances of that character. What that machine had been through was not explained. It ought not to be presumed in order to support the other presumption that it was in the same condition, and had not been impaired by use or ill treatment. We are therefore of opinion that the circumstances shown were not sufficient to constitute the explosion proof of defendants' negligence.

It is also claimed that negligence appears from the fact that defendants, since this accident, have constructed their cylinders of

brass—a stronger material than lead-plated iron, of which the cylinder in question was made—and have riveted the tops of the cylinders, instead of double-seaming them; the former making a stronger fastening. This, we think, was not evidence of former negligence. It was evidence that defendants built their new machines of stronger material and by stronger fastenings than their old ones, but was not evidence that the old ones were defective and not reasonably safe for the uses intended, or that defendants had not exercised reasonable care in their manufacture.

The testimony of witness Chatfield is referred to as showing negligence, as follows: "I live in San Antonio, and am a metal worker. Have had 27 years' experience as such. I am acquainted with the different kinds and classes of material. This [referring to pear burner] is made of a 22 or 24 lead-plated iron. Nos. 20 and 16 lead plate is stronger and thicker than this. Lead is put on to keep the rust from eating iron. I have no experience with pneumatic pressure applied to gasoline for heating purposes, and do not understand the principles of pneumatics, hydraulics, etc. My experience has been a tinner and metal worker. I do not know by actual experience how much pressure per square inch a metal like this will stand when manufactured into a cylinder like this one. [Referring to exploded burner.] I do know from my 27 years as a metal worker what effect double-seaming would have upon this kind of material. It would, in my opinion, weaken it, especially at the end where coil is attached, as that is put in last, and requires two turnings of the iron by hand, which would be calculated to fracture the fibers of the iron. If the ends of the machine were riveted, it would be much safer, because the metal is not strained. Riveting would make it stronger, in my judgment. Of course, if heavier metal had been used, it would have been stronger. The swedges around this can or cylinder, in my judgment, would tend to weaken the cylinder. The seaming in this head is still intact, and the head must have blown out. I don't think it was melted out. Nos. 22 and 24 refers to weight of the material. Brass is much better for a machine of this character, because it is much stronger and more flexible than iron." Cross-examined: "The weakest seam, in my judgment, is the long seam running from end to end. It is still intact, and has not opened at all. It should have been the first to break, as it was the weakest place. Yes; we swedge tall lard cans and boilers. Yes; that is to make them stiffer, but think it makes it weaker. I don't know whether that strengthens them, or not, against pressure. Suppose it does. Think perhaps swedging is used for that purpose. Don't know what pressure this material [referring to exploded can] will stand to the square inch. Don't know how much pressure

sure was necessary to operate machine. Don't know how much pressure 25 or 30 strokes of the pump will put in them. I have made gasoline stoves." His testimony was that No. 16 and No. 20 lead-plated iron is thicker and stronger than No. 20 or No. 24, of which the burner in question was made. There is nothing, however, in his testimony which shows that the material of which this burner was made was not strong enough. He says that double-seaming, in his opinion, has the effect of weakening this kind of material, and is calculated to fracture the fibers. This evidence amounted to nothing at all, because the material of this cylinder was not injured or fractured. The undisputed evidence is that the top was blown out entirely, and that the seaming was left intact. He says that if the ends were riveted it would be much safer, and a heavier metal would have been stronger; but he nowhere undertakes to say that the material of which the machine was composed, and the manner in which the end was fastened, were not safe and strong enough for the uses of the machine, as it was designed to be used, and he does not even express an opinion thereon. His whole testimony is to the effect that the cylinder could have been built stronger, and this was insufficient to prove negligence in the construction of the machine. Neither he nor any other witness testified to any defective workmanship. The material of which the cylinder was made was in fact sufficient, as it did not break. The seaming was sufficient, as it was intact. The only difficulty appears to have been in using double-seaming instead of rivets; the latter being stronger, in the judgment of this witness. He stated that, in his opinion, the effect of double-seaming would be to weaken the end, as it required two turnings of the iron, which would be calculated to fracture the iron. However, as the iron of this machine was intact after the explosion, the weakening effect upon it of double-seaming, if this witness was correct, had no connection with this accident. The entire testimony of this witness is, in substance, that the burner could have been manufactured stronger. If that high degree of care which the law, under certain circumstances, imposes on persons who place upon the market things inherently and necessarily dangerous, or which is imposed on carriers in favor of passengers, were applicable here, there was probably sufficient proof in this case to present a case of negligence against defendants. But they being responsible only for lack of ordinary care in manufacturing this appliance, the testimony was insufficient. None of the above items of testimony being sufficient of itself to prove negligence, they do not have that effect taken together.

The judgment being correct upon the whole evidence, it will not be reversed on account of any of the assignments of error which appear in appellant's brief. Affirmed.

On Motion for Rehearing.

(Jan. 20, 1904.)

The case of *Tyler v. Moody* (Ky.) 63 S. W. 433, 54 L. R. A. 417, was a case in which the purchaser himself was held entitled to recover on a warranty for damages sustained by him. The present action is not for damages sustained by the plaintiff's father, who purchased the machine, and to whom the warranty was made, if at all. He alone could recover by reason of a warranty of the article. The only theory upon which plaintiff could sustain a recovery is that of defendant's negligence. *Standard Oil Co. v. Murray*, 119 Fed. 572, 57 C. C. A. 1; *Peters v. Johnson* (W. Va.) 41 S. E. 190, 57 L. R. A. 423, 88 Am. St. Rep. 909.

The motion is overruled.

TEXAS MEXICAN RY. CO. v. MENDEZ.

(Court of Civil Appeals of Texas. Dec. 23, 1903.)

MASTER AND SERVANT—INJURY—NEGLIGENCE—EVIDENCE—QUESTION FOR JURY.

1. Where a railway bridge had been burned, and the fire had gone out, leaving the rails in position, and a train was precipitated, and the fireman injured, the injury itself would not warrant a finding of negligence of the railway company.

2. Evidence in an action for injuries to an employé held sufficient to sustain a finding that a railway bridge was burned in the afternoon preceding an accident to a train there which occurred at 4 o'clock in the morning.

3. Where two passenger trains and several freight trains passed over a railroad daily, and the rules of the company required frequent inspection of bridges, and the evidence warranted a finding that a bridge had burned a considerable time before an accident, whether the company was negligent in not having inspected the bridge within 14 or 15 hours preceding the accident to an employé was a question for the jury, though no accident had occurred on the road from that cause for 20 years previous.

Appeal from District Court, Webb County; A. L. McLane, Judge.

Action by Gregorio Mendez against the Texas Mexican Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed, and motion for rehearing overruled.

Thos. W. Dodd, for appellant. R. Winslow and E. A. Atlee, for appellee.

JAMES, C. J. The nature of the case will appear from the following substantial statement of all the material facts developed at the trial. As it is clear that a case of assumed risk cannot be claimed to exist in the evidence, we may omit, as immaterial, some recitals in the statement of facts.

Gregorio Mendez was a fireman on defendant's freight train running from Laredo to Alice. Along defendant's track was a bridge 91 feet long, from 5 to 9 feet high, and con-

¶ 1. See *Master and Servant*, vol. 34, Cent. Dig. § 955.

structed of heavy timbers. The train came to this bridge about half past 4 o'clock on the morning of May 1, 1902, and the bridge having been consumed by fire, and the fire having gone entirely out, leaving the rails thereon without support, the train was precipitated, and plaintiff injured. The last train that passed over said bridge prior to its destruction by fire was at 11:50 o'clock a. m. on the 30th day of April, 1902. The bridge was entirely consumed, and the fire had gone entirely out, leaving the rails there without any support. The defendant proved by the deposition of one Benito Chapa, who signed his deposition by mark, and swore that he was a section hand, that his boss on the morning of April 30, 1902, sent him over defendant's track east to Sweden Switch, and that he (Chapa) passed over the bridge 81a between 9 and 10 o'clock a. m. on said 30th day of April, 1902, and that said bridge 81a was then in good condition; that between 1 and 2 p. m. on said 30th day of April, 1902, he passed back over said bridge 81a, and examined it carefully, and it was all right and in good condition. Plaintiff testified that it was the custom of the section gang to go over and examine their section in day, but he never saw them do so at night, and did not know whether they did so or not. Pat Carroll, a witness in the case, testified that he was, and had been for many years, roadmaster for defendant on said line of railway between Laredo, Tex., and Corpus Christi, Tex.; that the rules of the Company require section bosses to make frequent inspections of the culverts and bridges of their respective sections; that the burnt bridge is about 4.4 miles east of Realitos Station by rail, and about $3\frac{1}{2}$ miles on a bee line; that Realitos is headquarters for the section gang of that section; that the country between Realitos and the burnt bridge is practically open, except chaparral, and that if the bridge burnt down in daytime the smoke ought to have been seen by people at Realitos, and if it burnt down at night the light could have been seen at Realitos, as a bridge of that size and timbers would make a big smoke in daytime, and a great light at night. This is the first accident that has occurred on this road within the past 20 years by reason of a burnt bridge. Leyendecker, the defendant's train dispatcher, testified that two regular trains passed over defendant's road each day, one going to and one coming from Corpus Christi, Tex., and that frequent extra freight trains were dispatched over the road at night; that the freight train that met with the disaster which caused plaintiff's injuries had orders to run 20 miles an hour. James Cross, the engineer in charge of the engine that run into the burnt bridge, testified that he was making about 20 miles an hour when he ran into the burnt bridge; that the fire had gone out, and he saw no light or smoke, and did not see the condition of the bridge until he was right at it, and had no time

to stop the train or jump. The bridge was about 91 feet long, from 5 to 9 feet high, and was constructed of timber bents 12x12 inches, with stringers 5x15 inches, and cross-ties 6x8 inches, 8 feet long. The above constituted all the testimony bearing on defendant's negligence.

The case is not one in which the jury would be warranted in finding negligence of defendant from the injury itself. It devolved on plaintiff to prove defendant's negligence—that is, the want of ordinary care in respect to a proper inspection of its track and roadbed at this point—and that such negligence was the proximate cause of the injury. If the evidence were such as made it impossible for the jury to fix the time when this burning took place—in other words, if it might have happened very shortly before the accident—it perhaps could not be said that defendant had been shown negligent in not discovering it in time to prevent the disaster. The difficulty in this appeal lies in the meagerness of the testimony, but if there be enough to indicate that this bridge had been burned a considerable time, and that defendant's servants had not exercised due care with reference to making timely discovery of it, the judgment ought to be affirmed. That when the train came to this bridge, at 4:30 in the morning, it had been entirely consumed, and the fire had gone out entirely, and there was even no smoke, is a very important fact. Considering the size of the bridge, and the number and size of the timbers, the fire could not have been recent. These facts indicate that the fire did not take place at a late hour that night. As such a fire could have been seen at Realitos, only $3\frac{1}{2}$ miles off, in daytime from the "big smoke" it must have made, or at night from the "great light" it would have made, it is more likely, as it does not appear to have been observed there, that the fire occurred during the previous afternoon, and had burned down when night came. Therefore we conclude that the jury could properly have found from the evidence that the bridge burned in the afternoon, after about 2 o'clock, when the inspector says he crossed it and found it all right. This inspection was 14 or 15 hours prior to the accident, and, if there had been any inspection that afternoon or that night, the injury would have been avoided.

We recognize that negligence should not be submitted to a jury unless there is testimony which reasonably supports it. *Galveston, etc., Ry. Co. v. Faber*, 77 Tex. 153, 8 S. W. 64. A jury composed of men who are supposed to be familiar with ordinary transactions of life can ordinarily determine whether or not a certain act or line of conduct is negligence from the act itself. But when the matter in question relates to a business of a peculiar nature, with which the public generally have no experience, such as the proper management of railways, it

would seem that something more ought to be shown than the act itself, in order to enable a jury to decide whether or not that act was the exercise of ordinary care. In other words, if nothing else appeared as to reasonable inspection but the fact that defendant sent out an inspector over this section track once a day, it may be that it ought to be held insufficient to enable a jury to pass on the question of negligence in regard to inspection. What is required in the way of ordinary care in regard to inspection depends a great deal on circumstances. Circumstances might be such that it would be negligence not to have inspectors make frequent daily or nightly trips, or even constant trips, over the track—as, for example, if the roadbed were such as to be easily susceptible to washouts, and the season one of frequent rainstorms. On the other hand, the track may be such and the season such as to render accident to the track and roadbed improbable, and less constant inspection would answer the demands of ordinary care. The burning of a bridge had not occurred in the history of this road for 20 years, and it was something that was not reasonably to be expected. It was not made to appear that this was a time in which fires were common along the track. In fact, nothing was shown in this regard except conditions which were ordinary, and which required the exercise of the character of inspection as such conditions demanded.

The rules of defendant, as Carrol testified, required section bosses to make frequent inspections of the culverts and bridges of their respective sections. It appears from plaintiff's testimony that it was the custom of the section gang to go over and examine their section in the day, and that he never saw them do so at night, and did not know whether they did so or not. On the day and night before this accident only one trip was made over the section. The law requires the inspection of the road to be frequent, and by this is meant such frequent inspection as is reasonable to assure the safety of the track, considering the business carried on over it. Where, as it appears here, two passenger trains passed daily, and frequent extra freight trains were dispatched over the road at night, it seems to us that it became a question proper to submit for the jury whether or not, in the conduct of the business it carried on over this road, one inspection trip in 24 hours was reasonable attention to give to the track. If the fire occurred in the afternoon of the previous day, as may be inferred, the bridge had been destroyed 10 or 12 hours when this train came along. An inspection that afternoon or any time that night would have disclosed the danger. The persistency of the inspection required depends on circumstances, and we think that, where trains pass over the track at night as well as in day time, due care for the safety of employes on the trains

might well require more than a single inspection in 24 hours, and this a jury might see proper to find. *Knathla v. Ry.* (Or.) 27 Pac. 95; *Maydole v. Ry.* (Colo. App.) 62 Pac. 964, and cases cited.

We have not laid any stress on the fact that Realitos Station, the headquarters of the section gang, was only $3\frac{1}{2}$ miles from this bridge, the intervening country being open, except for chaparral, and the fact that such a fire as this must have been could readily be seen in daytime by the smoke, and at night by its great light. No witness testifies that it was observed, but it is almost inconceivable that it could have escaped notice of the section gang. Under the circumstances, we are of opinion that the question was one for the jury.

Affirmed.

On Motion for Rehearing.

(January 13, 1904.)

The impression of appellant's counsel is that this was an occurrence which was not to be anticipated, no burning of a bridge having occurred for 20 years on defendant's line. It must be borne in mind that the evidence warranted the reasonable inference that this burning took place, as stated in the main opinion, 10 or 12 hours before the accident to plaintiff. The testimony tends to exclude the idea that the fire was communicated by the engine which passed over the bridge the previous day, or by the person who made the inspection that day, and there is no basis in the evidence for believing that it was communicated by any prairie fire. How it became ignited is unexplained. It was doubtless an unusual occurrence, but can it be said that it was so wholly improbable as not to have been anticipated? It is a matter of general knowledge that it is a common thing for persons to use the tracks of railways. With this fact in view, can it be said, as a matter of law, that one inspection of the road in 24 hours is the exercise of ordinary prudence? Trespassers who are liable to be upon or about its track at any time are in a position to make the track dangerous for use, whether by interfering with the rails, or by obstructions, or by setting fire, accidentally or otherwise, to such portions as are combustible. As any of these injuries to the track could originate from the presence of trespassers, their occurrence cannot be said to be wholly improbable. If we exclude the theory that the fire started from the preceding train, or from the inspector who says he examined the bridge, or from a prairie fire, then the probable explanation is that it was set on fire by the act of some trespasser. Suppose this engine had been derailed by a defect in the rails or track, which defect originated after the inspection the day before, and the question of sufficient inspection had arisen in that connection; it seems to us that it would clearly

be for the jury to say whether or not the inspection that was practiced was sufficient, in the exercise of reasonable care, particularly in view of the probable use of railroad tracks by unauthorized persons. Whether the defect subsequently originating along the route was by obstructions, by interference with the rails or roadbed, or by making the bridges or trestles unsafe by burning, the same case would be presented. It seems to be conceded by appellant that if any other train had in the meantime passed over the bridge, from which fire could have been conveyed, ordinary care might have required defendant to make another inspection before this train came along. As other known conditions, to some extent, at least, existed, from which a fire could originate, the courts cannot arbitrarily say with what frequency inspections ought to have been carried on in order to constitute ordinary care. It is unquestionably of the greatest importance for a railway company to be careful in protecting its employes, as well as its passengers, through inspection of its road. It will not do, as a matter of law, to say that it may send an inspector over its section, and then abstain from giving it any attention whatever for a considerable time, simply because no necessity is apparent for it. We apprehend that the origin of a defect might be so recent, and the circumstances such, that the courts could say that the company had not been negligent in not discovering it in time to prevent the particular accident. But as we have no statute prescribing the railway company's duty as to the frequency of inspection, the question is generally and necessarily one for the jury to determine.

The motion is overruled.

CITY OF SAN ANTONIO v. TALERICO.
(Court of Civil Appeals of Texas. Dec. 16, 1903.)

MUNICIPAL CORPORATIONS—SIDEWALK—INJURY—EVIDENCE—ADMISSIBILITY—INSTRUCTIONS—APPEAL—ASSIGNMENT OF ERROR—HARMLESS ERROR.

1. An assignment that the court erred in sustaining a general demurrer and special exceptions of a party, where there were eight special exceptions setting up distinct matters, is too general.

2. A request to charge that, if the sidewalk where one was injured was reasonably safe for persons exercising ordinary care, the city is not liable, is covered by a charge that persons using the sidewalks are bound to use such care as persons of ordinary prudence would use, and that the person injured cannot recover if he did not exercise such care.

3. A charge in an action for injuries from a defective sidewalk based on the supposition that the place where one was injured was not a regular crossing for foot passengers was properly refused, where the evidence showed that it was in the heart of the city, and used by the general public as a passway.

4. A charge that if one injured by a defective sidewalk lost his leg by improper or delayed treatment of the injuries, and if with proper treatment he would have recovered from

the injuries, the city is not liable for the loss of the leg, was properly refused, since it concerned the question of contributory negligence, but did not leave it to the jury.

5. Where it was a policeman's duty to report to the city any defects in the sidewalk, notice to him of such a defect is notice to the city.

6. A charge that if there was a hole in the stone curb, and plaintiff, in passing along the sidewalk, fell into the hole and was injured, he is entitled to recover, is not objectionable in not confining the consideration of the jury to the particular hole described in the petition, where the evidence showed that the hole he stepped into was the one described in the petition.

7. Photographs of a defective sidewalk, taken two months after plaintiff was injured thereby, are admissible in evidence in connection with evidence that they represent the locality as it was when the accident occurred, and that they were taken before the place was repaired.

8. Where the extent of a hole in a sidewalk curb, in which plaintiff had been injured, was in issue, photographs which showed a cement patch where the walk had been repaired were admissible in evidence.

9. Evidence that photographs of a defective sidewalk taken two months after an injury thereon are correct representations of the locality as it was when the injury occurred is admissible.

10. That a hole in a sidewalk in which plaintiff was injured was big enough for the witness' foot to go in was a fact of which he might testify without being an expert.

11. Any error in admitting testimony that one could not see a hole in the curb of a sidewalk in which plaintiff was injured, on account of a bridge resting on the edge of the sidewalk, was harmless, where the same witness testified to the same facts without objection.

12. A verdict for \$2,500 against a city for injuries from a defective sidewalk, whereby a boy 13 years old lost a leg, will not be set aside on appeal as inadequate.

On Rehearing.

13. In an action for injuries from stepping into a hole in the curb of a sidewalk, an instruction that persons traveling on the streets must use due care to avoid accidents was properly refused, "due care" not being equivalent to "ordinary care."

14. Where an action is brought for an infant by his father, as next friend, against a city, for injuries from a defective sidewalk, an instruction that the jury should find for the city if the father or son failed to use ordinary care was improper, in requiring a finding that both had exercised such care.

Appeal from District Court, Bexar County; S. J. Brooks, Judge.

Action by Willie Talerico, by his next friend, against the city of San Antonio. From a judgment in favor of plaintiff, defendant appeals. Affirmed, and motion for rehearing overruled.

Wm. Aubrey and C. C. Cresson, for appellant. T. F. Shields, P. H. Swearingen, H. C. Carter, and Perry J. Lewis, for appellee.

JAMES, C. J. Plaintiff, aged 13 years at the time of the occurrence, suing by his father and next friend, alleged that there was an uncovered hole, about 18 inches long and 8 inches wide and 12 inches deep, in the curb of the sidewalk which ran along the north

¶ 5. See *Municipal Corporations*, vol. 26, Cent. Dig. § 1645.

side of Main Plaza, in the city of San Antonio, between Cameron and North Flores streets, near which hole defendant city had placed or permitted to be placed an inclined bridge of boards, one end of which rested on the plaza and the other on the curb, which bridge was so constructed as to conceal the hole from the observation of any one passing from the plaza up on the sidewalk; that it was placed there for the purpose of being used by vehicles, teams, and pedestrians to pass from the plaza up to the sidewalk; that the hole had existed and the bridge had been in that position for years, and the city knew such facts, or by the use of reasonable diligence could have known of them, and had negligently failed to repair the defect; that on the evening of December 15, 1900, plaintiff, unconscious of said hole so hidden, in going from the plaza over said bridge to the sidewalk, stepped into the hole, and broke or injured the bones of his left ankle, and bruised and lacerated the skin on his left shin; and that said injuries were caused by said negligence of the city, and resulted in the loss of plaintiff's leg, also in great physical and mental pain and anguish to plaintiff, in the complete and permanent destruction of his capacity to earn money, and permanent injury to his nervous system and general health. The answer was general denial; contributory negligence of plaintiff; that the defect, if any, was patent, and by ordinary care on his part could have been observed and avoided; and further that the injury, if any, was merely a scratch or abrasion, and that owing to constitutional defects and inherent disease in his system, or through the negligence of his father in failing to have such trivial injury attended to within the proper time, plaintiff lost his leg, and hence the injuries complained of were not the natural, usual, necessary, or proximate results of any negligence on the part of the city. The St. Joseph's Orphan Asylum, a corporation, was made a party upon allegations by the city which prayed that, if plaintiff recovered against the city, it might have judgment over against the said asylum. The court sustained exceptions to the pleading of the city asking relief against the asylum, and, the city declining to amend, the asylum was dismissed. The verdict was against the city for \$2,500.

The first assignment of error complained of the action of the court "sustaining the general demurrer and special exceptions of defendant St. Joseph's Orphan Asylum (except exception No. 2), * * * and thereupon ordered this cause to be dismissed as to said asylum." Besides a general demurrer, there were eight special exceptions. The court sustained them all, except special exception No. 2, which invoked the statute of limitations. The other special exceptions set up separate and distinct matters. It has often been ruled that such an assignment is not sanctioned by the rules, being too general.

Paschal v. Owen, 77 Tex. 585, 14 S. W. 203; Henry v. McNew (Tex. Civ. App.) 69 S. W. 213; Wetz v. Wetz (Tex. Civ. App.) 66 S. W. 869; Cassidy v. Scottish-American Mort. Co. (Tex. Civ. App.) 64 S. W. 1023.

Assignment No. 2 complains of the refusal of this charge: "Persons traveling upon the streets must use due care to avoid accidents; and if you believe from the evidence that the plaintiff, or plaintiff's son, Willie Talerico, failed to use that care, under all the circumstances in evidence, which a person of ordinary prudence would have used under such circumstances, and that such want of care on his part contributed to or caused the alleged injury, you should find for the defendant, although you should also believe that the defendant was negligent." The court charged the jury as follows: "If you find from the evidence that the said plaintiff, Willie Talerico, failed to use such care as a person of ordinary prudence would have used under similar circumstances to avoid injury to himself, and that such failure, if any, was negligence, and that such negligence, if any, proximately caused or contributed to his injury, then plaintiff cannot recover, and you should so find, although you should also believe the defendant was negligent." The charge given would have been correct without the words "and that such failure, if any, was negligence." Plaintiff might, with some degree of reason, have complained of this addition, but we cannot see how it prejudiced defendant; being favorable to defendant, rather than otherwise.

The third complains of the refusal of this charge: "You are hereby charged that the city of San Antonio is bound to use only ordinary skill and diligence in making its streets and sidewalks safe for persons using same, and that it is not a guarantor or insurer of the safety of travelers thereon. Therefore, if you believe from the evidence that the sidewalk where plaintiff's son is alleged to have been injured was in a reasonably safe condition for persons exercising ordinary care and using said sidewalk for the purpose for which it was designed, then you will render a verdict for defendant, notwithstanding you may believe that plaintiff's son was injured at said place." The complaint seems to be that the court should have given an instruction that it was the duty of the city to use said degree of care to have its sidewalks reasonably safe for persons who themselves in such use exercise ordinary care. This was really the effect of the charges as given. The court distinctly charged the jury that persons using the sidewalks are bound to use such care as persons of ordinary prudence would have used under similar circumstances to avoid injury to themselves, and that plaintiff could not recover if he was not in the exercise of such care.

The fourth complains of the refusal of the following charge: "You are hereby charged that if you believe from the evidence in this

case that the place where plaintiff's son is alleged to have been injured was not a regular crossing for foot passengers that could have been used by plaintiff's son, and notwithstanding which plaintiff's son chose to attempt to travel over said place, you are hereby charged that plaintiff's son assumed the risk incident thereto, and plaintiff was charged therewith, and you will find a verdict for the defendant." While it appeared that this bridge was put there by the St. Joseph Orphan Asylum as an entrance to its premises, the undisputed testimony was that it was in the heart of the city, and used by the general public as a passway.

Assignment No. 5 is not sustained, because the matter of the refused charge was embodied in the charges given.

Assignments 6, 7, 10 and 11 are grouped in appellant's brief. They complain separately of that many refused charges. Assignments 6 and 7 ought not be considered because they do not state propositions of law, and are not followed by any proposition which is in accord with them. There is, however, a proposition presented at the end of the four assignments which is germane to the tenth and eleventh. It reads: "A wrongdoer is liable for the direct and proximate result of the wrong committed, not for such results as proper care, diligence, and skill on the part of the person wronged would have guarded against or prevented." The charges involved are: "You are hereby instructed that the plaintiff is confined in the recovery of any damages to which you believe from the evidence he is entitled to such damages as are sustained as the reasonable and probable results of the injuries received. If you believe from the evidence that, with proper and customary treatment, the plaintiff Willie Talerico would, in the ordinary course, have recovered from the effect of the injuries he is alleged to have received within a few weeks after receiving such injuries, you cannot find any damages against the defendant for the loss of plaintiff's leg."

"You are hereby instructed that if you believe from the evidence that the loss of plaintiff's leg was caused by improper treatment, or treatment too long delayed, of injuries received by plaintiff Willie Talerico, you cannot, in estimating the damages in this case, consider the loss of such leg."

It will be seen that these requests concerned the issue of contributory negligence, and yet they did not leave that question to the jury.

There was no error committed in refusing the charge mentioned in the eighth assignment. The matter was substantially and sufficiently given.

The ninth assignment refers to a refused charge, and the proposition advanced is that notice to an ordinary policeman of the defect is insufficient to affect the city unless it be shown that it was the duty of the policeman to report such defects to the prop-

er authorities, or to cause the same to be repaired. A policeman testified that his attention was called to it by John Garrett, and he did not report it because it was not on his beat. He stated: "I met John Garrett, * * * and he drew my attention to that hole in the curbstone, and asked me why I did not report it, and I told him that it was not on my beat; by rights I should report it, but I guess others would report it, as it was on their beat." So we think the proposition is not based on the evidence as it is. Where it appears to be a part of the duty of policemen to report such defects, notice to them is notice to the city. This disposes also of the fourteenth assignment. *Cummings v. City of Hartford* (Conn.) 88 Atl. 918; *Town of Norman v. Teel* (Okla.) 69 Pac. 791.

The thirteenth assignment complains of this charge: "If you find from the testimony that there was a hole in the stone curb, * * * and that plaintiff Willie Talerico, in passing along said sidewalk at said place, stepped into said hole, * * * and that he was thereby injured, * * * then you are instructed that plaintiff is entitled to recover." The criticism is that, as plaintiff's evidence showed other holes in the curbing at that place, the charge should have confined the jury to the consideration of the particular hole alleged in the petition. The charge referred to the hole into which plaintiff stepped. Plaintiff's testimony shows that the hole he stepped into was that described in the petition. There was no testimony raising the issue of his stepping into any other.

We think the fifteenth and eighteenth assignments demand no discussion.

The sixteenth complains of the charge in informing the jury that in determining the issue of contributory negligence they might look to the surrounding facts and circumstances, including the age of the plaintiff. The proposition is that it was upon the weight of evidence, saying that the jury might take into consideration the age of plaintiff. If this objection were valid—and we think it is not—it would not be available, in view of special charge No. 8 asked by defendant and given. We may dispose of the seventeenth assignment by referring to the same requested instruction.

Under assignments 19, 20, 28½, and 40, we have several propositions presenting objections to the admission of certain photographs. The accident occurred December 15, 1900. Photographs numbered 1 and 2 were taken February 12, 1901, and Nos. 3 and 4 were taken several months later. Defendant itself introduced testimony showing that the sidewalk had been repaired, and that this was done on February 12, 1901. The evidence showed that photographs 1 and 2 were taken before the repairing was done, and witnesses familiar with the place testified in regard to them that they represented the locality as it was when the accident oc-

curred. With this supporting evidence the photographs 1 and 2 were admissible as evidence—as much so, we think, as if they had been taken on the day of the accident. *Ry. v. Wilson* (Ill.) 59 N. E. 573.

This disposes of two of the propositions, leaving the third, which is directed to photographs 3 and 4 for the reason that testimony of repairs made subsequent to the injury is not admissible. This is true upon the single ground that such evidence is not competent to prove defendant's negligence in question. But it will be seen that defendant itself proved by its witnesses that the sidewalk had been repaired, the date of the repair, by whom it was repaired (the St. Joseph's Orphan Asylum), and substantially what was done in this respect. This being so, how defendant was prejudiced on the issue of negligence by the introduction of these photographs is not clear. The objection being only that such testimony was not competent to prove defendant's negligence, and it appears that defendant introduced proof of such repairs, and the fact that repairs were made, and the date being uncontroverted, we think defendant could not have been injured by the photographs. However, the photographs were admissible because they tended to prove a material fact. The existence and particularly the extent of the hole were issues. It was shown that the repairing consisted in cutting the sidewalk down and patching with cement. The witnesses testified to a patch in the curb at the right end of the bridge; being the place of the accident, as plaintiff claimed. This patch, as testified to by witnesses, showed in the photograph; and, in connection with other testimony, the photograph was evidence of the excavation and its extent. The photographs are in the record.

A number of assignments (Nos. 22, 25, 29, 30 to 36, and 41) are grouped, and under them is submitted a proposition as follows: "The testimony of witnesses comparing a photograph of the locality of an alleged accident, taken two months after such accident, with the locality as it appeared at or about the time of the accident, is hearsay evidence, and as such inadmissible." Assignments 22 and 31 furnish no basis for this proposition. Nor does assignment No. 36, because the proposition relates to photographs 1 and 2, and the witness mentioned in assignment 36 had reference to photograph No. 3. Nor does assignment 33, because the witness mentioned therein was the photographer, who did not compare these photographs with the locality as it was at the time plaintiff was hurt. He stated what the photographs represented, how he took them, and what he saw there at the time he took them. The witness Swearingen, as his testimony is in the statement of facts, did not testify as claimed. The witnesses Guido, Volino, Barberio, Frank Talerico, and Sister Blondin testified, in effect, that the photographs 1 and 2

were correct representations of the locality as it was at or about the time plaintiff was hurt. The proposition, therefore, goes to their testimony. We are unable to perceive any valid objection to this evidence.

The witnesses Guido and Cuzzi were allowed to testify that the hole was large enough for each of them to get his foot into. The latter testified: "It was big enough for my foot to go in, and any one's foot to go in." This was testimony of a fact. Persons may testify as to such facts without being experts. One of them said he did not measure it, but he knew he could get his foot into it. The other testified as above. Therefore we overrule the twenty-seventh and thirty-seventh assignments.

Assignment 24 complains of a question to witness Barberio as leading, and the answer it called for immaterial and prejudicial. The question was, "Did you ever notice to what extent, if any, the bridge obscured the hole?" We do not think this question objectionable as leading. If it were, it seems that the answer which the witness gave to that question was not all the testimony he gave on the particular subject. Besides the answer which the bill shows he was allowed to give to the particular question, the statement of facts shows he gave substantially similar testimony without objection. He answered the question thus, according to the bill: "You could see the rough edge of the curbing, but you couldn't see the hole, on account of the bridge resting right on the edge of the sidewalk. You couldn't see how big the hole was, or how deep it was. I stated the bridge was resting on the sidewalk, and covering the hole." The statement of facts shows that this witness also testified that "The curbing was broken, making that hole, and while the bridge was up you couldn't see the hole behind the bridge, because it was covered by the bridge." In another place he testified: "The bridge stood with one edge on the street and one edge on the sidewalk." Again: "There was a bridge right up against the curbing at this point." The witness was testifying to conditions when he examined the place a day or two after the accident. This testimony, which is not embodied in what the bill of exceptions shows to have been in answer to the question complained of, must be presumed to have been elicited by other questions.

Assignment 26 is presented without any proposition. What might be taken as a proposition in the brief deals with two distinct matters; one being that a certain question suggested the answer; the other being that it called for a conclusion of the witness.

Assignment 38 is clearly not well taken. It complains of a question relative to photograph No. 1, viz.: "Is that a correct representation of that location at the time you saw it?" The answer being, "I think so," as stated in the bill of exceptions. The testimony of this witness (Cuzzi), as appears

from the statement of facts, shows that he made no such answer in reference to photograph No. 1.

Appellee has a cross-assignment of error, by which we are asked to reverse and remand upon the ground stated in his motion for new trial, which the trial court overruled, viz., that the amount of the verdict is grossly inadequate, considering the evidence. The verdict is not large, compared with verdicts usually rendered by juries for such injury as plaintiff sustained. The amount of the damages in cases of permanent injuries is necessarily not capable of exact or even approximate ascertainment by any fixed standards. The question of duration of the injured person's life, had he not been injured, is incapable of definite proof, and it is necessarily a question for the jury to consider and determine according to their best judgment. We sustain verdicts for large sums in this class of cases because juries may believe, in the case before them, that the person would have lived to old age. But a jury may take a different view, and may resolve this question otherwise; and, when they do, it is not for us to revise them, in a matter so clearly in their province. We cannot say that this verdict is grossly or unreasonably small, which are the only grounds upon which we would be warranted to interfere, and we are not willing to send the case back with such a declaration.

Affirmed.

On Motion for Rehearing.

(Jan. 20, 1904.)

It is insisted that the action of the court in sustaining the general and special demurrers to the city's affirmative pleading against its codefendant should be reviewed, because such action was fundamental in its character. It appears that, without any assignment of error at all, this court ought to revise the action of the trial court sustaining a general demurrer to a petition. This was done in *Hall v. Johnson* (Tex. Civ. App.) 40 S. W. 46. This court considered in *Willard v. Guttman*, 43 S. W. 901, that it was proper, in the absence of an assignment, to revise the ruling of the trial court sustaining a demurrer to a petition which invoked the statute of limitations. A decision upon the question as it is presented in the present case is found in *Marshall v. Atascosa County* (Tex. Civ. App.) 47 S. W. 680, and *Hansen v. Yturria* (Tex. Civ. App.) 48 S. W. 797, and *Hansen v. Yturria* (Tex. Civ. App.) 48 S. W. 795. We refer to the reasons there given for disregarding the assignment.

We find it necessary to reconsider the second assignment of error. We recognize that the reason given in the main opinion for overruling it is unsatisfactory. Still the requested charge was correctly refused because, in the first place, it would have instructed the jury that the law required plaintiff to use

due care to avoid accidents in using the streets. The expression "due care" was indefinite and apt to mislead, and was not the equivalent of "ordinary care," unless the jury happened to so construe it; and, in the second place, it would have told the jury to find for defendant if plaintiff or his father had not used such care. The charge which the court gave on this subject, which is copied in the main opinion, is not attacked. Therefore it is not necessary to pass on the question whether or not the words "and that such failure, if any, was negligence," really constituted error.

The other questions are sufficiently discussed in the former opinion.

The motion is overruled.

GALLOWAY v. SAN ANTONIO & G. RY. CO.*

(Court of Civil Appeals of Texas. Dec. 23, 1903.)

MASTER AND SERVANT—INJURY—OPINION EVIDENCE—JUDICIAL ADMISSIONS—RELEASE—VALIDITY—INSTRUCTIONS.

1. Evidence held not to require a verdict for a railroad company in an action against it for injury from slipping off the front of a hand car by reason of the brakeman's negligence in not heeding a signal to stop the car.

2. The opinion of the wife of one injured that he was not conscious of what he was doing when he signed a release of his claim for the injury was admissible, in connection with the facts on which it was based.

3. The testimony of a witness that a person injured was not in a physical and mental condition to transact business, that he seemed to be in very bad health, and that his mental and physical condition was very much worse than before his injury, is admissible, when given in connection with facts indicating the mental and physical weakness, and where the witness had known the injured person a long time, and had seen him frequently up to within two days of the time when he executed a release of his claim for the injury.

4. Where a section foreman was injured by slipping off the front of a hand car, where he had been sitting, testimony, on the issue of ordinary care, that it was customary for foremen riding on hand cars to sit as he claimed he was sitting, is admissible.

5. Where the plaintiff in a suit for injuries seeks to set aside, for fraud, a release executed by him, evidence that he did not understand its contents when executing it was admissible.

6. Where an experienced section foreman had testified that a brakeman could have stopped a hand car in about a rail length, but that it went about three rails before stopping at the time of the accident, his testimony that, if his signal had been observed, the car would have been stopped, and the accident averted, was admissible.

7. A portion of plaintiff's abandoned petition alleging that his injury was due to the overcrowded condition of the hand car on which he was riding was admissible as an admission on trial on an amended petition, in which the cause of the injury was alleged to be the brakeman's failure to stop the car.

8. While a plaintiff may show that a statement in an abandoned pleading is not his, he must, to counteract its effect, show not only that he had not so informed his counsel, but

*Rehearing denied January 20, 1904.

that he did not know the petition contained the allegation when filed.

9. An instruction that a release of a claim for injuries was binding on plaintiff, unless, when he executed it, he did not and could not understand its contents, is not erroneous, in requiring a finding both that he did not and could not understand them.

10. An instruction that a release of a claim for injury is binding on plaintiff, unless defendant concealed its real meaning, and falsely represented that it was simply a receipt for money, is not erroneous, in requiring a finding of that particular misrepresentation, where it is the only one charged in plaintiff's pleading.

Appeal from District Court, Bexar County; S. J. Brooks, Special Judge.

Action by Joseph Galloway against the San Antonio & Gulf Railway Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Will A. Morris, Geo. Powell, Perry J. Lewis, and H. C. Carter, for appellant. Denman, Franklin & McGown and Davis & Williams, for appellee.

JAMES, O. J. The plaintiff, Galloway, alleged injuries resulting from slipping from a hand car, and falling in front thereof, through the failure of the brakeman to stop the car upon plaintiff's signal. Besides a general denial, defendant pleaded a release executed by plaintiff, and contributory negligence. By supplemental petition, plaintiff pleaded the invalidity of the release, because obtained by fraud, and because plaintiff was mentally incapable of executing a release. The verdict was for the defendant. There was evidence which required the case to be submitted upon the above issues; hence the contention that the testimony demanded the verdict (rendered in favor of defendant) cannot be sustained. Plaintiff testified that he was foreman, and was sitting at the front of the hand car, with a block under his thighs to keep his feet clear of the rails; that the car was going downhill, and the block slipped forward, and when he felt himself slipping forward he at once signaled the brakeman to stop, and then another signal to stop, neither of which was obeyed by the brakeman; and then he looked around to see if the brakeman was watching him, and saw that he was standing with his back half turned, talking to other men on the car; then the car ran about half a rail, when the block slipped out, and he fell, and was injured. There was evidence that the car ran about three or four rail lengths after plaintiff started to slip, and before he fell, and that the car could have been stopped in one rail length or less.

The fifth assignment of error alleges that the court erred in refusing to permit plaintiff's counsel to show by Mrs. Galloway that, at the time the release was signed, plaintiff was in such a condition that he was not conscious of what he was doing, as he could not recognize his friends, and that his head was hurt. It was shown that she was plaintiff's wife, and had been with him and nursed

him since he was hurt. She was competent to testify as to his mental condition, provided she accompanied her opinion with the facts upon which she based it. Rogers, Exp. Test. pp. 157, 160; Gillett on Coll. Evid. § 214; Haney v. Clark, 65 Tex. 93; Ry. v. Brantley (Tex. Civ. App.) 62 S. W. 96. The evidence that was offered exhibited facts upon which she based her opinion, viz., that plaintiff's head was hurt, and he could not recognize his friends; and, in addition to this, her relationship to plaintiff, and her having attended him since his injury, made the testimony clearly admissible.

The assignments 7 to 11 complain of the rejection of testimony by witness C. D. Weed, in which was to the effect that plaintiff was not in a physical and mental condition to transact business, that plaintiff seemed to be in very bad health, that since he had been out of the hospital he had not been capable of transacting business, that his mental and physical condition since he had been hurt had been very much impaired, and that his mental and physical condition was very much worse than before his injuries. The objection to all this testimony was that they were conclusions of the witness. It appeared that this witness had known plaintiff a long time before the injury, which happened on September 8, 1900, and had seen him frequently while at the hospital, and often since he left the hospital; the last time he visited him being on the 6th of October; the release being executed on the 8th of October. This witness testified to various facts occurring under his observation which indicated both physical and mental weakness of plaintiff. It seems to us clear, under the authorities, that the witness, though nonprofessional, was competent, in connection with what was shown by this witness, to state his opinion respecting plaintiff's condition as to health and mental capacity. See authorities supra. The testimony was not made irrelevant by the fact that the witness visited plaintiff the last time two nights before the release was signed.

For the above errors, or either of them, we think the judgment must be reversed.

There are other assignments of error, and it is proper for us to notice them, or some of them, at least, in view of another trial.

In reference to the first assignment, we think it would be in accordance with the decided cases in this state to allow testimony, upon the issue of ordinary care, that it was usual or was the general custom for foremen riding on the ends of hand cars to sit as plaintiff claims he was sitting.

In reference to the second and thirteenth assignments, we do not see how plaintiff could establish that the release was procured from him by fraud and deception, without his showing in some way that he did not understand the contents of the instrument, or misunderstood it, for, if he understood it and executed it, it would not be set aside for such error.

In reference to the third, we think that plaintiff, being an experienced section foreman, could testify to the effect upon the car of the brakeman's observance of his signals as to the time or distance in which it could have been stopped. Plaintiff testified that the brakeman could have stopped it in about a rail's length—about 30 feet—and the car went about 3 rails before it stopped. The court ruled out the witness' statement that, if the brakeman had observed the signals and applied the brakes, the car would have been stopped, and the accident averted. Of course, the testimony which plaintiff did give amounted to the same thing. It has been often held that ordinarily, where even nonexpert witnesses state their conclusions after stating the facts, it is not ground for reversal. Still, if facts had not been shown from which the jury could themselves have formed the conclusion that the car could have been stopped in time to avert the injury, we would doubt the propriety of allowing the witness to give this testimony in the form of a conclusion.

According to the sixth assignment, the defendant introduced part of plaintiff's original and abandoned petition. It was an allegation that his injury was the result of the overcrowded condition of the car. The materiality and importance of this, introduced as plaintiff's admission, is obvious, where plaintiff was seeking by his amended petition to recover upon the ground of negligence of the brakeman to observe and obey a signal to stop the car. It was an admission that the allegation of the amended pleading was false. Plaintiff's counsel then offered to prove by him that he had simply told his counsel the number of men that were on the hand car, but did not tell them that it was overcrowded, and did not tell them that he was thrown off the car by reason of its being overcrowded. It was competent for plaintiff to show that the declaration in the original pleading was not in fact his. Presumptively, it was his pleading and his statement, although signed by his counsel. For testimony to have the effect of counteracting its force, it seems to us it should have indicated not only that plaintiff had not so informed his counsel, but that he did not know that his petition contained such allegation when it was filed.

The twenty-first and twenty-second and twenty-third assignments are attacks upon the following charge: "You are instructed that in this case plaintiff executed a release to the defendant for the expressed consideration of \$135, and said release is valid and binding upon the plaintiff, and he cannot recover herein, although you may find that defendant company was guilty of negligence, and that such negligence, if any, caused his injury, unless you believe from the evidence that at the time plaintiff executed said release his mental condition was such that he did not and could not understand the nature and contents of the said release, or that the defendant, through its agents, willfully concealed from plaintiff

the real meaning and contents of said release, and falsely represented to plaintiff that the release was simply a receipt for money, and that plaintiff relied upon such false representation, if any such was made, and was thereby induced to sign said release, without reading same, or having it read to him, and without knowing its contents." One assignment complains of this charge in "requiring the jury to believe that plaintiff's mental condition was such that he did not and could not understand the nature and contents of the instrument," whereas it was sufficient if plaintiff either did not or could not understand same. The other assignment complains of it in requiring the jury to find that defendant's agent willfully concealed from plaintiff the meaning and contents of the instrument, and falsely represented that it was simply a receipt for money. It is evident that there is nothing in the first criticism. That part of the paragraph related to plaintiff's mental incapacity, and plaintiff, as to this, was entitled to no more than an instruction that if he could not, for that reason, understand the instrument, it was not binding. If he could not, he did not. We cannot see how plaintiff was injured by this phraseology. Nor do we see how the jury could have been misled thereby to plaintiff's prejudice. Nor do we think the second criticism well founded, in view of plaintiff's pleading, which seems to charge concealment to have been practiced upon plaintiff by means of defendant falsely representing to him that it was simply a receipt for money. The third is criticism also not well taken, as the petition charges willful concealment.

The twenty-fifth assignment of error is abandoned by appellant's counsel upon admission by them that they participated in its being given.

Reversed and remanded.

WESTERN UNION TELEGRAPH CO. v. ANDERSON.*

(Court of Civil Appeals of Texas. Dec. 9, 1903.)

TELEGRAPH—DELAY OF MESSAGE—NEGLIGENCE—MENTAL ANGUISH—NON-RESIDENT PLAINTIFF.

1. A telegraph company in Texas is liable for damages for mental suffering resulting from its negligence in failing to deliver promptly a message sent from there to a nonresident plaintiff, although the jurisdiction in which the latter resides does not authorize recovery in such cases.

Appeal from District Court, McLennan County; Sam R. Scott, Judge.

Action by P. F. Anderson against the Western Union Telegraph Company. Judgment for plaintiff, and defendant appeals. Affirmed.

This is a damage suit resulting in a judgment in favor of the plaintiff, and the de-

* Rehearing denied January 20, 1904, and writ of error denied by Supreme Court.

fendant has appealed. There is testimony in the record which supports the following conclusions of fact, which were found by the trial judge and are adopted by this court:

"(1) Plaintiff's father, J. M. Anderson, died at about 5 o'clock a. m., March 14th, about eight miles from the town of Taylor, Texas, in Williamson county. He suicided by hanging, and was at once removed to his home in said town of Taylor.

"(2) At about 4 o'clock p. m., on March 14, 1902, plaintiff's brother, B. J. Anderson, caused J. A. Kirkman to send the following message to plaintiff: 'Taylor, Texas, March 14th, 1902. To P. F. Anderson, Checotah, Ind. Ter.: Father killed himself this morning about 5 o'clock. [Signed] B. J. Anderson.' Said message was delivered to defendant's operator at Taylor, Texas, by Mr. Kirkman, and 70 cents was paid for the transmission and delivery of same for plaintiff's benefit to said town of Checotah, where plaintiff was temporarily residing, his home being in Texas.

"(3) Said telegram was delivered to the plaintiff's wife, and received by her for the plaintiff, about 4:30 p. m. on the 15th day of March, 1902, and by her delivered to plaintiff about 30 minutes later.

"(4) Checotah was a small town, and plaintiff was well known by most all of the business men there, and was known by the defendant's agent at said town, and plaintiff's residence was known and he was personally known by the defendant's messenger boy who delivered the message.

"(5) By the exercise of ordinary care said telegram could and would have been delivered to plaintiff within one or two hours after its delivery for transmission to the defendant's agent at the said town of Taylor, Texas.

"(6) If the message had been delivered promptly, and with due care, plaintiff could have boarded a south-bound train at Checotah at 9:37 p. m. on March 14, 1902, and would have reached the town of Taylor on March 15, 1902, at about 2:25 p. m.; and that he had means to secure transportation, and would have left Checotah at 9:37 p. m., March 14, 1902, and would have arrived at Taylor at 2:25 p. m. on March 15, 1902.

"(7) Plaintiff's father was buried in the town of Bruceville, Texas, and the remains left the town of Taylor, going north, at 4:30 or 5 o'clock p. m. on March 15, 1902, and he was interred in the town of Bruceville at about 6:30 or 7 o'clock on said date.

"(8) If the message had been delivered with due care, plaintiff could and would have arrived in the town of Taylor in ample time to accompany the remains of his father to Bruceville, to be present at his funeral, which he would have done.

"(9) That there was no train going south, which plaintiff could have boarded after he received said message, that would have carried him to Taylor, until late in the afternoon

of March 16, 1902, and no train that he could have boarded, after receiving said message, that would have carried him to Bruceville, until noon of said March 16, 1902.

"(10) The remains of plaintiff's father, at the time of his burial, had been kept out about 36 hours after his death, and had turned black, and decomposition had so far set in as to render it improper and impracticable to longer delay the burial than was done.

"(11) Plaintiff would have learned on arriving at Taylor that his father would be buried in the town of Bruceville.

"(12) The message was in words a sufficient notice to the defendant that plaintiff's father was dead, and that plaintiff would probably desire to attend the funeral.

"(13) Plaintiff sent the following message to his mother on March 15, 1902, at about 8 o'clock p. m., to wit: 'Checotah, Ind. Ter. March 15th, 1902. To Mrs. L. P. Anderson, Taylor, Texas: Can't come. Let me hear at once. [Signed] P. F. Anderson.' This message was sent subsequent to the burial of plaintiff's father, and was not in fact delivered to plaintiff's mother until several days after the burial, and after plaintiff's mother had returned from Bruceville to the town of Taylor, Texas.

"(14) That the message sent by plaintiff referred to in conclusion 13 was not intended by plaintiff as a refusal to attend his father's funeral, but it was meant to convey the idea that plaintiff had received the message sent him by his mother too late for him to get a train in time to attend his father's funeral, and, further, that he desired to know the particulars of his father's death.

"(15) Defendant breached its contract to send and deliver the message sent plaintiff by his brother, and in not delivering it on the afternoon of March 14, 1902, an hour or two after filing for transmission.

"(16) Defendant was guilty of negligence in failing to deliver the message to plaintiff on March 14, 1902.

"(17) Plaintiff was not guilty of contributory negligence in failing to undertake to have the funeral delayed to a later day, nor in sending the telegram to his mother, but in both instances acted as a person of ordinary prudence would have acted under the same or similar circumstances.

"(18) Under the laws of the Indian Territory, where the message was to be delivered to plaintiff, there can be no recovery for mental anguish in cases of this character.

"(19) Plaintiff was especially devoted to his father, and suffered great mental anguish by reason of his failure to accompany the remains of his father from Taylor to Bruceville, and to be present at his funeral, which was caused by the negligence of the defendant."

Clark & Bolinger and J. A. Kibler, for appellant. John S. Patterson and J. E. Yantis, for appellee.

KEY, J. (after stating the facts). The case is presented in this court on two assignments of error. The first assails the finding of the trial court to the effect that the failure to promptly deliver the message prevented plaintiff from attending the funeral of his father. While the telegraphic message sent by the plaintiff to his mother, soon after receiving the message announcing the death of his father, tends to support appellant's contention, the testimony given by the plaintiff supports the finding of the trial court on that subject.

Under the second assignment the point is made that, as the message was to be delivered in the Indian Territory, and as the law in that jurisdiction does not authorize recovery in this class of cases for mental suffering, the judgment should be reversed. Recent adjudications in this state have settled the law against this contention. *Tel. Co. v. Waller* (Tex. Sup.) 74 S. W. 751; *Tel. Co. v. Shaw* (decided by this court at a former day of this term) 77 S. W. 433.

No reversible error being shown, the judgment is affirmed. Affirmed.

INTERNATIONAL & G. N. R. CO. v. IVES.*
(Court of Civil Appeals of Texas. Dec. 16, 1903.)

RAILROADS—CROSSING—ACCIDENT—CONTRIBUTORY NEGLIGENCE—CONTRADICTORY TESTIMONY OF PLAINTIFF—QUESTIONS FOR JURY.

1. In an action against a railroad for personal injuries, evidence examined, and whether plaintiff was guilty of contributory negligence in driving on the track *held* question for jury.

2. Whether plaintiff in an action for personal injuries contradicted his testimony given on a former trial is a question for the jury, it appearing that he denied that he testified to the contrary, the stenographer's notes of the evidence on the former trial being inconclusive, and the record on appeal in the first case showing that he offered after the close of the evidence to return to the stand and testify to facts stated on the last trial, but was not permitted to do so.

Appeal from District Court, Travis County; Geo. Calhoun, Judge.

Action by Ira C. Ives against the International & Great Northern Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

For former opinion, see 71 S. W. 772.

S. R. Fisher, J. H. Tallichet, and N. A. Stedman, for appellant. Hogg, Robertson & Hogg and Z. T. Fulmore, for appellee.

STREETMAN, J. Appellee recovered judgment for personal injuries sustained at a public crossing on defendant's railroad. This is the second appeal, a former judgment having been reversed on account of an erroneous charge. *I. & G. N. R. Co. v. Ives* (Tex. Civ. App.) 71 S. W. 772. The negligence alleged on the part of appellant was the failure to give the statutory signals

for the crossing. The verdict, under the charge of the court, implies a finding that appellant was guilty of the negligence alleged, that appellee was free from contributory negligence, and that appellee was injured to the extent found by the verdict. The only question made by the assignments of error is the sufficiency of the evidence to sustain the finding upon the issue of contributory negligence. It is not claimed that there was error in the manner in which this issue was submitted to the jury, but it is strenuously urged that the evidence was so conclusive as to require the court to give a peremptory charge for defendant upon this issue, or at least that the verdict was so clearly against the preponderance of the evidence as to entitle appellant to a new trial. The accident occurred at about 11 o'clock at night, October 19, 1901. Appellant was alone, driving a two-horse wagon along a public road a few miles north or northwest from Austin. Attempting to cross appellant's railroad, his horses were struck by a locomotive drawing a passenger train. He was thrown from the wagon and very seriously injured. At the place of the accident the railroad runs nearly north and south, and the wagon road runs about east and west, but not exactly at a right angle to the railroad. Appellee was going in a westerly direction, and the train which struck him was going north; so that in approaching the crossing his left side was to the train, but his face would be slightly to the north. There was no timber on the right of way, but beginning on the east side of it, and just south of the wagon road, there was a piece of timbered land, which prevented appellee from seeing down the railroad to the south, until he came within about 120 feet of the track. The track was straight for several hundred yards south of the crossing. There was a switch beginning about 100 feet from the crossing, and extending south several hundred feet. There was a cut which began about 100 feet from the south end of this switch, and extended south several hundred yards. The evidence is conflicting as to the depth of this cut and as to the height of the dirt which had been taken from it and piled on the sides of the track. Appellant's witnesses testified that it was not deep enough to have obstructed the view of an approaching train. A witness for appellee, however, testified that "at the north end of the cut the distance from the rail to the top of the embankment is about seven feet." There was a mile post, which a map introduced by appellant shows to have been about 1,200 feet south of the crossing. The same witness testified that "right at the mile board the cut is about seven feet deep; * * * at the next telegraph post it is about 8 feet deep, at the next one about 9 feet, and later on about 11 feet high." Appellee had only one eye, having lost his left eye. He testified as follows: "Approaching the crossing

* Rehearing denied January 20, 1904, and writ of error denied by Supreme Court.

that night, I was driving in a jog of a trot. I was sitting on the spring seat on the double bed on the wagon, and driving in a slow jog of a trot. I was driving a pair of good Spanish horses. I was wide awake and duly sober. I had not drank anything stronger than coffee during that day. When I first got to the corner of the timber, just sufficient to see the switch to the left, I threw my eye to the left. I could see four or five hundred yards down south on the railroad right of way. When I looked in that direction I didn't see anything, nor did I hear anything. I was listening, as I was always accustomed to do when it was after night. I was listening for a bell and whistle of the train as it went out, and, if I didn't hear any train, then I expected, if it was train time, to find it on that switch, but there was nothing on the switch. I saw nothing and heard nothing. I had been in the habit of traveling over that road ever since the road was built. I always understood that the trains had to blow a steam whistle and ring a bell at least 80 steps of a public crossing. I didn't hear any signal, and when I got to where I could see by the timber and see the end of the switch I looked down at the switch. There was nothing on the switch and I heard nothing. There is a curve some 200 yards north of there, and when the south-bound train comes you can't see it until it comes around that curve, and I then threw my eye to the right, and there was nothing between me and the curve, and about that time I saw the glare of light on the track. When I discovered the light on the track I had proceeded nearly to the track. My horses were within five or six feet of the track, and they saw the train, and endeavored to run by on across the railroad, the way they were headed; and the train didn't look to me to be over 60 or 70 steps or a hundred feet from me at that time. The train was coming from Austin, and it looked to me like it was shot out of a gun. That was my idea of it. I threw my weight on the lines and tried to back my horses, but my right-hand horse reared on his hind feet and lunged, and I don't think I made over two hauls on my line before the cowcatcher was under my horse. I thought, well, I'm a dead man. If I turned my lines loose it would throw me right under the engine, and I thought my only show was to back them. I thought if I turned my lines loose they would carry me in front of the engine before I could quit my wagon, but I thought I could back them before the engine passed. The last I recollect was when the cowcatcher went under my horses. It threw me with such violence and so high and so far that I never knew where I struck, only what I have been told since." If this testimony of appellee was true, we think it cannot be doubted that it was sufficient to sustain the finding of the jury that appellee was not guilty of contributory negligence.

It shows that appellee was expecting danger from the north, and that his attention was therefore directed mainly to that point; but it further shows that he did not wholly fail to look to the south. It also shows that he was relying to some extent upon the statutory signals to warn him of the approach of a train from the south; and the finding of the jury, which is not assailed, warrants us in assuming that such signals were not given. Under these circumstances, the verdict ought not to be disturbed, unless the other evidence in the case is sufficient to discredit his testimony, and to show that he did not in fact use the vigilance to which he testifies. *Carraway v. Ry. Co.*, 71 S. W. 524, 6 Tex. Ct. Rep. 524; *Ry. Co. v. Fuller* (Tex. Civ. App.) 36 S. W. 319; *Ry. Co. v. Slattery House of Lords Law Rep.* vol. 3, p. 1155. It is insisted, however, that the other facts in evidence do discredit his testimony, and show that, if he had looked, as he claimed, he would certainly have discovered the approaching train; and that, under the circumstances, he must have been either drunk or asleep, or absolutely careless of his own safety in driving upon the crossing.

It is not necessary to determine where the burden of proof rested upon the issue of contributory negligence. The plaintiff having testified to facts which would warrant the finding that he was free from contributory negligence, before we would be authorized to disturb their verdict it would be necessary for us to say that the other undisputed evidence in the case disproved his statement. This is, in effect, appellant's contention. It is based mainly on the fact that the track south of the crossing was straight for a great distance; that the engine had an electric headlight; and that there was no obstruction that could have prevented appellee from seeing it, if he had looked, as he claimed he did, as he entered upon the right of way. To maintain this contention, however, we must assume that there was no obstruction to prevent appellee from seeing the train or the headlight when he claims to have looked in that direction, and from the evidence above set out this must depend upon the distance of the train from the crossing at that time. Appellee, when he says he looked south, was about 120 feet from the crossing. He reached the crossing at the same time as the engine. If we knew precisely the speed at which he was traveling, as well as the speed of the train, we could determine the location of the train at the time he claims to have looked; but the evidence is by no means conclusive, either as to his speed or that of the train. Appellee testified that he was traveling at a "jog trot." The engineer testified: "My train was traveling about 25 miles an hour. Don't think it was traveling about 35 miles an hour." Appellant assumes that a jog trot is about 4 miles an hour, and, taking the engineer's estimate of 25 miles an hour as correct, argues that the train must have been

only about six times as far from the crossing as appellee—that is, about 700 feet; and, the evidence showing that the headlight of the engine is about 10 feet high, insists that, if plaintiff had looked, he must certainly have seen the headlight of the engine. It is plain, however, that this evidence is not so conclusive as to warrant us in rejecting the evidence of appellee that he did look, and did not see the train. The engineer also testified that the statutory signals were given, but upon this point he was contradicted, and the jury did not credit his statement. It is altogether possible that his estimate of the speed of the train was incorrect, and that it may have been running at 40 or 45 miles an hour, instead of 25 miles. Appellee's statement is that it looked like it was "shot out of a gun." While this language is highly figurative, it is, nevertheless, expressive of a very high rate of speed. On the other hand, we do not feel authorized to assume that a jog trot is four miles an hour. It may have been somewhat less. As the ratio increases between the speed of the train and appellee's wagon, the distance of the train from the crossing at the time appellee entered upon the right of way correspondingly increases; and from the facts we have mentioned it does not seem impossible, or, indeed, improbable, that when appellee claims to have looked to the south the engine may have been 1,300 to 1,500 feet south of the crossing; and, if so, the evidence shows that in all probability the view would have been obstructed by the depth of the cut at that point.

It is further insisted that the light from the headlight itself shining down the track would have afforded sufficient notice of the train, and that appellant could not have failed to see it if he had been looking; but we are unable to say that the evidence is so conclusive upon this point as to compel the jury to discredit appellee's positive statement.

It is also contended that appellee himself, upon a former trial, testified that he did not look to the left, and that his testimony on that point ought not now to be believed. If it clearly appeared that appellee, upon a former trial, had deliberately testified in contradiction to his testimony upon this trial, we should hardly feel warranted in affirming the judgment upon his testimony. A case of that character occurred in *Railway Co. v. Somers*, 78 Tex. 441, 14 S. W. 779. In this case, however, appellee denies that he so testified, and from the stenographer's notes of his testimony, which were introduced by appellant, it appears that he probably did not intend to make that statement. He says that he wanted to explain his testimony at that time, and was not offered an opportunity to do so; and the record upon the former appeal in this case shows that he offered after the close of evidence upon the first trial to return to the stand and testify to the facts stated on the last trial, but was not permitted to do so.

The case as now presented is very similar to that of *Railway Co. v. Fuller* (Tex. Civ. App.) 36 S. W. 319, in which it was said: "It is true this court reversed this case upon the former appeal upon the ground that the evidence showed that Mrs. Fuller was guilty of contributory negligence. The record then before us showed that Mrs. Fuller herself testified that she went upon the track without a thought of danger, and without looking or listening, and with her head wrapped in a nubia covering her ears. Upon the last trial Mrs. Fuller testified that her testimony was not correctly given in the statement of facts used upon the former appeal, and she affirmatively testified that she did both look and listen before going upon the railroad, and neither saw nor heard the engine. She further testified that the nubia was thrown loosely over her head, and it was light, and its meshes so large as not to obstruct her hearing. Her testimony denying the correctness of the statement of her evidence as contained in the former statement of facts was sought to be impeached by the testimony of witnesses that she did testify on the former trial that she did not look or listen before entering the track. This issue of the credibility of the witness was peculiarly the province of the jury to settle, and the verdict settled it in favor of Mrs. Fuller. Unless there is some inherent reason in her testimony itself for setting it aside as untrue, or unless some other conclusively established fact demonstrates the falsity of her testimony, we must, in deference to the verdict, accept it as true."

We have carefully considered all the evidence in the record, as well as the authorities cited and the able argument of appellant's counsel, but we have reached the conclusion that we would not be justified either in reversing and remanding the case or rendering judgment for appellant. What will constitute ordinary care on the part of a person approaching a railroad track at a public crossing must necessarily be left to the judgment of a jury. How far he may rely upon his sense of hearing and the giving of signals required by law, to what extent he must exercise caution in looking for approaching trains, and to what extent he has used his senses of sight and hearing in the particular case, are matters peculiarly within the province of the jury. Where the evidence discloses clearly a lack of ordinary care, we should not hesitate to set aside their verdict; but where acts of caution are testified to, and the other evidence does not conclusively discredit such testimony, their finding is conclusive. We are not called upon to determine what our judgment would have been if the evidence had been presented to us in the first instance. Two juries have passed upon the issue of contributory negligence in this case, and two judges of the district court have refused to set aside their verdicts,

and we are unable to say that their conclusion is manifestly against the evidence.

The judgment is therefore affirmed.

BOYD v. BOYD.*

(Court of Civil Appeals of Texas. Dec. 16, 1903.)

DEEDS—ABSOLUTE CONVEYANCE—PAROL EXPLANATION—ADMISSIBILITY OF PAROL EVIDENCE—PARTNERSHIP—SUIT FOR DISSOLUTION—NECESSARY PARTIES.

1. On an issue as to whether a deed absolute in form was intended to create a trust in favor of the grantor, parol evidence was inadmissible; the deed being void because of failure to give any description by which the lands might be identified.

2. Where, on an issue as to whether a deed absolute in form had been intended to create a trust in favor of the grantor, there was testimony that at the time of the execution and delivery of the deed the grantee executed and delivered to the grantor a written instrument showing that the grantee was to hold the lands in trust, parol evidence was inadmissible.

3. The grantor in a deed absolute in form, valid, and delivered, may not show by parol evidence that the land was taken by the grantee in trust for the grantor.

4. On an issue as to whether lands in Arkansas had been deeded absolutely, or whether the conveyance was intended to create a trust for the grantor, it was to be presumed, in the absence of proof, that the law of Arkansas was the same as that of Texas.

5. In a suit for the dissolution of a partnership composed of plaintiff, defendant, and another, the latter was a necessary party, and, not having been joined, the court had no power to grant a dissolution.

Appeal from District Court, Llano County; Clarence Martin, Judge.

Suit by A. W. Boyd against B. F. Boyd. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Chas L. Lauderdale, for appellant. A. W. Boyd and Fiset, Miller & McClendon, for appellee.

KEY, J. Appellant's statement of the nature and result of this suit is substantially correct, and is as follows: This action was instituted by appellee against appellant alone on October 15, 1902, to dissolve and settle the business of a copartnership by him alleged to exist among three persons, being himself, the defendant, and R. Boyd; to recover his alleged share, alleged to be one-half, of the assets of said copartnership, consisting of the lands described in the petition, and of an uncertain and undescribed lot of cattle; to compel an accounting by defendant alone, and to recover the proceeds of any of said assets sold by defendant; and to establish a lien upon the interest of said defendant in said assets, and cause same to be condemned and sold to satisfy and pay to the plaintiff \$3,811, alleged to have been advanced by him to defendant; plaintiff alleging that he had advanced and delivered

to defendant that amount of money for investment for himself and defendant in said partnership business, under an agreement between them whereby he was to furnish one half of the funds to be invested in said business for himself and defendant equally; defendant contributing his time and labor in lieu of interest on half of said sum, while R. Boyd agreed to furnish the other half of such funds, taking a half interest in the business. Defendant pleaded a general denial, denied the partnership specially under oath, and by cross-action sought to recover certain loans and advances made by him to plaintiff. He specially alleged that the moneys alleged by plaintiff to have been advanced to him, as well as those which he loaned to plaintiff, were derived from the rents and sales of certain lands situate in the state of Arkansas, sold and conveyed in 1894 by plaintiff to defendant, such rents accrued and sales made after such sale and conveyance to defendant, and while they were defendant's property, and as his property; and he further alleged that he executed to plaintiff a power of attorney to sell and convey the remainder of said lands and receive the proceeds of sales as defendant's agent, and that under said power, and as such agent, plaintiff did sell said lands, and received therefor \$10,500, which he misappropriated, invested part of it in lands in his own name in Texas, and refused to account for any of it; and defendant, under proper allegations and prayer, sought judgment against plaintiff for the money loaned to plaintiff, \$3,889.57, and the \$10,500; also the rents collected by plaintiff on certain real estate situate in Harris county, Tex., belonging to plaintiff and defendant jointly; and also for partition of 10 acres of land belonging to them in said county. The cause was tried by the court without a jury at May term, 1903, and judgment rendered on May 28, 1903, that defendant take nothing by his cross-action, that plaintiff recover of defendant \$3,811, and that the alleged partnership be dissolved as between them.

It was shown by clear and undisputed testimony that the plaintiff had executed and delivered to the defendant two deeds—one dated January 10, 1894, and the other dated January 16, 1894—conveying to the defendant certain lands in the state of Arkansas. It was also shown by the same character of testimony that part of the money for which the plaintiff recovered judgment in this suit was obtained by the defendant from sales and rents of the lands referred to. After the deeds referred to had been introduced in evidence, the plaintiff was permitted, over the objection of the defendant, to introduce oral testimony tending to show that neither instrument was intended to operate as an absolute conveyance of land, and that the one dated January 10th was intended as a will, and that the other was executed for the sole purpose of enabling the defendant to sell the

*Rehearing denied January 20, 1904.

† 5. See Partnership, vol. 23, Cent. Dig. § 744.

land therein described for the benefit of the plaintiff, and that it was agreed that he was to hold the land in trust, and as the agent of the plaintiff.

The admission of the testimony referred to is complained of in appellant's first assignment of error. So much of that testimony as related to the instrument dated January 10, 1894, was inadmissible, for two reasons: (1) That instrument was void because it did not designate in what county, parish, or state the lands were situated, nor give any other description by which they could be identified. *Norris v. Hunt*, 51 Tex. 810; *Jones v. Carver*, 59 Tex. 293; *Coker v. Roberts*, 71 Tex. 597, 9 S. W. 665. And (2) there was testimony tending to show that at the time of the execution and delivery of that instrument the defendant executed and delivered to the plaintiff a written instrument showing that he was to hold the lands therein referred to in trust for the plaintiff.

However, as to the other deed from the plaintiff to the defendant, of date January 16, 1894, error was committed by the court in admitting and considering parol evidence tending to show that that instrument was not intended as an absolute conveyance, but as a trust by which the plaintiff remained the owner of the lands, and entitled to the proceeds and revenues derived therefrom. The written instrument which the plaintiff testified that the defendant had executed to him was not produced, and it was not shown that it referred to the lands conveyed by the plaintiff to the defendant in the deed of January 16, 1894. On the contrary, the plaintiff's own testimony shows that it did not, because he stated while on the witness stand that he took no writing back from the defendant in reference to the lands conveyed by his second deed. If the lands referred to had been situated in this state, the testimony complained of would not have been admissible. *McClendon v. Brockett* (Tex. Civ. App.) 73 S. W. 854. The case cited shows that the testimony was not admissible for the purpose of establishing trust, and that the plaintiff could not defeat his deed by showing that there was no consideration for its execution. In the absence of specific proof as to the law in Arkansas, the presumption is that it is the same as in this state. The plaintiff submitted no proof tending to show that it was otherwise, but the defendant put in evidence a statute of that state which requires trusts in real estate to be evidenced by an instrument of writing.

All the other assignments of error have been considered, and are overruled, except the one which complains of the judgment dissolving the partnership without making R. Boyd, the other alleged partner, a party to the suit. The plaintiff alleged in his petition that the partnership consisted of himself, the defendant, and R. Boyd, and, having made such an averment, and prayed for a judgment dissolving the partnership, R. Boyd should have been made a party before proceeding to trial;

and certainly the court had no power to dissolve the partnership existing between three persons, when only two were parties to the litigation.

For the errors pointed out, the judgment is reversed and the cause remanded. Reversed and remanded.

CASSIDY v. WILLIS & CONNALLY.*

(Court of Civil Appeals of Texas. Oct. 21, 1903.)

CHattel Mortgage — Foreclosure — Conversion — Joinder of Causes — Jurisdiction — Nonresident — Knowledge of Mortgage — Evidence — Sufficiency.

1. A suit for the foreclosure of a chattel mortgage may be joined with an action for the conversion of the mortgaged property.

2. A nonresident who appears to an action against him in the state, and files pleadings therein, subjects himself to the jurisdiction of the court.

3. Testimony of a party that he learned of the mortgagor's levy of a writ of sequestration in Texas on a dog and pony show, and the next day levied a writ of attachment on such of the property as remained in Arkansas, and of his attorney that he knew at the time of the second levy that the first levy had been made under a writ of sequestration, is sufficient to put such party on inquiry as to the existence of the mortgage.

Appeal from District Court, McLennan County; Marshall Surratt, Judge.

Action by Willis & Connally against M. Cassidy. From a judgment for plaintiffs, defendant appeals. Affirmed.

W. G. Cook and O. L. Stribling, for appellant. J. B. Scarborough and H. P. Jordan, for appellees.

STREETMAN, J. On June 1, 1901, the Campbell, Lewis & Harris Stock Association, a corporation under the laws of Texas, domiciled at Waco, Tex., executed to the appellees, Willis & Connally, and Huff & McNeil, four promissory notes, amounting, with accrued interest, at the date of the judgment in this case, to \$834.56. To secure these notes, a chattel mortgage was executed on a certain tent, seats, and miscellaneous assortment of trained ponies, dogs, monkeys, parrots, and other paraphernalia constituting a dog and pony show. This mortgage was properly recorded in McLennan county, Tex. On June 13, 1901, this suit was instituted against said corporation, as the sole defendant, to recover on said notes and foreclose said mortgage. On December 16, 1901, an amended petition was filed, in which appellant, M. Cassidy, who was alleged to reside in Bowie county, Tex., and Adolphus Bickham, sheriff of Miller county, Ark., were made defendants, and a recovery was sought by reason of substantially the following facts: That after the institution of this suit a writ of sequestration was issued for the mortgaged property to Bowie county, Tex., and taken there to be executed, and on June

*Rehearing denied January 20, 1904.

14, 1901, was levied upon a portion of said property. That this portion of the property was replevied by plaintiffs. That on the next day the remainder of said property not so levied upon by plaintiffs, being situated just over the line in Miller county, Ark., was converted by defendants Cassidy and Bickham by the levy of an attachment in a suit of said Cassidy against said corporation. That, while the property was being held under plaintiffs' writ of sequestration, a bill of sale was executed to plaintiffs for all of said property, and at the same time plaintiffs made an agreement to permit said corporation to have possession of said property, and make certain exhibitions, provided certain stated amounts should be realized within a specified time, and paid on the notes of plaintiffs. This bill of sale and agreement were in writing, and are attached to the petition. It is also alleged that an agreement was made with Cassidy to release the property which he had levied on under his attachment, in order that the company might proceed with its performances; that under these agreements the portion of the property levied upon under the sequestration writ was delivered to said company, but that as soon as it was taken across the line into Miller county, Ark., the defendants Cassidy and Bickham forthwith levied their attachment upon all of said property. It is alleged that said Cassidy and Bickham had notice of plaintiffs' rights. We do not discover any evidence to show the agreement alleged on the part of Cassidy to release the property first levied on under his attachment, and permit the company to proceed with its exhibitions. Aside from this, however, the facts alleged are, in our opinion, supported by the uncontradicted evidence in the record. The evidence shows that when the attorneys for plaintiffs reached Texarkana, Tex., on the 13th day of June, 1901, the property was all on the Arkansas side. On the next day, however, an exhibition was to be given, and in the street parade the bulk of the property was brought across the line, and plaintiffs levied their sequestration upon it. Appellant, Cassidy, was at his home when the procession passed. He learned of the levy of the sequestration, and thereupon, on the next day, levied his writ of attachment upon such of the property as remained on the Arkansas side. He and his attorney testified and admitted that they knew of the levy, and the attorney admits that he knew that it was made under a writ of sequestration. On the 28th of June the remainder of the property which had been levied on under plaintiffs' sequestration, and replevied by plaintiffs, was brought over the line into Arkansas, and was immediately levied on under appellant's attachment.

The only issue submitted to the jury was the value of the respective portions of the property levied on under the attachment at the dates of said levies, and the finding was

that the property levied on on June 15th was worth \$251.65, and that levied on on June 28th was worth \$1,038. Judgment was thereupon rendered against the corporation for the amount due upon the notes, with foreclosure of mortgage, and against said Cassidy and Bickham for the value of said property, as found by the jury, with the provision that said judgment might be satisfied by the payment of the judgment against said corporation.

The second and third assignments of error present the question of a misjoinder of parties and causes of action. That a suit for the foreclosure of a mortgage may be joined with an action for conversion of mortgaged property is now well settled. *Cobb v. Barber*, 92 Tex. 311, 47 S. W. 963. This we understand to be the nature of the case made by the amended petition, and such is the judgment rendered.

It is next insisted that the exceptions should have been sustained to the jurisdiction of the court; the suit being brought in McLennan county, and it being alleged that the defendant Cassidy resided in Bowie county, Tex. The facts developed that Cassidy resided in Arkansas, and was a non-resident of Texas. In either event, however, the court had jurisdiction. If he was a resident of Bowie county, Tex., he could be joined with the defendant corporation in the suit to foreclose the mortgage, and, being properly joined as defendant, could be sued in McLennan county. *Cobb v. Barber*, *supra*. "If, on the other hand, appellant was a non-resident, his appearance and pleadings subjected him to the jurisdiction of the court." *York v. State*, 73 Tex. 351, 11 S. W. 869.

Under several assignments of error, it is insisted that the court should have heard evidence and submitted to the jury issues as to whether plaintiffs used proper diligence in having their mortgage recorded in the state of Arkansas. We have concluded that the other evidence in the case dispensed with any necessity of hearing evidence upon or submitting such issues to the jury. When appellant levied his first attachment upon the property, he knew that a portion of this property had been levied on under plaintiffs' sequestration. The second levy of his attachment was levied upon the very property upon which the sequestration had been levied. Appellant testifies that he had no actual knowledge of the mortgage at the date of either levy, but his knowledge of the levy of the sequestration was sufficient to put him upon inquiry, and this inquiry could not have failed to develop complete knowledge of the mortgage. We are therefore of opinion that the court below properly treated appellant as having full notice of plaintiffs' rights, and that the issue submitted was the only matter of fact necessary for the jury to determine.

All of the assignments have been carefully considered, and, there being no error in the judgment, it is affirmed. Affirmed.

**FIRST NAT. BANK OF LAMPASAS v.
CITY OF LAMPASAS.***

(Court of Civil Appeals of Texas. Nov. 18, 1903.)

**NATIONAL BANKS—TAXATION OF PROPERTY—
CAPITAL STOCK—PENALTY FOR
NONPAYMENT.**

1. As Rev. St. U. S. § 5219 [U. S. Comp. St. 1901, p. 3502], permits taxation by states of the real estate only of national banks, such a bank is under no legal obligation to render and pay taxes on its stock.

2. A national bank having voluntarily rendered its capital stock for taxation, and stated, in its answer, in an action to recover the taxes thereon, as increased in value on equalization, that it was willing to pay taxes thereon according to its rendition, it may be held liable for the taxes on the value of its stock as rendered, though taxation of such stock is unauthorized; but an equalization board could not, without its consent, augment its conceded liability by adding other personal property to its rendition, or raising the value of that which had been rendered.

3. A national bank, having tendered payment of the taxes legally due from it, in accordance with its rendition of property for taxation, and before the time fixed by the statute for the accrual of the penalty for nonpayment, is not liable for the penalty in an action to recover in addition an amount exceeding that which was legally due, and for which it was not liable.

Appeal from District Court, Lampasas County; John M. Furman, Judge.

Action by the city of Lampasas against the First National Bank of Lampasas. From a judgment for plaintiff, defendant appeals. Reformed and affirmed.

This is a suit by the city of Lampasas to recover \$600, as taxes, and 10 per cent. thereon as a penalty, from the First National Bank of Lampasas. There was a nonjury trial, resulting in a judgment for the plaintiff for the amount sued for, and the defendant has appealed.

The trial judge filed the following findings of fact:

"(1) I find as a fact that the city of Lampasas is a municipal corporation, duly incorporated under and by virtue of the laws of the state of Texas as a city of over one thousand inhabitants.

"(2) I find as a fact the defendant is a corporation duly and legally incorporated as a national bank, and was engaged in doing a banking business on January 1, 1902, with a capital stock of \$50,000, of which \$200 was invested in real estate mentioned in plaintiff's petition, and was also possessed of a surplus fund of \$10,000 over and above said \$50,000 capital stock, and was doing business and located in the city of Lampasas, with J. F. Skinner as president, H. N. Key as second vice president, and J. F. White as cashier.

"(3) I find that on, to wit, the 22d day of May, 1902, plaintiff, through its regularly qualified city assessor and collector of taxes, called upon defendant to render its property

for taxes for the year 1902, whereupon said defendant, through its cashier, J. F. White, made out under oath, and rendered to said city assessor and collector, a rendition containing, among other items, the following: '500 shares of capital stock, etc., value, \$49,800'; also the real estate mentioned in the petition, of the value of \$200.

"(4) I find that said city assessor, in accordance with law, delivered to the board of equalization of said city the various lists of property rendered for taxes for said year 1902, among which was the list so rendered by J. F. White as cashier of defendant.

"(5) I find as a fact that said board of equalization were duly qualified to act as such, and did thereafterwards, on or about July 23, 1902, enter an order placing the valuation of said 500 shares of capital stock so rendered by defendant at the sum of \$59,800.

"(6) I find as a fact that said valuation was ascertained and found by said board by considering the valuation of said stock as rendered, together with the value of said surplus fund of \$10,000; and I further find that said board considered, under all the evidence, that said 500 shares of stock so rendered was of the fair and reasonable value of \$59,800 on the 1st day of January, 1902. And I further find that said 500 shares of stock was in fact of the fair and reasonable market value of \$59,800 on said 1st day of January, 1902.

"(7) I find as a fact that after determining to raise said valuation of said stock from \$49,800, as rendered, to \$59,800, the real value thereof, said board of equalization caused the defendant to be duly notified of said proposed increase in valuation, and thereupon the said defendant appeared before said board, and, after a full hearing, said valuation, as changed and raised by said board, was ordered by said board to be placed on the tax rolls of said city for the year 1902, which was accordingly done. I further find that on August 9, 1902, said rolls were duly approved by said board; said rolls then showing that said 500 shares of stock were valued at \$59,800, and the real estate of said defendant was valued at \$200; all being assessed in the name of the First National Bank of Lampasas, and making a total valuation of \$60,000.

"(8) I find that the city council of the city of Lampasas duly levied the following taxes for the year 1902: On each \$100 of assessed values as shown by the assessment rolls, viz.: For current expenses of said city, .25 on each \$100 assessed valuation; for permanent improvement fund, .25 on each \$100 assessed valuation; for support, etc., free schools of said city, .35 on each \$100 assessed valuation; maintenance, etc., of streets and alleys, .15 on each \$100 assessed valuation; making 100 cents on each \$100 valuation of property as shown by assessment rolls for the year 1902. And I find that the

*Rehearing denied January 20, 1904.

aggregate taxes due to plaintiff by defendant amounted to the sum of \$800 for the year 1902, and was due and payable on October 1st, 1902.

"(9) I find as a fact that defendant has failed and refused to pay the same on or before January 31, 1903, and that the same now remains wholly due and unpaid."

In addition to these findings, it was shown by undisputed testimony that the shares of stock referred to in the rendition were those issued by the defendant bank, and not the stock of some other corporation. It was also shown by undisputed testimony that on January 31, 1903, the defendant tendered to the plaintiff's tax collector the sum of \$500 in payment of the taxes due by it, which amount said collector refused to accept because the tax rolls showed the amount of the defendant's taxes to be \$600.

Matthews & Browning, for appellant. W. B. Abney, for appellee.

KEY, J. (after stating the facts). It is settled by decisions of the Supreme Court of the United States that it is not within the power of a state to subject the property of national banks to taxation without the consent of the federal Congress. The only provision of the federal statutes which authorizes such taxation is section 5219 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3502], and that permits such taxation, as against such banks, upon real estate only. It authorizes state taxation of the stock of such banks as against the owners of such stock, but not as against the banks. In harmony with that statute, the Legislature of this state has made full provision for the assessment and collection of taxes upon national bank stock from the owners of such stock, and has made no attempt to compel national banks to pay taxes on such property. *Sayles' Rev. Civ. St. 1897, arts. 5079, 5079a, and 5080.* Hence we are of opinion that the bank was under no legal obligation to render and pay taxes on the property in question. These views are supported by authority. *Miller v. First National Bank, 46 Ohio St. 424, 21 N. E. 860; First Nat. Bank v. Fisher, 45 Kan. 726, 26 Pac. 482.*

However, as the bank voluntarily rendered the property for taxation, and states in its answer that it is willing to pay taxes thereon according to its rendition, we shall not, as we otherwise would, hold it not liable for any portion of the taxes on the bank stock. But not being originally liable for taxes on the stock, we are of opinion that the board of equalization could not, without its consent, augment its conceded liability by adding other personal property to its rendition, or raising the value of that which had been rendered.

We are also of the opinion that as the bank tendered payment of the taxes due, according to its rendition, before the time fixed

by the statute for the accrual of the penalty, the bank is not liable for the penalty. Therefore the judgment appealed from will be reformed so as to reduce the appellee's recovery from \$660 to \$500, together with the costs of the district court. The costs of the appeal will be taxed against the appellee.

Judgment reformed and affirmed.

GALVESTON, H. & S. A. RY. CO. v. CLOYD.
(Court of Civil Appeals of Texas. Dec. 16, 1903.)

MASTER AND SERVANT—RAILWAYS—PERSONAL INJURIES—VENUE—RESIDENCE—FELLOW SERVANTS.

1. Evidence merely that an employé had worked for several weeks in the county where he was injured while at such work did not establish his "residence" in such county, under the statute relating to venue in actions for such injuries.

2. Where plaintiff and another were employed in the common work of cleaning and preparing a railway engine for the road, and plaintiff was injured by such other person entering the cab and reversing the lever, but there was no evidence that the duties of such person differed from those of plaintiff, or that he was engaged in moving the engine, the negligence was that of a fellow servant, and plaintiff could not recover.

On Rehearing.

3. The Court of Civil Appeals is not required to file the testimony on any given point, but its conclusions alone as to what facts have been established by the evidence.

4. Under *Sayles' Annu. Civ. St. 1897, art. 4560b*, providing that railway employes who are in the same grade of employment, and are doing the same character of work or service, and are working together at the same time and place, and at the same piece of work, and to a common purpose, are fellow servants with each other, employes engaged in cleaning and preparing an engine need not be in actual bodily contact with each other, or engaged in cleaning the same wheel or piece, or each know exactly what the other is doing, in order to constitute them fellow servants.

Appeal from District Court, Medina County; I. L. Martin, Judge.

Action by Thomas Cloyd against the Galveston, Harrisburg & San Antonio Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Baker, Botts, Baker & Lovett and Ellis & Love, for appellant. C. L. Bass, V. H. Blocker, and J. R. Storms, for appellee.

FLY, J. Appellee sued for and recovered damages alleged to have accrued through the negligence of appellant. The verdict and judgment was for \$6,000.

Appellee was 22 years old when injured, and was born and reared in Medina county, and that was undoubtedly the place of his residence so long as he was a minor and incapable of destroying the domicile of his origin or birth. He had lived in numbers of places, but the evidence justified the finding that his residence was in Medina county. Appellee had been at work in Pecos county, where he was injured, for several weeks, but

there was no evidence indicating any intention to make that county his residence; and to hold that the residence contemplated in the statute is the place where a person is existing at the time of the injury would have the effect of making "residence" synonymous with "the county in which the injury occurred." The evidence certainly did not tend to show a legal residence in Pecos county, and appellee either had his residence in Medina county, or he had none at all. The court correctly charged on the question of venue, and the special charges on that subject were properly refused.

In the case of *Long v. Railway*, 94 Tex. 53, 57 S. W. 802, the fellow-servant statute is discussed; and it is there held that section 3 of the act of June 18, 1897, p. 14, c. 6 (article 4560h, Sayles' Ann. Civ. St. 1897) which defines fellow servants, was substituted for section 2 of the act of 1891, and must govern in the consideration of the subject, so far as the employes of persons, receivers, or corporations controlling or operating railroads or street railways are concerned. Such employes who are engaged in the common service of those operating or controlling railroads, "in the same grade of employment and are doing the same character of work or service and are working together at the same time and place and at the same piece of work and to a common purpose, are fellow servants with each other. Employes who do not come within the provisions of this article shall not be considered fellow servants." According to the testimony offered by appellee, Ramon Escamillo was what is known in railroad parlance as a "hostler" and "wiper," and was also a "machinist helper," and, in addition, was to do what he was told. Appellee was a "wiper" and "roustabout." It was his duty to wipe the links and engines, and perform other labor that might be required of him. The testimony of appellant showed that Ramon and appellee were engaged in the same kind of work. It was shown by the testimony offered by appellee that at the time of the injury he was under the engine in a ditch, wiping a "link," which appears to be a part of the engine; and, while he was so engaged, Ramon Escamillo, who was in the cab of the engine, reversed the lever, and it flew up and hit appellee in the side, inflicting the injury complained of. There can be no question that Ramon Escamillo and appellee were in the common service of appellant; that they were in the same grade of employment, and were doing the same character of work or service; and that they were working together at the same time and place. It is also clear that, at the time the injury was inflicted, Ramon was not engaged in moving the engine into or out of the roundhouse. He swore that he knew nothing of the injury. Slimmons, a witness for appellee, swore that he saw Ramon in the cab, and saw him throw the reverse lever. Ramon then came down out of the cab with

a hammer and waste paper in his hands. The only other witness who testified to seeing Ramon on the occasion of the injury stated he saw him coming down out of the cab. He also stated that the engine was under steam at the time of the accident, and headed forward into the roundhouse. The engine did not move when the lever was thrown. Slimmons stated that he did not know why Ramon threw the lever, and that all of them were working on the engine. Whether the reversal of the lever was a part of the work of cleaning the engine is not definitely shown, but Ramon, appellee, and two others were shown to have been at work on the engine; and the evidence, while very unsatisfactory, tended to show that Ramon and appellee were engaged at the same piece of work, namely, the engine, and were working to the common purpose of preparing the engine for the road. The charge of the court conditioned the finding of negligence upon a finding, among other things, that Ramon was not a fellow servant of appellee. The evidence tended to show that he was. While it may be the true construction of the law of Texas to hold, as was held in the *Long Case*, above cited, that one member of a section gang engaged in carrying tools in his arms to a certain place, and another engaged in carrying tools on a hand car to the same place, are not fellow servants, we are not disposed to hold that two servants in the common service of a railway company, in the same grade of employment, and doing the same character of work, and working together at the same time and place, on the same locomotive, for the purpose of cleaning it or preparing it for the road, are not fellow servants. The evidence as to the work of the persons engaged in preparing the engine for the road was developed very unsatisfactorily, and the full facts in the case should be brought out.

The judgment is reversed, and the cause remanded.

On Motion for Rehearing.

(Jan. 20, 1904.)

Appellee seeks to have this court set out the full testimony in this case on the question of Ramon and appellee being fellow servants. This court is not required to file the testimony on any given point, but its conclusions alone as to what facts have been established by the evidence. The facts all tend to show that Ramon and appellee were fellow servants. Slimmons, a witness for appellee, detailed what the four men were doing about the engine, and said: "We were all working on the same engine." We conclude that the evidence failed to show that appellee was injured through any negligence of appellant, but tends to show that the injury resulted from the negligence of a fellow servant.

This court cannot subscribe to the doctrine

advanced by appellee that persons engaged in cleaning an engine are not working together at the same time and place unless they are in actual bodily contact with each other, and are engaged in cleaning the same piston or wheel, and unless each knows exactly what the other is doing at the time. We do not think that it was contemplated by the law-makers that so narrow and contracted a view of the law of fellow servants should be entertained. The four men at work on the engine were working together, whether a portion of them were on one side of the engine or the other, to the common purpose—that of cleaning and preparing the engine for the road. They were working at the same time and place, namely, around the engine, which was clearly the same piece of work.

The motion is overruled.

HOUSTON & T. C. R. CO. v. SHULTS.

(Court of Civil Appeals of Texas. Nov. 11, 1903.)

APPEAL — EXCESSIVE VERDICT — MOTION FOR NEW TRIAL — SPECIFICATIONS OF ERROR — SUFFICIENCY.

1. An assignment of error predicated on the insufficiency of the evidence on an issue to which the court's attention was not called on the motion for new trial will not be considered on appeal.

Appeal from Llano County Court; F. J. Johnson, Judge.

Action by C. E. Shults against the Houston & Texas Central Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

S. R. Fisher, J. H. Tallchiet, and Baker, Botts, Baker & Lovett, for appellant. Chas. L. Lauderdale, for appellee.

STREETMAN, J. We have considered all of the assignments of error presented by appellant, except those which complain that the verdict is excessive. These assignments are as follows: "(9) The verdict of the jury is excessive, outrageous, and unconscionable, because the same is for plaintiff for an amount greater than that asked by plaintiff in his petition and authorized by the law and the evidence, and the court therefore erred in overruling defendant's motion for new trial. (10) The verdict of the jury is excessive, outrageous, and unconscionable because, under the evidence, plaintiff was not entitled to recover for total loss in weight of 6,848 pounds, but for a far less weight, and because plaintiff was not entitled to recover damages for reduction in classification of $\frac{22}{100}$ of a cent per pound on the alleged weight of the hogs as received at Ft. Worth, but at a far less rate per pound; and, further, because it appeared from the evidence that 74 head of plaintiff's hogs were sold at the top market price, and that plaintiff had suffered no loss on account of grade or classification of said 74 head. The court therefore

erred in refusing to grant defendant's motion for new trial. (11) The court erred in refusing to grant defendant's motion for new trial because the verdict of the jury is outrageous, excessive, and unconscionable and is the manifest result of passion and prejudice." The only mention of the question of excess in appellant's motion for a new trial was as follows: "(15) The verdict of the jury is excessive under the evidence; the evidence at most authorizing a recovery for the three dead hogs and the depreciation in market value. (16) The verdict of the jury is excessive and outrageous under the pleadings, the evidence, and the charge of the court."

It has been held that such statements in a motion for new trial are insufficient to require an examination by this court of the evidence in order to determine whether or not there was an excess. The fifteenth paragraph of the motion might have been sufficient. If the evidence had in fact only warranted a recovery for the three dead hogs and the depreciation in market value. There was much evidence, however, tending to show that, in addition to those items, plaintiff was entitled to recover for loss in weight of the hogs. If there was an excess, it was in the particulars pointed out in the tenth assignment of error above copied; but the motion for new trial did not present these matters to the trial court in such manner as to require us to review the ruling upon said motion. Consolidated Kansas City Smelting & Refining Co. v. Conring et al. (Tex. Civ. App.) 33 S. W. 547; City of Galveston v. Devlin, 84 Tex. 321, 19 S. W. 395; Clark & Loftus v. Pearce, 80 Tex. 148, 15 S. W. 787; S. A. & A. P. Ry. Co. v. Ilse (Tex. Civ. App.) 59 S. W. 564. For the reasons stated, we have not considered the assignments presenting the question of excess in the judgment. In the other assignments we find no error.

The judgment is therefore affirmed.

WILLIAMS v. GALVESTON, H. & S. A. RY. CO.*

(Court of Civil Appeals of Texas. Dec. 23, 1903.)

CARRIERS — INJURY TO PASSENGER — DANGER OF COLLISION — ATTEMPT TO ALIGHT FROM TRAIN — INSTRUCTIONS — NEGLIGENCE.

1. In an action by a passenger for injuries alleged to have been caused by the negligent starting of a train as he was about to alight therefrom because of fear of a collision with a freight train approaching from the rear, evidence considered, and held to justify submission to the jury of the issue as to defendant's negligence.

2. In an action by a passenger for injuries alleged to have been caused by the negligent starting of a train as he was about to alight therefrom because of fear of a collision with a freight train approaching from the rear, evidence considered, and held to justify submission to the jury of the issue as to plaintiff's contributory negligence.

3. The petition in an action by a passenger against a railroad company for personal in-

* Writ of error denied by Supreme Court.

juries alleged that while the train on which plaintiff was riding was standing still defendant negligently permitted another train to approach it from the rear, so as to make it appear to plaintiff that there was imminent danger of a collision, in consequence of which he attempted to leave the train, and that while so doing the train was negligently started so as to throw him to the ground. Held not to state several and distinct acts of negligence, proof of either of which would entitle plaintiff to recover, but that, to justify a recovery, plaintiff was required to prove both the acts of negligence alleged.

4. Plaintiff in an action for personal injuries could not, on appeal, complain of a charge authorizing a recovery only upon proof of all the acts of negligence alleged in his petition, in the absence of any request for additional instructions.

5. In an action by a passenger against a railroad company for injuries alleged to have been caused by defendant's negligently allowing a train to approach from the rear the train on which plaintiff was riding, so as to cause him to fear a collision, and in attempting to leave the train to be injured by the negligent starting of the same, a charge that, if the jury found plaintiff guilty of any negligence in going upon the platform or in getting off the train, which caused or contributed to his injury, the verdict must be for defendant, was not objectionable on the ground that it told the jury that certain facts would constitute contributory negligence.

6. A charge that if, while the train on which plaintiff was a passenger was stopped, another train approached it from the rear, so as to make it reasonably appear to plaintiff that there was imminent danger of a collision, and that from all the circumstances plaintiff had reasonable grounds for believing and did actually believe that there was danger of a collision, and that, if he remained in the passenger train, he was in imminent danger of losing his life or receiving great bodily injury, and, so believing, left his seat, and attempted to alight, and was injured, etc., he was entitled to recover, was not open to the objection that, to justify plaintiff in attempting to escape from apparent danger, he should actually be in imminent danger of losing his life or receiving great bodily injury.

7. An instruction that if the jury should find that plaintiff was guilty of any negligence in going on the platform or getting off the train, and such negligence caused or contributed to his injury, they should find for plaintiff, was not error.

On Rehearing.

8. The undisputed evidence having shown that plaintiff's effort to get off the train was the efficient cause of the injury, it was not error to instruct that, if plaintiff's endeavor to get off the train either caused or contributed to his injury, plaintiff could not recover.

Appeal from District Court, Bexar County; J. L. Camp, Judge.

Action by John Williams against the Galveston, Harrisburg & San Antonio Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Burgess, Hopkins & Rainbolt, Chas. W. Ogden, and W. H. Lipscomb, for appellant. Newton & Ward and Baker, Botts, Baker & Lovett, for appellee.

NEILL, J. Suit by appellant against appellee to recover damages for personal injuries occasioned by the alleged negligence of the latter. The railroad company pleaded

not guilty and contributory negligence. This appeal is from a judgment in its favor.

The evidence is amply sufficient to show that appellee was not guilty of the negligence charged, and that appellant's injuries were caused by contributory negligence on his part. As all the assignments of error except one, which complains of the sufficiency of the evidence to support the verdict, are directed against the court's charge, we will, after stating the acts of negligence alleged by appellant in his petition and the facts relied on to sustain such allegation, copy all the charge except the part giving the rule for the measure of damages, so that our rulings upon the assignments may be fully understood.

After alleging that he was a passenger on one of appellee's trains, plaintiff avers in his petition that the defendant negligently caused or permitted its line of railway upon which said passenger train was being operated to be obstructed by a freight train, by reason of which the passenger train was negligently stopped by defendant upon the main track of its railway, and while standing on the track defendant's agents and employes negligently permitted and caused a freight train to be driven along the main track in the rear of and towards the passenger train at such speed and in such close proximity as to make it appear to plaintiff that there was great and imminent danger of a collision with said train; that plaintiff, fearing there would be a collision, endeavored to get off the passenger train for the purpose of avoiding the danger of a collision, and for this purpose left his seat and went upon the platform of the car for the purpose of alighting from the train: that when he reached the platform, and was about to alight therefrom, the train was negligently, carelessly, and suddenly started by the agents and employes of defendant with so violent a jerk and jar as to throw him with great force and violence from the platform to the ground, which he struck with great force, causing the infliction of serious, painful, and permanent injuries.

The evidence shows that plaintiff was a passenger on one of defendant's passenger trains en route from Gonzales to the city of San Antonio; that a freight train was running towards the last-named city, in its rear, and another freight train in front of the passenger train; that when the passenger train arrived at a point east of the defendant's yards in San Antonio, near where the Missouri, Kansas & Texas road joins that of defendant, the freight train in front was stopped by reason of a drawhead having been pulled out of a car next the engine; that the passenger train came up to the freight train, and stopped until the latter could get out of the way. While the passenger train was thus waiting for the freight train to get ahead, after remaining stationary for several minutes, the rear freight train came up. As soon as the passenger train stopped, a flagman was sent back from it to signal the approach

ing freight train, and its engineer and crew testified that the flagman gave the signals, and that they were answered by the engineer of the freight train, and that it was under full control, and at no time was there any danger of its collision with the passenger train. However, when the passenger train stopped and the freight train was seen to approach from the rear, some uneasiness of a collision was manifested by the passengers, and a number of them got off. The plaintiff left his seat and went to the platform of the car for the purpose of leaving the train, but whether he did so before or after the passenger train was brought to a stop the evidence is conflicting. One of his witnesses testified that he jumped off the train while it was in motion, and before it had stopped, but there was testimony from which it could be found that, after the train stopped, and he was in the act of alighting, it was put in motion, and he fell to the ground and was injured.

As to whether the evidence of these facts showed negligence on the part of defendant or contributory negligence on the part of plaintiff was a question of fact for the jury to determine under the charge given them by the court. Such charge is as follows:

"If you find from the testimony that the defendant's passenger train upon which this plaintiff was a passenger was stopped upon the main track of defendant's line of railway by reason of a freight train obstructing said track, and that while said passenger train was so stopped upon said main track another freight train approached said passenger train from the rear, in such close proximity thereto as to make it reasonably appear to this plaintiff that there was imminent danger of there being a collision between said passenger train and said approaching freight train; and you further find that by reason of the manner in which said trains were operated this plaintiff had, under all the circumstances, reasonable grounds for believing, and did actually believe, that there was great danger of a collision of said trains, and that if he remained upon said passenger train he was in imminent danger of losing his life or receiving great bodily injury, and, so believing, that this plaintiff left his seat and went upon the platform of defendant's passenger coach, and that while plaintiff was attempting to alight from said train the passenger train was suddenly started, and that this plaintiff was thereby thrown or fell to the ground and injured as alleged in his petition; and you further find that in operating its trains in such manner as to make it reasonably appear to plaintiff that there was imminent danger of a collision between the passenger train on which plaintiff was riding and the approaching freight train, if you find they were so operated, and in allowing said passenger train to move suddenly forward as plaintiff attempted to alight from said train, if you find it was so moved, defendant company was guilty of negligence, and that such negligence, if any,

was the proximate cause of plaintiff's injury, if any; and you further find that plaintiff was not guilty of any negligence that either caused or contributed to his injury, if any—then you will find for plaintiff. By 'reasonable grounds,' as used in this charge, is meant such a condition of apparent danger as would ordinarily cause an ordinarily prudent and considerate person to become apprehensive of danger to himself under like circumstances and conditions.

"If, however, you find that the defendant company used that high degree of care that a very cautious, competent, and prudent person would have used under similar circumstances to prevent any collision between defendant's passenger train and an approaching freight train, and that its said trains were operated in such a manner that an ordinarily prudent person, under all the circumstances, would not have had reasonable grounds for believing that there was imminent danger of a collision of said trains, and that he was in imminent danger of losing his life or receiving great injury if he remained upon said train, and that plaintiff's endeavor to get off of said train at said time and place either caused or contributed to his injury, if any, then you are charged that plaintiff cannot recover and you will find by your verdict. Or if you find that the plaintiff was guilty of any negligence in going upon said platform or in getting off of said train, and that such negligence, if any, either caused or contributed to his said injury, if any, then your verdict must be for defendant, and you will so find. 'Negligence,' as applied to the plaintiff herein, means a failure to use that degree of care that would be exercised by an ordinarily prudent person under similar circumstances; and, as applied to the defendant herein, means a failure to use that high degree of care that would be exercised by a very cautious, competent, and prudent person under similar circumstances."

This charge, including the omitted paragraph upon the measure of damages, comprehends all the instructions given to the jury. No special instructions were requested either by plaintiff or defendant. Apparently each party was satisfied at the time with the charge given by the court.

Appellant's first and second assignments of error are as follows: "(1) The court erred in instructing the jury that, in order for the plaintiff to recover, it was necessary for the jury to find not only that the plaintiff had reasonable grounds for believing that there was danger of a collision between the passenger and an approaching freight train, and that, to escape such apparent danger, the plaintiff attempted to alight from the car, and that in so doing he was injured, but also that while plaintiff was attempting to alight from said train the passenger train was suddenly started. (2) The court erred in instructing the jury that, in order for plaintiff to recover, it was necessary for the

jury to find that the defendant was guilty of both acts of negligence charged against the defendant, namely, that the defendant was negligent in operating its trains in such a manner as to make it reasonably appear to plaintiff that there was imminent danger of a collision, and was also negligent in moving the passenger train suddenly forward." It is clear from an inspection of plaintiff's petition and reading the court's charge that the very acts of negligence alleged are submitted to the determination of the jury. It does not occur to us that this is a case where the petition charges several acts of negligence conjunctively, any one of which would entitle plaintiff to recover if established. While several acts of negligence are charged, they are by the allegations so connected with each other as to require proof of all to establish a cause of action. He not only had to show that the negligent acts of defendant caused him to believe that he was thereby placed in imminent peril of a collision of the freight train with the one upon which he was a passenger, but that in his effort to avoid such apprehended peril in attempting to alight from the train it was suddenly started, and he was thereby thrown therefrom to the ground and injured. If, however, plaintiff's petition should be construed as charging several acts of negligence conjunctively, any one of which would, if established, entitle him to recover, he cannot be heard to complain that the charge only authorizes a recovery upon proof of all the acts of negligence alleged in the absence of a request for additional instructions. *Ry. v. Hill*, 95 Tex. 629, 69 S. W. 136; *Ry. v. Brown*, 78 Tex. 402, 14 S. W. 1034; *Ry. v. Wood*, 69 Tex. 679, 7 S. W. 372.

The third assignment of error complains of the second paragraph of the charge. Under this assignment are asserted the following propositions: "(1) Where two independent and distinct acts of negligence are alleged as the basis for a recovery, either of which, if established and shown to be the proximate cause of the injury, would entitle plaintiff to recover, and both are denied, and the testimony on both issues is conflicting, it is error for the court to instruct the jury that a finding that the defendant is not guilty of one of the acts of negligence charged would prevent a recovery. (2) Contributory negligence is a question of fact, and it is not proper for the court to tell the jury that certain facts would amount to negligence. (3) Contribution by plaintiff to the injury complained of, to constitute a defense, must be negligent. (4) In order to justify a passenger in attempting to escape from apparent danger, it is not necessary that he should be in 'imminent danger of losing his life or receiving great bodily injury,' but it is sufficient if the appearance of danger is sufficient to alarm a person of reasonable prudence."

What we have said under the two preced-

ing assignments disposes of the objection to the charge contended for by the first proposition. The same authorities are applicable.

In regard to the second and third propositions, we will say that we cannot perceive that the court in its charge tells the jury that certain facts would constitute negligence. The charge left to the jury all questions of fact, and for them to determine whether such facts as found by them constituted contributory negligence. It nowhere assumes the existence of any fact or invades the jury's province. It groups the facts constituting appellee's defense, and correctly applies the law to them. *Railway v. McGlamory*, 89 Tex. 638, 35 S. W. 1058; *Railway v. Mangham*, 95 Tex. 418, 67 S. W. 765; *Railway v. Washington*, 84 Tex. 517, 63 S. W. 534.

The charge does not instruct the jury, as is contended by the fourth proposition, that, to justify plaintiff in attempting to escape from apparent danger, he should be in "imminent danger of losing his life or of receiving great bodily injury." It only requires that defendant's negligence made it reasonably appear to him that there was imminent danger of a collision between the trains, and that he had reasonable grounds for believing, and did believe, there was great danger of a collision, and that, if he remained on the train, he would be in great danger in losing his life or receiving great bodily injury. In *I. & G. N. Ry. v. Neff*, 87 Tex. 309, 28 S. W. 286, it is said: "The rule is sound and just which holds the party guilty of negligence responsible for the result, if that negligence has caused another to be surrounded by such circumstances as to him appear to threaten the destruction of life or serious injury to his person." The charge simply states this rule announced and sanctioned by the Supreme Court. It is the imminent appearance of danger that threatens the destruction of life or serious bodily injury, brought about by the negligence of another, that relieves one from contributory negligence, rendering it immaterial whether he acted prudently or imprudently, in his effort to save his life, or himself from serious bodily injury, and makes him, who was guilty of the negligence, responsible for the injury caused the other in his effort to escape the apprehended peril, regardless of the means by which he undertook to avert it. Fear of a slight injury does not justify one in encountering the risk of a greater injury to avoid it. The fear of death or serious injury naturally results from the apprehension of imminent danger of the collision of railway trains. And it is this fear, when brought about by the negligence of the company, that justifies one in encountering peril in order to escape it, and renders the company liable if he is injured in such endeavor.

The fourth assignment of error complains of this sentence in the charge: "Or if you find that plaintiff was guilty of any negli-

gence in going upon said platform, or in getting off said train, and that such negligence, if any, either caused or contributed to his injury, if any, then your verdict must be for the defendant, and you will so find." We can see nothing wrong in it. If plaintiff's negligence either caused or contributed to his injury, such negligence, regardless of the negligence of the defendant, will defeat his right to recover. *Railway v. Rowland*, 90 Tex. 365, 38 S. W. 756; *Culpepper v. Railway*, 90 Tex. 627, 40 S. W. 386; *Railway v. Hubbard* (Tex. Civ. App.) 70 S. W. 112.

The charge did not give undue prominence to the defense of contributory negligence. The issue of such defense was not referred to oftener than was necessary to make the charge complete and its meaning clear to the jury.

Our conclusions of fact dispose of the remaining assignment, which complains of the verdict being against the preponderance of the evidence.

There is no error in the judgment, and it is affirmed.

On Motion for Rehearing.

(Jan. 20, 1904.)

The undisputed evidence in this case shows that, if plaintiff's effort to get off the train contributed to his injury, such effort on his part proximately contributed to such injury. Indeed, such evidence shows that it not only proximately contributed to, but it was the efficient cause of, the injury. Therefore it was not error for the court to instruct the jury: "That if plaintiff's endeavor to get off said train at such time and place either caused or contributed to his injury, if any, then you are charged that plaintiff cannot recover."

The motion is overruled.

KELLEY & LYSLE MILLING CO. v. ADAMS.

(Supreme Court of Arkansas. Dec. 12, 1903.)

RES JUDICATA — JURISDICTION OF CIRCUIT COURT—FAILURE TO DELIVER GOODS SOLD—AGENCY FOR SELLER—SUFFICIENCY OF EVIDENCE.

1. In an action in the circuit court for failure to deliver goods sold, defendant answered that in an action before a justice of the county, in which the parties were reversed, the present plaintiff had set up the same cause of action as a counterclaim, and that the present defendant recovered judgment, which on appeal was affirmed by the circuit court, and was in full force. *Held*, that to sustain a demurrer to the plea of *res judicata* on the ground that the circuit court had no jurisdiction to try it was error.

2. Evidence in an action for failure to deliver goods sold examined, and *held* to show that one claimed by plaintiff to have been defendant's agent, through whom the purchase was effected, had authority only to solicit orders subject to defendant's approval; the order in the present case having been rejected by defendant.

73 S.W.—4

Appeal from Circuit Court, Independence County; Charles Coffin, Special Judge.

Action by D. D. Adams against the Kelley & Lysle Milling Co. Judgment for plaintiff, and defendant appeals. Reversed.

This was a suit instituted in the Independence circuit court by appellee (plaintiff below) against appellant (defendant below) to recover \$300 damages, which plaintiff alleged to have suffered by reason of the failure of defendant to perform a contract for the sale of 125 barrels of flour which plaintiff claimed to have purchased from defendant's agent, and which defendant failed to deliver. At the same time plaintiff filed an affidavit for attachment, and obtained service by process of garnishment against Powell & Powell, who had in their hands certain funds belonging to defendant, and having issued against defendant a warning order requiring it to appear and answer plaintiff's cause of action. On the 16th of April, 1901, the defendant filed its answer, in which it denied that plaintiff purchased from it the flour as alleged, and denied that it agreed to ship any flour to plaintiff upon the order alleged, or any other order. Defendant, for further answer to plaintiff's complaint, set up a former adjudication of plaintiff's alleged cause of action in a suit instituted by the Kelley & Lysle Milling Company against said plaintiff, D. D. Adams, on the 2d of October, 1899, in the justice court of I. N. Reed, a justice of the peace for Ruddell township, Independence county; alleging in that connection that the plaintiff, D. D. Adams, who was defendant in that suit, appeared in person and by attorney, and filed an answer and cross-complaint admitting the claim of the Kelley & Lysle Milling Company, and alleging as a counterclaim and set-off to the same the identical matters sued upon in this action, to wit, that on or about the 14th day of April, 1898, he (D. D. Adams) purchased from the Kelley & Lysle Milling Company 125 barrels of flour, at \$4.66 per barrel for best patent, and upon the same basis for other grades, and claiming damages in the sum of \$300 for the failure of said company to perform said contract and deliver said flour; that the plaintiff in that action demurred to the counterclaim and set-off of the said D. D. Adams in the suit before the justice of the peace, which demurrer was overruled, and, upon the issues raised by such answer, evidence was introduced, and the cause fully submitted to the justice, and judgment given by the said justice in favor of the Kelley & Lysle Milling Company for the full amount of its claim and costs; that from this judgment the said Adams appealed to the circuit court, and, upon the hearing of the appeal in the circuit court, judgment was rendered in favor of the said Kelley & Lysle Milling Company, affirming the judgment of the justice, and the same has not been overruled, set aside, or modified, and remains in full force and effect. Judgment for the

plaintiff, from which the milling company appealed.

R. H. Powell, for appellant. Yancey, Reeder & Casey and Morris M. Cohn, for appellee.

HUGHES, J. (after stating the facts). It appears that the plaintiff, Adams, claims to have purchased 125 barrels of flour of the defendant company through A. G. Anderson, who he alleges was the agent of said company. The defendant did not order the 125 barrels of flour through the said A. G. Anderson, and the company refused to fill the order. If Anderson was the agent of the milling company, and had the authority, as such agent, to sell flour for defendant generally, the judgment of the court in this case was right, and ought to be affirmed. But the testimony in the case tends to show that Anderson was merely authorized to solicit orders for flour, and send them to the Kelley & Lysle Milling Company, which would fill them, if it approved them, and ship the flour, but reserved the right to decline to fill any order sent to it by Anderson. Anderson testified that he had no specific understanding with the company, and had no contract with it in writing. The order in this case was taken by the clerk of Anderson in Anderson's absence, and was forwarded to the milling company for the flour to be shipped to Anderson. The name of Adams, the plaintiff, was not mentioned in the order. The company notified Anderson that it would not fill the order, and Anderson notified Adams that it declined to fill the order. In reference to his authority as agent of the company to sell flour for it, Mr. Anderson testified: "Q. And you say there was no understanding or arrangement, further than you were to solicit orders, and for your services to receive a commission of ten cents a barrel, and you had no further understanding from the Kelley & Lysle Milling Company? A. No; that is about the extent of it." Mr. Lysle, vice president of the Kelley & Lysle Milling Company, testified: "Q. Did not Anderson have full authority to take orders for your flour, and to make contracts for the sale of same, upon the prices given him by you? A. No; at no time did Mr. Anderson have authority from our company to make contracts for a pound of flour. He only had authority to solicit orders in the capacity of a broker, submit the orders to us, and, if we approved the orders and accepted them, they were filled; but no contract of sale was made, except by us direct. In other words, a contract was never a contract until we accepted the order." We think that the circuit court had jurisdiction to try the case on appeal from the justice of the peace, and that the court erred in sustaining a demurrer to the plea of *res judicata*. We find there was no evidence developed in the case tending to show that Anderson had authority to make contracts for the sale of the flour

of the Kelley & Lysle Milling Company. The evidence shows that Anderson had authority only to solicit orders for the sale of the company's flour, and send them to the company, which, if it approved them, filled them, and that the company made all contracts of sale. If Adams, the appellant, made an order for the flour, which was received by the company, and if it failed to notify him of its nonacceptance, he might have had reason to believe the order was accepted; and in such a case the company, if it failed to fill the order, might have been liable. But the evidence shows that the order was made in the name of Anderson, and that he was notified that the company could not fill it, and that he had notified Adams that it would not be filled. It does not appear that the company knew Adams in the transaction until some time after it had notified Anderson that it would not fill the order.

Finding no evidence in the case that Anderson had authority to make contracts for the sale of appellant's flour, and that there was no contract of sale of the 125 barrels of flour to appellee, and for the error in sustaining the demurrer, the judgment of the circuit court is reversed, and the cause is remanded for a new trial. The court erred in giving instructions upon the theory that Anderson was the general agent of the milling company. There was no evidence upon which to base such instructions, and they were misleading.

VAUGHN v. VILLAGE OF GREEN-CASTLE.

(Court of Appeals at Kansas City, Mo. Jan. 4, 1904.)

MUNICIPAL CORPORATIONS—VILLAGES—REAL PROPERTY—PARKS—POWER TO PURCHASE.

1. Rev. St. 1899, c. 91, art. 7, §§ 6067-6103, makes provisions for parks in cities. Section 6004 of article 6, relative to villages, declares that a village may grant, purchase, hold, and receive real and personal property, and may lease, sell, and dispose of the same for the benefit of the town, but contains no express power to provide for a park, or nothing from which such power is to be implied. *Held*, that a village had no authority to purchase land for a park.

Appeal from Circuit Court, Sullivan County; Jno. P. Butler, Judge.

Action by George Vaughn against the village of Greencastle. From a judgment for plaintiff, defendant appeals. Reversed.

Wattenbarger & Bingham and Calfee & Eubanks, for appellant. Wilson & Clapp, for respondent.

BROADDUS, J. Defendant is a village organized under article 6, c. 91, §§ 6004-6066, Rev. St. 1899. On March 6, 1892, at a meeting of the board of trustees of said village, a motion was made that the board discuss the proposition of buying a piece of land for

the purpose of converting the same into a park for the benefit of the village. After some discussion a further motion was made and carried that the chairman appoint a committee of three to act for the village and negotiate with one George Vaughn to purchase from him $1\frac{1}{2}$ acres of land for said park. A committee was accordingly appointed, which at an adjourned meeting of the board reported favorably, and that they had agreed to purchase amount of land named from said Vaughn for \$250, and that he had agreed to make a deed for the same on an advance payment of the purchase price. A motion was made and carried to accept said report, whereupon, on motion made and carried, a warrant was drawn on the village treasurer for \$50 advance payment, and issued to said Vaughn, who thereupon made a deed to the property in question in favor of the village, and deposited same with a third party. Afterwards the defendant refused to accept said deed, and further refused to pay the warrant for \$50 advance payment so issued as aforesaid. This suit is to compel payment of the same. Plaintiff recovered judgment, and defendant appealed.

The defendant contends that under the statutes, which is its charter, it had no authority to purchase land for a park, and that, if it had had such authority, it could only exercise it in the manner provided by law; that is, by ordinance. Section 6004 of said article 6 and chapter 91, Rev. St. 1899, amongst other things provides that a village "may grant, purchase, hold and receive property, real and personal, within such town, and no other, burial grounds and cemeteries excepted, and may lease, sell and dispose of the same for the benefit of the town," etc. Under this proviso there can be no question of the right of an incorporated village to purchase real property, but it can hardly be contended that it can do so except for village purposes. In fact, there is no such claim upon the part of plaintiff. Section 6010 of said article provides that a board of village trustees shall, by ordinance, have the power to "erect and maintain calabozos, poorhouses and hospitals," and "to organize and maintain fire companies," etc. The power being conferred to purchase and hold real estate, it is a necessary inference that, under the power to erect and maintain poorhouses, hospitals, and fire companies, the village for these purposes was authorized to purchase, hold, and receive real estate. And these powers granted to villages are almost indispensable to their existence as minor municipal departments of state government. Said section 6010, contained in more than an entire page of the statutes, specifically enumerates all the powers which a village may exercise by way of by-laws and ordinances, and in which no reference is made whatever to parks. It is, however, the law that a municipal corporation possesses and can exercise powers other

than those expressly granted, viz., "those necessarily or fairly implied in or incident to the powers expressly granted," and "those essential to declared objects and purposes of the corporations, not simply convenient, but indispensable." *Knapp v. Kansas City*, 48 Mo. App. 485, and cases there cited. The power of a village to purchase and hold real estate for park purposes not being expressly granted, we must look to the different provisions of the article in question in order to ascertain if there be any from which such power may be reasonably implied; and, as no words can be found therein which even in the remotest degree contemplate that villages are authorized to establish and maintain parks, there is nothing from which an inference in that respect may be implied. But it is insisted that, as the purpose for which land may be purchased and held is not prescribed, defined, or limited, it can therefore be bought and held for any legitimate purpose. But the term "legitimate purpose," as applied to the acts of municipal corporations, means such a purpose as is authorized by the municipal charter. It was not the intention of the Legislature to clothe incorporated villages with general power to deal in real estate in all instances where it was not actually prohibited; for instance, as a private person might do. A village park may be in some sense an attraction and a convenience to a village, but it is not indispensable; and it seems that it was not so considered by the Legislature. Article 7 of said chapter (sections 6067-6103) makes provisions for parks for cities, but no such provision can be found anywhere in the chapter relating to parks for villages. The provision in the one instance for parks and the omission in the other to so provide for villages is a very clear intimation that the Legislature did not deem them indispensable to the latter. And, taking into consideration the entire law governing cities, towns, and villages, we find no authority vesting in the trustees of the latter the right to purchase real estate for park purposes. It follows that, as there is no express authority in the village charter, and none to be implied, and the park not being indispensable, the defendant was without authority of any kind to make the purchase of the land for the purpose contemplated. Such being our holding, the remaining question is of no importance, and therefore not decided.

The cause is reversed. All concur.

WHITE v. SMITH et al.

(Court of Appeals at Kansas City, Mo. Jan. 4, 1904.)

MARRIED WOMEN—EXEMPTIONS.

1. Under the express provisions of Rev. St. 1899, § 4335, a married woman may claim all exemptions given to the head of a family,

¶ 1. See Exemptions, vol. 23, Cent. Dig. §§ 14, 21.

though her husband may be such head, except where he has claimed the exemptions for the protection of his own property.

Appeal from Circuit Court, Cole County.

Action by E. C. White against George A. Smith and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Barnett & Barnett, for appellant. Silver & Brown, for respondents.

BROADDUS, J. This is a suit against defendant Smith and his securities on his bond as constable. The case was begun in a justice's court, and was tried on appeal in the circuit court, where defendants prevailed, and plaintiff appealed. The facts were that plaintiff had obtained a judgment before a justice against one R. H. McKay and his wife for \$41.98, and that one Peasner, as executor of a certain estate, held in his hands the sum of \$50, which was a part of the wife's distributable share in said estate, and that execution was issued against the husband and wife and said Peasner was summoned as garnishee, who, upon interrogatories being filed, answered that he was owing said sum to the wife, and paid the same to the constable, taking his receipt therefor. The wife gave notice to the constable that she claimed the money in his hands as exempt under section 4335, Rev. St. 1899. The constable, after some hesitation, paid her the money. The plaintiff claims that in so doing he committed a breach of his bond. The evidence tends to show that this was all the property owned by the wife, except certain other funds in the hands of said executor, upon which she had created a lien. It was proved that McKay, the husband and head of the family, made no claim of exemption in his own behalf. It is contended by plaintiff that, as she lived with her husband, and was being supported by him, she was not the head of a family, and therefore not entitled to the exemptions provided by the statute. In *Gladney v. Berkley*, 75 Mo. App. 98, the court held that: "As between husband and wife, there can be but one homestead right, and that, in the absence of a statute, this right must be asserted in the name of the husband, because so long as the marriage relation exists de jure he must be regarded as the head of the family within the meaning of the statute." The homestead in question belonged to the husband, and the court's decision had reference to property of that status only. It could not be held to apply to a case where the property in question belonged to the wife, because it would clearly be against the very letter of said section 4335, which reads as follows: "A married woman shall be deemed a feme sole so far as to enable her to carry on and transact business in her own name, to contract and be contracted with, to sue and be sued, and to enforce and have enforced against her property such judgments as may be rendered for and against her, and may sue and be sued at law and in equity with or without her hus-

band being joined as a party. Provided, a married woman may invoke all exemption and homestead laws now in force for protection of personal and real property owned by the head of a family except in cases where the husband has claimed such exemption and homestead for the protection of his own property." The language of the act is that "a married woman may invoke all exemption and homestead laws, notwithstanding the husband may be the head of the family." The object of the statute seems to have been for the purpose of protecting a married woman, because under existing laws at the time the act was passed she could not claim the benefit of the exemption and homestead laws because she was not the head of a family. Therefore it is in the nature of an enabling statute. It does not take away the husband's right as the head of the family to claim the benefit of said exemption and homestead laws, and the wife's right to avail herself of said laws is not an absolute right, for, if the husband has claimed them, the wife is precluded from doing so. It is only in cases where the husband has failed to exercise his right that the wife may exercise her own. The statute has thus provided that there shall not be two exemptions and two homesteads for the benefit of the same family. In the case under consideration the husband and wife were both judgment debtors, and, the husband having failed to claim his exemption, the wife was authorized to do so by the very letter of the act.

We have found no decision by the appellate courts of this state on the question, but we think it is clear that the judgment was right, and it is therefore affirmed. All concur.

PAGE v. ROBERTS, JOHNSON & RAND SHOE CO.*

(Court of Appeals at St. Louis, Mo. Dec. 15, 1903.)

BILLS OF EXCEPTIONS—INSTRUCTIONS—COMMENTING ON EVIDENCE—TRUSTEE IN BANKRUPTCY—PROOF OF DUE APPOINTMENT.

1. Under Rev. St. 1899, § 728, providing that all exceptions taken during the trial of a cause before the same jury shall be embraced in the same bill of exceptions, while the final bill of exceptions must be embraced in one document, it is proper to preserve exceptions by separate term bills.

2. Under Rev. St. 1899, § 748, instructions may, under proper conditions, be given after the jury has retired.

3. An instruction that if the jury find for plaintiff they will assess the damages at the reasonable value of the merchandise, not exceeding \$850, and that plaintiff claims \$571.24 as such reasonable value, is erroneous, as commenting on the evidence, and making too conspicuous a feature of the case which is an issue for the jury.

4. Under Bankr. Act July 1, 1898, c. 4, § 18, "e" and "f," 30 Stat. 551, c. 541 [U. S. Comp. St. 1901, p. 3429], primarily committing the adjudication in bankruptcy to the judge, and only in his absence authorizing the clerk to refer the case to the referee, where the adjudication

*Rehearing denied January 5, 1904.

was by a referee there must, in an action by the trustee in bankruptcy, be affirmative proof the judge was absent, giving the referee jurisdiction, notwithstanding section 21, "d" and "e." 30 Stat. 552 [U. S. Comp. St. 1901, p. 3430], making copies of proceedings before a referee admissible with the force and effect of records of the court, and a copy of the order approving the trustee's bond conclusive evidence of the vesting in him of title to the bankrupt's property.

5. Though evidence in an action by a trustee in bankruptcy to show his due appointment is admitted without objection, its sufficiency may afterwards be questioned.

6. An instruction in an action by a trustee in bankruptcy, whose petition alleges the transfer of merchandise as a preference and prays judgment for its value, that verdict, if for plaintiff, shall be for the value of the "property, money or both," given the creditor, is too broad.

Appeal from St. Louis Circuit Court; Horatio D. Wood, Judge.

Action by J. G. Page, trustee in bankruptcy, against the Roberts, Johnson & Rand Shoe Company. Judgment for plaintiff. Defendant appeals. Reversed.

Virgil Rule, for appellant. Lee W. Grant and P. B. Peabody, for respondent.

Statement.

REYBURN, J. This is an action under the bankrupt act for recovery of an alleged preference obtained by defendant corporation, as a creditor of H. U. Williams, a bankrupt. The petition, commendably concise, is as follows: "Plaintiff states that on May 22, 1902, a petition in bankruptcy was filed against H. U. Williams in the District Court of the United States for the Eastern Division of the Southern District of Georgia, and that thereafter the said H. U. Williams was duly adjudicated bankrupt, and that thereafter this plaintiff was duly elected trustee of the estate of said bankrupt, and has duly qualified as such. That defendant is, and was at the times hereinafter mentioned, a corporation duly organized and existing according to law. For its cause of action, plaintiff states that on or about the 22d day of May, 1902, the said H. U. Williams was insolvent, and was indebted to this defendant in the sum of \$874.40, and in payment on said indebtedness transferred to this defendant merchandise consisting of shoes, of the reasonable value of \$850. That the effect of such transfer of said property was that this defendant obtained a greater percentage of its debt than any other creditor of said bankrupt of the same class. That defendant and its agents had reasonable grounds to believe at said time that it was intended by such transfer of property to give a preference to this defendant within the meaning of the acts of Congress relating to bankruptcy. That after this plaintiff had been elected trustee, and had qualified, he notified defendant that he avoided said transfer of property as a preference, and he demanded of defendant the return of said property, but that defendant re-

fused and still refuses to return the same. Wherefore plaintiff prays judgment in the sum of \$850 and his costs." Defendant pleaded a general denial by way of answer.

The evidence disclosed that prior to May 2, 1902, in obedience to telegraphic instructions from defendant, Pinckard, its agent, called on Williams at his place of business in the state of Georgia, and demanded payment of its indebtedness of \$874.40. Williams stated he was unable to make payment, and Pinckard, believing he had grounds for attachment, insisted on payment or the return of those shoes in stock bought from defendant. After taking legal advice, Williams turned over to Pinckard one lot of shoes, amounting to about \$200, which were reshipped to defendant. For another lot, of the value of \$394, Pinckard agreed to accept their invoice price, less 6 per cent., and these goods were left in Williams' possession under an arrangement with a local bank, which was in dispute, but resulted in delivery to Pinckard of a check for \$371.24. Pinckard took notes to the amount of \$239.66 of the debtor for the balance of the claim; also giving credit for the amount of the goods for which the check was given. Williams' indebtedness, exclusive of the obligation to defendant, then aggregated \$5,000, and so remained until, 20 days later, he filed a petition in voluntary bankruptcy, under which he was adjudicated a bankrupt by the referee, June 24th. The stock of the bankrupt inventoried \$2,200, the book accounts were of the face value of \$1,400, and a piece of land was valued at \$200; but the total realized from the bankrupt estate was about \$1,700.

Opinion.

1. This action was tried before a jury, which, after deliberating upon the verdict, addressed a communication to the trial judge, requesting him to give the amount to be inserted to fill out the verdict; that the instructions did not contain it. The court made known to the attorneys of the respective parties the contents of the foreman's note, and stated he would instruct the jury as to the measure of damages, and let each side state to the jury what they had to say on that point. Defendant's counsel objected to such proceedings and to the giving of any further instructions in the case, and left the courtroom, without then saving any exception. The court, of its own motion, wrote out and sent by the sheriff to the jury room the following: "The court instructs the jury that if they find in favor of the plaintiff they will assess the damages at the reasonable value of the merchandise turned over by said Williams to defendant, not exceeding the sum of \$850, and that the plaintiff claims the sum of \$571.24 as such reasonable value." Whereupon the jury returned a majority verdict in favor of plaintiff, assessing his damages at the sum of \$571.24. On the day following, defendant, through its attorney, presented,

had signed by the trial judge, and filed a special bill of exceptions, which later, at a succeeding term of court, after the motion for new trial had been overruled, was embodied in the general bill of exceptions bearing date June 23, 1903, which in other respects was in the usual form. The statute provides that all exceptions taken during the trial of a cause before the same jury shall be embraced in the same bill of exceptions. Rev. St. 1890, § 728. In an early case, it was held that the law now allowed but one bill of exceptions, and the matters excepted to during the trial are to be noted at the time, and after the trial is over, and the motion for a new trial, or other appropriate motion, has been overruled, a bill of exceptions is to be prepared, stating the matters excepted to in the order in which they occurred during the trial. *Dougherty v. Whitehead*, 81 Mo. 255. This court, in a recent decision construing the above section, has held that it was a mandatory provision, and contemplated that the final bill of exceptions should be embraced in one document. *Atchison v. Railway*, 94 Mo. App. 572, 72 S. W. 489. The last-cited case was intended, however, by this court to be confined to bills of exception taken after the appeal had been allowed, and was not meant to dispense with term bills of exception. The approved practice, if the action of the trial court is desired to be reviewed by the appellate court, is to preserve the exception by proper bill at the term at which the ruling, the subject of exception, was had, and incorporate such term bills in the final bill of exceptions—ultimately taken as a step for appeal of the cause, which was the course adopted in this proceeding, and which has received the sanction of the Supreme Court. *Smith v. Baer*, 166 Mo. 392, 66 S. W. 166.

2. The section of the statutes (Rev. St. 1890, § 748) relating to the stage of the trial at which the instructions shall be given, and the right of a trial court to instruct a jury at a period other than immediately after the evidence is concluded, will be found elaborately discussed by the Supreme Court in *Yore v. Transfer Co.*, 147 Mo. 879, 49 S. W. 855, where the practice was approved permitting the giving of an instruction at any time during the consideration of the case by the jury, provided the instruction announced a correct proposition of law applicable to the facts of the case, given in open court, and affording the opposing parties an opportunity to know its contents and note exceptions thereto, if desired, or to ask further explanatory instructions, if deemed necessary. The instruction herein was given under the conditions held requisite by the above decision, and we are restricted to weighing its contents. Waiving the doubt whether the defendant is entitled to have the question considered, as it is very questionable whether the exception was properly saved, we are unable to escape the conviction that the concluding clause, advising the jury of the amount claimed by

plaintiff as the reasonable value of the merchandise asserted to constitute the preference, is amenable to the twofold charge that it is a comment upon the evidence, and tends to make too conspicuous a feature of the case which was an important issue under submission to and properly to be determined by the jury. Its materiality and prejudicial tendency is attested by the prompt return thereafter by the jury of a verdict in the amount named in the instruction.

3. The proof offered to establish the allegations made in the petition of the bankruptcy proceedings, and the election and qualification of plaintiff as trustee of the estate of Williams, consisted of the following, both entitled as of the District Court of the United States for the Eastern Division of the Southern District of Georgia, and in the matter of the bankrupt:

"At Brunswick, in said district, on the twenty-fourth day of June, A. D. 1902, before me, A. J. Crovatt, referee of said court in bankruptcy, the petition of H. U. Williams, that he be adjudged a bankrupt within the true intent and meaning of the acts of Congress relating to bankruptcy, having been heard and duly considered, the said H. U. Williams is hereby declared and adjudged bankrupt accordingly.

"A. J. Crovatt, Referee in Bankruptcy."

"I, A. J. Crovatt, one of the referees in bankruptcy of said court, do hereby certify that the foregoing is a true and accurate copy of the original order of adjudication in the case of H. U. Williams, bankrupt, original of file in my office.

"Dated at Brunswick, Georgia, March 23, 1903.

"A. J. Crovatt, Referee in Bankruptcy."

Also a copy of the bond of plaintiff as such trustee, and its approval by the referee in bankruptcy, and a certificate of authentication of both by the same referee.

These documents were admitted in evidence without objection thereto by defendant, and respondent now insists that the latter must be held to have waived the contention, now sought to be pressed, that there was no proof that Williams was legally adjudicated a bankrupt, in the absence of evidence in the record that the judge was absent from the district, or the division of the district, in which the petition was pending. The bankrupt act provides that, "If the judge is absent from the district, or the division of the district in which the petition is pending, on the next day after the last day on which pleadings may be filed, and none have been filed by the bankrupt or any of his creditors, the clerk shall forthwith refer the case to the referee." The preceding subdivision declares, "If, on the last day within which pleadings may be filed, none are filed by the bankrupt or any of his creditors, the judge shall, on the next day, if present, or as soon thereafter as practicable, make the adjudication or dismiss the petition." Act

July 1, 1898, c. 4, § 18, "e" and "f," 30 Stat. 551, c. 541 [U. S. Comp. St. 1901, p. 3429]. It is manifest, from this language of these subdivisions of this chapter of the bankrupt act, that primarily the adjudication in bankruptcy is committed to and must be made by the judge of the court in which the proceeding is pending, and only in the absence of such judge from the district, or the division of the district, is authority conferred upon the clerk to refer the case to the referee to whom, as the arm of the court, jurisdiction attaches to consider the petition in such case, make adjudication, or dismiss the petition. Chapter 5, § 35, 30 Stat. 555 [U. S. Comp. St. 1901, p. 3435]. The absence of the federal judge from the district, or from the division of the district, is a condition precedent to the lodging of authority in the referee. Such absence of the judge is a jurisdictional fact which transfers the right and power of such absent judge to the referee, upon action referring the case to him by the clerk, to make the adjudication or dismiss the petition; and, as a fact essential to create or confer jurisdiction, affirmative evidence of its existence must appear, and no presumption respecting it can be indulged in. It is true that the act further provides that certified copies of proceedings before a referee shall be admitted in evidence with like force and effect as certified copies of the records of district courts of the United States, and that a certified copy of the order approving the bond of a trustee shall constitute conclusive evidence of the vesting in him of the title to the property of the bankrupt (section 21, "d" and "e," 30 Stat. 552 [U. S. Comp. St. 1901, p. 3430]), but impliedly upon the assumption that the bankruptcy be duly adjudged in conformity to the terms of the act. In the forms promulgated by the Supreme Court of the United States, November 28, 1898, pursuant to section 30, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3434], a form for reference by the clerk to the referee, in the judge's absence, is adopted (Form No. 15; 18 Sup. Ct. xxv), which recites the absence of the judge of the district. Nor is appellant precluded from presenting and urging this objection although it made no objection to the fragments of evidence in the record, for the introduction of this imperfect proof is not now objected to, but its insufficiency and failure to sustain the averments of the petition are pressed.

4. In its charge to the jury, the trial court included the following instruction: "If the jury find in favor of plaintiff they will render a verdict for such sum as will equal the value of the property, money or both, given by Williams to Pinckard in partial settlement of his debt to defendant." The petition alleged the transfer of merchandise, of the value stated, as a preference unlawful under the acts of Congress, and prayed judgment for its value. The instruction was broader than the pleading upon which it was based, and therefore fatally erroneous. Wolfe v.

Supreme Lodge, 160 Mo. 675, 61 S. W. 637; Friedman v. Pulitzer, etc., Co. (No. 8,253, Mo. App.) 77 S. W. 340.

In view of the conclusions reached and above expressed, it is not deemed essential to indulge in considering other propositions presented by appellant, which, even if worthy of determination, are not likely to be repeated upon a retrial. For errors above noted, the judgment is reversed and the cause remanded.

BLAND, P. J., and GOODE, J., concur.

KUBE v. ST. LOUIS TRANSIT CO.

(Court of Appeals at St. Louis, Mo. Dec. 15, 1903.)

STREET RAILWAYS—INJURIES TO PEDESTRIANS—NEGLIGENCE—CHILDREN—CARE REQUIRED OF OTHERS—PROXIMATE CAUSE—MISCHANCE OF PERSON INJURED.

1. Where an individual, by some accident, precipitates a casualty resulting in injury to himself owing to a dangerous situation brought about by another's negligence, his own mischance, instead of the prior negligence of the other, is not necessarily deemed the proximate cause of the injury; but whether the injured person is entitled to recover from the negligent one depends on whether he himself was guilty of negligence that proximately caused the injury.

2. The degree of care resting on street railway employes to avoid injury to a child on the street is the same as that resting on it generally to avoid injuring persons in the streets; that is, merely ordinary vigilance and activity.

3. The obligation imposed on street railway employes to pedestrians is to take merely the care that men of ordinary prudence take when confronted by similar situations and conditions, and what precautions a man of ordinary prudence will take to prevent accidents depends on his knowledge of facts which suggest the probability of such accidents ensuing, unless means are adopted to avert it, and suggest, therefore, as well, the adoption of such means.

4. A motorman in charge of a street car must stop his car before reaching a person exposed to danger on the track if he has time to do so after discovering the perilous position.

5. In an action against a street railway for injuries to a child, evidence that the motorman was accustomed to his run, knew that a number of children usually came upon and crossed the street at the hour that he was passing, and could see for a long distance that there was no policeman on guard to protect the children as usual, but nevertheless ran his car at an excessive speed, made a question for the jury as to defendant's negligence.

Appeal from St. Louis Circuit Court; J. R. Kinealy, Judge.

Action by Nicholas Kube, by George F. Dimitry, next friend, against the St. Louis Transit Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Jones, Jones & Hocker, for appellant. Jos. A. Wright, for respondent.

GOODE, J. Plaintiff is a minor child, and was not quite seven years old when he received the injury which is the basis of this action. He was a student at the Ashland

¶ 4. See Street Railroads, vol. 44, Cent. Dig. § 197.

School in St. Louis, which is situate on the east side of Newstead avenue at the corner of Sacramento. About 800 children of ages ranging from 6 to 15 years attended that school. It was the custom to have a policeman stationed at the locality at dismissal hours in order to protect the children from injury by street cars while crossing Newstead avenue, on which there are tracks. On the day the accident happened to plaintiff the police officer had been temporarily withdrawn from that station on account of an accident at the Fair Grounds. The boy Nicholas Kube was dismissed, along with a crowd of his school fellows, about half past 3 o'clock in the afternoon, and the children hastened, as was their wont, in various directions; many of them, among whom was the plaintiff, crossing the street to the west side on the way to their homes. Plaintiff, while crossing the street, stumbled or fell on the track, and was struck by a car. But two persons besides the car crew, who were not called to testify, were eyewitnesses of the accident, and they were school children. One of them—Cecella Spindler—told it as follows: "Q. When was the accident? A. The 7th of January, and I was just coming out of my room when I seen the little boy—Q. What time in the afternoon? A. About after 3 o'clock; just when school was letting out. Q. What room are you in? A. I am in 6. Q. What floor is that on? A. Third floor. Q. Where did you first notice Kube, this little boy, when you came out of school? A. I was going straight home, and he was running—Q. Where? A. He was running across the tracks. Then he just stumbled on the tracks, and hardly couldn't get up—the car was coming at such awful speed—he couldn't get up, and the car ran over him. Q. Was the car coming fast or slow? A. Fast. Q. Did the motorman ring the bell? A. He rang the bell when he was right near him. Q. How close to the boy when he rang the bell? A. About six feet. Q. Did he ring the bell before that, that you heard? A. No, sir; I didn't hear him ring the bell. Just when he was trying to get by I heard the bell. Q. What became of the boy? Where did the car hit him? A. First it hit him in the leg; then he took a somersault; and when the car ran over him I seen him lying in the street there. * * * Q. Where was he when you first saw him? A. He was right crossing the street. Q. Which side of Sacramento, north or south? A. I think it was north. Q. North side of the street? A. Yes, sir. Q. From the east over toward the west side? A. Yes, sir. Q. Was he in the street when you first saw him? A. Yes, sir; he was in the street, and he was running. Then he stumbled. Q. Was he running after anybody? A. I don't know if he was running after anybody. Q. Was anybody running after him? A. I don't know whether anybody was running after him. Q. As he ran across the street, you saw the car com-

ing? A. Yes, sir. Q. You say he fell down? A. He fell down. Q. Where did he fall? A. on the car track. Q. Right in the middle of the car track? A. Yes, sir. Q. What part of the car hit him? A. The fender hit him first. Q. Where was he lying after the car struck him? A. In the middle of the track. Q. So the car must have run over him? A. Yes, sir. Q. Right square over him? A. Yes, sir. Q. Sure about that? A. Yes, sir. Q. How far away were you? A. I was about half a block away. I was standing at the crossing when it happened." Willie Vought testified: "Q. Were you at school the day this little Kube boy got hurt? A. Yes, sir. Q. How long have you known this little Kube boy? A. About a month. Q. A month before the accident? A. Yes, sir. Q. Did you see him, on the day he was hurt, coming out of school? A. Yes, sir. Q. Did you see the car that struck him? A. Yes, sir. Q. Tell the jury just what you saw there. Where was the boy when you came out of the school? A. He was running across the street, and he stumbled, and the car came, and he rang the bell, but he couldn't get up in time, and the car hit him. Q. How far was the car away from the boy when the motorman rang the bell? A. About eight feet. Q. About eight feet away? A. Yes, sir. Q. Did you hear him ring the bell before that? A. No, sir. Q. Was the car running fast or slow? A. Fast. Q. Where did the car hit this little fellow? A. Hit him on the leg first. Q. Where did it hit him next? A. He went under the car, and I didn't see him after that. * * * Q. Which crossing was he on, north or south crossing? A. He was on the south crossing. Q. On the south crossing? A. Yes, sir. Q. And he was running from the east over to the west side of the street? A. Yes, sir. Q. Did he fall before the car struck him or afterwards? A. He fell before the car struck him. Q. Fell on the tracks? A. Yes, sir."

For the plaintiff the court instructed that the law required persons situated as Nicholas Kube was when and before the accident happened to exercise ordinary caution to avoid injury to themselves, and that the absence of such caution constituted negligence; but that in determining whether plaintiff was exercising such caution the jury should take into consideration his age and capacity; that if, in going on defendant's track, plaintiff was using the degree of care which, according to the ordinary experience of mankind, is to be expected of one of his capacity, he was not guilty of negligence. Further, that the law required the defendant company's servants to be watchful to see that the way was clear in the direction in which a car was going, and that where they had reason to anticipate the sudden and unexpected appearance of children on or approaching the track they should so manage the brakes and controller of the car as to be able to stop quickly and readily, if necessary; that if, under all the circumstances detailed in the

evidence, the jury found there was reason to anticipate the sudden and unexpected appearance of children on the track at the intersection of Newstead and Sacramento avenues, and that the defendant's servants in charge of the car were not so managing its controller and brakes as to be able to stop quickly should occasion require, and further found the injuries sustained by plaintiff were caused by the failure of defendant's servants to so manage said controller and brakes, their verdict should be for the plaintiff; unless they found the plaintiff himself was not using the degree of care to be expected of a boy of his age and capacity in the circumstances shown.

For the defendant the court instructed substantially as follows: That the burden was on the plaintiff to establish by the greater weight of evidence that the agents or servants in charge of the car were guilty of some act of negligence or want of ordinary care which was the direct, proximate, and efficient cause of the injury, and, unless plaintiff had so proven, he was not entitled to recover. That the mere fact of the accident was no evidence of negligence in itself, but, to find for the plaintiff, the jury must find that at the time of his injury defendant's servants were guilty of some want of ordinary care; that is to say, of doing some act which would not have been done by an ordinarily careful person in similar circumstances, or omitting some act that would not have been omitted by such a person in the circumstances. That, in order for the plaintiff to recover on account of the speed of the defendant's car, the jury must find it was being run at a speed which was negligent under the circumstances; or, in other words, at such a speed as a reasonably careful and prudent motorman would not have tolerated; and unless they so found plaintiff could not recover on the ground of excessive speed. That, in order to find for the plaintiff on the theory that the defendant's motorman, by the exercise of ordinary care, would have seen the plaintiff in time to stop his car and avoid a collision, the jury must find plaintiff was in a position of peril on or near defendant's track when the car was a sufficient distance away for the motorman, by the exercise of ordinary care, to have stopped or checked the car before it reached plaintiff. That the defendant was not required to sound the car gong at all times, and, in order to find for the plaintiff on account of failure, if failure there was, to sound the gong, the jury must find that an ordinarily careful motorman, situate as defendant's motorman was, would have sounded the gong on approaching Sacramento avenue. That, if they did so find, they could not return a verdict for the plaintiff for failure to sound the gong, unless they further found that such failure was the direct and proximate cause of plaintiff's injury. That, if the jury found from the evidence that plaintiff ran in front of defendant's car with-

out warning, and under such circumstances as to make it impossible to stop the car and avoid a collision after the motorman saw, or by the exercise of ordinary care might have seen, plaintiff was about to place himself in contact with the car, the verdict must be for the defendant. That the absence of a policeman from the place could not make the defendant liable. That if the jury found the plaintiff failed to exercise the caution in caring for himself usually exercised by persons of his age, experience, and intelligence in respect to placing himself in danger, at a time when it was impossible for the motorman to avoid injuring him by the exercise of ordinary care, plaintiff was not entitled to recover.

A peremptory instruction requested by the defendant was refused, as were others to the effect that there was no evidence to show the plaintiff was in a position of peril for a sufficient length of time for the motorman to have averted the collision by the exercise of ordinary care, that there was no evidence that the car was run at a negligent or careless rate of speed, no evidence that defendant failed to sound the gong, and that the jury could not find for the plaintiff on those grounds.

A verdict for \$1,000 was returned in favor of the plaintiff. Judgment was entered accordingly, and defendant appealed.

Opinion.

The point pressed on our attention is that on the whole evidence a nonsuit should have been ordered. The argument made in support of this proposition is based on the assumption that plaintiff was crossing the track far enough ahead of the car to have passed over safely if he had not fallen; hence the fall or stumble was the proximate cause of the accident; not negligence on the part of the motorman in running at too high speed, or failing to stop the car as quickly as possible after he discovered the danger of running over the boy. Several cases are cited in support of this point. *Barkley v. Railroad*, 96 Mo. 367, 9 S. W. 793; *Boland v. Railroad*, 36 Mo. 484; *Kennedy v. Railroad*, 48 Mo. App. 1; *Kline v. Traction Co. (Pa.)* 37 Atl. 522; *Stabenau v. Ry. (N. Y.)* 50 N. E. 277, 63 Am. St. Rep. 698; *Fenton v. Ry.*, 126 N. Y. 625, 28 N. E. 967. We do not consider it so absolutely certain that plaintiff would have crossed the track safely, if he had not stumbled, as to preclude the possibility of a reasonable inference to the contrary. The testimony of the eye witnesses is consistent with the theory that the boy was struck on the leg after he stumbled, but before he fell to the ground. One witness said the car first hit him on the leg, then he took a somersault, and when the car ran over him he was lying in the street. The other witness gave about the same version, saying the car hit him on the leg first, and he went under the car. True, this witness swore he fell on the tracks before the car struck him, but the en-

tire evidence allows the inference that plaintiff stumbled, and, before he could recover himself, was hit, and fell to the ground. He could hardly have been thrown a somersault if he was prostrate when first struck. What is controverted is the sufficiency of the evidence as a whole to raise an issue of fact for the jury's decision as to whether the plaintiff, despite his stumble or fall, could have been saved from harm if the car had been moving at what was a reasonable speed, considering the likelihood of children being in the street. If an individual, by some involuntary mischance, precipitates a casualty resulting in injury to himself, but was exposed to danger of the casualty by another's negligence, the law does not always construe his own mischance, instead of the prior negligence of the other party, to be the proximate cause of the injury, and shut him off from damages. Whether the injured party will be denied relief depends on whether he himself was guilty of negligence that proximately caused the harmful accident.

There are numerous negligences that only result in mishaps because of some incident, like the fall of this boy, but in which the negligence itself, and not the mishap which made it potent to do harm, was the proximate cause of the harm. In *Lore v. Mfg. Co.*, 160 Mo. 608, 61 S. W. 678, the plaintiff, a girl of 16, slipped on the greasy floor of a factory, and as she fell thrust her arm into some insufficiently guarded cogwheels and gearing machinery, whereby it was crushed. The negligence of the defendant consisted in working the machinery without having the guards in good repair, as the statute required it to have. The contention was advanced that the girl assumed the risk of slipping on the floor, and could not recover; for, although the machinery was unguarded, she would not have been hurt but for her fall. In dealing with this contention the Supreme Court said the slipping was not the sole cause of the injury; which would not and could not have happened but for another cause—the insufficient guard around the gearing; and that, as plaintiff was in the exercise of ordinary care at the time she accidentally slipped, and would not have been hurt except for the unguarded machinery, she had a good case. A similar instance was *Musick v. Dold Packing Co.*, 58 Mo. App. 322. The plaintiff therein slipped on a piece of ice, or a slippery floor, and was thereby caused to fall into a vat of hot water negligently left uncovered. The defendant complained of error because the court had refused an instruction that, if the plaintiff was injured by slipping, there could be no recovery, as to which the court said: "Besides this, the negligence charged in the petition was that the defendant had maintained said vat in an unfinished and incomplete condition, etc. The facts embraced within the assumption of the instruction, if true, would not excuse the defendant from its liability to plaintiff for

the injuries alleged to have resulted to plaintiff in consequence of the defendant's breach of duty. It is true that, if the plaintiff had not slipped, his limb would not have been plunged into the hot-water tank. It is equally true that, though he slipped, the disaster would not have overtaken him had not the tank been uncovered. The slipping was not the sole cause of the injury. The latter would not have occurred except for the presence and co-existence of both causes. The cause of the plaintiff's slipping was altogether accidental. If it was the sole cause of the injury, the defendant is not liable. But the injury would not have resulted had not another cause combined with the accidental cause. If the plaintiff was in the exercise of ordinary care and prudence at the time he slipped, and the injury is attributable to the absence of the cover over the tank, together with the slipping; then the plaintiff should recover. If the direct and proximate cause of the injury was the uncovered and unprotected condition of the tank, then plaintiff would be entitled to recover though the slipping of the plaintiff contributed to the injury."

The cases dealing with accidents to children on car tracks which we have cited from the defendant's brief are unlike this one, since the several casualties which gave rise to them occurred at points on streets where the carmen had no reason to anticipate the presence of a crowd of children, and therefore no reason to run their cars at less than the speed permissible elsewhere. In some of them the injured child had fallen on the track before the car reached it; but, whether that happened or not, the decision exonerating the railway company was based in every instance on testimony proving the child darted suddenly on the track when a car was approaching at considerable speed, and so near that it could not be stopped before reaching the victim. The vigilance and activity obligatory on the defendant's servants to avoid hurting the plaintiff were the same in degree as rest on it generally to avoid harm to persons in city streets; that is, ordinary vigilance and activity, not extraordinary. Although less care for their own safety is exacted of young children than of individuals of full capacity, the general rule for measuring the care to be observed by others in such instances is not raised in favor of children. *Stanley v. Railroad*, 114 Mo. 606, 21 S. W. 832. But, while only ordinary care must be taken by the servants of railway companies to avoid hurting pedestrians in streets, whether the pedestrians be children or adults, greater precautions are necessary in order to fulfill the rule in some instances than in others. The obligation imposed by the law is to take the care that men of common prudence take when confronted by similar situations and conditions; not what men of extreme prudence might take. *Frick v. Railway Company*, 75 Mo. 595. What precautions a man

of ordinary prudence will take to prevent a catastrophe depends on his knowledge of facts which suggest the probability of a catastrophe ensuing unless means are adopted to avert it, and suggest, therefore, as well the adoption of such means. *Bowen v. Ry.*, 95 Mo. 268, 8 S. W. 230; *Quirk v. Ry. Co.*, 126 Mo. 279, 28 S. W. 1080; *King v. Oil Co.*, 81 Mo. App. 155; *Conrad Grocer Co. v. Ry.*, 89 Mo. App. 391. In *Frick v. Railway*, supra, it was held that, although a railway company is bound to use ordinary care, both in the country and in towns, to avoid hurting travelers or running over them, greater pains are needed to comply with that legal requirement in towns than in the country, because the risk of such accidents is greater on city streets than on country roads. In *Stanley v. Railway*, supra, which was an action for the death of a minor child, the above principles were declared; the Supreme Court saying of the rule requiring ordinary care: "It is one that enables each jury in each recurring case, to say, after a careful survey of all the facts, whether a party has used that care that an ordinarily prudent person would have used under similar circumstances. It is one that is susceptible of practical application. It furnishes the measure required by the law, and leaves to the triers of the fact the determination of the facts and fixing the liability under that rule. It is sufficiently elastic to meet the most aggravated case, or one containing the slightest negligence." The idea of notice, warning, or data of knowledge which will enable one using good judgment to anticipate a possible catastrophe deeply pervades the rules fixing the responsibility for negligent torts. Indeed, one of the cardinal and general rules of the law of negligence is that the quantum of care to be observed and liability for its non-observance are in proportion to the opportunity of forecasting danger and knowing the need of obviating it. In commenting on a case founded on an injury to a servant caused by the defective handhold of a freight car, in which the evidence showed the defect was invisible to one looking at the handhold, but that it bore signs of age and rust that might have warned the inspector of the importance of thorough scrutiny, the Supreme Court said: "We cannot formulate any rule of law fixing definitely the standard of ordinary care. Every attempt to do it has resulted in failure. What is ordinary care in one case might be the grossest negligence in another. A mere glance at one handhold might indicate to an ordinary observer that it was safe; while, on the other hand, a glance might discover its defectiveness; and again, the conditions might be such that ordinary prudence would suggest and require a careful scrutiny." *Gutridge v. Mo. Pac. Ry. Co.*, 105 Mo. 520, 16 S. W. 943. It is clear that, though the varied facts of different situations may not alter the legal standard of care required to avoid an accident,

they often multiply the precautions that must be observed to comply with the standard; that is, to satisfy the law. It is clear, too, that warning or foreknowledge plays an important part in fixing the responsibility of a person accused of negligently doing mischief. But the warning which fastens liability if mischief is not prevented, because it affords an opportunity to prevent the mischief, may be received in different ways. If the casualty was due to the collision of an electric car with a pedestrian, the motorman may have been warned by discerning the person walking on the track ahead of the car, or about to drive on it oblivious of danger, or lying asleep on it. In either of those emergencies, or others which may arise, the motorman must stop his car before reaching the exposed party, if he has time to do so after discovering the perilous position; as has been decided with wearisome repetition. That is equivalent to deciding that liability falls on a street railway company if a motorman operating one of its cars neglects to get the car under control as soon as he can after he knows, or ought to know, he must do so to save life or limb. *Aldrich v. Transit Co.* (Mo. App.) 74 S. W. 141. Now, if a carman knows a street crossing will be thronged with school children at a certain hour of the day, that fact ought to warn him of the danger of a fatality if he moves over the crossing at that hour without having his car under control; and if a child is injured by his running over the crossing at a high speed at the given hour, a question of fact arises as to whether he was negligent. The situation suggests the danger, if we may adopt the language used in *Lore v. Mfg. Co.*, supra. This seems to be the doctrine announced by the Supreme Court in *Schmidt v. Railway*, 163 Mo. 645, 63 S. W. 834; *Id.*, 149 Mo. 269, 50 S. W. 921, 73 Am. St. Rep. 380—which authority controls the present controversy. Its reasoning was carefully followed by the circuit judge in instructing the jury on the trial below, and in fact the main instruction given for the plaintiff is a copy of one approved in the *Schmidt Case*. In that action it appeared a child of the plaintiff had been killed by a street car on a certain crossing in St. Louis while the car was running fast, at an hour when the crossing was usually filled with school children. The Supreme Court said: "If the gripman had been on the lookout, as this instruction said it was his duty to have been, he would have seen those children on the sidewalk; and if, as he said, the buggy obscured his view, he ought reasonably to have apprehended that some were likely or liable to emerge from behind that obstruction when the crossing of Lemp avenue was reached; and, if he had been on the watch then, and holding his train in control, the probabilities are the child would not have been killed." The operator of the car which struck the plaintiff was accustomed to that run, knew a swarm of children poured into

Newstead avenue and over the crossing at the hour he was passing, and could see for a long distance that there was no policeman on guard as usual. The testimony of two eye-witnesses bore sufficiently on the speed of the car to warrant the inference that it was excessive, the facts considered, since both of them swore it was running fast, and one that it was running "awful fast." This evidence made an issue for the jury, and precluded the nonsuit of the plaintiff. In dealing with a similar litigation, the Supreme Court of Kansas said: "It would be difficult to conceive a more reckless act than that of driving street cars at a rate of twelve miles an hour into a swarm of school children just as they were leaving school." The speed of the car in this case may not have been that high, but there was testimony for the jury as to whether or not it was higher than it ought to have been when the carmen knew little children would be in the street, and some of them heedless of danger.

The case was well tried, the instructions given for the defendant were liberal, and there was evidence for the jury as to whether the negligence of its servants was the proximate cause of the accident.

Judgment affirmed.

BLAND, P. J., and REYBURN, J., concur.

BENEDICT v. CHICAGO GREAT WESTERN RY. CO.

(Court of Appeals at Kansas City, Mo. Jan. 4, 1904.)

MASTER AND SERVANT—INJURY TO RAILROAD BRAKEMAN—UNUSUAL METHOD OF STOPPING TRAIN—NEGLIGENCE—BURDEN OF PROOF—UNSAFE POSITION—CONTRIBUTORY NEGLIGENCE—RECOVERY UNDER LAW OF OTHER STATE.

1. The burden of proof is on a defendant railroad company, sued by its brakeman for injuries from the sudden stopping of a train, to show that the employment of the emergency brake instead of the "service stop," which was an unusual proceeding and ordinarily unnecessary, was demanded by the circumstances of the case.

2. The sudden stopping of a freight train by the unusual and unnecessary application of the emergency brake instead of the "service stop," whereby a brakeman was injured, is not a risk assumed by him.

3. The act of a brakeman in going on the caboose platform to place rear signals, in discharge of his duty, is not contributory negligence as a matter of law, though performed before the train has come to a stop, so as to preclude his recovery for negligent injury from its sudden stopping by the unusual and unexpected application of the emergency brake instead of the "service stop."

4. McClain's Code Iowa, § 2002, gives a right of action against a railroad company to any employe for damages from the neglect of a fellow servant. Rev. St. Mo. 1899, § 547, provides that whenever a cause of action has accrued under the laws of another state it may be brought in the courts of Missouri. *Held*, that a railroad brakeman injured in Iowa by the negligence of an engineer can recover in Missouri.

Appeal from Circuit Court, Buchanan County; W. K. James, Judge.

Action by Ford W. Benedict against the Chicago Great Western Railway Company. Judgment for defendant, and plaintiff appeals. Reversed.

C. F. Strop and W. K. Amick, for appellant. James C. Davis, for respondent.

BROADBUD, J. The plaintiff was a rear brakeman on one of the defendant's freight trains. The train on which he was injured was going from Des Moines, Iowa, to St. Joseph, Mo., on March 18, 1901. There were sixteen cars in the train. The first ten cars back from the engine were equipped with the air brake; the six rear cars were not equipped with the air brake. The air brake was controlled and operated by the engineer on the engine. For all ordinary stops, such as stopping at stations and water tanks, and all cases except emergency, the "service stop," as it was termed, was used. The "service stop" checked the train gradually, but did not lock the wheels. The "emergency stop" was used only for a sudden stop in case of danger, and was a full application of all the brake power, which had the effect of locking the wheels. If a train was moving at a rate of four or five miles per hour, and the "emergency brake" was applied, it would lock the wheels hard. The effect in stopping the train was almost instant, and the shock and recoil was unusually severe, while if the "service brake" was applied it would stop the train gradually, and there was no recoil. It was unusual to use the "emergency brake," and when it was applied persons about the train could generally hear the explosive sound which it made.

On the day and at the time plaintiff was injured the train was running at the rate of about four or five miles per hour, and was approaching the water tank at Peru, Iowa, for the purpose of supplying the engine with water. It was then getting dusk. Plaintiff had been riding in the cupola of the caboose. Another train was following. As the train approached Peru, and was slowing down, plaintiff climbed down from the cupola, got his red lantern and the "markers" ready. "Markers" were red lights to be hung on both sides of the rear end of the caboose to designate the rear end of the train. It was plaintiff's duty to put these markers in place. Plaintiff stepped out on the rear platform with the red lanterns and "markers" in his hands. He set one of the "markers" and the lantern down on the platform. He took the other "marker" in one hand, and, holding it by the ball, grasped the iron railing of the platform, and grasped a handhold on the end of the car with the other hand, braced his feet, one against the iron railing and the other against the body of the car, and stood in this braced position waiting for the train to stop. This position was reasonably safe

¶ 4. See Master and Servant, vol. 34, Cent. Dig. § 326.

If the train had been properly managed, but while in this position the engineer applied the "emergency brake," which stopped the train almost instantly. The shock was so violent that it tore plaintiff's grasp loose, and threw him against the end of the caboose, and the recoil cast him back off the platform on to a bridge and down into a creek. Both of the plaintiff's arms were broken by the fall, and he received other wounds and bruises.

The plaintiff's petition based his right to recover on the ground of the negligence of the engineer in applying the emergency brake, which was the alleged cause of the injury. The statute of the state of Iowa, where the injury was received, was pleaded, and also introduced in evidence. This statute gives a right of action against a railroad company operating a railroad in that state to any employé for damages sustained in consequence of the neglect of a fellow servant. Section 2002, McClain's Code, Iowa. The defense was a general denial, and also allegations constituting contributory negligence. At the close of plaintiff's case the court sustained a demurrer to his evidence.

It is the contention of plaintiff that the application of the emergency brake under the circumstances was unnecessary, and consequently constituted negligence. On the other hand, defendant contends that that act alone did not of itself amount to negligence. The record does not explain why the engineer applied the emergency brake in approaching the water tank instead of what is known as the "service stop," the first being adapted and used in instances of emergency, as its name implies, and the latter being used in ordinary cases, where a stoppage of the train can be accomplished by a gradual application of the brakes.

We are confronted at the beginning with the question of whether the circumstances in proof would authorize a finding that no such emergency existed as justified the engineer in applying the emergency brake in question. Notwithstanding that ordinarily the "service stop" should have been applied, there might have existed some cause which rendered the application of the other brake necessary. Yet it having been shown that the use of the latter was unusual and unnecessary on such occasions, and it not being shown that its use was demanded or made necessary on the present occasion, when it was the cause of plaintiff's injury, the natural and legitimate conclusion is that the act was negligent, and it devolved upon defendant to rebut such conclusion by showing that notwithstanding what was both unusual and unnecessary ordinarily was demanded by the circumstances at the time in question.

An act which is performed in the usual manner in practice for the doing of such acts is presumed in law to be reasonably safe,

and a servant injured while in the service of the master on such occasions is held to have assumed the risk, and the master is not liable to the servant for his damages. But if the mode adopted by the master is unusual, and the servant is injured by reason thereof, the servant does not assume the risk, and the master is liable for damages suffered by the servant. And the reason for holding the master liable to the servant under the facts in this case are much stronger, as it was shown that the act of the engineer, which was the act of the master, was not only unusual, but prima facie unnecessary.

But it is contended by defendant that the plaintiff by his carelessness contributed to his own injury, in that he should have waited for the train to stop at the water tank before he went upon the platform to hang out the signal lights at the rear end of the train. What is meant is that there was open to him two ways for putting out the signal lights—one to wait until the train stopped at the water tank, when he should then have gone upon the platform and placed his signals, and the other method was the one he adopted—and that, as he selected the dangerous way, he was guilty of contributory negligence, and consequently not entitled to recover. In *Moore v. Ry. Co.*, 146 Mo. 572, 48 S. W. 487, the court held that: "An employé who has a choice of two ways of performing his labor for his master, one of which is perfectly safe, the other subject to risks and dangers, and voluntarily chooses the latter, is guilty of contributory negligence, and cannot recover for the injuries resulting from such choice."

But we do not think the rule should be applied as a matter of law to the facts of this case, so as to prevent a recovery, for the reason that ordinarily the mere fact that plaintiff was upon the platform of the car for the purpose of placing the signals when the train should stop at the water tank was not an act accompanied with much risk or danger. At most, it was a question for the jury whether, under the circumstances, plaintiff was guilty of negligence. It is a matter of common observation that brakemen are, by the very necessities of their employment, required for many purposes to be upon the platforms of the cars while the trains are in motion. However, had the plaintiff here known that the emergency brake was to be applied by the engineer to stop the train, he would have been guilty of negligence in having chosen for the performance of his duty a time fraught with danger.

As the injury to plaintiff was sustained while he was in the state of Iowa, he seeks to recover under the laws of that state. This he may do. *Guerney v. Moore*, 131 Mo. 650, 32 S. W. 1132; section 547, p. 238, Rev. St. Mo. 1899.

For the reasons given, the cause is reversed and remanded. All concur.

CASE v. CORDELL ZINC & LEAD MIN. CO.*

(Court of Appeals at St. Louis, Mo. Dec 15, 1903.)

WRONGFUL DEATH—ACTION—STATUTES—PARTY PLAINTIFF—MINOR CHILDREN—EVIDENCE—SUFFICIENCY.

1. Under Rev. St. 1899, § 2864, providing that actions for wrongful death may be brought, first, by the husband or wife of the deceased, or, second, if there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of deceased, a suit commenced by the widow more than six months after the death of her husband cannot be maintained where the deceased left a minor child or children.

2. In an action for wrongful death under Rev. St. 1899, § 2865, designating actions that survive, it was alleged by the widow of deceased that he left no minor child or children surviving him. The only evidence to support the allegation was her testimony that she had been married before she married the husband for whose death the action was brought, and that she had living a minor child, but to which of her husbands the child was to be credited was not distinctly stated. In referring to her last husband, she said, "He provided well for me and my child." Held insufficient to show that the husband for whose death plaintiff sued left no minor child.

Appeal from Circuit Court, Greene County; Jas. T. Neville, Judge.

Action by Mrs. Donie Case against the Cordell Zinc & Lead Mining Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Allen & Rathbun and Clark & Buckley, for appellant. Robertson & Mann, for respondent.

BLAND, P. J. Plaintiff sued to recover damages on account of the death of her husband, occasioned, as alleged, by the negligence of the defendant in furnishing deceased, while in its employ, with an unsafe and dangerous tamping bar to be used by deceased in tamping dynamite in drilling holes in defendant's mine. Plaintiff's husband was killed in defendant's mine on October 2, 1900, by the premature explosion of a dynamite charge in a drill hole. The suit was commenced on April 24, 1901. After all the evidence was heard, plaintiff was forced to take a nonsuit by the ruling of the circuit court on the evidence. After an unsuccessful motion to set aside the involuntary nonsuit, plaintiff appealed.

It is alleged in the petition that the deceased left no minor child or children surviving him, but there is not to be found in the record a syllable of evidence proving this allegation. The suit was commenced more than six months after the death of plaintiff's husband. The action is founded on section 2865, Rev. St. 1899. The persons upon whom the right to sue is conferred by this section, and the limitations as to time in which suit may be brought, are found in

the next preceding section (2864), which in this respect provides that the action may be brought: "First, by the husband or wife of the deceased; or, second, if there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of the deceased, whether such minor child or children of the deceased be the natural born or adopted child or children of the deceased. * * *

In *Barker v. The Hannibal & St. Joseph Ry. Co.*, 91 Mo., loc. cit. 92, 14 S. W. 281, the Supreme Court, referring to section 2864, said: "This provision is not, we think, merely a limitation or bar to the remedy of the wife, but is a bar to the right itself, if there are minor children, and the existence or nonexistence of such minor children is to be held, we think, as of the substance of the right of the wife to sue after the six months have expired." This construction of the statute was approved and followed in *McIntosh v. Railway*, 103 Mo. 131, 15 S. W. 80; *Sparks v. Railroad*, 31 Mo. App. 111; *Dulaney v. Railway*, 21 Mo. App. 597. The suit having been commenced more than six months after the death of her husband, it was indispensable to her right to maintain the suit to both allege and prove that her husband left no minor child or children surviving him. It is alleged in the petition that no minor child or children were left surviving the deceased. The plaintiff, in her evidence, shows that she had been married before marrying the deceased, and that she has a minor child, but to which of her husbands this child is to be credited does not distinctly appear in the record. In referring to her last husband, she said: "He provided well for me and my child." From this expression, the inference might be drawn that the child was by her first husband. Had it been by the last husband, she would most likely have said: "He [her last husband] provided well for me and our child." However, the paternity of the child is not made sufficiently clear by the record to warrant us in concluding deceased left no minor child surviving him; failure to make this clear was fatal to plaintiff's case, and compelled the nonsuit that was forced upon her.

The judgment is affirmed.

REYBURN and GOODE, JJ., concur.

FANNING v. ST. LOUIS TRANSIT CO.*

(Court of Appeals at St. Louis, Mo. April 28, 1903.)

STREET RAILWAYS—CROSSING ACCIDENT—CONTRIBUTORY NEGLIGENCE—CONCURRENT NEGLIGENCE.

1. Where plaintiff was 15 or 20 feet from a street crossing when she noticed a street car approaching from the other side of the crossing, but she went onto the crossing, and did not no-

*Rehearing denied January 5, 1904.

¶ 1. See *Death*, vol. 15, Cent. Dig. § 52.

*Rehearing denied January 19, 1904.

¶ 1. See *Street Railroads*, vol. 44, Cent. Dig. § 208.

tice the car again until she had reached the middle of the track, she was guilty of contributory negligence.

2. A pedestrian injured owing to her own negligence in failing to look for the car and the motorman's in running at a prohibited rate of speed cannot recover.

Appeal from Circuit Court, St. Charles County; Elliott M. Hughes, Judge.

Action by Mary Fanning against the St. Louis Transit Company. From a judgment for plaintiff, defendant appeals. Reversed.

Boyle, Priest & Lehmann and T. C. Bruere & Son, for appellant. A. R. Taylor and T. F. McDearmon, for respondent.

Statement.

BLAND, P. J. On May 27, 1900, plaintiff was struck by one of defendant's west-bound cars on Manchester avenue, in the city of St. Louis, and injured. The suit is to recover damages alleged to have been caused by the collision. The petition contains the following assignments of negligence: That the car was running at a wild, excessive, and unlawful rate of speed; that it was running in violation of what is commonly known as the "Vigilant Watch Ordinance," and also in violation of the speed ordinance—all of which acts of negligence are alleged to have contributed to plaintiff's injuries. The answer was a general denial and a plea of contributory negligence to the effect that plaintiff stepped on the track immediately in front of defendant's car, and so near thereto that it was impossible to stop the car in time to prevent it striking plaintiff. On the part of plaintiff the evidence is that she kept a boarding house on the north side of Manchester avenue a short distance west of where the accident occurred; that at about 2:30 p. m. on May 27, 1900, she, in company with her grown daughter and Mrs. Charles Herron, started to church; that they traveled a short distance east on the north side of Manchester avenue, and then turned south to cross over the street in single file; that Mrs. Herron was in advance, the daughter next, and the plaintiff in the rear; that Mrs. Herron crossed the street, and had just stepped on the sidewalk, when plaintiff was struck; that plaintiff's daughter was six or seven feet south of the track, and plaintiff had just stepped over the south rail of the track, but not far enough from it to miss the car. Plaintiff testified that the fender or some part of the car struck her on the lower and back part of her legs, and threw her into the street; that both bones of the right leg below the knee were broken, the cap of the left knee displaced, the condyles of the tibia of the left leg fractured, her back badly bruised, and that from these injuries she was confined to her bed and was under medical treatment for eight or nine months; that her left knee was permanently injured, and so weak that she was unable to bear her weight upon it, and was compelled to go upon crutches. In respect to her injuries, she was corroborated by

her daughter, who waited on her, and by her attending physician. The latter testified that the injury to her left knee was incurable, and she would be compelled to go on crutches the balance of her life; that she also had an incurable kidney trouble, probably caused by the injury to her back when she was struck by the car. Plaintiff testified that prior to the accident she was making from \$50 to \$60 a month keeping boarders; that after she was injured she had to give up the business, for the reason that she was unable to look after it; that for medicine and medical attendance she had been put to an expense of from \$250 to 275. The evidence is that at the time of the accident the employes of the defendant were out on strike; that they had an assembly hall on Manchester avenue, near the place of the accident, and that a number of the strikers were boarding with the plaintiff, and a number of them were around in the neighborhood when the accident happened; that a torpedo had been put on the track about 200 feet east of where plaintiff was struck by the car, and when the car passed over this torpedo it exploded, and made a loud noise, which noise caused plaintiff to look up; that she saw the car coming about 200 feet east of her when she looked up, but did not notice that it was running at an unusual rate of speed, and could not tell at what speed it was running; she supposed it was running at the usual rate of speed (7 or 8 miles per hour); that when she looked up she was from 15 to 20 feet west of the crossing; that she did not stop, but walked on towards the crossing, turned south immediately in the rear of her daughter, and proceeded to cross the street; that when she reached the middle of the track she looked east, and saw a car coming within 30 or 40 feet of her, running rapidly; and that she then hurried to get off the track, but was struck before she could clear the car. She testified that she thought she had plenty of time to cross before the car would arrive, and did not look at the car again, after the explosion occurred, until she was on the track; that if she had continued to look at it she supposed she might have seen that it was running at a rapid speed. Other witnesses, in behalf of plaintiff, testified that the car was about 200 feet east of the crossing where plaintiff was injured when the torpedo exploded; that the car was running on a downgrade with the power turned on, which was unusual, and was running at a speed of from 15 to 25 miles an hour; that when the torpedo exploded the motorman in charge became frightened, lost control of the car, and let it run wild, and another motorman, who was inside the car, came out and took charge of it, but was unable to stop it until it had run from 120 to 150 feet beyond where plaintiff was struck. The vigilant watch ordinance and speed ordinance were read in evidence by plaintiff. On the part of defendant the evidence tends to prove that plaintiff was but slightly injured; that no bones in her left leg were broken; that

her right knee was not injured, and she was apparently in good health, and there was no apparent reason why she should use crutches; that the car at the time was under the control of the motorman, was running at a speed of from 6 to 7 miles per hour, and that plaintiff, when she turned south to cross the track, stopped near the track and looked and saw the car coming within 30 or 40 feet of her, and then deliberately proceeded to walk over the track; that the motorman and a special police officer on the car saw her movements, and called to her to look out; that she paid no attention, but continued on the track, and was in such close proximity to the car that it was impossible to stop it in time to prevent it striking her; that the car was stopped within 45 feet after it struck her. The evidence of defendant was that the crossing where plaintiff was injured was about 125 feet west of the point on the track where the torpedo was exploded; that a car running from 6 to 8 miles per hour could be stopped on that track, in the condition it was in on that day, in about 70 feet; if running at a speed of 15 or 20 miles per hour, it could be stopped in about 80 or 90 feet. In rebuttal the evidence is that no warning was given by the motorman or other person to plaintiff to look out. A verdict assessing plaintiff's damages at \$4,000 was signed by 10 of the jurors, and returned into court. After an unavailing motion for new trial, defendant appealed.

Opinion.

Defendant, as is usual in this class of cases, offered peremptory instructions at the close of plaintiff's evidence and again at the close of all the evidence that under the evidence plaintiff could not recover, which instructions the court refused. Plaintiff testified that her attention was called to the car by the explosion of the torpedo; that she was then 15 or 20 feet from the crossing, and the car was 200 feet east of her; that without paying any further attention to the car she walked on the crossing, turned south, and proceeded to go across the track, and did not notice the car until she was in the middle of the track, when the car was close upon her, running at a rapid speed. It seems to us that, having seen the car 200 feet away, ordinary prudence would have dictated to plaintiff, before proceeding across the track, to look and ascertain whether or not she had time to cross in safety, and that by her own evidence she convicts herself of negligence. *Kelsay v. Railway*, 129 Mo., loc. cit. 372, 30 S. W. 339; *Holwerson v. Railway*, 157 Mo. 216, 57 S. W. 770, 50 L. R. A. 850, and cases cited. Conceding, then, that defendant's motorman was guilty of negligence in running the car at a prohibited rate of speed, the fact remains that plaintiff was likewise guilty of negligence, concurrent with the negligence of the motorman, and that the injury was the result of the concurrent negligence of both. In such circumstances the law is well settled, here

and elsewhere, that plaintiff is not entitled to recover. *Turner v. Railroad*, 74 Mo. 602; *Powell v. Railroad*, 76 Mo. 80; *Butts v. Railway*, 98 Mo. 272, 11 S. W. 754; *Boyd v. Railway*, 105 Mo. 371, 16 S. W. 909; *Kreis v. Railway*, 148 Mo. 321, 49 S. W. 877; *Murphy v. Railway*, 153 Mo., loc. cit. 262, 54 S. W. 442; *Smith v. Railway Co.*, 52 Mo. App. 36; *Jones v. Barnard*, 63 Mo. App. 501; *Lien v. Railway Co.*, 79 Mo. App. 475; *Skipton v. Railway*, 82 Mo. App., loc. cit. 143; *Killian v. Railway*, 86 Mo. App. 473; *Gahagan v. Railroad (N. H.)* 55 L. R. A. 426, and note.

We conclude that defendant's instruction in the nature of a demurrer to plaintiff's evidence should have been given, and reverse the judgment.

REYBURN and GOODE, JJ., concur.

HADLEY et al. v. BERNERO et al.

(Court of Appeals at St. Louis, Mo. Dec. 15, 1903.)

ERROR CORAM NOBIS—WHEN LIES—UNLAWFUL DETAINER—APPEAL.

1. Though an appeal from a judgment of a justice of the peace in an unlawful detainer action, given during term time of the court to which the appeal lies, must be taken within six days after judgment, on pain of the appeal being dismissed, if the court does not dismiss the appeal, but entertains the cause without question of its jurisdiction being raised, the judgment, if subject to attack, cannot be vacated by motion in the nature of a writ of error coram nobis, as that writ will not lie if the complaining party knew, or might have known, the fact complained of during the trial.

Appeal from St. Louis Circuit Court; D. D. Fisher, Judge.

Action by Leo G. Hadley and others against David Bernero and others. Judgment for plaintiffs. Motion in the nature of a writ of error coram nobis for vacation of the judgment. From an order overruling the motion, defendants appeal. Affirmed.

Vernon W. Knapp, for appellants. Thos. S. Meng, for respondents.

GOODE, J. Plaintiffs, Leo G. Hadley and others, obtained judgment against the defendants, David Bernero and others, October 18, 1901, in an unlawful detainer action before a justice of the peace. Defendants appealed to the circuit court from the justice's judgment eight days after it was rendered. This appeal was not in time, as the circuit court was then in session, as now appears, and the statutes require the appeal from a justice's judgment in an unlawful detainer case to be taken in six days after judgment, if the court to which it lies is then holding a term. We suppose the fact that the appeal was too late was not called to the attention of the circuit court, and it may not have occurred to either of the parties. At all events, the cause was tried anew, with the result that judgment was again entered

against the defendants, who again appealed, and the cause came to this court. Here a point was raised against the jurisdiction of the circuit court; but, as the record before us failed to show the justice's judgment was given during term time, we ruled the point against the defendants, because we had no right to take notice that a term of the circuit court was then running, but, in the absence of proof to the contrary, were bound to presume, in favor of the judgment, that said court found the facts existed which authorized it to hear and determine the cause, to wit, that the justice gave judgment while it was in vacation. The report of our decision will be found in 97 Mo. App. 314, 71 S. W. 451.

After the affirmance of the judgment the defendants filed a motion in the nature of a writ of error coram nobis in the circuit court to vacate its judgment, assigning as ground for the motion the tardy appeal from the magistrate's judgment. Proof was made that the circuit court was in fact sitting when the judgment was rendered; but the motion coram nobis was overruled, notwithstanding that proof, and defendants have again appealed to this court from the order overruling the motion.

An appeal from a judgment of a justice of the peace in an unlawful detainer action given during term time of the court to which the appeal lies must be taken within six days after judgment, on pain of the appeal being dismissed, as has been decided frequently. *Robinson v. Walker*, 45 Mo. 117; *Bauer v. Cabanne*, 11 Mo. App. 114; *Hastings v. Hennessey*, 52 Mo. App. 172. An appeal in other litigation will fail if allowed after the lapse of the statutory period for appealing. *State v. Epperson*, 4 Mo. 90; *State v. Anderson*, 84 Mo. 524; *St. Louis v. Gunning Co.*, 188 Mo. 347, 89 S. W. 788. According to the opinions in those cases, the circuit court acquires no jurisdiction over the subject-matter of the action, if an appeal is too late—a statement that seems to be too broad, and to intend rather that the court appealed to obtains no jurisdiction of the particular case. Jurisdiction over the subject-matter of an action means the power to determine legal controversies of the same class or sort. *Postlewaite v. Ghiselin*, 97 Mo. 420, 10 S. W. 482; *Livingston v. Allen*, 88 Mo. App. 294; *Leonard v. Sparks*, 117 Mo. 103, 22 S. W. 899, 88 Am. St. Rep. 646. Or, as is sometimes said, it is the power to adjudge concerning the general question involved; the power to act and adjudicate in litigation of the same nature, though, from lack of service on a party or some other deficiency, the power may not be exercisable in a pending case. *Brown, Jurisdiction* (2d Ed.) 8. Circuit courts have appellate jurisdiction, by force of the statutes, in unlawful detainer actions, and have, therefore, strictly speaking, jurisdiction over the subject-matter of any case of that kind. But they have

no power to determine an action appealed from a magistrate's court, whether it be an unlawful detainer one or some other, unless the appeal was taken within the period fixed by the statutes. *Robinson v. Walker* and *Bauer v. Cabanne*, supra; *Moore v. Minkler*, 3 Mo. App. 596. And it is held that, if an appeal is taken out of time, consent of parties cannot give the circuit court power to decide. *Moore v. Minkler*, supra; *Moulder & Simpson v. Anderson*, 68 Mo. App. 39. If the subject-matter of the action falls within the concurrent original jurisdiction of the circuit court, and the parties appear and go to trial, according to established principles this ought to give the court power to determine the cause, even if the appeal was too late. *Brown, Jurisdiction* (2d Ed.) § 21a. But decisions of this state appear to have prescribed otherwise, and the remark is irrelevant, since the present action is one of which the circuit court has no original, but only appellate, jurisdiction. The validity of the appeal hinged on a fact which it was incumbent on the circuit court either to find from evidence or notice judicially before proceeding further. When a tribunal is clothed with jurisdiction of the class of actions to which a controversy belongs, and its right to adjudicate the controversy depends on certain facts which it must ascertain, and it makes an express finding on them, that decision becomes as much *res judicata* as the decision of any other issue, and the parties are precluded from reopening it afterwards, except by appeal or writ of error. They are precluded, not because jurisdiction of the subject-matter can be waived or conferred by consent, but because it is conferred by law, and the facts on which it may be exercised have been found to exist in the particular controversy. If the decision that they existed was erroneous, the remedy is the same as when other erroneous decisions occur—review by an appellate court, to which the cause may be carried and the decision reversed, if the evidence on which it was given is preserved in the record in a way to enable the upper court to pass on it. *Black, Judgments*, § 300; *Howard v. State*, 58 Ark. 229, 24 S. W. 8; *Williams v. Edwards*, 34 N. O. 118; *Hawkins v. Bowie*, 9 Gill & J. 428. So far as this record discloses, there was no affirmative finding by the circuit court that the appeal from the magistrate's court was timely. Still, it retained and decided the case, thereby assuming jurisdiction, and must be presumed to have done so on facts found which gave it the right. *Clary v. Hoagland*, 6 Cal. 685; *State v. Waupaca Bank*, 20 Wis. 640; *Thorn-ton v. Baker*, 15 R. I. 553, 10 Atl. 617, 2 Am. St. Rep. 925; *Vanfleet, Coll. Attack*, § 62, and citations. It is at least questionable if the whole matter of its jurisdiction is not *res judicata*, and no longer open to attack in any mode, though the decisions as to what is a direct attack on a judgment, and when

it may be made, are inharmonious. *Morrill v. Morrill*, 23 Am. St. Rep., note on page 104 et seq. There would be no doubt that it is *res judicata* if the circuit court had made an affirmative finding in favor of its jurisdiction. Courts are constantly called on to determine preliminary facts on which hinge their power to decide litigation, and their determinations are constantly reviewed by appellate tribunals when the evidence essential to a review is in the record. *Hembree v. Campbell*, 8 Mo. 572; *Peery v. Harper*, 42 Mo. 131; *Brackett v. Brackett*, 61 Mo. 221; *Smith v. Simpson*, 80 Mo. 634; *Roberts v. State Ins. Co.*, 26 Mo. App. 92. The decisions on which defendants' counsel relies to show the appeal of the present action to the circuit court was abortive are in point on this proposition. We apprehend that, if the finding of a jurisdictional fact is based on contradictory testimony, the lower court would have to be sustained, because it weighs testimony, and upper courts do not. But if the fact was found against all the testimony, the error in exercising jurisdiction could be corrected by a reversal of the judgment. When the record of a court of general jurisdiction in a cause wherein it proceeds according to the course of the common law is silent as to jurisdictional facts, or contains no finding, the presumption prevails that the court had jurisdiction. 1 *Herman*, *Estoppel*, §§ 356-367. Or, as is sometimes said, nothing shall be intended to be out of the jurisdiction of a superior court but what specially appears to be. *Huxley v. Harrold*, 62 Mo. 516; *Gates v. Tusten*, 89 Mo. 13, 14 S. W. 827; *Schad v. Sharp*, 95 Mo. 573, 8 S. W. 549; *St. Louis v. Lanigan*, 97 Mo. 175, 10 S. W. 475; *McClanahan v. West*, 100 Mo. 309, 13 S. W. 674; *State v. Baty*, 166 Mo. 561, 66 S. W. 428. In the case last cited a record entry needed to show the jurisdiction of the circuit court was missing; but the Supreme Court said that every presumption would be indulged in favor of the action of the court, and that it proceeded by right, and not by wrong; further, that if the record was silent about a matter necessary to confer jurisdiction, or more properly to cause it to attach in the particular instance, the existence of such matter (nothing appearing of record to the contrary) would be presumed; and it would be presumed, too, when some regular and formal intermediate entry should have been made which did not appear in the transcript, that its absence was occasioned by the misprision of the clerk.

In *Gates v. Tusten*, *supra*, an attachment suit was brought against the defendants in Jackson county by publication, they being nonresidents. The judgment went against them. Writs of attachment were issued, and the Phoenix Insurance Company garnished. Said company answered that it owed the defendants Tusten and De Neven the proceeds of a policy of insurance, but had been noti-

fied of the transfer of the policy to one Eastland on the orders of Tusten and De Neven, and asked that Eastland and Gates be required to interplead. Eastland filed a plea to the jurisdiction on the ground that no property of Tusten and De Neven had been attached in Jackson county. The record and judgment disclosed nothing as to whether it had or not; but the Supreme Court held that it must be ruled the Jackson county circuit court had jurisdiction because of the presumption of the right exercise of jurisdiction by a superior court. The opinion says: "It is one of the fundamentals of the law that where the record of a court of general jurisdiction shows it assumed to exercise jurisdiction over a person or subject-matter, in the absence or silence of the record as to any fact showing the acquisition of jurisdiction, or how it was acquired, then jurisdiction is presumed; for the rule is that 'nothing shall be intended to be out of the jurisdiction of a superior court but which specially appears to be so.'"

In *Schad v. Sharp*, *supra*, an ejectment case, the jurisdiction of the circuit court of Morgan county was questioned in the Supreme Court, because the record did not show affirmatively the land sued for was in that county. But the record nowhere showed the land was not in Morgan county, and it was ruled that the circuit court would be presumed to have rightly exercised its jurisdiction.

Probate courts must often determine their power to grant administration on estates, when the power turns on extrinsic facts, such as where the mansion house of the deceased was, or his lands, or where he died, and other matters. The rule is now established, after some wavering in the decisions (based on the fact that probate courts were for a long time regarded as inferior tribunals), that if a probate court grants administration, after finding that the fact on which it ought to do so existed, the grant, and all matters thereafter, are valid, although the fact was found erroneously. *Johnson v. Beazley*, 65 Mo. 250, 27 Am. Rep. 276; *Cox v. Boyce*, 152 Mo. 576, 54 S. W. 467, 75 Am. St. Rep. 483; *Davison v. Davison*, 100 Mo. App. 263, 73 S. W. 373. Consent of parties cannot give jurisdiction; but parties may admit the existence of facts which show jurisdiction, and courts may act judicially on such an admission, and their action be binding and effective, as was decided in a case where the jurisdiction of the circuit court of the United States depended on the character of the action. *Railroad v. Ramsey*, 89 U. S. 322, 22 L. Ed. 823.

Appeals are of statutory origin, and in entertaining them an appellate court does not proceed according to the course of common law; but, nevertheless, the presumption in favor of the right exercise of jurisdiction has been held to prevail, and if the circuit court hears and decides a cause appealed from a justice's court the appeal will be

presumed to have been taken within the time allowed by law, unless the record shows it was not. *City of Kansas v. Clark*, 68 Mo. 588; *Fourth v. Anderson*, 87 Mo. 354. In recognition of the foregoing principles and authorities we held, in the former decision of this case, that it must be presumed the circuit court rightly entertained and determined the controversy. We held, too, that said court could take judicial notice of its sessions and adjournments, and that it was unnecessary, in order for it to determine the question of its power to hear the cause, to make proof that the appeal was or was not taken in time. *Bauer v. Cabanne*, 11 Mo. App. 114. We further held and decided that this court could not take judicial notice of the adjournments of the circuit court, and therefore could not decide the appeal from the justice's judgment was too late, in the absence of evidence to show the fact.

The judgments of superior courts occupy a different status when their jurisdiction or power to decide is called into question on account of matter in pais from what they do when the want of jurisdiction appears from an inspection of the record or judgment roll. If it may be discerned by inspection that the cause was of a kind which did not fall within the domain of the court's jurisdiction at all (for instance, if it was an ejectment case decided by the probate court) the judgment will be utterly void on the face of the record, and so all the decisions say. Note *Morrill v. Morrill*, *supra*. But where the power to decide depends on facts dehors the record and the judgment roll, the judgment is valid until it is reversed on appeal or annulled by other direct attack.

It is not easy to see what kind of a direct attack, other than an appeal or writ of error, can be made on a judgment for lack of jurisdiction to render it, when the record does not show the lack, if the instance is one where the necessary jurisdictional facts are presumed to have been found; for it looks like the finding would render the question of the existence of the facts *res judicata*. While there are modes of attack which are classed as direct, and therefore as permitting proof of facts in pais to vacate a judgment (such as a bill in equity, writs *audita querela*, and *coram nobis*), it is debatable if in instances like this one the attack by appeal or writ of error is not the only method to seek relief. One must speak dubiously on the subject because of the discordant decisions. An attack on a judgment may be made in a manner usually spoken of as direct, and yet the circumstances be such as to deprive the mover of the prerogatives that commonly pertain to direct attacks. *Morrill v. Morrill*, *supra*, note page 105; *Vanfleet, Coll. Attack*, §§ 2, 3; *Harman v. Moore*, 112 Ind. 221, 13 N. E. 718; *Reid v. Mitchell*, 93 Ind. 469. In the decision last cited a petition was filed to set aside a judgment on the ground that it was rendered against the petitioners

by an attorney called in to try the case by the judge of the court without the consent of the parties, and who therefore had no power to sit. The court held that the proceeding or any other to annul a judgment for facts dehors the record was a collateral attack. In commenting on this decision a writer said that "all the cases agree that a record of a domestic court of general jurisdiction cannot be overturned in another action by matters dehors the record; and such an attempt, when the sole object is to declare the judgment void, and not to get a review or new trial for newly discovered evidence, or to set it aside under the rules of equity, is always a collateral attack." *Vanfleet*, § 4, citing *Newcomb's Ex'rs v. Newcomb*, 13 Bush, 544, 26 Am. Rep. 222.

In *Truesdell v. McCormick*, 126 Mo. 39, 28 S. W. 885, a petition by a married woman to vacate a judgment rendered against her as void because of her coverture was declared to be plainly a collateral attack. The equities of the matter, and the rights of third parties, influence the result of proceedings against judgments, whether they be what are styled direct or collateral; and it looks as though some confusion had been introduced into the law by speaking of the same proceeding as direct in some instances and collateral in others, instead of saying that such a proceeding, although properly called a direct one, will not prevail when the justice of the matter requires it to fail.

We are confident that the motion *coram nobis* does not lie to vacate a judgment for the reason assigned in the present motion. After considerable research we have found no instance, nor have we been cited to any, of the use of the procedure for such a purpose.

In *Craig v. Smith*, 65 Mo. 536, a motion *coram nobis* was entertained to set aside the judgment because one of the defendants had not been served, the sheriff's return showing no service, and it appearing by testimony that in fact he was not served. The opinion states that the propriety of the motion for the purpose was not called into question. Whether proper or not, it is obvious the circumstances were very different from those we have here. In that case the defendant Van Camp was never in court at all, and hence had no chance to make defense. But these defendants were in court from the first, and, moreover, themselves took the appeal to the circuit court, had an opportunity before the trial to question its jurisdiction, and insisted, on the former appeal, that said court erred in deciding the controversy, because it was bound to take judicial notice that the appeal was abortive, as taken out of time. A writ of error *coram nobis*, and the motion which, in modern practice, is substituted for it, have a well-defined function. Their function is to vacate a judgment in the court where it was rendered by bringing some fact to the knowledge of

that court which was not previously known, and which, if known, would have prevented the rendition of the judgment. What facts may it bring before the court in order to obtain relief? The rule, as usually declared, is that on a writ of error coram nobis, only such errors of fact can be assigned as are consistent with the record before the court in which the case was tried. *Williams v. Edwards*, 34 N. C. 118. The motion lies when a party against whom judgment was rendered was not served with process (*Craig v. Smith*, supra); or when judgment went on publication, and the defendant was within the jurisdiction of the court and could have been personally served (*State ex rel. v. Heinrich*, 14 Mo. App. 146); or when a defendant was dead at the time judgment went against him (*Dugan v. Scott*, 37 Mo. App. 663); or if judgment was rendered against a married woman as though she was single (*Latshaw v. McNees*, 50 Mo. 381); or when a person not sui juris, as a slave, minor, or insane person, was proceeded against without a guardian, or in some irregular mode (*In re Toney*, 11 Mo. 661; *Powell v. Gott*, 13 Mo. 459, 58 Am. Dec. 153; 5 Am. & Eng. Ency. Law, 27). Probably these instances do not embrace all the matters for which the motion coram nobis will lie, and in any case equities may have supervened that will defeat the remedy. It was questioned in the case of *Gould's Estate v. Watson*, 80 Ill. App. 242, if it will lie in other instances than those well recognized by precedents. Undoubtedly it may be used to correct judgments based on errors of the clerk of a court, or in process, as was decided in *Pickett v. Legerwood*, 7 Pet. 147, 8 L. Ed. 638. It will not lie to vacate the present judgment on the ground that the appeal from the justice was after the lapse of the statutory period, for one reason, if for no other—a reason consistent with the general principles which always determine the efficacy of the motion: the fact was one which the defendants knew, or by reasonable diligence might have known, prior to the trial in the circuit court. They might have called that court's attention to the unseasonableness of the appeal, and have stopped further litigation and expense. The peculiar provision of the forcible entry and detainer statutes requiring appeals to be taken within six days after judgment, if the court to which the appeal lies is in session, whereas, generally, appeals from justices may be taken in ten days after judgment, has proved something of a pitfall, because it is sometimes forgotten for the nonce, and the general statute followed. It may be that the unlawful detainer statute was never thought of by any of the parties to this cause until after the circuit court had determined it. That circumstance would not entitle the defendants to relief, because ignorance or forgetfulness of the law has no such effect, except in a few instances, of which this is not one. Or maybe neither of the parties,

nor the court, remembered that a term of the St. Louis circuit court was in progress when the justice's judgment was rendered. But this was a fact the defendants ought to have remembered or ascertained. It was a fact, too, which the circuit court could have noticed judicially, as defendants contended on their former appeal. Now, the law is that the writ of error coram nobis does not lie if the complaining party knew the fact complained of at the trial, or before, or by reasonable diligence could have known it, or was otherwise guilty of negligence. 5 Ency. Pl. & Pr. p. 29; *Jackson v. Milsom*, 6 Lea, 515; *Brandon v. Diggs*, 1 Heisk. 472; *Marble v. Vanhorn*, 53 Mo. App. 361.

In *Marble v. Vanhorn*, supra, it is said "that where the party complaining knew the fact, or might have known it and failed to bring it to the attention of the court, he cannot afterwards do so. Thus, 'a man shall never assign that for error which he might have pleaded in abatement; for it shall be accounted his folly to neglect the time of taking that exception.'" That language was used in a case wherein the motion coram nobis had been used to have costs retaxed, and an appeal was taken from the judgment taxing the costs on the motion. The costs had been retaxed because certain witnesses appeared by the return on a subpoena to have been summoned prior to the date of the subpoena. It was held that the costs were improperly retaxed, because, in truth, the witnesses had been subpoenaed under a previous subpoena, and but for the false appearance due to the second subpoena the judgment on the motion to retax costs would have been different. It was ruled, however, that the truth might have been ascertained by proper effort, and that as the circuit court passed on the facts, though erroneously, the motion coram nobis could not be invoked to have a matter formerly decided again examined; citing *McKindley v. Buck*, 43 Ill. 488. On this proposition the opinion says that the fact relied on in the motion must have been previously unknown to the court; for if it was known, and the court decided erroneously or irregularly, the error was one of law, to be corrected on appeal. This coincides with our view that these defendants could have presented this question on the former hearing if they had introduced evidence at the trial to show the circuit court lacked jurisdiction. The untimeliness of the appeal from the justice's decision was not a concealed or latent fact like the infancy of a minor, or the coverture of a married woman, or the residence within its jurisdiction of a defendant who was served by publication, which a court can only know when its attention is called to it, and which the party adversely affected by the judgment might be ignorant of without negligence, or, if not ignorant, have no chance to prove at the trial. But these defendants, if they did not know the circuit court was sitting when the

justice gave judgment, should have known it. If they knew it, they allowed the circuit court to proceed with the case to a decision, thereby imposing on it. In either event they have no standing to reopen the question by this motion, and the judgment of the circuit court overruling it is affirmed.

BLAND, P. J., and REYBURN, J., concur.

MANNY v. NATIONAL SURETY CO. OF NEW YORK.

(Court of Appeals at St. Louis, Mo. Jan. 5, 1904.)

CORPORATIONS — SUCCESSION — MECHANIC'S LIEN — CONTRACTOR'S BOND — LIABILITY OF SURETY — DEFENSES — JUDGMENT — INTEREST.

1. Where one surety company absorbed the assets of another, and assumed all its liabilities, and was in all respects its corporate successor, such succeeding company was liable on a bond executed by its predecessor.

2. A bond executed by a contractor and builder, with surety, to save the owner harmless against all claims, mechanics' liens, etc., was a joint and several bond, under Rev. St. 1899, § 889, declaring that all contracts which by common law are joint only shall be construed to be joint and several. Therefore the owner might proceed against the surety without first exhausting his remedy against the contractor.

3. Where proceedings to enforce a mechanic's lien were defended by the surety on the contractor's bond, and it did not make the defense that the lien was not filed in time, on judgment being rendered against the owner, and paid by him, the surety or its successor was liable in an action on the bond, and could not make such defense thereto.

4. After the work on a house under a contract with the builder, the owner sold the house, and the purchaser required some extra work, for which new contracts were made, after which the contractor filed a lien including work under both the old and new contracts, and recovery was had for full amount in proceedings thereon. *Held*, that the liability of defendant as surety on the contractor's bond did not extend to that portion of the lien which included work under the new contract.

5. Where the owner of a building is compelled, in proceedings against him, to pay a mechanic's lien for which the surety on the contractor's bond is liable, on recovering against the surety the owner is entitled to recover costs incurred in the proceedings against him, the amount of the lien paid, with interest thereon to the date of judgment therefor, and interest on such judgment plus the amount of costs from date of rendition.

Appeal from St. Louis Circuit Court; J. A. McDonald, Judge.

Action by Edmund A. Manny against the National Surety Company of New York. From a judgment for defendant, plaintiff appeals. Judgment for plaintiff.

Johnson & Richards and C. C. Allen, for appellant. T. J. Rowe, for appellee.

GOODE, J. Action on a contractor's bond, originally brought against the firm of Lyons Bros., the contractors, the National Surety Company of Missouri, and the National Surety Company of New York. We gather from

the record that the case was dismissed as to the firm of Lyons Bros. That firm contracted with the plaintiff, Manny, to build him a house, and gave bond for the faithful performance of the contract, with the National Surety Company of Missouri as surety thereon. The bond bound the Lyons Bros. to well and truly perform and fulfill the stipulations and covenants of the contract; keep Manny harmless and indemnified against all claims, demands, judgments, liens, mechanics' liens, costs, and fees of every description incurred in suits or otherwise that might be had against him, or against the improvements to be constructed under said contract; and repay to said obligee all sums of money which he may be obliged to pay on account of labor done or materials furnished for said improvement, etc. After the completion of the house, the O'Connell Painting Company filed a lien against the premises, and brought suit to enforce it. The National Surety Company of Missouri, as surety on the bond, was notified to defend the case, and did so. It resulted in a judgment enforcing the lien against the premises for the sum of \$536.45, and \$28.80 costs, which sums were afterwards paid by the plaintiff. No appeal was taken from this judgment by Manny, in view of advice from the attorneys of the surety company that they did not see any ground on which an appeal could be successfully prosecuted. They demanded that Manny pay the judgment, and then sue Lyons Bros. and the National Surety Company of Missouri on the bond; stating that their reason for making this demand was that the surety company held an indemnifying contract, and the indemnitors had not authorized the surety company to pay the judgment, and hence it did not feel safe in doing so. The letter containing those matters was written by McKelghan & Watts, attorneys for the surety company. It stated further that they knew of no defense that would be available against the judgment in favor of the painting company. During the trial it was admitted that the National Surety Company of New York had become the successor of the National Surety Company of Missouri for all purposes, and had purchased its assets and assumed its liabilities, and that the averments of plaintiff's petition in that respect were true. The answer set up as a defense that the plans and specifications for the building were changed without the consent of the Surety Company of Missouri, and that the alterations and changes made in the work during its progress involved a difference in the cost of construction of more than \$500. The answer further pleaded as a defense that plaintiff made payments to Lyons Bros. before they were due under the terms of the building contract, and, further, that this is an action on a bond of indemnity, and cannot be maintained against the surety company until plaintiff has exhausted his remedy against the principals. The reply, be-

sides a general denial, set up an estoppel against the surety companies, based on the letter of their attorneys to plaintiff after judgment in the lien suit, in which it was said there was no defense to the suit, nor cause to appeal, on which notice plaintiff acted, and did not appeal, but paid the judgment and costs.

1. As the National Surety Company of New York has absorbed all the assets and assumed all the liabilities of the Surety Company of Missouri, and is in all respects its corporate successor, it is liable on the bond of the National Surety Company of Missouri for any liability that company had incurred. *Thompson v. Abbott*, 61 Mo. 176; *Eans' Adm'r v. Bank*, 79 Mo. 182.

2. The bond was joint and several, and an action lay on it against the surety company without first proceeding to the extremity of the law against the principals. *Rev. St. 1899, § 889 et seq.; Union Trust Co. v. Citizens' Trust & Surety Co.*, 185 Pa. 217, 39 Atl. 886.

3. The work on the house under the contract was finished November 11, 1897. On November 16, 1897, Manny sold his house to N. G. Pierce, who required some extra work to be done, for which new contracts were made. There appears to have been no extra work except this. The O'Connell Painting Company had been doing the painting work on the building, but that work, as far as called for by the original contract, was finished prior to the sale. The painting company was engaged by another contract to do the extra work. The work done under the original contract amounted to \$497, and the extras to \$39.45. The lien account filed against the premises by the O'Connell Company included both those amounts, or \$536.45. It is contended by the defendant that the time for filing the lien for painting done under the original contract had expired before the lien papers were filed, and that a lien for that work could not have been maintained except by the inclusion of it with the extra work; that, therefore, as the lien was lost, plaintiff ought not to recover in this action. Tardiness in filing the lien may have been a defense to the painting company's suit for the amount due under the first contract, but no such defense was preferred. The case was defended by the National Surety Company of Missouri, and it devolved on it to make that defense if it saw proper. What is certain is that a judgment was rendered enforcing the lien against Manny's property for \$497, due under the original contract, as well as for \$39.45 due under the new contract; and, as he paid that judgment, it falls within the obligation of the building bond as to the amount due on the first contract.

We think the points made by the defendant are without merit.

Plaintiff also appealed, and his complaint is based on the contention that the judgment in this case should have been for the full

amount of the judgment recovered in the lien suit, as well as for the costs recovered in that action. We cannot agree that Manny is entitled to recover against these sureties the sum he had to pay the painting company under the new contract, for he had no bond covering the new contract. We think he is entitled to recover the costs he paid out in that action, to wit, \$28.80. He is also entitled to be reimbursed the \$497, plus the interest which had run on that sum to the date of the judgment, and the interest on that amount plus the amount of the costs from the date he satisfied the judgment until now. We compute the total amount which plaintiff is entitled at this time to recover at \$707.34, for which sum judgment will be entered here.

Wherefore it is considered and adjudged by the court that the plaintiff take nothing by his suit herein against the defendant National Surety Company, incorporated under the laws of the state of Missouri, but that said defendant go hence without day, and that the plaintiff recover of the defendant National Surety Company, incorporated under the laws of the state of New York, the sum of \$5,000, the penalty of the bond sued on herein, to be satisfied upon the payment of \$707.34, the damages assessed as aforesaid, together with costs of suit, and that execution issue against said defendant in the manner and form found as aforesaid.

BLAND, P. J., and REYBURN, J., concur.

BAXTER v. ST. LOUIS TRANSIT CO.

(Court of Appeals at St. Louis, Mo. Dec. 15, 1903.)

STREET RAILWAYS—COLLISION—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EVIDENCE—QUESTION FOR JURY—IMPUTED NEGLIGENCE—LAST CLEAR CHANCE—DAMAGES—INSTRUCTIONS.

1. On appeal from a judgment for plaintiff in considering the question whether a compulsory nonsuit should have been granted, the testimony offered for plaintiff should be taken as true, and every reasonable inference in favor of plaintiff should be drawn.

2. Where, in an action against a street railway for injuries sustained by plaintiff's son in a collision between a street car and a wagon on which he was riding, the son testified that the wagon was moving slowly, and he could see back of the wagon for about 1,000 feet, and that he looked back for a car, but saw none, and that the wagon was struck by a car coming from behind about 300 feet from the point where he looked, a contention that the car could not have run 1,000 feet while the wagon moved only 300 feet was of no merit, there being nothing improbable in the son's testimony.

3. Defendant's evidence tended to show that a car had passed the wagon, going in the opposite direction, just before it was struck from behind by the car in question, but plaintiff's son testified that he did not see that car. *Held*, that the son's testimony was not opposed to the physical facts, since the car might have passed and not have been seen by plaintiff, and the physical fact relied on was not one that proved itself, and could hence be overthrown by evidence of other witnesses.

4. Where the motorman of a street car saw a wagon within a foot or so of the track, proceeding in the same direction as the car, and the driver of the wagon was hidden from view, and the motorman, by the exercise of ordinary diligence, could have stopped the car in time to have avoided a collision, but failed to do so, his negligence, notwithstanding any negligence of the driver of the wagon, was the proximate cause of the injury.

5. Where the motorman of a street car saw, or by the exercise of diligence could have seen, a wagon moving in the same direction as the car, and in dangerous proximity to the track, his failure to ring his bell was negligence.

6. Where the driver of an ice wagon had charge of the wagon and the driving, and handed out ice to a boy who rode with him, and who delivered the ice to the customers, and the boy had nothing to do with the driving, the negligence of the driver in driving in dangerous proximity to a street railroad track was not imputable to the boy.

7. In an action for injuries sustained by a boy, consisting of the breaking of his leg, owing to the alleged negligence of defendant, evidence considered, and held sufficient to warrant submission to the jury of the question whether there had ever been a second fracture of the bone after the breaking at the time of the accident.

8. In an action for injuries sustained by plaintiff's minor son owing to the alleged negligence of defendant, it was a question whether the son's leg, which had been broken at the time of the accident, had been again broken, owing to his own carelessness, or whether there had never been union of the fracture after the accident. The court instructed on the question of damages that the jury should assess plaintiff's damages, if they found for plaintiff, at such sum as would be fair compensation to plaintiff for the sum reasonably incurred for medicines, etc., for a sum reasonably worth the nursing of the boy by plaintiff and his wife, and in such amount as plaintiff had been damaged by way of loss of services of the boy until the age of 21, taking into consideration his earning capacity in his injured condition and also the possibility of death; but that plaintiff could not recover if the boy's then condition was owing to a second breaking of the limb, caused by his own carelessness. *Held*, that the instructions were proper and fair.

9. There is no error in refusing instructions covered by others given.

10. Where, in an action for injuries sustained by plaintiff's minor son owing to the alleged negligence of defendant, it appeared that a leg had been broken, and that it was in such a condition that it was $2\frac{1}{4}$ inches shorter than the other and bowed out above the knee so that the foot turned inward and hung in front of the other foot, and that plaintiff had expended \$500 for medical services, a judgment for \$2,000 was not excessive.

Appeal from St. Louis Circuit Court; D. G. Taylor, Judge.

Action by William Baxter, as the next friend of Arthur Baxter, a minor, against the St. Louis Transit Company. From a judgment in favor of plaintiff for \$2,000, defendant appeals. *Affirmed*.

Dodge & Mulvihill, for appellant. Jas. M. Sutherland, for respondent.

BLAND, P. J. Plaintiff is the father of Arthur Baxter, a minor. The suit is to recover damages for injuries to the son, caused, as alleged, by the negligence of the defendant's servants in the management and operation of one of its street cars on Arsenal street,

in the city of St. Louis. The petition alleges and the evidence shows that on August 27, 1901, Arthur Baxter, then 12 years old, was in the employ of Isaac Davis, an ice dealer; that the boy's duties were to go on an ice wagon and to carry ice from the wagon to such houses as the driver of the wagon should direct; that on the above-named day the boy was on the seat of the ice wagon with the driver, Albert Davis, traveling west on the north side of Arsenal street; that there are two street railway tracks in the street, cars going west occupying the north track; that the ice wagon was being driven near the north rail of the north track; that when it had passed about 150 feet beyond where Spring avenue crosses Arsenal street a car running west on the north track struck the hub of the rear wheel of the wagon with such force as to throw the boy and the driver out into the street. The boy fell to the north, in front of the wagon, and the wheel of the wagon passed over his left leg, and broke it above the knee, causing a compound fracture, from which he has not, and never can, recover. Various contentions for a reversal of the judgment are made by the appellant company. These we will take up in the order in which we find them in the brief of counsel.

1. It is insisted that appellant's instruction (asked and refused) that under the evidence offered by plaintiff he was not entitled to recover should have been given. Plaintiff's evidence tends to show that the bed of the ice wagon on which he was traveling was constructed as such wagons usually are—i. e., with a canvas-covered bed, a seat in front for the driver, the back of which closed the entire front of the covered part of the wagon with a half-moon shaped hole in the back of the seat to enable the driver to look behind him; that the curtain on the rear end of this wagon was old, and torn into strips, so that ordinarily one on the seat could, by looking through the moon hole, see the street from the rear of the wagon; that in the forenoon of the day of the accident the wagon turned into Arsenal street from Grand avenue, and traveled west. Plaintiff's son testified that when they had gone about 150 feet on Arsenal street he looked east to see if a car was coming; that again when the wagon had traveled about 450 feet on Arsenal street he looked east for a car, but saw none, and that he could see at least two blocks east; that after this the wagon proceeded about 300 feet, when it was struck by a car running west; that the wagon had about one ton of ice on it, and was a one-horse wagon; that there was a slight downgrade, and the horse was walking in a brisk walk. He further testified that he did not hear any bell sounded, and that, if it had been sounded, he would have heard it; nor did he hear the rumbling of the car as it approached, and knew nothing of it until, to use his own language, "he was thrown up in the air"; that the car ran from 70 to 100 feet after it struck the wagon. He

also testified that on account of some ruts along the north side of the street the driver pulled in close to the railway track about 300 feet east of where the wagon was struck, and continued to drive very near to the track until the wagon was struck; that, after driving in near the track, he did not look to see if a car was coming; that, if he could not see back through the hole in the rear of the seat when he wanted to look back, he would get up on the seat and look back; that the day was clear, and he could both see and hear well; that he did not notice a car pass traveling east just before the accident; that he listened for a car bell, but did not hear any. One witness testified for the plaintiff that he was on the car, and that it was running at a speed of 25 miles an hour when it struck the wagon, and that it ran from 75 to 80 feet after it had struck the wagon. Another witness for plaintiff, who was also aboard the car at the time, testified that he thought the speed of the car was from 10 to 12 miles an hour. There was a great deal of countervailing evidence offered by the defendant, but whether or not the court erred in refusing a compulsory nonsuit must be answered by considering the evidence offered by the plaintiff, separate and apart from the defendant's countervailing evidence; and in considering the plaintiff's evidence with a view of ascertaining whether or not he made out a prima facie case entitling him to go to the jury the testimony offered in his behalf should be taken as true, and every reasonable inference therefrom in favor of plaintiff should be drawn. *Pauck v. Provision Co.*, 159 Mo. 467, 61 S. W. 806; *Buckley v. Kansas City*, 156 Mo. 16, 56 S. W. 319; *Steube v. Iron & Foundry Co.*, 85 Mo. App. 640; *Dorsey v. Railway*, 83 Mo. App. 528; *Schermerhorn Bros. Co. v. Herold*, 81 Mo. App. 461. But defendant insists that the boy's evidence is opposed to some of the physical facts shown in the case, and hence is not entitled to credence. He testified that he could see east for at least two blocks, or about 950 or 1,000 feet; that when they were about 150 feet from Grand avenue he looked back east, and again when they were about 450 feet west of Grand avenue, and that at neither time did he see a car; that the wagon was struck by the car about 300 feet from the point where he last looked back. The contention is that the car could not have run the length of two blocks, or 1,000 feet, on that street, while the wagon moved only 300 feet, and, if the boy looked when he said he did, he must have seen the car. We see nothing improbable in the statement of the boy, even if it is conceded that the car ran 1,000 feet while the wagon was moving only 300 feet, hence we cannot say that his testimony in respect to looking back and not seeing the car is opposed to the physical facts.

Defendant's employes testified that a car traveling east on the south track passed the wagon just before it was struck. The boy

testified that he did not see that car. It is contended that this testimony is opposed to the physical facts; that a car passed near by him just before the accident. Now, it may be true that a car passed, and the boy did not see it, for it is the experience of mankind that objects at times pass near us within plain view that we are not conscious of seeing, and noises are sounded in our ears that we are not conscious of hearing; but the physical fact relied on, that the car passed, is not a fact that proves itself, but is dependent upon the evidence of witnesses to establish it, and could therefore be overthrown by the evidence of other witnesses. If we take the plaintiff's evidence as true, and make every favorable inference from it that is reasonable, we have this condition of things: An open street, with a double street railway track laid in its center, with a car traveling west on the north track at a high rate of speed; 300 feet in front of it, and within a foot or a foot and one-half of the track on which the car is running, is a covered wagon, proceeding slowly in the same direction; the driver of the wagon is hidden from view; the car is running at a rapid speed, without giving any warning of its approach; it overtakes the wagon, strikes the hub of the wheel, and hurls the boy into the air; he falls on the street in front of the wagon, which is pushed or pulled over him, and the car runs on from 75 to 100 feet before it is stopped. In these circumstances it may be conceded, for the sake of the argument, that both the driver and the boy were guilty of negligence in failing to look back for a car after the wagon had been pulled in close enough to the track to be struck by a car moving on it. Nevertheless it is not the law that this negligence necessarily precludes the plaintiff from recovering. The negligence of the boy and of the driver first exposed the boy to the risk of being injured by a car coming from the east, but it seems to us that this exposure was seen, or could have been seen, by the motorman in charge of the car, by the exercise of ordinary diligence, in time for him to have stopped his car and avoided the accident. If so, then his negligence in not stopping the car was the proximate cause of the injury. *Kloekenbrink v. Railroad*, 81 Mo. App. 351. The principle of law in such circumstances is that "the party who has the last opportunity to avoid the accident is not excused by the negligence of anyone else." *Sherman & Redfield on the Law of Negligence* (5th Ed.) § 99; *Bunyan v. Railway*, 127 Mo. 12, 29 S. W. 842; *Morgan v. Railway*, 159 Mo. 262, 60 S. W. 195; *Holwerson v. Railway*, 157 Mo. 216, 57 S. W. 770, 50 L. R. A. 850; *Schmidt v. Railroad*, 163 Mo. 645, 63 S. W. 834; *McAndrew v. Railway*, 88 Mo. App. 97; *Hutchinson v. Railway*, 88 Mo. App. 376; *Edwards v. Railway*, 94 Mo. App. 36, 67 S. W. 950. It is also shown by the evidence that the boy did not hear the bell of the car; that,

had it been sounded, he would have heard it; and the evidence further shows that the motorman saw, or by the exercise of due diligence could have seen, the wagon moving along in dangerous proximity to the track. In these circumstances it was his duty to have sounded the bell in time to allow the driver to pull away from the track. His failure to do so was negligence, for, had he sounded the bell, the probabilities are it would have been heard, and the wagon pulled away from the track in time to have avoided the injury. *Grocer Company v. Railroad*, 89 Mo. App. 391; *Morgan v. Railway*, supra. We conclude that plaintiff's evidence entitled him to go to the jury.

2. Contributory negligence was alleged in the answer as a defense. The court, in effect, instructed the jury that the negligence of Davis, the driver of the wagon, should not be imputed to plaintiff's son, but that, before it could be found that he was guilty of negligence contributing to the injury, the jury should find that he, independent of Davis, was guilty of negligence. It is contended by appellant that the negligence of Davis, the driver, should be imputed to the boy. The evidence shows that the driver and the boy were engaged in one and the same employment, to wit, hauling and delivering ice. The driver had charge of the wagon, and drove the horse and handed out the ice from the wagon to the boy, who carried it from the wagon and delivered it to the customers. Both rode on the wagon, occupying the same seat. Plaintiff was not 13 years old when he got hurt, and the driver of the wagon was 18. Plaintiff had nothing to do with the driving, and no control over it. He and the driver, therefore, were not engaged in a joint enterprise in such sense that the driver's negligence could be imputed to him. That rule only comes into play where two persons are co-operating to do the same thing. But plaintiff's duties were entirely distinct from those of the driver, and he could not possibly influence the driver's course by any authority he had over him, and should not be responsible for the driver's negligence. The case of *Keitel v. Railroad*, 28 Mo. App. 657, is directly in point, and settles this question. All the cases cited by the appellant, except one in New York, are where the persons were engaged in doing the same thing—that is, controlling the team, say—and under such circumstances the negligence of one is held to be imputable to the other because each may influence the other's conduct. In *Dickson v. Railroad*, 104 Mo. 491, 16 S. W. 381, it is directly decided that the negligence of a driver of a vehicle, he not being in the employment or under the control of the person injured, cannot be imputed to the latter. In *Munger v. Sedalia*, 66 Mo. App. 629, it was held that a city cannot set up negligence of a husband in driving over a sand pile in a street, which was negligently left there, in an action for inju-

ries sustained by the wife. In *McCormack v. Railroad* (Sup.) 44 N. Y. Supp. 684, the view is supported that there was no joint venture by Davis and the plaintiff under the evidence shown in this case. They were merely co-employees of the same employer. *Schron v. Railroad* (Sup.) 45 N. Y. Supp. 124, on its face might lend some countenance to the defendant's contention. But the opinion in that case was written by the same judge who wrote the opinion in the *McCormack Case*; hence it is fair to conclude that the facts of the two controversies were entirely different, and that the facts shown in the *Schron Case* clearly made out a joint venture—that is, that the person injured and the person with him were actively engaged in doing the same thing. In New York, etc., *Railroad v. Kistler* (Ohio) 64 N. E. 130, a father and daughter were driving on a country road in a buggy, and he was injured by a freight train. The father was deaf, and there was evidence to show the daughter was taken along to listen for trains. In view of this evidence it was held that it was for the jury to say whether they were both engaged in the driving, and, if they were, the daughter's negligence would be imputable to the father, on the same principle that the negligence of a servant is imputed to the master, namely, that the latter can control the former. The principle of the decision (as of all such decisions) is that the party actually negligent stood in such relation to the injured party that the latter could influence the action of the other, and thereby prevent injury by his negligence. There has been, apparently, some fluctuation in the Iowa decisions in imputing negligence in a joint venture (*Yahn v. Ottumwa*, 60 Iowa, 429, 15 N. W. 257; *Slater v. Railroad*, 71 Iowa, 209, 32 N. W. 264), and in the last-cited case the Supreme Court took occasion to repudiate the doctrine which had been attributed to that court by text-writers because of their construction of their decision of *Stafford v. City of Oskaloosa*, 57 Iowa, 748, 11 N. W. 668. Perhaps it is fairly deducible from the last opinion by that court that it holds now, as do the appellate courts of this state, that negligence is not imputable on the theory of joint venture unless the relations of the parties injured in the accident are such that the negligent one might have been controlled, or at least influenced, by the other.

On the measure of damages the court instructed the jury for plaintiff as follows: "(5) If the jury finds a verdict in favor of the plaintiff, it should assess his damages at such an amount as the jury believe, from the evidence, will be a fair compensation to plaintiff. First, for such a sum as he reasonably incurred for medicines, hospital charges, drugs and appliances in the treatment of his said son, occasioned by said injuries; second, for such a sum as it was reasonably worth for the nursing of said son by plaintiff and his wife occasioned by the

injuries in question; and, third, for such sum as the jury may believe from the evidence, if any, plaintiff has sustained, or will probably sustain, by way of loss or partial loss of services of his said minor son occasioned by said injuries, until he attains the age of 21 years, taking into consideration the earning capacity of the boy in his injured condition, and also the possibility of his death before reaching the age of twenty-one years. And the jury, in assessing the plaintiff's damages, will confine itself to the elements of damages above enumerated, but the total damages allowed, if any, must not exceed the sum of forty-two hundred dollars." Counter to this instruction the court gave the following: "The court instructs the jury that the plaintiff cannot recover in this action for the present condition of the plaintiff's son, Arthur Baxter, if you believe and find from the evidence that the second injury or breaking of the limb was caused by the carelessness of the said Arthur Baxter himself, and you believe from the evidence that the present condition of said Arthur Baxter is the result of such second injury." In respect to the injuries, the evidence shows a compound fracture; that the bone protruded through the flesh, skin, and the boy's clothing; that he was taken to St. Mary's Infirmary, and there treated by Dr. R. F. Amyx for over five months; that, when the plaster of paris cast was taken off, Dr. Amyx thought, and testified, that there had been a union of the broken bone, and the boy was sent home, with instructions from Dr. Amyx to exercise his leg carefully on crutches. He went home. The wound had not healed, but he was able to walk from one chair to another across the room. After he had been at home for a short time, on a pleasant day, he went out, on his crutches, into the yard, and was playing with his sisters. One of them handed him a lemon, which he threw, or rather tossed, back at her. He heard his leg snap when he made the throw, and thought and said he had broken his leg over. When he made the throw, he had his crutches under his arms, and the foot of the broken leg was on the ground, but he was not bearing his weight upon it. Dr. Amyx was called in, and placed the leg in an iron brace splint. It remained in this condition for several weeks, but did not improve. The boy was taken back to the infirmary, and his leg operated on. It was found that there was no union of the bone, and that the ends at the fracture were diseased. The decayed or rotten parts were removed, and the ends wired together. The result is no firm union has taken place, and the leg is $2\frac{1}{2}$ inches shorter than the other. It is bowed out above the knee, and the foot turns inward, and hangs in front of the other foot. Dr. Geo. W. Broome testified that he made an examination of the boy's injuries two or three weeks before the trial; that by means of the X-ray he found that "the inner border of those

two fragments of the thigh bone are at a very strong angle from the knee joint up to the fracture, and from the fracture up to the thigh quite an angle. Right at this point of angulation the inner margin of the bone came in contact with the inner border of the two fragments of the bone; as I say, quite a considerable angulation." He further testified that he did not think there was a bony union; that the point of contact between the two bones seemed to be a soft, transparent structure, and it was impossible for the leg to ever become strong, and that he was very positive that there never had been a perfect bony union; that "a compound fracture does not necessarily aggravate or extenuate a simple fracture. A compound fracture means the soft parts are involved, the hole extending from the skin into the broken bone. The compound means that this violence that produced the fracture also produced an opening from the skin into the bone. That is what compound means. Had it been comminuted, that, then, would be different. Comminuted means the bone broken in several pieces. Simply a compound fracture does not necessarily make the fracture any worse than if simply subcutaneous. If it is a compound fracture, it is always infected—always infection follows—and we require for any union at all that infection to be destroyed. Now, since you ask the question, I understand what the difficulty is in this case. It has been a case of infection right from the start. That has been the element that undoubtedly operated against the union, because the proper application—the proper treatment—seems to have been properly applied." We think it reasonably appears from this evidence that there never was a cure of the injury; that it continued from its inception down to the day of the trial; that there never was a second fracture of the bone, for the reason the original fracture had never healed; at any rate, there is substantial evidence to this effect, and it was appropriately submitted to the jury.

We think the two instructions on the measure of damages were eminently proper under the evidence, and entirely fair to both sides. We discover no error in the instructions given on the issues of negligence and contributory negligence. Those given cover all there was for the jury to consider as to the merits of the cause, and hence there was no error in refusing other instructions asked by the defendant. The verdict was for \$2,500. The trial judge thought it excessive, in consequence of which the plaintiff remitted \$500, and judgment was rendered for \$2,000. The evidence shows that for treatment of the injury plaintiff had paid out \$500. In view of this expenditure, we think the judgment is for a reasonable amount and should be affirmed.

The judgment is affirmed.

REYBURN and GOODE, JJ., concur.

EXCHANGE REAL ESTATE & BUILDING CO. v. SCHUCHMAN REALTY

CO. et al.*

(Court of Appeals at St. Louis, Mo. Dec. 1, 1903.)

LANDLORD AND TENANT—RIGHT TO REMOVE BUILDINGS—ESTOPPEL—MEASURE OF DAMAGES—DECLARATION OF LAW—ERROR.

1. Where one purchases the leasehold of one in possession of real estate on the representation of the agents of the owner that he should have the right to remove the improvements, the owner is estopped to deny the right to remove the improvements, though at the time of the purchase the written lease granting the right to the tenant to remove the improvements had expired.

2. Where an action to recover the value of buildings which plaintiff, a tenant, is wrongfully prevented from removing, is tried on the theory that the measure of damages is the value of the material after the buildings had been wrecked and removed, and no evidence is offered as to their value standing on the premises, a declaration of law by the court from which it might be inferred that the damages were estimated to be the value of the buildings standing on the premises is not cause for reversal.

Appeal from St. Louis Circuit Court; Robert M. Foster, Judge.

Action by the Exchange Real Estate & Building Company against the Schuchman Realty Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Collins & Chappell, for appellants. E. W. Banister, for respondent.

BLAND, P. J. This controversy arises out of the following clause in a lease of certain real estate in the city of St. Louis for a term of five years executed by Simon Rossi to William H. Dausman February 20, 1895, to wit: "At expiration of said lease in case the said lessor, his heirs or assigns, and the said lessee, his heirs or assigns, do not agree on terms for new lease of said lot, said lessor, his heirs or assigns, agree to allow the said lessee, his heirs or assigns, to remove all improvements put on lot by said lessee at his, said lessee's, expense." The lease by mesne assignments was acquired by the plaintiff. The lessees erected on the premises a one-story brick building, 30 by 50 feet, and a frame building 30 by 80 feet, and a 20-foot shed on the side of the brick building, and put up about 300 feet of fencing. The material in these improvements was estimated by plaintiff's witnesses to be of the net value of \$500 at the time defendant took possession (November, 1901); that is, it was of that value after the buildings had been wrecked, and the material piled and removed from the premises. The defendant's evidence is that the material was worth, net, from \$75 to \$80. Hubert Gaesar, one of the assignees of the lease, was in the occupancy of the premises when the lease expired. Fisher & Co. were the agents of Rossi for

the property, and collected the rents. A short time before the lease expired, Gaesar went to Rossi, the then owner, and wanted the lease renewed. Rossi told him he did not want to give a new lease, but that he could continue on in the occupancy of the premises. Gaesar said, if he could not get a new lease, he wanted to remove the buildings before the lease expired; and Rossi assured him that he might remove the buildings at any time in the future, and that when he (Rossi) wanted possession he would give him 90 days' notice, so as to give plenty of time to remove the buildings, and told him to see Fisher & Co., his agents, about a new lease. Gaesar went to Fisher & Co., and they refused to give a lease, but assured Gaesar that he might remain on the premises at a rental of \$35 per month, and that so long as he paid his rent he might keep the premises, and agreed to give him 90 days' time in which to vacate and move off the improvements. This agreement, Gaesar testified, was indorsed on his receipt for rent for the month of February, 1900, and that he informed Fisher & Co. at the same time that he wanted to put up another improvement, and they told him to go ahead and put it up; that he had a right to remove the buildings on the premises, and no one would interfere with this right, and he should have 90 days' notice when they wanted possession of the premises, to give him time to move off the improvements. That on the faith of this agreement he put up a frame structure about 50 feet square on the premises. Fisher & Co. admitted that they agreed to give 60 or 90 days' notice to Gaesar to vacate, but denied that they recognized his right to remove the improvements after the expiration of the lease of 1895. Gaesar subsequently sold the improvements, and the tenant occupying the premises on October 23, 1900, paid Fisher & Co. for that month's rent. A receipt was given for the rent, and was indorsed, "Ninety days' notice to be given lessee in case of re-lease or sale," etc., and signed, "Fisher & Co." After this, defendant acquired the fee to the premises by mesne conveyances from Rossi. Gaesar sold his lease and the improvements to L. H. Lawrence, and Lawrence to the plaintiff. Before making the purchase from Lawrence, plaintiff sent E. W. Banister to the defendant for the purpose of finding out whether or not Lawrence had the right to remove the improvements from the premises at the termination of his tenancy. Banister and Lawrence went together to see the defendant, and they met Schuchman, of the Schuchman Realty Company, and had a conversation with him in regard to the matter. They both testified that Schuchman stated Lawrence had the right to remove the improvements, and that the law gave him 30 days to remove them after notice to quit; that Lawrence wanted the time extended, but Schuchman refused to extend the time of

*Rehearing denied January 19, 1904.

notice over 30 days, and advised Lawrence to remain on the premises, stating that they did not expect to sell for some time, and that Lawrence could make money by renting the premises for a saloon. Schuchman admitted he had a conversation with Lawrence and Banister, but denied that he recognized Lawrence's right to remove the improvements; denied that anything whatever was said in the conversation about the improvements; stated that Lawrence wanted an extension of time of notice to quit, and also a new lease, but that he refused to execute a new lease, or to extend the time of notice to quit. He further testified that he knew nothing about the original lease, had never seen it, and did not know of its existence; that before his company bought the property he went on the premises for the purpose of seeing who was there, and was informed by the tenant then in possession that the tenancy was from month to month, and bought the premises with that understanding. On the part of plaintiff, the evidence is that it was in possession of the premises by a subtenant, and that in October, 1901, plaintiff took possession by force. On the part of the defendant, the evidence is that the premises were unoccupied—being used as a sleeping place by tramps—when he took possession. On October 31, 1901, defendant was notified in writing by plaintiff that plaintiff would, within 30 days, as the owners thereof, remove the improvements from the premises. On November 1, 1901, defendant, by written notice, forbade plaintiff to remove anything from the premises. The suit was to recover the value of the improvements. The issues were submitted to the court, who found for the plaintiff, and assessed his damages at \$500. Defendant saved its exceptions in the usual way, and appealed.

Plaintiff went into possession of the premises as a tenant after the expiration of the term of the five-year lease from Rossi to Dausman, and defendant acquired the title from Rossi by mesne conveyances, also after the expiration of the term of the lease. If nothing more appeared in the record, it is evident that plaintiff was not entitled to recover, as the right to remove the improvements coexisted with the life of the lease, and if the lease was dead, and plaintiff was in possession under a new one, in which no agreement was made that the tenant might remove the improvements, he had no right to remove them. *Williams v. Lane*, 62 Mo. App. 66, and cases cited.

It is contended by defendant that a new lease was made after the expiration of the lease of 1895, and that plaintiff occupied the premises under this new lease. The evidence shows that Fisher & Co. were the agents of defendant, as well as Rossi and of all the owners of the premises, from the date of the Rossi lease until defendant took possession. It reasonably appears from the evidence that all the tenants after Gaesar,

including plaintiff, purchased on the faith of the agreement between Rossi and Gaesar in February, 1900, that, whenever the owner should desire to terminate the lease, 90 days' notice would be given the tenant in which to remove the buildings, and that the right to the improvements under the old lease was fully recognized. It also appears from the testimony of Banister and Lawrence that, before plaintiff would purchase of Lawrence, defendant assured Banister, the plaintiff's agent, that Lawrence had the right to remove the buildings, and had the right to 30 days' notice to remove them at any time when the tenancy might be terminated. The uncontradicted evidence is that Rossi and his agents, Fisher & Co., both refused to give a new lease, and agreed that the tenant, by paying \$35 per month, might remain on the premises for an indefinite term, and that he should have 90 days' notice of the termination of the tenancy, and that Rossi expressly agreed that he should have this notice for the purpose of enabling him to remove the buildings from the premises. This was a new arrangement, but it distinctly recognized the right given in the old lease to remove the improvements, notwithstanding the future holding should be from month to month. By this arrangement, we think the clause in the old lease, that the tenants should have the privilege of removing the improvements at the expiration of the lease, was distinctly adopted and continued in force down to the day the defendant unlawfully took possession of the premises. The evidence of plaintiff shows that it would not have made the purchase of Lawrence, and paid the price it did pay, but for the representation of Schuchman that the improvements belonged to Lawrence, and that he was entitled to 30 days' notice in which to remove them. On this state of facts, defendant was estopped to deny the right of plaintiff to the improvements. *Reynolds v. Kroff*, 144 Mo., loc. cit. 447, 46 S. W. 424; *State ex rel. v. Branch*, 151 Mo. 622, 52 S. W. 390; *Cornwall v. Ganser*, 85 Mo. App. 678. And the finding of the circuit court for the plaintiff may be well sustained on the theory of an estoppel.

2. Defendant has furnished us with a very interesting brief as to the measure of damages in a case like this. His contention is that the proper measure of damages is the value of the material after the buildings had been wrecked and the material removed from the premises. Whether or not this is the correct rule, it is the one most favorable to the defendant, and the one adopted by the plaintiff by its introducing evidence to prove the value of the material in the buildings after the buildings had been torn down and the material removed, and by not introducing any evidence of the value of the buildings to the defendant, standing on the premises. The court declared the law of the case as follows: "The court, sitting as a jury,

declares the law to be that, under the evidence in this case, the plaintiff is entitled to recover of the defendants, and that its measure of damages is the reasonable value of the buildings on the 1st day of November, 1901, the date of the demand made for the same by plaintiff, and the refusal to deliver by the defendants; and the court further finds the reasonable value of said buildings at said date to be \$500." From this declaration of law, the defendant draws the inference that the court estimated the damages to be the value of the buildings to the defendant, standing on the premises. As we have seen, there was no evidence introduced by either party of their value to defendant, standing on the premises. The plaintiff's evidence tended to prove the net value of the material in the buildings to be \$500, and the court must have acted on this evidence in assessing the damages. We do not think we should convict the trial court of error on account of an unguarded expression in a declaration of law, when to do so would convict the court of assessing the damages from a viewpoint not supported by any evidence whatever, and in the face of the fact that from another viewpoint, and on the theory adopted by both sides at the trial, there is ample evidence in support of the finding.

From the whole record, it seems to us that the judgment is for the right party, and it is affirmed.

REYBURN and GOODE, JJ., concur.

PHILIPPI v. AMERICAN BRASS & MFG. CO.*

(Court of Appeals at St. Louis, Mo. Dec. 15, 1903.)

INJUNCTION OF ACTION—FINAL JUDGMENT.

1. On affirmation by the Court of Appeals of a judgment for plaintiff in a suit of unlawful detainer, there is nothing on which an injunction can operate, and judgment in a suit to enjoin such action must go for defendant therein.

Appeal from St. Louis Circuit Court; Franklin Ferriss, Judge.

Bill by Theodore F. Philippi against the American Brass & Manufacturing Company. From a decree for defendant, plaintiff appeals. Affirmed.

Kurt Von Reppert, for appellant. Rasmieur & Buder, for respondent.

BLAND, P. J. This suit is by bill in equity to reform the description of real estate in a written lease, and to enjoin the prosecution of a suit of unlawful detainer brought by the defendant against the plaintiff herein. The evidence is wholly insufficient to warrant a reformation of the lease in the manner prayed for by the plaintiff. The unlawful detainer suit was by the plaintiff

therein prosecuted to a judgment in its favor, from which the defendant (plaintiff herein) appealed to this court. The judgment of the circuit court in the unlawful detainer case has, on the appeal, been affirmed by this court, and is final. There is therefore nothing left in the controversy to be enjoined, and the judgment of the circuit court is affirmed.

REYBURN and GOODE, JJ., concur.

KENNEDY v. ST. LOUIS TRANSIT CO.*

(Court of Appeals at St. Louis, Mo. Dec. 1, 1903.)

CARRIER—INJURY TO PASSENGER—DAMAGES—MENTAL ANGUISH—APPEAL.

1. Where, in an action against a street railway company for injury to a passenger, the court, on behalf of the company, directs a finding for it if she was not caused to fall by the starting of the car with a sudden jerk, but through an attempt to leave the car while it was in motion, she is entitled to an instruction that, before there can be a finding for the company because of her negligence, there must be a preponderance of evidence that she attempted to alight before the car stopped.

2. Where bodily injuries are alleged in the petition, and proof thereof made on the trial, mental anguish, distinguished from physical pain, is a proper element of damage, though not stated in the petition, and though there is no disfigurement of the person.

3. A verdict against a street railway company for injuries to a passenger, being clearly wrong and excessive, will be set aside by an appellate court in the exercise of the superintending control over inferior courts granted by Const. art. 6, § 12, notwithstanding the refusal of a new trial by the trial court.

Goode, J., dissenting.

Appeal from St. Louis Circuit Court; Franklin Ferriss, Judge.

Action by Annie Kennedy against the St. Louis Transit Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Jones, Jones & Hocker, for appellant. Waddill, Welch & Hall, for respondent.

REYBURN, J. The material paragraphs of plaintiff's petition are as follows: "And for her cause of action plaintiff says that on the 23d day of December, 1902, she was a passenger on one of defendant's Olive street cars going east; that after said car turned north on Broadway from Olive street, and came to a stop for passengers to alight, and whilst plaintiff was in the act of stepping off of said car, the defendant's servants—its motorman and conductor in charge of its said car—so carelessly and negligently, and without using the proper care and caution in the management and control of its said car, did cause and suffer said car to start with a sudden jerk, thereby throwing this plaintiff to the street, she alighting upon her

*Rehearing denied January 19, 1904.

*Rehearing denied December 15, 1903.

¶ 2. See Damages, vol. 15, Cent. Dig. §§ 441, 446.

back, injuring her back and spine, causing her great pain and suffering, and disabling her, and preventing her attending to her usual pursuits and business for a long time, to wit, from said 23d day of December, 1902, until the present time, and the plaintiff believes, and so charges the fact to be, that she is permanently injured in her spine and back by being so thrown from said car as aforesaid; that said injuries so inflicted as aforesaid were caused by and are attributable solely to the careless and negligent handling of said car by the defendant through its servants, said motorman and conductor." An allegation of damages in a sum specified and prayer for judgment therefor follow. The answer embraced a general denial and a special plea that plaintiff's injuries, if any there were, were due to her own negligence in attempting to alight from defendant's car while the same was moving round a curve in its track leading from its Olive street to its Broadway line.

Plaintiff's testimony was to the effect that she was 44 years of age, and about 7 o'clock a. m., December 23, 1902, accompanied by her husband and granddaughter, the latter a child 10 years of age, she got upon an Olive street car at Ewing avenue, all on their way to a store on Broadway, where they were employed, plaintiff being then a saleslady in one of the departments. After the car turned north into Broadway, her husband pressed the electric button for the car to stop, and, together with the granddaughter, who had been seated on plaintiff's knee, walked in front of plaintiff, and, after the car stopped, proceeded to get off, and plaintiff following walked back towards the rear door, started to get off, being on the step and holding the hand rail, when the car lunged, and threw her violently into the street. She was assisted by her husband to arise, and with his aid proceeded on foot to the store, the place of their employment several blocks north, where she remained during the day, working a portion of the time, and returning home in the evening. That from that time she had been unable to work from suffering with her back. That she suffered continually in the lower part of the spinal column and across the lower part of the back, and had been confined for two months to the house. On December 26th she applied for treatment to the Washington University Dispensary. A few days later she was treated by a physician in the defendant's employ, and then consulted a physician recommended to her, who continued to treat her at intervals thereafter.

1. Among other instructions given at instance of plaintiff was the following: "(6) The court instructs the jury that before you can find for the defendant on the grounds that plaintiff's own negligence contributed to cause the injury, as alleged in defendant's answer, you must believe from a preponderance or greater weight of the evidence that

plaintiff negligently attempted to alight from defendant's car before it came to a stop at Broadway and Olive streets." Appellant vigorously assails this charge as ignoring the plea of contributory negligence contained in the answer, and precluding the jury from its consideration. The instructions of the trial court together constitute the whole charge, and, if taken as a whole and read together, they submit the issues fairly, are not calculated to mislead the jury, are harmonious, consistent, and embrace all the issues, they are sufficient. *Liese v. Meyer*, 143 Mo., loc. cit. 560, 45 S. W. 282. In this case the court gave eight instructions, made up of three at instance of plaintiff, four asked by defendant, and one of its own motion, respecting the form of the verdict. Instruction numbered 3 on behalf of defendant was predicated upon the contributory negligence pleaded in its answer, and directed a finding for defendant if the jury found that plaintiff was not caused to fall by the starting of the car with a sudden jerk, but fell through an attempt to leave defendant's car while it was in motion. Plaintiff in turn was entitled to the instruction criticised, and the whole charge found in the entire instructions, considered together, embraced all the issues and fairly submitted the cause to the consideration of the jury.

2. The instruction regarding the elements and measure of recovery, authorizing the jury to award damages for future mental anguish distinguished from physical pain and injury, is assailed as not warranted, as there was no disfigurement of the person to produce mental anguish as distinguished from physical pain, either in the past or in the future, and no evidence of any past or prospective mental anguish was tendered; and, finally, the petition contained no allegation of mental anguish, and, in absence of proof of such injury, the court should not have instructed for recovery thereon. Mental anguish may be caused by great pain of body or mind, or both, even where the injury may not be external or visible, nor accompanied by apparent disfigurement. In the language of Judge Black in *Brown v. Railway*, 99 Mo. 310, 12 S. W. 655—a well-considered case dealing with this subject: "Facts which are necessarily implied from those alleged need not be stated. Bliss on Code Pleading (2d Ed.) § 176. Physical pain and mental anguish usually, and to some extent necessarily, flow from or attend bodily injuries. It is not necessary to make specific proof of pain and mental anguish. These elements of damage are sufficiently shown by the evidence which discloses the nature, character, and extent of the injuries. From such evidence the jury may infer pain and mental anguish. *C., B. & Q. R. R. v. Warner*, 106 Ill. 538; *Id.*, 18 Am. & Eng. R. R. Cases, 100; *T. & P. R. R. v. Curry*, 64 Tex. 85. It follows, from what has been said, that where bodily injuries are alleged in the petition,

and proof thereof made upon the trial, and the person injured is the plaintiff, physical pain and mental anguish are proper elements of damage, though not stated in the petition."

3. The injuries sustained by plaintiff were described by her medical attendant as a fracture of one of the hip or pelvic bones—the coccyx, as denominated by him in medical nomenclature; a hurt which he deposed would take at least a long time to heal and unite, and which he did not regard as very rare, and of which, in his 14 years' experience, he had seen over 20. On defendant's behalf three members of the medical profession testified. The first, a man of 30 years' and more professional experience, of which professional life he had spent many years at the city hospital, accompanied by the attending physician referred to above, and a younger physician later mentioned, had made an examination of plaintiff's condition on the morning of the trial, May 12, 1903, and gave as his expert opinion its results. He declared that he found no evidence of any fracture, and that the bone in question appeared to be in normal condition, and, if any such injury as fracture of the coccyx had been suffered by plaintiff, she would have been unable thereafter to walk six blocks, or even to stand, and that the only two patients with such injury he had seen—which he pronounced a very rare fracture—were unable to stand. The remaining doctor present at the above examination also expressed his professional judgment that there was no injury of the kind described, and the region mentioned was in natural condition. The physician in defendant's employ, who attended plaintiff shortly after the occurrence, and investigated the extent of her injury, testified that he had visited and examined plaintiff at her residence, and found no evidence of the injury; that the bone involved showed no evidence of any fracture, and its position was normal; that she was in bed when he visited her, but she sat up, and was up and around the room, walking around the room when he was there, and in bed about half the time, and it would have been impossible for her to walk, sit up, or move if such fracture had occurred; and the injury indicated was of such rare character that many practitioners never encountered it. The testimony was barren of any proof of any medical expenses paid or incurred by plaintiff, or any expenditure for any restoratives or medicines.

The defendant urges that the verdict is so manifestly against the evidence that simple justice demands a new trial. In ordinary actions at law this court does not weigh the evidence, and usually should not interfere in regard to the weight of the evidence as encroaching upon the province of the jury. *Garratt v. Greenwell*, 92 Mo. 120, 4 S. W. 441; *Whitsett v. Ransom*, 79 Mo. 258. And this court will rarely interfere with the discretion of the trial court in directing a new trial on

the mere question of evidence, inspired by the belief that the trial courts recognize and bear in mind the rule so clearly announced by the highest tribunal of this state. "Circuit courts have large discretion in the matter of granting new trials, particularly upon the ground that the verdict is against the weight of the evidence. This court has often ruled that in law cases, where there is a conflict in the evidence, it would not review it, and determine its weight; and it has as often declared it to be not only the right, but the duty, of circuit courts to supervise the verdicts of juries and grant new trials, if the verdict is, in their opinion, against the weight of evidence." *Bank v. Wood*, 124 Mo. 72, 27 S. W. 554. And more tersely but as forcibly stated in a later case: "It is the province of the jury, in the first place, to assess the damages; and it is the duty of the trial court to grant a new trial or to order a remittitur if it thinks the damages excessive." *Norris v. Whyte*, 158 Mo. 20, 57 S. W. 1037. But it is now well settled in this state that an appellate court, under the superintending control conferred over the inferior courts of record by the Constitution of the state (article 6, § 12), has the power and authority to set aside judgments, where the trial judge has failed to interpose, based upon verdicts indicative of passion, prejudice, or misconduct. *Norris v. Whyte*, supra; *Chitty v. Railway*, 148 Mo. 64, 49 S. W. 868.

Summarizing the testimony in this case, the conclusion is irresistible that the verdict and award of damages herein are manifestly and clearly wrong and excessive, and that justice will be attained by reversing the judgment and remanding the cause for retrial, which is accordingly ordered.

BLAND, P. J., concurs. GOODE, J., dissents.

ROGERS et ux. v. SAMUEL MEYERSON PRINTING CO.*

(Court of Appeals at St. Louis, Mo. Dec. 15, 1903.)

MASTER AND SERVANT—PERSONAL INJURIES—MINORS—SAFE PLACE TO WORK—NEGLIGENCE—PRESUMPTION—QUESTION FOR JURY.

1. In an action for negligence causing the death of a boy 13 years of age in defendant's employment, the presumption was that the boy was careful.

2. The court properly instructed that a deceased employé was bound to exercise only such care and prudence as reasonably might be expected of a boy of his age and capacity in the same circumstances, and that the law does not require as high care from a person of tender years and imperfect discretion as from one of mature years.

3. In an action for the death of a boy in defendant's employment, caused by his falling through a window extending about two feet and a half above the level of a landing on a stairway down which he was descending, it appeared

*Rehearing denied January 19, 1904.

¶ 2. See *Master and Servant*, vol. 34, Cent. Dig. § 688.

that deceased knew that a laborer had once fallen through the window while moving machinery, and that defendant had warned boys against sliding down the stair banister on account of danger of falling through the window. The landing was about seven feet wide and eight feet long. *Held*, that whether defendant was negligent in his duty of furnishing a safe place to work, by failing to place guards across the window, was a question for the jury.

Appeal from St. Louis Circuit Court; J. R. Kinealy, Judge.

Action by Charles T. Rogers and wife against the Samuel Meyerson Printing Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Kehr & Tittman, for appellant. Cunningham & Mauere, for respondents.

GOODE, J. Respondents' son, Walter Rogers, was killed while performing his duty as an employé of the appellant company, and this action was brought by the parents for the damages sustained by his death, which is ascribed in the petition to negligence on the part of the appellant. The fatal accident was of a singular kind, as will appear from a statement of the facts, so far as they are known. The printing company did business in a four-story building on the southwest corner of Third and Vine streets, in the city of St. Louis. Between the third and fourth stories, on the north side of the building, were two flights of stairs of 10 steps each, the lower flight rising from the third story to a platform or landing midway between the two stories, and the other flight rising to the fourth story. The steps were wide enough, and of low height. On the right hand in ascending, left hand in descending, was a banister. It curved at the platform on an arc whose chord was nine inches. The landing platform between the two stories was, as we gather, about seven feet wide and more than eight feet long. A window in the north wall of the building occupied the middle space of that part of the wall across which the platform extended. This window was a little over four feet wide, and each sash (the upper and lower) had two panes of glass in it about two feet wide. Only two feet seven inches of the window projected above the platform, the other eight feet extending below. The window was arched at the top, and the arch was, of course, narrower toward its center than at the sides. The banister running from the fourth story to the landing would, if prolonged, have struck the window just four inches east of the center. The center of the window coincided with the center line of the curve of the banister at the landing, which curve, as stated, was nine inches across; that is, a line prolonged from the center of the curve would strike exactly in the center of the mullion of the window; and, as the chord of the curve was nine inches long, the upper banister would thereby be thrown a little over four inches east

of the mullion. During the afternoon of May 16, 1901, Walter Rogers, then a lad 13 years old, was sent to the fourth story of the building, and, after dispatching his errand, started to return to the third story. When next seen, he was in the air outside the building, having fallen through the east pane of the window at the landing, whence he dropped into the middle of Vine street and was killed. He was seen in his descent by a workman engaged in a building across the street. The negligence charged against the defendant was failing to guard and protect the window above the stair landing, which is alleged to have been dangerous in its unguarded state.

One position assumed by the appellant is that the boy, Walter, lost his hold while sliding down the rail of the banister, slipped off, and plunged through the window at the foot. On this assumption he is said to have caused his death by his own negligence. There is testimony that he and other boys who worked on the premises were in the habit of half sitting, half lying, on the railing, with their heads leaned slightly outside of it and their feet inside and sliding down, and that they had been warned against the prank. There is no positive and very slight circumstantial evidence that at the time Walter was killed he slid down the banister. A mark was found on the platform, beginning a few inches from the window and running to the edge of the platform, which was thought to have been scraped by the boy's heel, and to show he had slipped off the banister; but the inference could as well be drawn that he had slipped from the stairs to the landing and made the mark. An argument designed to show that the physical facts demonstrate the boy slipped from the banister through the window is addressed to us by appellant's counsel, but, while the reasoning is satisfactory on the proposition that the accident could have happened that way, it falls short of demonstrating that it must. Until evidence was in which bore on the question, the presumption obtained that the deceased was careful instead of negligent, and it was for the appellant to overcome that presumption by positive or circumstantial evidence proving him to have been careless. The issue was referred to the jury in all the instructions, and they must have found the boy was free from negligence.

Appellant's counsel contend the court erred in advising the jury that the deceased was bound to exercise only such care and prudence as reasonably might be expected of a boy of his age and capacity in the same circumstances, and that the law does not require as high care from a person of tender years and imperfect discretion as from one of mature years and discretion. The court's charge was in harmony with the prevalent rule of law in this state in regard to the negligence of children. *Donoho v. Iron Works*, 7 Mo. App. 447, 75 Mo. 401; *Schmitz*

v. R. R., 119 Mo. 256, 24 S. W. 472, 23 L. R. A. 250; Van Natta v. Ry., etc., Co., 133 Mo. 13, 34 S. W. 505. Appellant's counsel argue as if the fact that the boy slid down the banister conclusively established negligence on his part, and the lower court adopted that theory and gave an instruction which directed the jury to return a verdict for the appellant if they found the deceased was killed by slipping from the rail and dashing through the window. Appellant surely got all it was entitled to in that charge on the particular point we are dealing with, and has no room for complaint. In view of our decision that the evidence as to the manner of the accident afforded ground for a finding against the banister theory, we must presume the jury returned a verdict for the respondents because they rejected the conclusion that the deceased rode down the railing, and with it the hypothesis that he was negligent in so doing.

Another defense relied on is that the appellant was guilty of no negligence in failing to guard the portion of the window which projected above the landing; that the risk of a servant, or other person having business on the premises, falling through the window, was so remote as to excuse the appellant from anticipating such an event and taking precautions against it. To one not familiar from observation with the position of the window and the landing, the occurrence of an accident like the one that befell the deceased would appear from the evidence to be extremely improbable; and we might be inclined to accede to the appellant's contention on this point but for certain facts disclosed by the testimony. Before stating them, let us revert for a moment to elementary principles in order to better appreciate the legal force of the facts. If an injury occurs which a prudent man, all the circumstances considered, would have been unlikely to anticipate, it is referable to the category of inevitable accidents. *Graney v. R. R.*, 157 Mo. 666, 57 S. W. 276, 50 L. R. A. 153; *Fuchs v. St. Louis*, 167 Mo. 620, 67 S. W. 610, 57 L. R. A. 136. It is axiomatic that whether a man must take precautions to prevent injury to others, in order that he may stand exonerated from blame for an injury if one happens, depends on his previous knowledge of facts adapted to excite in a prudent mind an apprehension of the harmful event transpiring. *Smith v. Car Co.*, 60 Mich. 501, 27 N. W. 662, 1 Am. St. Rep. 542; *Bowen v. R. R.*, 95 Mo. 268, 8 S. W. 230. One form in which the rule has been laid down is that a person is guilty of no want of ordinary care, and hence is not responsible for an injury, if he behaves, everything considered, as men of prudence would have behaved. *Hogan v. R. R.*, 150 Mo., loc. cit. 49, 51 S. W. 473. Appellant's counsel insist that a man of common prudence would never have thought of a person falling, by any mischance, through the window above

the platform. But this argument is prostrated in the present case by testimony which shows that prior to the accident there had been good cause to anticipate such a mishap, and that, in fact, it had been anticipated by Samuel F. Meyerson, the president of the appellant company. When the appellant was moving into the building, a workman who was assisting in placing a press fell from one of the windows; and as well as we can tell from the testimony, the accident was similar to the one which resulted in the death of the plaintiffs' son, in respect to the workman falling through the top of a window from a stair landing. The testimony certainly leaves that impression; but, as our statement of this matter is said by appellant to be unsupported by the record, we will transcribe all the evidence bearing on it: "Q. During the time that you were there, had any accident of this nature ever happened in that building? A. Not of that kind. Q. I mean, of anybody falling out of the top of one of those windows? A. There was an accident from the window when the firm moved into the building. Q. I mean while Meyerson was running the establishment. Did any employé ever fall from the platform through one of those windows? A. No, sir. Q. You made a statement a few minutes ago—I don't want to have any misunderstanding about it—that there had been an accident when you were moving in. A. Yes, sir. Q. Was that anything more than the fact that a crowbar fell out of the window? A. One of the laborers moving a press fell out with the crowbar. Q. While the laborers were moving into the building, some one with a crowbar fell out of the window? A. Yes, sir. Q. And that laborer was not ever working for Mr. Meyerson? A. I don't know." Furthermore, Mr. Meyerson swore the boys employed in the establishment were in the habit of sliding down the banister rail. Many boys had been warned many times against doing so, he said, because he knew they might fall through a window; and particularly had Walter Rogers been warned of the risk. This shows Meyerson knew the windows were in an unsafe condition. It will not do to say an event could not have been anticipated, when the evidence shows it was anticipated. As no precaution was taken to prevent such a fatality, except to warn the boys to refrain from sliding down the banisters, the decision of the case hinges on the adequacy of that precaution as constituting a full discharge of its duty by appellant, so that the court may exonerate it for the fatality on proof that warning was given. Was that enough to satisfy the law, or did the jury have a right to conclude the appellant was bound to guard the window in order to perform its duty to use ordinary care to prevent a casualty? To our minds it is scarcely debatable that it was a question for the jury whether some simple precau-

tion that would render such an accident impossible, like barring the window, ought not to have been taken by the appellant company after its officers knew one person had fallen through an unbarred window, and apprehended the like misfortune to some other employé. A casualty cannot be classed as a pure accident, for which no one is to blame, merely because it would happen infrequently, if the danger of its occurrence was present to the mind of the party who was charged with the duty of taking care to avert the casualty, or if by reasonable prudence he could have known there was danger of its occurrence. An unfenced area by a street, like the one into which Buesching fell (*Buesching v. St. Louis Gaslight Co.*, 73 Mo. 219, 39 Am. Rep. 503), would not often cause death or injury; for almost all passers-by would miss or avoid the hole, as thousands had before Buesching fell into it and was killed. None the less, it was negligence to leave the place unguarded, because some one was liable to fall into it at any time, as could be readily seen. An accident, properly so called, is where the cause of the event was so unusual that common foresight could not anticipate it. As the liability of the very catastrophe that happened to Walter Rogers was foreseen, it was not an accident for which the appellant was blameless, if it was preventable by ordinary care.

Many cases have been cited by counsel in which casualties were ascribed to causes which could not have been foreseen, but none of them presents the facts most prominent in the present controversy. In *Lawless v. Laclede Gaslight Co.*, 72 Mo. App. 679, the plaintiff, while digging a trench for the defendant, got his feet wet by water bursting into the trench from an old cistern. The water was poisonous, and generated a disease in plaintiff's system. It was held that the defendant could not have anticipated such an effect, and therefore was not responsible. In *Am. Brew. Co. v. Talbot*, 141 Mo. 674, 42 S. W. 679, 64 Am. St. Rep. 538, malt stored in defendant's warehouse was destroyed by the caving in of the premises on account of an unprecedented flood of the Mississippi river. That loss was plainly due to the act of God. In *Sullivan v. R. R.*, 133 Mo. 1, 34 S. W. 566, 32 L. R. A. 167, a passenger on an open summer car, after lighting a cigar, threw the match so that it ignited the plaintiff's dress, burning her severely. The decision was that the railway company could not reasonably have anticipated such a mischance, and was not to blame for it. In *Fuchs v. City of St. Louis*, 167 Mo. 620, 67 S. W. 610, 57 L. R. A. 130, a sewer exploded, from what cause was not shown, although it was claimed to have been due to the presence of a large quantity of kerosene which had flowed into it. The decision was that, as a sewer explosion was never known before, the city had no reason to expect one, and was not called on to take preventive measures. In *Dougan v. Champlain*

Co., 56 N. Y. 1, plaintiff's intestate was drowned by slipping under a guard rail on the deck of defendant's boat. The hat of the deceased blew off, he sprang to recover it, slipped, and fell overboard. Boats of the same construction had been used for many years, the guard rail had always proven sufficient to prevent passengers from falling into the water, and there was no evidence that the company's officers had thought of such an accident. *Loftus v. Ferry Co.*, 84 N. Y. 455, 38 Am. Rep. 533, is a case in which the facts were that a child, while passing from a ferryboat to the land, fell through an open span beneath the guard rail and was drowned. The evidence showed that 40,000,000 persons annually passed off the boat, that no accident of the kind had occurred before, and no proof was made that the possibility of the occurrence had been foreseen. Without saying more, it is sufficient to state that in none of those precedents was it shown that the defendant actually anticipated such a fatality as happened, on account of a similar one having happened before; but, on the contrary, in all of them previous experience taught the extreme improbability of the misfortune. A master must furnish a servant a reasonably safe place to work, and the inference that one is remiss in that regard if he leaves small boys in his employ exposed to the danger of death by falling through a window, after he fully realizes the danger and has had one accident of the sort befall, cannot be denounced as unwarranted.

Some minor criticisms which we have examined, and deem undeserved, are indulged in concerning the court's instructions. The instructions were few and clear, and, we think, presented the issues to the jury in a manner that was accurate and easily understood.

The judgment is affirmed.

BLAND, P. J., and REYBURN, J., concur.

GETTYS v. ST. LOUIS TRANSIT CO.

(Court of Appeals at St. Louis, Mo. Dec. 15, 1903.)

STREET RAILWAYS—PERSONAL INJURIES—COLLISION WITH VEHICLE—CONTRIBUTORY NEGLIGENCE—VIGILANT WATCH ORDINANCE.

1. Where plaintiff, having her horse under perfect control, deliberately drove on a street car track, facing, and from 30 to 200 feet distant from, a car approaching at ordinary speed, and waited for another person to get into the buggy, and the car failed to stop until just as it struck the buggy, throwing plaintiff out, she was guilty of contributory negligence, and, in absence of willful negligence by the motorman, could not recover by virtue of an ordinance requiring the motorman to keep vigilant watch for persons and vehicles approaching the track, and to stop on the first appearance of danger.

Appeal from St. Louis Circuit Court; Warwick Hough, Judge.

¶ 1. See *Street Railroads*, vol. 44, Cent. Dig. §§ 212, 214.

Action by Emily B. Gettys against the St. Louis Transit Company. From a judgment for plaintiff, defendant appeals. Reversed.

Boyle, Priest & Lehmann, for appellant.
A. R. Taylor, for respondent.

GOODE, J. This plaintiff should have been nonsuited, as requested by the defendant, for the reason that all the evidence shows she was injured because of her own carelessness. One of the defendant's street cars ran into a buggy in which she was seated on September 23, 1902. The accident occurred in the daytime on Olive street, between Sarah and Whittier streets, in the city of St. Louis. The allegations of negligence, as stated by plaintiff's counsel in his brief, are these: "First. Common-law negligence, in running the car without using any care to watch for vehicles on defendant's tracks, and without using any care to control or stop the car, and without giving any signal by bell or otherwise, which negligent acts are alleged to have caused the collision and respondent's damages. Second. The vigilant watch ordinance, and its violation, which violation of said ordinance is alleged to have directly contributed to cause plaintiff's injuries."

No evidence was introduced by the defendant, and but two witnesses in behalf of plaintiff, besides the physician who attended her. She was one of those witnesses, and her account of the accident is that on the day mentioned she ordered her horse and buggy from Scott & Lynch, liverymen, whose stable is on the west side of Olive street. She took a friend out driving, and, after the drive was over, started to the livery stable with the horse and buggy. She drove along Sarah to Olive street, and, on reaching the latter, turned west along the north side of it. She drove on Olive street until she reached the Westminster Laundry, on the north side, in front of which a wagon was standing. The wagon was close to the curb, and she could have gone around it by driving with the left wheels of the buggy inside the north rail of the north track; there being two tracks on Olive street, of which the north one is used by west-bound, and the south one by east-bound, cars. But the livery stable where she kept her horse was diagonally across the street from the laundry, and she desired to get a boy from that stable to go home with her and bring the horse and buggy back to the stable. So, instead of driving around the wagon, she drove across the north track, and stopped on the south one, with the buggy standing in the track, and the horse headed northwest. Her intention was to pick up the boy, and then drive again to the north side of Olive street and proceed to her home. According to her own testimony, when she drove on the south track and stopped for the boy she saw an east-bound car coming directly toward her, and knew it

would strike the buggy. The effect of her testimony on this point is disputed by her counsel, and, to show what it is, we will quote some excerpts, but we cannot quote it all: "Q. Which side of your buggy did the colored boy get into? A. Onto my left. Q. When your buggy stopped there for the purpose of his getting in, how far away was that car? A. Well, it was farther away than from here to the door. Q. Well, how much further? A. I don't know. Perhaps from here to over at the corner [far corner]. Q. How long did it take the boy to come from the stable to get into the buggy? A. Why, it didn't take him any length of time at all, because Mr. Scott saw me, and sent the boy across to get into the buggy. I didn't have to go all the way across. Q. How far did the boy have to come to get to the buggy—to get into it? A. Well, just from the stable to that track, where my buggy was. Q. Of course. How far would that be Mrs. Gettys? Because we do not know. A. Well, about from here to you, where I am. Q. Only that far? A. Yes, sir. Q. Your buggy was standing in the manner in which you have described it, and the colored boy came from the stable about that distance? A. Yes, sir. Q. And got into your buggy. Now, what was the car doing all that time? A. Why, it was coming toward me. It didn't make any effort whatever to stop. He could have stopped. He could have avoided the accident if he had wanted to. He didn't make any effort until he crashed into the buggy and threw me out. * * *

Q. What did you do in order to get across? A. Well, I saw the car approaching me, and it didn't make any effort to stop, and jerked my horse this way, so that he would not be struck with the car, even if the rest was. Q. You jerked your horse which way? A. North. Q. That would be to the right? A. Yes, sir. Q. You pulled him out to the right? A. Yes, sir. Q. When you pulled your horse that way, what occurred? A. The car ran right into my buggy. Q. What part of your buggy did it run into? A. The left side. The south side of it. Q. What portion of the buggy did it hit—the front wheels or the hind wheels? A. It hit the front wheel and part of the dashboard, and injured both wheels. Q. It hit both wheels? A. Yes, sir. Q. When the car hit your buggy, describe to the jury what became of you? A. Why, I was thrown out." On cross-examination she said if she had not seen the wagon in front of the laundry she would have stayed on her own side of the street, and, as Mr. Scott, the liveryman, was standing in the door of the stable, he would have sent the boy to her; but, as the wagon was in the way, she drove across to the south track to get the boy. She testified further as follows: "Q. Did Mr. Scott halloo to you, or say anything to you? A. No, sir; he just nodded his head. That was all. Q. Bowed to you? A. Yes, sir. Q. Do you

know why he sent the little negro over? A. Well, I suppose he saw the car coming. I don't know, I am sure. He can answer that for himself. Q. Did you see the car coming? A. Yes, sir. Q. Now, were you in control of your horse? A. Yes, sir. Q. You had your horse under control? A. I always have had. Q. Well, I mean on that occasion? A. Yes, sir. Q. The horse was under perfect control? A. Yes, sir. Q. You saw the car? A. I did. Q. You knew where you were going? A. Yes, sir. Q. You were facing the car? A. Yes, sir. Q. And you drove over on the south track, with the horse's head in the direction that the car was coming? A. Yes, sir. Q. And you were looking right at the car? A. Well, I can't say that. I was looking at my horse. Q. Well, you saw that car, at any rate? A. Yes, sir; I saw the car. Q. When you got over on the south track, and stopped your buggy for the negro to get in, the car was about as far as from here to the corner of the room? A. Yes, sir. Q. Not farther than that? A. No, sir. Q. The conductor, or the motorman, rather, was making slow speed, you say, or rapid? A. Well, an ordinary speed. Q. You drove by there and stopped your horse, and, when you got your horse stopped for the boy to get in, the car was about as far as from here to the corner from you? A. Yes, sir. Q. You stood there and waited for the boy to get in? A. Yes, sir. Q. You saw that the motorman had not stopped the car, and that it would go right into you? A. Yes, sir. Q. In order to save your horse—to keep your horse from being hurt—you pulled him to one side, and the car struck the wheel of the buggy? A. Yes, sir. * * * Q. When you first saw the car, after you had stopped your horse, the car was as far as from here to the corner of the room, yonder? A. Yes, sir. Q. You waited there for that little negro to come from the stable and get in the buggy? A. Yes, sir. Q. And that was why you were waiting there? A. Yes, sir. Q. And before you could get away after the little negro got in, you saw that the car was going to strike the horse or the buggy, one, and you pulled the horse to one side? A. Yes, sir."

That testimony makes a clear case of negligence, not to say recklessness, on the part of the plaintiff, for she deliberately took a position on the track when she saw a car approaching her 30 or 35 feet away (the distance across the courtroom), and knew it would strike her. Her horse was under perfect control, and she could have driven off the track easily; there being no impediment or obstruction, so far as the evidence shows, to the north, and no nearby car approaching on the north track to endanger her. She herself testified that the car that hit her was not running rapidly—only at a moderate speed—and that the motorman could have stopped it if he had tried. We have, therefore, no question of excessive speed in the

case. Neither was there any testimony that the gong was not sounded by the motorman to warn her, as alleged in the petition, though, of course, no warning was necessary, for she saw the car before she drove on the track, and was facing it all the time. The action is founded entirely on negligence, and not on willfulness; and hence the contributory negligence of the plaintiff, if she was guilty of it, is a bar to her recovery. *Moore v. R. R.* (Mo. Sup.) 75 S. W. 672; *Zumault v. R. R.* (Mo. Sup.) 74 S. W. 1015.

What the plaintiff relies on is that the motorman failed to obey the vigilant watch ordinance, which requires carmen to keep watch for persons and vehicles approaching a track, and stop the car in the shortest time and space possible on the first appearance of danger to such person or vehicle. This ordinance does not exonerate the plaintiff from all responsibility for her own negligence in the circumstances stated. One cannot deliberately and advisedly place himself in a position which makes a collision with a street car imminent, retain the dangerous position until a collision occurs, and then get damages on account of the negligence of the carmen. *Moore Case*, supra. We do not mean to say that even in that state of facts carmen owe no duty to the endangered person on the score of humanity, or that they may run him down; but we do mean to say that willfulness or wantonness on the part of carmen must be shown, to make a case in favor of a plaintiff, when the latter has so behaved. The case was not tried on the theory of willful tort, and, indeed, the car stopped simultaneously with the collision, which goes to show that the motorman, instead of disregarding plaintiff's peril when he discerned it, tried to avoid hurting her. The witness Scott, who in most respects testified like the plaintiff, differed from her as to the distance the car was from the buggy when the buggy first stopped on the track. He estimated it to be from 150 to 200 feet, and this testimony is insisted on by plaintiff's counsel as authorizing the inference that the car could have been stopped before striking the buggy. If we take the whole of Scott's testimony, it shows even worse recklessness on the part of plaintiff than her own does, for he testified that she not only stopped on the track, but, on starting again, drove 15 or 20 feet toward the approaching car, instead of driving off. However, suppose the car was that distance away when the buggy stopped; she was looking right at it. Did the motorman have any reason to suppose she would not drive off, and was he bound to check the car that distance away? Her buggy was light, and could be quickly and easily driven out of the way. Vehicles are constantly on tracks that far ahead of cars, and are as constantly turned off without injury. This case is wholly unlike those in which plaintiffs were driving along the tracks ahead of cars, but unconscious of their ap-

proach. This plaintiff did nothing to save herself, but relied on the motorman to stop the car. She was neither alarmed nor confused. In the Moore and Zumault Cases the doctrine was laid down that if a party is conscious of impending danger, and makes no effort to shun it, when he might easily do so, his own carelessness is an active cause in producing any injury he receives, and bars recovery. Passages from text-writers are quoted at length in the opinion in the Moore Case, and, without again quoting them, we will simply refer to that authority and the citations: 7 Am. & Eng. Ency. Law (2d Ed.) 385; Cooley, Torts (2d Ed.) 812; Nellis, Street Railways, pp. 383, 384. Perhaps we had better quote the rule as stated by one of those writers, and we select Judge Cooley's text. He says: "Regarding the case of a negligent injury, the general result of the authorities seems to be that if the plaintiff or party injured, by the exercise of ordinary care under the circumstances, might have avoided the consequences of defendant's negligence, but did not, the case is one of mutual failure, and the law will neither cast all of the consequences upon the defendant, nor will it attempt any apportionment thereof."

The judgment is reversed.

BLAND, P. J., and REYBURN, J., concur.

RUOHS et al. v. TRADERS' FIRE INS. CO.
et al.

(Supreme Court of Tennessee. Nov. 28, 1903.)

INSURANCE—CONTRACTS BETWEEN INSURERS—ASSUMPTION OF POLICIES—RESCISSION—LIABILITY OF INSURER—ACTIONS—PERSONS ENTITLED TO SUE.

1. On the insolvency of the T. Ins. Co., by which plaintiffs were insured, defendant company contracted with the T. Co. for a certain consideration to assume the T. Co.'s fire risks not otherwise reinsured from a certain date. The contract required other payments from the T. Co. to be made at dates specified, and declared that it should be null and void unless the payments were made, and also that it was a temporary agreement, to be replaced by a final contract of like terms and conditions when the total amount due under the schedules could be ascertained. Defendant thereafter notified the T. Co.'s agents of such assumption, and received from it all of its assets, and thereafter proceeded to collect premiums and adjust losses under policies so assumed. *Held*, that defendant, having taken all of the T. Co.'s assets, and thereby rendered it permanently insolvent, could not relieve itself from liability on the T. Co.'s policies by subsequently declaring the contract of assumption void for the T. Co.'s failure to pay subsequent installments thereunder as required.

2. Where defendant assumed all the policies of another insurance company by which plaintiff was insured, for a sufficient consideration, plaintiff was entitled to sue in his own name defendant to recover a loss under a policy which defendant assumed under such contract.

Appeal from Chancery Court, Hamilton County; T. M. McConnell, Chancellor.

Action by Joseph Ruohs and others against

the Traders' Fire Insurance Company and others. From a judgment in favor of plaintiffs affirmed by the Court of Chancery Appeals, defendants appeal. Affirmed.

Chambliss & Chambliss and John T. Leyett, for appellants. Cook, Swaney & Cook, for appellees.

McALISTER, J. Complainants, who are original policy holders in the Traders' Fire Insurance Company, preferred this bill against the North British & Mercantile Insurance Company to recover indemnity, first, for fire losses claimed to have been sustained; second, for returned premiums on account of canceled policies; and, third, claims of W. J. Colburn & Co. for returned premiums paid to policy holders of the Traders' Company under written instructions of the North British Company. The theory of the bill is that complainants are the beneficiaries of a contract entered into between the Traders' and the North British Companies, by which the latter assumed the payment of the liabilities of the former company. The contract, which is made the basis of the present suit, is in the words and figures following, to wit:

"In consideration of One Dollar, the receipt of which is hereby acknowledged, and a further payment of Ten Thousand Dollars before twelve o'clock noon, on Saturday April 28th, the North British & Mercantile Insurance Company of Edinburgh and London, hereby agrees through its United States Manager, to assume the fire risks of the Traders' Fire Insurance Company, of New York, from six o'clock P. M. April 27th, 1900, not otherwise reinsured.

"A further payment on account, of Twenty-Five Thousand Dollars, to be paid on or before May 1st, and the balance due, namely, the net, unearned premiums on outstanding policies, less 15% commissions thereon, to be paid upon completion of schedules, and at least, within thirty days from date hereof.

"This contract to be null and void unless payments as above stated are duly made.

"This temporary agreement to be replaced by a final contract of like terms and conditions when the total amount due hereunder is determined as per schedule. Schedules to be completed as soon as practicable.

"North British & Mercantile Ins. Co. of Edinburgh & London,

"By E. G. Richards, United States Manager.

"The Traders' Fire Insurance Company of New York,

"By W. A. Halsey, President.

"April 27th, 1900."

It is insisted on behalf of the North British Company that no liability attaches to it on account of said contract, for the reason, as disclosed on its face, it was only a provisional and temporary agreement, dependent for its consummation upon the payment of the consideration therein expressed, and that the Traders' Company, having defaulted in

the payment of \$70,000 due thereunder, the North British Company was constrained on August 3, 1900, to declare said contract forfeited. The insistence made on behalf of the North British Company is that the policy holders of the Traders' Fire Insurance Company can have no higher rights than that company, for the reason they claim under the contract which the Traders' forfeited. It is said that this contract was clearly a contract of reinsurance, as is disclosed by the language used, "not otherwise reinsured." Joyce on Insurance, § 117, is then cited for the proposition, viz.: "A reinsurance contract is a contract of indemnity to the company reinsured only. The reinsured sustains as to the reinsurer the same relation which the original insured bears to the reinsured. The contract of reinsurance does not inure to the benefit of the insured. He has no claim, legal or equitable, against the reinsurer." *Royal Insurance Company v. Vanderbilt Insurance Company*, 102 Tenn. 267, 52 S. W. 168, is also cited, in which it was said as follows:

"A contract of reinsurance is peculiar in its character, and differs from the ordinary policy of insurance. It claims no privity between the reinsurer and the party originally insured. It is simply an agreement to indemnify the insurer, partially or altogether, against a risk assumed by the latter in a policy issued to a third party."

The general rule is conceded that a third party may sue directly in his own name on a contract made for his benefit, but it is insisted that the exception is well established that such third party cannot maintain an action to enforce the promise, where the promise is void as between the promisor and the promisee. In support of this position counsel for the North British Company cite *Dunning v. Leavitt*, 85 N. Y. 30, 39 Am. Rep. 617, where it appeared that a grantee, holding under a warranty deed which contained a covenant that the grantee assumed and agreed to pay a mortgage on the premises, had been evicted by a paramount title. It was held that the holder of the mortgage could not enforce the covenant for the reason that the consideration therefor had wholly failed. *Andrews, J.*, delivering the opinion of the court, wrote:

"It is said that the action can be maintained upon the doctrine of *Lawrence v. Fox*, 20 N. Y. 268, and kindred cases, but I know of no authority to support the proposition that a person not a party to the promise, but for whose benefit the promise is made, can maintain an action to enforce the promise where the promise is void as between the promisor and the promisee for fraud, want of consideration, or failure of consideration. It would be strange, I think, if such an adjudication should be found."

The position assumed by counsel for the North British Company may be best stated in his own language, to wit:

"First. That the preliminary contract was not a contract of assumption, but was a contract of reinsurance. Second. That, if construed to be a contract of assumption, the Traders' Fire Insurance Company could not recover from the North British & Mercantile Company, by reason of its own breach, and that these claimants could not be in any better attitude than the Traders' Company. Third. That, as shown on this record, the North British & Mercantile Insurance Company acted as agent during the existence of the preliminary contract, and has done no act or thing which would mislead these claimants. Fourth. That the North British & Mercantile Insurance Company made the preliminary contract in good faith with the Traders' Fire Insurance Company, and used every effort to effectuate and consummate the same, and to induce the Traders' Fire Insurance Company to pay the consideration agreed. And that because of such default on the part of the Traders' Fire Insurance Company the North British & Mercantile Insurance Company should not be made to suffer."

This brief outline comprises a general statement of the principal defenses relied on by the North British Company. We will now proceed to state the case made on behalf of the complainant policy holders, and cannot do better in presenting their contention than to state the proposition formulated by their counsel, as follows:

First. This is not an ordinary case of technical insurance between two insurance companies. The facts found by the Court of Chancery Appeals make it a contract for the use and benefit of complainants and other policy holders of the Traders' for a valuable consideration under circumstances entitling them to maintain this suit. The Court of Chancery Appeals finds that the agreement and understanding was that the North British should "assume" all outstanding risks of the Traders', and place itself in the same position towards said policy holders as if said policies had been its own; that the Traders' went out of business, and all of its assets, amounting to about \$85,000, went into the hands of the North British Company, and the latter assumed all the fire risks of the former, and the North British dealt with the Traders' policies the same as its own, canceling some, paying returned premiums, granting permits, adjusting and paying losses, and gave out statements by letters and agents that it had assumed all of said policies, and that nothing was necessary to be done by the policy holders to make said contract binding on the North British Company.

In order to show the full scope of the present suit, it should have been stated that the bill was filed in the nature of a general creditors' bill on behalf of complainants and all other policy holders and creditors.

The chancellor was of opinion that the North British Company was liable to com-

plaintants for the payment of their claims. He was also of opinion that the contract in question operated to transfer to the North British Company practically all of the assets of the Traders' Company, and that the latter company, having at once ceased to do business, all of its property became a trust fund for its creditors. He was further of opinion that the \$85,000 was wrongfully paid by the Traders' Company and received by the North British Company; that it is a debt due the Traders' Company, which its creditors are entitled to collect and appropriate to the payment of their debts pro rata.

The bill was therefore sustained as a general creditors' bill, and publication was ordered, together with a reference for an account. On appeal, the Court of Chancery Appeals affirmed the decree of the chancellor. Defendant insurance companies again appealed, and have assigned errors.

Our first inquiry is to ascertain the facts of the case as found and established by the Court of Chancery Appeals. That court finds that in the years 1899 and 1900 the Traders' and the North British Companies were both carrying on an insurance business in Tennessee. W. J. Colburn & Co. were the general agents of the Traders' Insurance Company for the state of Tennessee, with an office at Chattanooga. In March, 1900, the Insurance Commissioner of Tennessee, for reasons satisfactory to himself, refused to renew the license of the Traders' Company to do business in Tennessee. In 1900, Everett U. Crosby, the general agent of the North British Company, advised W. J. Colburn & Co. by letter that the outstanding business of the Traders' Company had been reinsured by the North British & Mercantile Insurance Company. It appears that this letter was inclosed by Colburn & Co. to Insurance Commissioner Craig, who replied that this reinsurance in the North British Company would be entirely satisfactory to his department. The North British Company on April 27, 1900, took charge of the business of the Traders' Company, and from that date to August 2, 1900, received in installments the sum of \$85,000 from the latter company.

The Court of Chancery Appeals, through Judge Taylor, further finds that: "Notice of this reinsurance was published in the papers throughout the country, and it was given out by the North British Company generally to all the former agents and policy holders of the Traders'. The North British Company dealt with the Traders' policies as if they were its own, canceling some, paying returned premiums, granting permits, and paying losses, and giving out statements by letters and through its agents that it had assumed all of said policies, and that nothing was necessary to be done by the policy holders to make said policies binding." That court finds:

"There can be no question as to the undertaking of the North British Company to re-

insure policy holders in the Traders' Company, and to assume all liabilities and risks that had been incurred by the latter."

The Court of Chancery Appeals further finds:

"On the 3d of August, 1900, the North British Company attempted to cancel its contract with the Traders' by letter as follows:

"Traders' Fire Insurance Co., of New York, 33 Liberty Street, New York—Dear Sir: You will please take note that you have made default in the contract entered into between you and the North British & Mercantile Insurance Company of London and Edinburgh, bearing date 27th day of April, 1900. We do hereby declare said contract to be null and void.

"Very respectfully.

"North British & Mer. Ins. Co. of London & Edinburgh,

"By E. C. Richards, Gen. Mgr."

"On the 7th of August, 1900, the North British Company wrote W. J. Colburn & Co. that the former had ceased to act as agents of the Traders' Company, and had canceled the contract with the latter company on Friday, August 3, 1900, because the Traders' had failed to fulfill conditions precedent in the nonpayment of the consideration agreed. The Court of Chancery Appeals finds that up to this time there had been no claim on the part of the North British Company that it was simply acting as agent of the Traders' Company, but on the contrary, it had notified the general agents at Chattanooga that the North British had reinsured all outstanding liabilities of the Traders'."

The opinion holds that: "The fact that there was a condition in said contract, if such existed, was not made public, or known to any of complainants, until the receipt of the letter to Colburn & Co. advising them that the North British Company had ceased to act as agent of the Traders' Company, and had canceled said contract. In fact, all the policy holders, as far as the record discloses, were relying on the assurance of the North British Company that they had been reinsured, and that the solvency of said company was such that they would be protected.

"It is insisted by the North British Company that the directors of the Traders' Company made false statements to the former in respect to the amount of returned premiums and its financial condition, and failed to make certain payments, which were conditions precedent to said contract. This fact, however, is established: that as early as June 15, 1900, the North British Company knew all the facts concerning the Traders' Company, and that the schedules of the business of the latter company recently issued by it were not complete, and the full amount of premium to be paid to the North British had not been ascertained. Yet the North British granted an extension of time to the Traders' Company. Not only this, but it

dealt with the policy holders on the basis of a valid contract, without any conditions whatever. We also find that Colburn & Co. paid the Traders' Company premiums for a number of complainants and others, amounting to several hundred dollars, after the time when the North British contracted with the Traders', and agreed to and did reinsure its policy holders. It also appears that funds and accounts were in the hands of Colburn & Co. due the Traders' Insurance Company after May 1, 1900, which were held, as appears, until after the reinsurance of the Traders' liability in the North British Company, which were remitted to the Traders.'

"Also, that Colburn & Co. paid all returned premiums when policies in the Traders' Company were ordered canceled by the North British Company. Among these was the claim of W. T. Crutchfield in the latter company, which was ordered canceled by letter to North British dated July 24, 1900. The returned premiums were paid by Colburn & Co. W. J. Colburn & Co. forwarded the letter of August 7, 1900, from the North British Company, denying liability on these Traders' policies, to Insurance Commissioner Craig, who wrote the North British Company, and demanded that it retract this denial of liability, or he would revoke its license, by a date named.

"Thereupon the North British Company brought suit against the Insurance Commissioner in the Chancery Court at Nashville, Tennessee, seeking to enjoin his proposed action; but the Supreme Court finally dismissed said bill, and sustained the Insurance Commissioner."

North British Company v. Craig, 106 Tenn. 621, 62 S. W. 155.

The Court of Chancery Appeals also finds that: "As the result of the contract of April 27, 1900, the Traders' Company went out of business, and all of its assets passed into the hands of the North British Company, and that the latter assumed the fire risks of the Traders', and sent its special agent to Chattanooga, who informed W. J. Colburn & Co. that the North British Company had reinsured all the liabilities of the Traders', and that the North British Company realized out of the assets of the Traders' about \$85,000 (its entire assets), and paid losses of the Traders' Company, with knowledge of its insolvency."

It should have been stated that the Court of Chancery Appeals found that the North British Company made several extensions to the Traders' Company on payments due under said contract from May 31 to July 28, 1900, and at least two of these payments were made after the time limits had expired by the terms of the extension agreement.

It is unnecessary to quote further from the elaborate findings of the Court of Chancery Appeals, since it is believed that the quotations made are sufficient to raise the questions of law propounded on the appeal of the North British Company. The fundamental

proposition advanced on its behalf is that the contract of April 27, 1900, between it and the Traders' Insurance Company, was, in legal contemplation, a contract of reinsurance, and that its interpretation and effect must be governed by the rules of law applicable to that peculiar form of insurance. Reinsurance is defined to be "insurance by the first insurer of the whole or some part of his interest in the risk created by his contract of insurance"; or, as it is otherwise defined, "It is the contract that one insurer makes with another to protect the first from a risk he has already assumed." 24 Am. & Eng. Encyc. of Law (2d Ed.) p. 248; *Iowa Ins. Co. v. Eastern Ins. Co.*, 64 N. J. Law, 343, 45 Atl. 762.

The general rule is that "the ordinary contract of reinsurance operates solely between the insurer and the reinsurer, and creates no privity whatever between the reinsurer and the person originally insured. The contract of insurance and that of reinsurance remain totally distinct and unconnected, and the reinsurer is in no respect liable, either as surety or otherwise, to the person originally insured." 24 Am. & Eng. Encyc. of Law (2d Ed.) p. 249, citing numerous cases.

To the same effect is our own case of *Royal Insurance Company v. Vanderbilt Insurance Company*, 102 Tenn. 267, 52 S. W. 168.

But an exception to this general rule is also well established—that a direct liability may be incurred by the reinsurer to the originally insured if the intention to create it sufficiently appears from the contract of reinsurance. 24 Am. & Eng. Encyc. of Law (2d Ed.) p. 249.

It is further said in this valuable work that: "The general rules of construction applicable to contracts and written instruments apply to contracts and policies of reinsurance. A contract of this character, like any other contract, depends upon the intention of the parties, to be gathered from the words used in the instrument, taking into consideration, when the meaning is doubtful, the circumstances attending the transaction. The court should give to the instrument a reasonable and sensible construction, and one which appears to conform the nearest to the justice of the case, and the purpose which the parties meant to accomplish. The contract should receive a construction that will be uniform throughout the various transactions in which it is involved. It must be so construed as to have a certain meaning in one way for the purpose of collecting premiums, and in another for the purpose of determining liability." 24 Am. & Eng. Encyc. of Law (2d Ed.) p. 254.

In the same work it is said:

"While, as a general rule, the liability of the reinsurer is solely to the reinsured, it is competent for the reinsurer to make the reinsurance contract inure directly to the benefit of the party originally insured, and in jurisdictions where a third party is allowed to maintain an action on a contract made for his benefit he may, in such a case, recover

directly from the reinsurer. Thus where, in reinsuring risks for which policies are outstanding, the reinsurer contracts with the insured to assume the policies and to pay the holders thereof all such sums as the reinsured may become liable to pay, the persons to whom these original policies are payable acquire a direct right of action against the reinsurer, and can sue in their own names, and recover upon the contract of reinsurance, and it is immaterial that they are not named in the policy or contract. * * * The holder of an original policy of insurance acquires a right of action on a contract of reinsurance where the original insurer sells its business and good will to another person, and the latter company, in consideration thereof, reinsures the risks of the first company, and contracts to pay the losses under the first company's outstanding policies." 24 Am. & Eng. Encyc. of Law (2d Ed.), p. 258; *Whitney v. Am. Ins. Co.*, 127 Cal. 464, 59 Pac. 897; *Alliance Mut. Ins. Co. v. Welch*, 26 Kan. 641; *Barnes v. Hekla Ins. Co.*, 56 Minn. 38, 57 N. W. 314, 45 Am. St. Rep. 438; *Glen v. Hope Mutual Ins. Co.*, 56 N. Y. 379; *Fisher v. Hope Mut. Ins. Co.*, 69 N. Y. 161; *Shoaf v. Palatine Ins. Co.*, 127 N. C. 308, 37 S. E. 451, 80 Am. St. Rep. 804; *Travelers' Ins. Co. v. Cal. Ins. Co.*, 1 N. D. 151, 45 N. W. 703, 8 L. R. A. 769; *Johannes v. Phenix Ins. Co.*, 68 Wis. 50, 27 N. W. 414, 57 Am. Rep. 249; *Hunt v. Ins. Co. (N. H.)* 38 Atl. 145, 36 L. R. A. 514, 73 Am. St. Rep. 602; *Chalaron v. Ins. Co. (La.)* 21 South. 267, 36 L. R. A. 742; *Gifford v. Corrigan*, 117 N. Y. 257, 22 N. E. 756, 6 L. R. A. 610, 15 Am. St. Rep. 508.

In the case of *Johannes v. Phenix Insurance Company*, 66 Wis. 50, 27 N. W. 414, 57 Am. Rep. 245, the syllabus is as follows:

"The plaintiff held a policy of insurance in the Standard Fire Office of London. That company sold to the Phenix Insurance Company its entire business in the United States, and the good will thereof, together with the other property, and the latter company, in consideration thereof, reinsured all the risks of the Standard Company upon property situated in the United States, and agreed that all losses arising under the policies of that company on such property should thereafter be borne by the Phenix Company, and he paid, satisfied, and discharged by it." Held, that plaintiff could maintain an action against the Phenix Company for a loss arising under his policy.

In the course of the opinion the court said:

"The contention is that the contract between the two companies is confined strictly to them, and that the plaintiff, under his policy issued by the Standard, has no privity in the contract made by the Phenix, and can maintain no action thereon against the Phenix; in other words, that it was strictly a contract of reinsurance by the Standard Company solely for its own benefit, and not for the benefit of any of its then existing policy holders in the United States. * * * But

in the case before us the contract between the defendant companies is, as it seems to us, something more than a reinsurance. By that contract the Standard Company sold and turned over to the Phenix its entire business, and the good will of that business in the United States, together with a large amount of bonds and other property, in consideration of which the Phenix thereby reinsured all the risks of the Standard Company upon property situated in the United States, * * * and agreed that all losses arising under the policies of the said defendant Standard Fire Office, Limited, upon property situated in the United States of America, should, after that time, January 1, 1894, be borne by the said Phenix Insurance Company, and should be paid, satisfied, and discharged by it; * * * and agreed that the loss of this plaintiff arising thereunder should be borne, paid, satisfied, and discharged by said Phenix Insurance Company, which thereupon became the owner of the good will, original documents, and books of its codefendant herein, the Standard Company, relating to the risks aforesaid, and assumed control of the same and of the business pertaining to said risks, policies, and losses. Such are the alleged terms of the contract we are required to construe. The losses thus arising under the policies could only be borne, paid, and discharged by the Phenix in a direct transaction with the policy holders. Even a payment by it of the amount of the loss of the Standard Company would not satisfy or discharge the plaintiff's claim for such a loss on his policy. That could only be done on payment to the plaintiff. It seems to us that by the terms of the contract as alleged, the Phenix, in effect, thereby assumed the risk covered by each policy, and agreed to pay any loss arising under each policy. The mere fact that the plaintiff was not named in the contract does not preclude him from maintaining an action upon the contract."

Shoaf v. Palatine Ins. Co., 127 N. C. 308, 37 S. E. 451, 80 Am. St. Rep. 804.

In *Barnes v. Hekla Fire Insurance Company*, 56 Minn. 38, 57 N. W. 314, 45 Am. St. Rep. 438, the principle that a simple contract of reinsurance between insurance companies is a contract of indemnity, and is solely for the benefit of the latter, is recognized, but it is said: "Where such a contract also includes a promise or agreement to assume and pay the losses of policy holders, actions in case of loss may be brought by them directly against the reinsurer upon such promise or undertaking."

In *Whitney v. American Insurance Company*, 127 Cal. 464, 59 Pac. 897, the same doctrine is thus stated in the syllabus:

"The assumption of all the fire insurance policies of an insurance company by a new company is much broader than a mere naked contract of mere reinsurance under the Code; and a holder of a policy issued by the former

company sufficiently manifests his consent to the contract by which the payment of the policy is assumed by bringing an action against the new company upon the policy. The law creates the privity necessary for the maintenance of the action."

In that case the court said: "The facts in this case show the contract in question to be much broader than a mere technical reinsurance."

Mr. Wood, in his work on Insurance, says: "The question as to whether the insured may sue the company on the risk reinsured depends upon the circumstances whether in the state where the policy was issued the person for whose benefit it was made may bring suit thereon, although not named in the contract, and whether it was the intention of the parties that the insurance company should stand in the place of the insurer with the assured."

What, then, is the application of these principles in the present case? The Court of Chancery Appeals finds:

"(1) The Traders' Fire Insurance Company went out of business, and all of its assets went into the hands of the North British & Mercantile Company, and the latter assumed the fire risks of the former, and sent its special agent to Chattanooga, who informed W. J. Colburn & Co. that the North British Company had reinsured all the liabilities of the Traders'.

"(2) The Traders' Company went out of business—a fact known to the North British Company—and under the contract of April 27th paid to the latter company all of its assets, amounting to about eighty-five thousand dollars. The North British Company also paid the losses of the Traders' Company with knowledge of its insolvency.

"(3) In this case, without consulting the policy holders of the Traders' Company, the North British Company did assume all risks of the Traders' Company, and occupied by their act the relations that previously existed between the Traders' Insurance Company and its policy holders, and thereby became liable to said policy holders, and can be proceeded against by them just as they could have proceeded against the Traders' Company. The North British Company cannot make a contract agreeing to reinsure these policy holders, and then, because the contract is not as good as they thought, repudiate it to the detriment of the rights of these complainants.

"(4) According to the proof and facts in this case the North British Insurance Company did agree and promise to assume all the risks and liabilities of the Traders' Company, took the assets of the latter, and on account of its alleged default of a condition of which the policy holders knew nothing, and when it is rendered insolvent, it shields itself behind the contention that complainants cannot sue them. This promise or contract was made upon sufficient consideration,

and for the benefit of these complainants, policy holders of the Traders' Company, although they were not parties to the contract. This contract between these two insurance companies was based upon a consideration, and a part of it was for the benefit of these complainants and others who were not parties to it, and hence can be enforced.

"(5) The agreement of reinsurance was not for a part, but the whole, of the risks taken previously by the Traders', and the effort is to blind the reinsurers to make good the losses of the original insurer to its policy holders.

"(6) In the case at bar it was a reinsurance of all the Traders' policies, and an assumption by the North British Company of all liabilities, and was a promise made by it to the Traders', based upon a sufficient consideration, for the benefit of its policy holders, who were not parties to the contract.

"(7) Admitting, however, that the contract of April 27, 1900, was a conditional one, as insisted, has not the North British & Mercantile Company, by its conduct, waived the same, by granting the extensions hereinbefore noticed, and by the statements of its managers and agents to policy holders, and publications, and its conduct of the business of the Traders', and its assurances to them? Said company held itself out to the public by letters, the acts of its agents, and its own conduct, as assuming all risks, without condition, and by so doing waived any that might have existed.

"(8) The fact that there was a condition in said contract, if such existed, was not made public, or known to any of complainants, until the receipt of the letter attempting to cancel the contract. In fact, all the policy holders, as far as the record discloses, were relying on the assurances of the North British Company that they had been reinsured, and that the solvency of said company was such that they would be protected.

"(9) The fact is established that as early as June 15, 1900, the North British Company knew all the facts as to the insolvency of the Traders' Company, and that the schedules of the business of the latter company were not completed, and the full amount of premiums to be paid the North British had not been ascertained; yet they gave an extension of time to the Traders' Insurance Company, and dealt with the policy holders on the basis of a valid contract, without any condition whatever."

Upon the facts found by the Court of Chancery Appeals, which are conclusive and binding upon this court, we are constrained to hold that the contract of April 27, 1900, between the Traders' and the North British Companies was not an ordinary contract of reinsurance. It was rather an assumption on the part of the North British Company of all of the outstanding liabilities against the Traders' Company preparatory to the retirement

of the latter permanently from business. As evidence of this fact, the Traders' Company, in consideration of this assumption of liability on the part of the North British Company, transferred to the latter company its entire assets, amounting in value to about the sum of \$85,000. It was not contemplated by either party at the time of the execution of this contract that the Traders' Company would go forward with its business, collecting premiums and adjusting losses in the ordinary way. It was known to be wholly insolvent, and the acceptance by the British Company of the entire assets of the former had disabled it from the fulfillment of its contracts of insurance with its numerous policy holders. While the alleged contract of reinsurance provides on its face that it is to be null and void upon the failure of the Traders' Company to pay the deferred payments, yet the outstanding policy holders who had been deprived of the assets of the Traders' Company as a security and indemnity for their individual losses could not be prejudiced by such a conditional defeasance whereof they had no knowledge. In other words, the North British Company, by taking over the entire assets of the Traders' Company, had disabled the latter company from complying with its contracts made with its policy holders, and the British Company cannot be heard now to say that it is not liable to these policy holders.

We are not advised of any case which adjudges that facts like these constitute a technical reinsurance contract, and that policy holders, by reason thereof, are remediless against the guarantying company, and must look for indemnity against an insolvent company, whose entire assets have been appropriated by the reinsuring company, and the former thereby rendered permanently insolvent. In Tennessee the doctrine is firmly established that the beneficiary, though not a party to the contract, may maintain an action directly in his own name against the promisor, where such promise between the promisor and the promisee is made upon sufficient consideration for the benefit of the third party. *County v. The Railroad*, 14 Lea, 525; *McCarty v. Blevins*, 5 Yerg. 196, 26 Am. Dec. 262; *Moore v. Stovall*, 2 Lea, 543; *O'Conner v. O'Conner*, 88 Tenn. 76, 12 S. W. 447, 7 L. R. A. 33; *Thompson v. Thompson*, 3 Lea, 126; *Mills v. Mills*, 3 Head, 711; *Railroad v. Houston*, 86 Tenn. 224, 2 S. W. 36.

The result is the decree of the Court of Chancery Appeals must be affirmed.

SHOUN v. STATE.

(Supreme Court of Tennessee. Nov. 28, 1903.)

CRIMINAL LAW—CONTINUANCE—DISCRETION—COUNTER AFFIDAVITS—INTOXICATING LIQUORS—SALE WITHOUT LICENSE—FINE.

1. A continuance of a criminal prosecution at the first term is equally within the discretion of the trial judge as when application therefor is made at a subsequent term.

2. On an application for the continuance of a prosecution for unlawfully selling liquors, to secure the testimony of a witness that he was present at the time and place alleged and that no sale was made by defendant, counter affidavits are properly permitted to show that such witness was not present, but was two miles away.

3. The continuance of a prosecution for illegally selling liquors, sought to obtain the testimony of a witness that he was present at the time and place charged and that no sale was made by defendant, is properly refused where five other witnesses make affidavit that the sale did occur, and that the witness whose testimony defendant sought was not present on the occasion.

4. Const. art. 6, § 14, provides that no fine shall be laid exceeding \$50 unless it shall be assessed by a jury. Laws 1899, p. 309, c. 161, punishes selling intoxicating liquors without a license by a fine of not less than \$50 nor more than \$200. *Held*, that a fine of \$100 assessed by the court for illegally selling liquor would be reduced to \$50.

Appeal from Circuit Court, Johnson County; C. J. St. John, Judge.

N. T. Shoun was convicted of selling liquor without a license, and appeals. Modified.

Jenkins, Wilson & Cole and Campbell, Boren & Butler, for appellant. Charles T. Cates, Jr., Atty. Gen., for the State.

WILKES, J. The defendant is convicted of unlawfully selling liquor without license. He was found guilty by the jury, and his punishment was assessed by the court at a fine of \$100, and imprisonment in the county jail for the period of six months.

A sale was made, if at all, by means of what is called a "blind tiger." The facts in regard to the sale are testified to by five persons, and from their evidence it clearly appears that a sale was made, and the jury was fully warranted in believing from the testimony that it was made by the defendant.

He was brought to trial on the same day of his arrest, and moved the court for a continuance of his case until the next term, and supported his motion by an affidavit that he was not guilty; that he had not had time to secure the attendance of his witnesses; that he had caused subpoenas to be issued for them; that these subpoenas were returned executed, except as to Baxter McEwen and A. J. Shoun; that they were material to his defense; that he expected to prove by A. J. Shoun that he was at defendant's place of business on the 18th of July, when the illegal sale was alleged to have been made, and that defendant did not sell intoxicating liquors at that time and place; that he knows of no other witnesses by whom he can prove these facts, except by these witnesses, and especially the witness A. J. Shoun; that he had used due diligence to procure the attendance of these witnesses; that they are not absent by his consent or procurement; that he will have them or their testimony at the next term; that this application was not for delay, but that justice might be had. The

¶ 2. See Criminal Law, vol. 14, Cent. Dig. § 1365.

court permitted counter affidavits, and five witnesses, who afterwards testified on the trial as to the sale, all made affidavit that they were at or near the distillery of the defendant on the day mentioned, and at the time the sale was made, and at the time the defendant was arrested, and that it all took place within a half hour's time. They swear that the purchase was made by one of their number; that the rest of them were in and around the building when and where it was done; and that neither A. J. Shoun nor Baxter McEwen was present at the time of the alleged sale, and at the time of the arrest of defendant; the defendant was alone in the building; and one of them swears that, after he had arrested defendant and started with him to Mountain City, he saw A. J. Shoun in a field two miles from the place where the sale and arrest was made, and that he and defendant had a conversation with him there.

It is said that it was error to refuse the continuance, and also to permit the introduction of the counter affidavits.

It has been frequently held that a continuance is a matter within the sound discretion of the trial judge, and that this court will not overrule that discretion unless it appears that it has been improperly exercised or grossly abused. *State v. Rigsby*, 6 Lea, 554.

And a continuance at the first term is equally within the discretion of the trial judge as if made at a subsequent term. *Fox v. State*, 76 S. W. 815.

This court has never passed directly upon the question of permitting counter affidavits upon a motion to continue. The question was expressly waived in the case of *Walt v. Walsh*, 10 Heisk. 318, and we know of no direct adjudication on the question in this state.

In volume 4, Ency. Pl. & Pr. 876, it is said: "In some jurisdictions the use of counter affidavits is wholly condemned" (referring to cases from Indiana, Illinois, Kentucky, and Louisiana).

In the Illinois courts it is held that the reception of the counter affidavit does not constitute reversible error, if it is shown upon the trial to have been harmless; but the great weight of authority is that counter affidavits may be admitted:

To show want of diligence in procuring the testimony of an absent witness.

To show want of good faith in the application.

To show improbability that the proposed testimony can be obtained.

To contradict an averment that a witness or counsel who is absent is sick.

To dispose of the allegations of public excitement and prejudice.

It may also be introduced to prove other facts, in the discretion of the trial judge, which do not go to the case upon its merits.

Under the Georgia Code, which provides that the presiding judge may admit counter affidavits on motion for a continuance, it was

held that, while the judge may not try the merits of the case on the issue of continuance, and thus take from the defendant the right of trial by jury, yet he may try all such issues as the question of a subpoena of a witness, the sickness of the witness, his absence from the county, or even what he would swear, if he were present, drawn from what he had sworn on another occasion when the same transaction was in question.

In the case of *Walt v. Walsh*, 10 Heisk. 318, before referred to, the court said that it was proper for the court to hear enough of the record and of the nature of the controversy to enable him to see and to determine the importance of the testimony, as well as whether the party had been guilty of negligence in obtaining it.

In that case, the court, looking to other portions of the record and the testimony of other witnesses, said: "In the face of all this, of what possible avail to the defendant could the testimony of Bonfelli have been? It is impossible that his testimony could have overthrown the evidence above set forth."

In the present case, it appears that the testimony of A. J. Shoun, if given as claimed in the affidavit, would be only negative and indefinite in its character, and would be directly contradictory of that of five other witnesses, not impeached, as to the question of a sale, and his presence on the occasion, and would have been directly in conflict with the testimony of the witness who saw him, immediately after the transaction, at a point two miles distant from where the transaction took place.

We may repeat the language of *Walt v. Walsh*, and say: "In the face of all this, of what possible avail to the defendant could the testimony of A. J. Shoun have been?"

We think it is proper practice, within proper limits, to allow the introduction of counter affidavits on the motion for a continuance, at the sound discretion of the trial judge; but the affidavits should not be allowed to go to the extent of trying a case upon its merits upon the preliminary question of a continuance, but only to satisfy the trial judge whether a continuance is necessary or not in order to reach the merits of the controversy upon the grounds stated in the affidavit for a continuance.

If there is an abuse of the discretion of the judge, it is the imperative duty of this court to reverse and correct it. *State v. Poe*, 8 Lea, 647.

We are of opinion that there was no error in permitting the counter affidavits upon the motion made in this case, nor in refusing the continuance. We are also of opinion that the trial judge did not unduly hasten the trial of the case, that he did not invade the province of the jury, and that there is no material error in his charge.

The fine of \$100 imposed by the court is valid only to the extent of \$50, under the provisions of the act of April 7, 1899, p. 309,

c. 161, and under section 14, art. 6, of the Constitution, and it is reduced to that amount, and the judgment of the court is in other respects affirmed, with costs.

SWAIN v. TENNESSEE COPPER CO. et al.
COLE v. DUCKTOWN SULPHUR, COPPER
& IRON CO., Limited, et al.

(Supreme Court of Tennessee. Nov. 21, 1908.)
NUISANCES—MAINTENANCE—SEPARATE ACTS—
PARTIES DEFENDANT—JOINDER.

1. Where two corporations, each engaged in the reduction of copper, maintained plants in the same neighborhood, and each of the plants contributed to the pollution of the air surrounding them with poisonous material emitted from their respective hearths, roast piles, and furnaces, but such corporations were entirely independent of each other, without any community of interest, concert of action, or common design, they could not be joined in a single action for damages caused to adjoining property owners by their wrongful acts so separately committed.

Appeal from Circuit Court, Polk County;
Geo. L. Burke, Judge.

Actions by A. W. Swain against the Tennessee Copper Company and another, and by Thomas L. Cole against the Ducktown Sulphur, Copper & Iron Company, Limited, and another. From a judgment in favor of defendants, sustaining separate demurrers to the complaint for misjoinder of parties defendant, plaintiffs appeal. Affirmed.

B. B. C. Witt and J. E. Mayfield, for appellants. Cornick, Wright & Frantz and R. M. Copeland, for appellee Tennessee Copper Co. J. G. Parks and G. C. Hyatt, for appellee Ducktown Sulphur. Copper & Iron Co.

SHIELDS, J. These two cases, brought against the same defendants and involving the same questions, were heard together in this court, and will be so considered in this opinion.

The plaintiffs, A. W. Swain and Thos. L. Cole, brought their separate suits in the circuit court of Polk county against the Tennessee Copper Company, a corporation under the Laws of New Jersey, and the Ducktown Sulphur, Copper & Iron Company, Limited, a corporation under the laws of the kingdom of Great Britain and Ireland, jointly, to recover damages sustained by them, respectively, caused by a nuisance created and maintained by the defendants in the separate management and operation of the plants severally erected and owned by them.

The defendants interposed separate demurrers for misjoinder, which were sustained by the trial judge, and the plaintiffs have brought the cases before this court for review.

It appears from the allegations of the declarations, which are practically the same, that the plaintiffs are the owners of lands situate and lying near Ducktown, Polk county, Tenn., upon which they reside, and have gardens, orchards, and inclosed fields for the

cultivation of fruits, vegetables, grains, grasses, and other farm products, and valuable growing timber.

That the defendants, separate and independent corporations, created and organized for the purpose of carrying on the business of mining copper ores, and converting them into metal ingots suitable for commerce, more than three years before the bringing of these actions located their respective plants near Ducktown, and there severally erected furnaces, hearths, and fireplaces for roasting, reducing, and converting ores into commercial copper, and were respectively carrying on said business extensively in proximity to each other, and that in their said business, they unlawfully caused, created, and maintained a great nuisance at and around Ducktown, by sending out from their respective hearths, roast piles, and furnaces, into the pure air, immense volumes of noxious, foul, and poisonous smoke and gases, which, ascending from their several and respective works into the atmosphere, therein became and were indistinguishably mingled, commingled, and intermingled into clouds of noxious, deadly, and poisonous vapor, which permeated the surrounding atmosphere, and steadily drifted over and on the premises of the plaintiffs, often covering the same for hours, poisoning the air, rendering difficult respiration, wrongfully and unlawfully burning, parching, and destroying plaintiffs' said gardens, orchards, crops, and timber, and impairing and expelling the convenience and comfort of their homes, whereby plaintiffs were injured and sustained damages, etc., for which they sue.

The declarations contain no averments of a common ownership or operation of the properties of the defendants, or any common design, purpose, concert, or joint action upon the part of the defendants in discharging the foul and poisonous fumes, gases, and smoke causing and maintaining the nuisance complained of; but, on the contrary, it clearly appears from them that the defendants are distinct corporations, owning separate plants, which they severally operate, without any connection, and independent of each other. The only averment tending to show joint action or common purpose is that the poisonous and noxious gases, fumes, and smoke which are discharged from the furnaces and roast heaps, after leaving the same and ascending into the air, there become commingled and indistinguishable, and then constitute a nuisance, which injures and destroys the property of the plaintiffs. These injuries are not averred to be the result of force directly applied, or concurrent negligence of the defendants in the operation of their several respective plants, but the consequential effect of their said unlawful conduct.

The questions which this court is called upon to determine in these cases are not merely of pleading, but also of liability, or when one tortfeasor is liable for damages

done by others to the same party, for the test of joint liability is whether each of the parties is liable for the entire injury done. If they are joint tortfeasors, each one is responsible for the damages resulting from the acts of all the wrongdoers, and they may all be sued severally or jointly; but, if they are not joint tortfeasors, each is liable only for the injury contributed by him, and can only be sued in a separate action therefor. These are most important questions, often far-reaching in their consequences, and deserve the most careful consideration.

The defendants, by their demurrers, do not, and could not successfully, deny that the averments of the declarations, if true, show an actionable nuisance, for which they are severally liable to the extent which they respectively contributed to its creation and maintenance.

This was so held in the case of Ducktown Sulphur & Iron Co., Limited, v. Barnes and others—a bill brought to enjoin the prosecution of certain suits instituted against the complainant in that cause to recover damages to the property of plaintiffs therein caused by it in the operation of its plant at Ducktown in the same way complained of in these cases.

In the able opinion of the Court of Chancery Appeals in that case, delivered by Judge Wilson, and adopted by this court, it is said:

"Assuming that complainant is engaged in a lawful business, and that it conducts it lawfully and prudently, and according to the latest and best-known methods established for the operation of such business, is it liable in damages for an injury to the property rights of another living in the vicinity, caused by the operation of its business? The principle is well settled that when a trade or business is carried on in such manner as to interfere with the reasonable and comfortable enjoyment by another of his property, or which causes material injury to the property itself, it amounts to a wrong to the neighboring owner, for which an action will lie; and it is no defense to such an action to prove that the place where the business is carried on at is a suitable locality, or that the business is lawful and one useful to the public, or that the best and most approved appliances and methods are used in the conduct and management of the business." *Ducktown Sulphur & Iron Co. v. Barnes et al.*, 60 S. W. 600.

What they do controvert is the contention of plaintiffs that they are joint tortfeasors, and jointly and severally liable for all the damages caused by both of the plants in question, and can be sued jointly therefor, and these are the points now before us for decision.

When a tort is committed by two or more persons jointly, by force directly applied, or in the pursuit of a common purpose or design, or by concert, or in the advancement of a common interest, or as the result and ef-

fect of joint concurrent negligence, there is no doubt but that all the tortfeasors are jointly and severally liable for all the damages done the injured party, and that these damages may be recovered in joint or several actions, although the wrongful conduct or negligence of some may have contributed less than that of others to the injury done.

Torts may also be joint on account of the relations of the parties, such as the joint liability of a husband and wife for the wife's torts, that of the master and servant for the latter's torts, and that of the principal and agent, employer and employé, partner and copartner, for the acts of the agent, employé, and copartner, when committed within the scope of the agency, employment, or partnership. *Snyder v. Witt*, 99 Tenn. 619, 42 S. W. 441; *Railroad v. Jones*, 100 Tenn. 511, 45 S. W. 681; *Electric Railway Co. v. Shelton*, 89 Tenn. 425, 14 S. W. 863, 24 Am. St. Rep. 614; 1 *Jaggard on Torts*, § 67; *Coolcy on Torts*, p. 133.

The parties in all these cases are joint tortfeasors. The reason for holding them liable for all the damages inflicted by any of them is that they are all present, in person or by representation, and join in the wrongful act, or in some way knowingly aid in doing it, thereby consenting to and approving the entire wrong and injury done. The whole injury is committed by each and all of the trespassers, and it is but just and right that each of them should be held responsible for all the damages inflicted; and, the liability being several and joint, they may be sued separately or jointly. But this is not the rule where the tortfeasors act independently of each other, without community of interest or concert of action, or common design or purpose, or concurrent acts of negligence, or where the injury is not the result of force directly applied, but the consequential effects of the wrongful conduct or negligence constituting a nuisance.

Where the tortfeasors have no unity of interest, common design, or purpose or concert of action, there is no intent that the combined acts of all shall culminate in the injury resulting therefrom, and it is just that each should only be held liable so far as his acts contribute to the injury. In such cases the party injured must proceed in separate actions against the several wrongdoers for the proportion of the damages caused by them, respectively. This is the only reasonable and just rule that can be applied. If the law were otherwise, one whose acts contributed in a very slight degree to the wrong could be held for great damages done by others, of whose wrongful conduct he did not know until after it was done, and did not approve and consent to at any time.

The allegations of the declarations upon which the plaintiffs seem to rest their contention that the defendants are jointly and severally liable for the entire damages caused by the nuisance resulting from the opera-

tion of the plants of defendants are those that the noxious and poisonous fumes and gases discharged from their respective roast heaps and furnaces become, when discharged, mingled and commingled in the air into one indistinguishable mass and cloud, and in this form drift over and upon plaintiffs' premises, and damage and destroy their property.

These allegations do not sustain the position of the plaintiffs. The wrong done by the defendants is the discharge of foul and offensive fumes and gases from their plants into the air, corrupting and poisoning the same. This is done by each of them upon its own premises, controlled and operated by it independently of, and without any connection or relation whatever with, the other. It is in every sense and by every definition a separate wrong, and it cannot be made joint because the consequences of it afterwards become blended and united with those wrought by other wrongdoers. A tort which is several when committed cannot be made joint by matters occurring subsequently, over which the tortfeasor has no control. The commingling of the gases does not cause those discharged by the different parties to be more injurious, but each has its own proportionate hurtful consequences, such as would have resulted if there had been no blending. If parties are to be held to be joint tortfeasors where the consequences of their wrongful acts become subsequently united, all torts, where similar injuries are inflicted to a person or his property about the same time, are joint, because the injuries in such case will severally affect and aggravate each other, and the consequences of the several wrongs become more or less blended. This is not the law.

It seems to be settled by all the authorities that we have had access to that the mere union and blending of consequences will not have the effect to make torts originally several joint. *Chipman v. Palmer*, 77 N. Y. 52, 33 Am. Rep. 566; *Little Schuylkill, etc., Co. v. Richards*, 57 Pa. 142, 98 Am. Dec. 209; *Miller v. Highland Ditch Co.*, 87 Cal. 430, 25 Pac. 550, 22 Am. St. Rep. 254; *Gallagher v. Kemmerer*, 144 Pa. 509, 22 Atl. 970, 27 Am. St. Rep. 673; *Lull v. The Fox & Wis. Imp. Co.*, 19 Wis. 100.

If the rule was as contended by plaintiffs, one who has caused an offensive odor by the slaughtering of one animal near a slaughterhouse where great numbers are killed, and an actionable nuisance created, would be held for the entire damage done; where the smoke of one chimney of a residence near a brickkiln which has become a nuisance united with that of the kiln, the owner of the residence would be liable for all the damages caused by the nuisance; and a citizen who allowed his private sewer to flow into a stream in which the sewers of a large city were discharged, fouling and poisoning its water, however small the taint caused by his

private sewer, would be liable for the entire damage done.

No sound reason or principle can be found to support a rule which will work such injustice.

The difficulty of ascertaining the extent of the injury done by each of the several tortfeasors furnishes no argument against the rule as we have stated it. That a plaintiff may be embarrassed in proving the wrong done him by one person is no reason why he should recover his damages from another, who did not cause them, merely because he did the plaintiff a similar injury.

This rule has been held peculiarly applicable to actions for the recovery of damages caused by nuisances of the character of that in question, resulting from the conduct of a number of persons acting independently of each other, because the damages in such cases are not the direct and necessary consequences of the wrongful conduct of the defendants, but merely the natural results, known as "consequential damages," for which no action will lie unless they are special (that is, not common to the general public), and which must be specially averred and proven. *Lowery v. Petree*, 8 Lea, 678.

The case of *Ducktown Copper & Iron Co., Ltd., v. Barnes et al.*, supra, is also authority upon the question. It is there said:

"The authorities also meet the contention that another mining company is operating its business in the same vicinity. It is true, it is competent for plaintiff to show that the damages done, if any, to the property of appellees, was done in part by the smoke, gases, etc., emanating from the works of the *Pittsburg & Tennessee Mining Company*. In other words, the plaintiff is liable only for the damages caused by it, and not for the damages caused by the operation of the works by an independent and separate corporation. The question of the amount of damages inflicted by appellees by the operation of the works of plaintiff is a matter to be determined by all the proof, and, in determination of this question, it is competent for plaintiff to show that smoke and gases are emitted by the works of the other company, which produce the damages, or some of them, complained of."

Or, in other words, defendant *Ducktown Sulphur, Copper & Iron Company*, complainant in that cause, was liable only for the injuries caused by the noxious, foul, and poisonous smokes and gases discharged from its own works, and not for those caused by the gases from the roast heaps and furnaces of another company, located in its vicinity, and acting independently of it; and, of course, it could not be sued jointly with such other company for the entire damage done by both companies. The case of *Gay v. State*, 90 Tenn. 645, 18 S. W. 260, 25 Am. St. Rep. 707, is also analogous. The trial judge there charged the jury that, although a pigpen kept by the defendant in a city was not of itself suf-

sufficient to constitute a nuisance, yet, if it contributed, with other pens maintained by other persons in the neighborhood, to cause a nuisance, the defendant was liable for such nuisance; and it was held error by this court, on the ground that the defendant could only be held liable for the consequences which his own acts produced.

The case of *Dyer v. Hutchins*, 87 Tenn. 198, 10 S. W. 194, is to the same effect.

The plaintiff in that case sued the several owners of a number of dogs which united in worrying and killing his sheep, to hold them jointly liable for the damage done his property; and it was held that each one was liable only for the injury done by his dog, and that a joint action could not be maintained, although it was impossible to tell the damage done by any particular dog.

The rule is so stated in the leading textbooks upon the subject.

In 2 *Jaggard on Torts*, p. 797, it is said: "But the liability of joint contributors is not necessarily that of joint tortfeasors. If persons who maintain a nuisance act independently, and not in concert with others, each is liable for damages which result from his individual conduct only. And the fact that it may be difficult to actually measure the damages caused by the wrongful act of each contributor to the aggregate result does not affect the rule, or make any one liable for the acts of others."

Mr. Gould, in his work on the *Law of Waters*, § 222, says:

"In general, where two or more persons act independently in producing an injury, they are not jointly liable for the combined results of their acts, but the riparian owner may prevent each from discharging his contribution to that which becomes in the aggregate a nuisance.

"Where suit was brought for damage to a dam filled by deposits of coal dirt from different mines on the stream, some of which were worked by the defendants and their tenants, and some by persons not connected with the defendants, the latter were held not liable for the whole damages caused by the deposits, or for the acts of their tenants, so far as these were done without their sanction. So, where plaintiff's boarders left his boarding house in consequence of the corrupt and offensive condition of the adjoining stream, caused by the sewerage discharged into it from a large number of hotels and other boarding houses before it reached plaintiff's premises, it was held that each contributor causing the torts was liable only to the extent of the wrong committed by him."

It is said in the text of 14 *Ency. of Pl. & Pr.* p. 1108, "Where a nuisance results from the act of several persons acting severally, they cannot be joined as defendants in actions for damages;" and in volume 15, p. 562, of the same work, it is said further that "persons who act severally and independently, each causing a separate and distinct injury,

cannot be sued jointly, even though the injuries may have been precisely similar in character, and inflicted at the same time. A joint tort is essential to the maintenance of a joint action. If separate and distinct wrongs, in no wise connected by the ligament of a common purpose, actual or implied by law, the wrongdoers are liable only in separate actions, and not jointly in the same action."

All these authorities cite in support of the rule as stated by them numerous cases, many of which we have examined, and found to fully sustain the text.

The leading case upon the subject is *Chipman v. Palmer*, 77 N. Y. 52, 33 Am. Rep. 566, which is so closely in point that we quote from it at length:

"The first proposition contained in the charge was clearly correct. The right of the plaintiff to recover of the defendant all the damages which he had sustained by reason of the nuisance, I think, cannot be maintained. The injury was not caused by the act of the defendant alone, or by that of others who were acting jointly or in concert with the defendant. It was occasioned by the discharge of sewerage from the premises of the defendant and other owners of lots into the creek separately and independently of each other. The right of action arises from the discharge into the stream, and the nuisance is only a consequence of the act. The liability commences with the act of the defendant upon his own premises, and this act was separate and independent of, and without any regard to, the act of others. The defendant's act being several when it was committed, cannot be made joint because of the consequences which followed in connection with others who had done the same or a similar act. It is true that it is difficult to separate the injury, but that furnishes no reason why one tortfeasor should be liable for the acts of others who have no association and do not act in concert with him. If the law was otherwise, the one who did the least might be made liable for the damages of others far exceeding the amount for which he really was chargeable, without any means to enforce contribution, or to adjust the amount among the different parties. So, also, proof of an act committed by one person would entitle the plaintiff to recover for all the damages sustained by the acts of others who severally and independently may have contributed to the injury. Such a rule cannot be upheld upon any sound principle of law. The fact that it is difficult to separate the injury done by each one from the others furnishes no reason for holding that one tortfeasor should be liable for the acts of others with whom he is not acting in concert."

Another leading case is that of *Little Schuykill, etc., Co. v. Richards*, 57 Pa. 142, 98 Am. Dec. 209—an action brought against one of the parties contributing to a nuisance in filling up a milldam, resulting from throwing coal dirt into the river above it, by a

number of parties acting independently of each other, to hold one of them liable for the entire injury, which the trial judge held could be done.

In reversing the judgment against the defendant, the court said:

"The doctrine of the learned judge is somewhat novel, though the case itself is new, but, if correct, is well calculated to alarm all riparian owners, who may find themselves, by a slight negligence, overwhelmed by others in gigantic ruin.

"It is immaterial what may be the nature of their several acts, or how small their share in the ultimate injury. If, instead of coal dirt, others were felling trees and suffering their tops and branches to float down the stream, finally finding a lodgment in the dam with the coal dirt, he who threw in the coal dirt and he who felled the trees would each be responsible for the acts of the other. In the same manner separate trespassers who should haul their rubbish upon a city lot, and throw it upon the same pile, would each be liable for the whole, if the final result be the only criterion of liability. But the fallacy lies in the assumption that the deposit of the dirt by the stream in the basin is the foundation of liability. It is the immediate cause of the injury, but the ground of action is the negligent act above. The right of action arises upon the act of throwing the dirt into the stream. This is the tort, while the deposit below is only a consequence. The liability, therefore, began above with the defendant's act upon his own land, and this act was wholly separate and independent of all concert with others. His tort was several when it was committed, and it is difficult to see how it afterwards became joint, because its consequences did not increase his injury. If the dirt were deposited mountain high by the stream, his dirt filled only its own space, and it was made neither more nor less by accretions. True, it may be difficult to determine how much dirt came from each colliery, but the relative proportions thrown in by each may form some guide; and a jury, in a case of such difficulty, caused by the party himself, would measure the injury of each with a liberal hand. But the difficulty of separating the injury of each from the others would be no reason that one man should be held liable for the torts of others without concert. It would be simply to say, because the plaintiff fails to prove the injury one man does him, he may therefore recover from that one all the injury that others do."

In the case of *Lull v. Fox & Wis. Imp. Co.*, 19 Wis. 100, the plaintiff sought to recover damages sustained by the overflow of his lands, caused by the erection and maintenance of dams in the two channels of the Fox river by the defendants, acting independently of each other, in a joint action against them.

The court, in sustaining a demurrer to the declaration for misjoinder, said:

78 S.W.—7

"There is no allegation that all the defendants acted together in erecting or maintaining either or both of these dams. On the contrary, it is alleged they acted separately. Each dam was erected and has been maintained by a part of the defendants without the aid or approval of the others. We are at a loss to perceive how, by the well-established rules of pleading, these causes of action can be united. It is argued that the results of the separate acts of the defendants in erecting and maintaining the dams is a joint result, the same as if all the defendants had been engaged in erecting and maintaining both dams. If it were so, it does not follow that the defendant or defendants who alone erected and maintained one dam, without any concert of action or connection with the defendant or defendants erecting and maintaining the other dam, should be held liable to pay the damages occasioned by erecting and maintaining both."

In the case of *Miller v. Highland Ditch Co.*, 87 Cal. 430, 25 Pac. 550, 22 Am. St. Rep. 254, where a joint action was brought against the several owners of three ditches, which had been made by them, without any concert of action or unity of interest, for the purpose of discharging foreign waters from their respective lands into a cañon, which, there united, passed out of the cañon, and flowed over plaintiff's lands, depositing thereon sand and other debris, greatly injuring the same, for which damages were sought to be recovered, it was held it could not be done, the court saying: "It is clear that the rule as established by the general authorities is that an action at law for damages cannot be maintained against several defendants jointly, when each acted independently of the others, and there was no concert or unity of design between them. It is held that in such case the tort of each defendant was several when committed, and that it does not become joint because afterwards its consequences unite with consequences of several other torts committed by other persons. If it were otherwise, say the authorities, one defendant, however little he might have contributed to the injury, would be liable for all the damages caused by the wrongful acts of all the other defendants, and he would have no remedy against the latter, because no contribution could be enforced by the tortfeasors. * * *

The case of *Blaisdell v. Stephens*, 14 Nev. 17, 38 Am. Rep. 523, involved the same question, arising upon a similar state of facts. Several persons, owning and operating separate and distinct tracts of land, each in his own right, were jointly sued for discharging water from ditches on their respective premises into a ditch owned and maintained by plaintiff. It was held that there was no joint liability, the court saying: "The general principle is well settled that where two or more parties are acting each for himself in producing a result injurious to plaintiff, they

cannot be held jointly liable for the acts of each other."

In the case of *Valparaiso v. Moffitt*, 12 Ind. App. 250, 39 N. E. 909, 54 Am. St. Rep. 524, it is said: "Concert of action and a common intent and purpose are generally necessary to make two or more persons joint tort feors and jointly liable. If several distinct acts of several persons have contributed to a single injury, but without concert of action or common intent, there is generally no joint liability."

In *Gallagher v. Kemmerer*, 144 Pa. 509, 22 Atl. 970, 27 Am. St. Rep. 674—an action to recover damages for injuries to plaintiff's land by a deposit of culm and dirt thereon caused by the defendant washing coal in a stream flowing through plaintiff's land—the error assigned was the refusal of the court to charge that a certain sum, which another coal company, operating upon the same stream, had paid plaintiff for the damages to his lands contributed by similar conduct, was a bar to the recovery, upon the theory that all the parties contributing to the nuisance were joint tort feors, and the consequences of their several acts one tort, for which only one satisfaction could be had; and it was held no error, Clark, J., saying:

"It is argued on the part of appellant that the injury to which the plaintiff was subjected was of such a character that it could not, as between the parties who caused it, be divided, so as to determine in what proportion it was caused by each, and that, even if the defendant's mines had not been operated, the mining operations of the Highland Coal Company, conducted contemporaneously with the operations of the defendant's mines, would have resulted in the same injury. It is true that the injury complained of may have been caused in part by the operations of the Highland Coal Company, conducted contemporaneously with defendant's mines, and that it would be difficult, if not quite impossible, to separate and ascertain, definitely or certainly, the proportion of the whole damage done by each of these operations, respectively. But these several operations were entirely independent of each other. They were several miles apart, and the ownership, management, and control were wholly distinct and separate. There was no concert of action or common purpose or design which would support the theory of joint injury."

In *Sloggy v. Dilworth*, 38 Minn. 179, 36 N. W. 451, 8 Am. St. Rep. 656, the defendant and others dug ditches on their respective lands, draining the waters therefrom upon the plaintiffs, and the court said: "Upon these facts, defendants, if liable at all in the action, would only be liable for the proper proportion of the damages caused by them. If waters are wrongfully turned upon the lands of another as the result of the acts of several parties, they are liable. If the damage caused is the combined result of several acting independently, recovery may be

had severally in proportion to the contribution of each to the nuisance, and not otherwise."

In *People v. Oakland Water Co.*, 118 Cal. 234, 50 Pac. 305, it is held:

"Where, in a suit to abate a public nuisance, it appears that each of the several defendants acted independently of the other in the maintenance of a separate alleged nuisance, a demurrer will lie for misjoinder of the case and of parties defendant."

In *Martinowsky v. Hannibal*, 35 Mo. App. 70, it is said:

"When the act producing the injury is not joint, the party can be responsible only to the extent of injuries inflicted by his own wrong, and a joint action against the parties whose separate acts produced the wrong cannot be brought."

There are many other cases in accord with these, among which are: *Adams v. Hall*, 2 Vt. 9, 19 Am. Dec. 690; *Van Steenburgh v. Gray and Tobias*, 17 Wend. 562, 31 Am. Dec. 310; *Russell v. Tomlinson & Hawkins*, 2 Conn. 206; *Loughran v. City of Des Moines*, 72 Iowa, 382, 34 N. W. 172; *Sellick v. Hall*, 47 Conn. 280; *Evans v. Wilmington & W. R. Co.*, 96 N. C. 45, 1 S. E. 529.

It will be found, upon examination of the cases cited by counsel for plaintiffs as holding a contrary rule, that there was either community of interest, concert of action, or common purpose and design, or joint, concurrent negligence, in some form, which made the defendants joint tort feors, and that, when carefully considered, they are not really in conflict with the doctrine here announced.

This is true of our own cases of *Electric Co. v. Shelton*, 89 Tenn. 424, 14 S. W. 863, 24 Am. St. Rep. 614; *Snyder v. Witt*, 99 Tenn. 619, 42 S. W. 441; *Railroad v. Jones*, 100 Tenn. 511, 45 S. W. 681; *Beopple v. Railroad*, 104 Tenn. 420, 58 S. W. 231.

In the last case cited there was only one defendant, whose wrongful conduct consisted in the joint negligence of the crews of two different trains belonging to the same railroad company, or several agents of the same principal.

In the other cases the defendants were held liable on account of their joint concurrent negligence contributing directly to produce the injuries complained of, and there could be no serious controversy but that they were jointly and severally liable for the entire damage done, and the questions now under consideration were neither involved nor discussed in any of them.

Nor do we see any great difficulty in ascertaining the proportion which the defendant in cases of this character contributed to the damages done the injured party. Take the cases under consideration as an illustration. Proof of the extent and capacity of the several plants causing the damages complained of, the tonnage of ores treated by each of them, the time each has been in operation,

their comparative proximity or distance from the plaintiff's lands, the usual condition of the air currents in that locality, and many other facts and circumstances, will show with substantial certainty the extent of the injury inflicted by each of the defendants; and in this way justice may be done the injured party. It is said in one case that, in the absence of all proof, it may be presumed that the several tort feorsors contributed equally to the damages inflicted, the effect of which would be to throw upon the defendant tort feoror the burden of showing that others contributed to the injury, and the extent of such contribution. And in the case of *Little Schuylkill River, etc., Co. v. Richards*, supra, it is said that juries will measure the damages done by each with a liberal hand, which is doubtless true; and experience will probably show that plaintiffs will not suffer in prosecuting two actions.

While we are not now called upon to pass upon this question, we think that, where defendants are guilty of wrongs necessitating the action, juries should not be held to great nicety and accuracy of judgment in ascertaining the damages to be assessed against each of the tort feorsors; and this court would be slow to interfere with verdicts supposed to be excessive.

The declarations in these cases present two distinct causes of action against two distinct defendants, caused by conduct while acting without concert of action, or the presence of a common interest or purpose, sought to be redressed in one action, and are clearly subject to the objection urged against them.

The defendants are only liable for the proportion of the damages contributed and done by them, respectively, and cannot be sued in one action for the aggregate injuries sustained by the respective plaintiffs.

The judgment of the trial judge sustaining the demurrers and dismissing the suits is affirmed, with costs.

EAST TENNESSEE & W. N. C. R. CO. v. LINDAMOOD.

(Supreme Court of Tennessee. Nov. 14, 1903.)
MASTER AND SERVANT—DEFECTIVE APPLIANCES—PRESUMPTION OF MASTER'S NEGLIGENCE—CONFORMITY OF PROOF TO PLEADING—NATURE OF DEFECT—ADMISSIBILITY OF EXPERT EVIDENCE—INSTRUCTIONS.

1. The evidence in support of an action by a servant for injuries must conform to the specific acts of negligence alleged.

2. No presumption of the master's negligence arises from the mere fact of the servant's injury by an appliance latently defective.

3. Where there is no evidence to show the nature of the defect in a brake, which caused it to lurch forward while being set, thereby occasioning a brakeman's injury, expert evidence that certain enumerated defects would occasion such a lurch is inadmissible.

4. A brakeman suing for injuries alleged that the brake he was trying to set was defective,

in that the brake chain was too long, and, in a second count, that the deadwood in the car projected against the brake rod and eyebolt so as to prevent it from turning freely. His proof showed that when he attempted to set the brake it gave a sudden jerk or lurch forward, which loosened his hold on it so that he fell, but there was no evidence as to the nature of the defect occasioning the lurch. The defendant railroad company requested instructions that, if the jury were not able to determine which of the two defects alleged caused the injury, plaintiff could not recover; that it was presumed that the company had provided suitable appliances and kept them in proper condition, the burden being on plaintiff to show the contract; and that it was presumed that, if the car was in good repair before the accident, it continued in like good condition to the time of the accident, the burden being on plaintiff to show the contrary. *Held*, that the refusal of these requests was error, though the court gave some general rules, correct in themselves, but embodied in a charge which embraced much other matter.

Appeal from Circuit Court, Washington County; C. J. St. John, Special Judge.

Action by Walter C. Lindamood against the East Tennessee & Western North Carolina Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Tipton & Miller and Kirkpatrick, Williams & Bowman, for appellant. Robert Burrow and Isaac Harr, for appellee.

BEARD, C. J. This is the second time this case has been before this court. At the September term, 1902, it was reversed because of the admission of incompetent testimony. The opinion of the court on that reversal will be found in 109 Tenn. 407, 74 S. W. 112. Upon its remand, another trial was had, resulting in a verdict and judgment for \$5,000 against the railroad company; and it has appealed, and assigned errors upon the action of the trial judge.

The defendant in error was a brakeman in the service of plaintiff in error, and while discharging his duty as such he received the injury, to recover damage for which this suit was brought. The declaration contains two counts. In the first of these it is alleged that while engaged in this service he was thrown from the top of a freight or box car in motion, and thereby received the injury complained of, and that his fall was caused by the negligence of his employer in having in use upon this car a brake which was out of repair and dangerous, in that the brake chain was too long, and, by reason of this defect, when attempting to apply the brake he fell from the car, and was run over by it.

The second count averred that the fall and injury as alleged in the first count were attributable to the negligence of the master in using a freight car with a brake which was defective, in that the deadwood in the car projected against or so close to the brake rod and the eyebolt of the brake rod as to prevent it from turning freely, and, in consequence of this, when attempting to apply the

§ 2. See *Master and Servant*, vol. 24, Cent. Dig. § 321.

brake, defendant in error fell and was injured.

It will thus be seen that the plaintiff below presented by his declaration two theories upon which he sought to recover: First, that the brake chain was too long; and, second, that the eyebolt of the brake rod rubbed against the deadwood, and that one or both of these conditions occasioned his injury, and that the negligence of the master in permitting the existence of one or both of these defective conditions was actionable, so far as he was concerned. The record shows that the plaintiff in error was operating a narrow-gauge railroad upon a line some 32 miles long, running from Johnson City, in this state, to its terminus, near the boundary of North Carolina, and owned and was using on this line 10 or 12 freight or box cars. It also shows that the defendant in error had been for several years engaged in the shops of the company, repairing and building such cars. About six months, however, before the occurrence of the accident, he was employed by this company as brakeman; and, as has been already stated, it was while acting in this capacity he received his injury.

His account of the accident is that, under the direction of his superior, he mounted a freight car, which had been kicked on a side track, for the purpose of stopping it; and, to do this, he took hold of the wheel at the top of the brake staff, and was pulling it around with all his force, when the brake gave "a sudden jerk or lurch," loosening his hold on the wheel, so that, losing his balance, he fell from the car, which was still in motion, and was run over by it. He does not undertake to say what was the cause of this jerk or lurch, as he did not examine the car or brake staff either before, at the time of, or after the accident, nor did any one else make such examination. So far as his testimony, or that of the other witnesses introduced by him, was concerned, the court and jury were left in the dark as to what occasioned it. No witness undertook to state affirmatively that the accident resulted from either of the conditions charged as negligence in the declaration, or, in fact, from any other defect in the brake or its connections. The record is silent upon this very essential question, unless information is to be found in certain testimony, the competency of which will be hereafter considered.

Before coming to the examination of the assignment of error that calls in question the admission of this testimony, there are certain well-established principles controlling such a case as the present, which it is proper to state:

In the first place, it is well settled that the evidence of the plaintiff must conform to the specific acts of negligence alleged in the declaration. *El. T. Coal Co. v. Daniel*, 100 Tenn. 72, 42 S. W. 1062. In the second place, as between the employer and employé, there is no presumption of negligence on the part of

the former in furnishing appliances to the latter, arising from the injury itself. *Mr. Wood*, in his work on the Law of Master and Servant, § 368, says: "From the mere fact that an injury results to a servant from a latent defect in machinery or appliances of the business, no presumption of negligence on the master's part is raised. There must be evidence of neglect connecting him with the injury. * * * The mere fact that the machinery proves defective, and that the injury results therefrom, does not fix the master's liability. Prima facie, it is presumed that the master has discharged his duty to the servant, and that he was not at fault. Therefore the servant must overcome this presumption by proof of fault on the master's part, either by showing that he knew or ought to have known of the defects complained of. * * * The burden of proving negligence on the part of the master is upon the servant; and he is bound to show that the injury arose from defects known to the master, or which he would have known by the exercise of ordinary care, or that he has failed to observe precautions essential to the protection of the servant which ordinary prudence would have suggested."

Again, at section 382, the same author says: "The servant seeking recovery for an injury takes the burden upon himself of establishing negligence on the part of the master, and due care on his own part. And he is met by two presumptions, both of which he must overcome in order to entitle him to recovery: First, that the master has discharged his duty to him, by providing suitable instrumentalities for his business, and in keeping them in condition; and this involves proof of something more than the mere fact that the injury resulted from a defect in the machinery. It imposes upon him the burden of showing that the master had notice of the defect, or, in the exercise of that ordinary care which he is bound to observe, he would have known it. When this is established he is met by another presumption, the force of which must be overcome by him, and that is that he assumed all the usual and ordinary hazards."

This rule rests in part on the ground that one charging negligence as the gravamen of his action must prove it (*The Nitroglycerin Case*, 15 Wall. 524, 21 L. Ed. 206), and in part upon the presumption of law, which, in absence of all evidence to the contrary, is in favor of the performance of duty (*Polk v. Kirtland*, 56 Tenn. 292). In one form or another it has been applied by this court in *R. v. Gurley*, 80 Tenn. 46, and *R. Co. v. Duffield*, 80 Tenn. 63, 47 Am. Rep. 319, and *R. v. Stewart*, 81 Tenn. 432, and in other cases.

Mere conjectural testimony will not be sufficient to meet and overcome these presumptions. In *Sack v. Dolese*, 137 Ill. 129, 27 N. E. 62, the rule was applied to facts somewhat similar to those of the present case. In that,

an employé attempted to stop a loaded car by the use of the brake, when it gave way, and he was thrown to the ground, sustaining severe injuries. As to the accident his testimony was as follows: "The car was still in the act of running slowly. I was holding with all my strength the brake to stop the car. Then I got a sort of push from the brake. It swung me about, and I fell down, and the car ran over me. That is all. The brake threw me down, around. I was taking hold of it with my might, and with all my strength. That is why it threw me. Something loosened on the chain below. The wheel in my hand turned. The chain gave way that is on the handle below on the brake."

The above is the sum of the testimony upon which a recovery was sought. There was no evidence as to what, if any, defect was in the brake chain; and there was none that the plaintiff was injured by reason of lack of skill in performing the work. His injury, said the court, "was clearly due to the breaking—and from no fault of his—of the appliance which he was handling. Therefore the only count of his declaration which the evidence would fit is the one charging the failure on the part of the appellees to furnish, in and about the work which the appellant was directed to do, proper cars, and suitable appliances and brakes for stopping and operating the same, and keep them in proper repair; and, by reason of the carelessness and negligence of appellees in that regard, plaintiff was injured."

The trial judge, at the close of the plaintiff's evidence, had instructed the jury to find the defendants not guilty, and it was insisted in the Supreme Court that this was error. That court, in disposing of this contention, said: "There was no evidence introduced or offered by plaintiff to show that the brake of this car was improperly constructed, or in what the defect in it consisted. The plaintiff's right to recover depends upon the proof of injurious negligence by defendant. He alleged such negligence in his declaration, and the burden was on him to prove it. Proving that the brake chain parted, or that something gave out, so that the brake wheel suddenly turned with him and threw him from the car, does not show that appellees were guilty of negligence." One of the questions for the plaintiff to answer, by satisfactory evidence to the jury, said the court, was, "Why did the brake chain part?"

There was one fact proven in that case which is not shown in the present, and that is, there had been no inspection of the cars on which the defective brake was; and the insistence, among others, was that the failure to inspect was negligence which of itself entitled the plaintiff to recover. In other words, the contention was that failure to inspect threw on the appellees the burden of showing the brake apparatus was properly constructed, and that there was no defect in it

that an inspection would have disclosed. To this, however, the court replied in these words: "This imposes the burden on the wrong party, and compels the defendant to prove that the injury did not result from his negligence. The proposition goes upon an unwarrantable assumption, to wit, that the inspection would have disclosed the defective condition of the brake. That is an affirmative proposition to be shown by the evidence, and the burden of proving it rests upon him who asserts it. If plaintiff had shown that the fault in the brake was in fact known to appellees' brakeman or car inspector, but unknown to himself, he would have made out his case; and so, too, he would have made his case, had he shown that the defect was of such a nature that it would have been known to them if they had exercised due care. No defect is latent which an inspection will disclose; hence appellees would be charged with knowing what an inspection would inform them. But before a court and jury can say that their negligence to inspect the car was the cause of plaintiff's injury, it must be shown by the evidence that the fault or defect in the appliance was one which a proper inspection would have made known to them." That court held that there was no error in the instruction of the trial judge to the jury to return a verdict of not guilty.

We have quoted from this opinion at such length because of the soundness of its reasoning, and the abundant citation of authority made by the court to sustain its conclusions. Among the authorities cited in support of its holding by that court, and more or less in point in the present case, are *Morrison v. Phillips*, 44 Wis. 405, 28 Am. Rep. 599; *Ballou v. Railway Co.*, 54 Wis. 257, 11 N. W. 559, 41 Am. Rep. 31; *Ladd v. R. Co.*, 119 Mass. 412, 20 Am. Rep. 331; *Duffy v. Upton*, 113 Mass. 544; *Le Barron v. Ferry Co.*, 11 Allen, 312, 87 Am. Dec. 717; *De Graffe v. R. Co.*, 76 N. Y. 125.

In *Soderman v. Kemp*, 145 N. Y. 427, 40 N. E. 212, it was held that, where a servant undertakes to recover against his master for an injury resulting from alleged negligence in the furnishing of appliances, it must be shown affirmatively that such negligence existed; that a recovery could not be rested upon a mere inference of some neglect on the part of the master. To the same effect are *Hughes v. C., N. O. & T. P. R. Co.*, 91 Ky. 528, 16 S. W. 275; *Dingley v. Star Knitting Co.*, 134 N. Y. 552, 32 S. W. 35; *L. & N. R. Co. v. Binlon*, 98 Ala. 570, 14 South. 619; and many other cases.

But it is insisted the case of the plaintiff below was made out upon certain testimony admitted over the objection of the defendant, and which it is now insisted was incompetent. The testimony in question is that which was referred to in a previous part of this opinion, and will now be considered.

M. Lindamood was the father of the defendant in error, and was at the time, and

had been for many years, the master mechanic of this railroad company, having charge of its repair shop. He was introduced by the defendant in error as a witness. While it is necessarily inferable from his testimony that the car upon which the defendant in error was at the time of the accident had been in the shop for repairs, and under his control, yet he could not fix the date when it was there; nor did he then or at any time discover any infirmity in the brake staff or any of its connections. He made no examination after the accident occurred to ascertain whether there was any such infirmity. This might easily have been done, and the question put at rest as to whether either of the conditions charged in the declaration existed, but it was not done. It is also fairly inferable from this record that no complaint had ever been made of the working of this brake staff. From the amount of work that this road did with the limited number of cars at its command, we think there can be no doubt but that this car was in weekly use, if not oftener. The brake staff had been there for at least 17 years. How long the chain and eyebolt had been used is not shown, but the deadwood against which it is claimed that the eyebolt rubbed had been underneath the car for at least 6 or 7 years; and yet, so far as this record discloses, no difficulty in the working of this brake staff had ever been discovered. It would seem, therefore, that whatever occasioned the lurch or jerk that precipitated the defendant in error from that car was sudden and unexpected. In this connection, and for the purpose of supplying the lack of affirmative evidence, the effort was made to establish the fact of negligence from mere inferences, rather than from proven facts. To make good this claim of negligence, the testimony in question was introduced. The question put to Lindamood, and the answers given by him, are as follows: "Q. Describe how the brake operates when it is put on—how it stops a car? A. This chain [the brake chain] is connected with the rod of the lever—a floating lever is connected with an eyebolt in the brake staff. Then we turn the brake staff, and it works the chain, and winds it up around the staff, and pulls the lever forward, and brings the rod in there, and that presses the brake apart. You wind on that, and it catches by the dog in the ratchet wheel. Q. The dog is a piece of iron that goes in the notches of the wheel to hold it? A. Yes, sir. Q. Where does the brakeman stand to use that? A. On this little board called the 'ratchet board,' on a box car. Q. How should that brake turn when in proper condition? A. Free of any obstruction, and to the right. Q. When a brake works freely, is there any lurching or jerking forward suddenly when put on? A. No; it works smooth and even. Q. Until the brake is on tight? A. Yes, sir, until it is on with the tension—with all the tension you can put it on. Q. You may state to the jury

what would cause, or could cause, a brake to lurch forward suddenly when being put on? A. The way our brakes are constructed, I cannot conceive of anything, unless a chain should break loose, or rod break, or a chain might wind up on itself, or there might be an obstruction to the eyebolt. Q. What could the eyebolt catch against? A. It could catch against the deadwood timber. Q. What would be the effect if it should? A. It would cause an obstruction, and stop the winding of the chain around the brake staff. Q. Suppose the brakeman should still put his weight against it? A. It might possibly free itself and give a lurch forward. Q. What would be the effect if the chain were too long, and would reach up and slip off? A. It would lurch forward, and have the same effect as any other obstruction that would keep it from turning."

One J. M. Smith was also introduced as a witness by the defendant in error. He knew nothing of the car or its condition, but undertook to testify as an expert. In describing the operation of the brake staff when used to control the movement of the car, he said: "If it [the brake chain] goes two-thirds of the way [around the brake chain] before taking effect on the wheels, it is a pretty good brake; and if it goes far enough to double up, and the chain wrap over the top, it is a little bit dangerous. Q. Why is that? A. It might slip off. Q. What effect would that have on the brake wheel? A. It would fly around quick. Q. In what direction? A. The way you were putting the brake on. Q. Would a brake in proper condition lurch forward that way, as from the chain slipping off? A. I do not think so—hardly ever. Q. What other way would account for the brake suddenly going forward when the brake was being put on? A. If the brake shaft were crooked, it might slip around there and fall off. It might come around easy part of the way, and get tighter. Q. Look at this model, and see if the brake staff should bind in turning against the deadwood, and should go under it, what would be the effect? A. It might catch, if it were too high. Some time they get turned and catch a little, but it does not amount to much; but, if it were too high, it might rub and slip loose. Q. And cause the same kind of motion? A. Yes, sir. Q. Would a brake in good state of repair lurch forward when the brakeman is putting it on? A. No, sir." One Thomas Brummitt was examined as an expert, and gave the same kind of testimony.

Going into the field of surmise, we can see no reason why these witnesses did not conjecture, as additional causes of the lurch or jerk, that the wheel itself had given away under the strain, or that the eyebolt had separated from either the brake staff or brake chain, or the latter from the floating lever, or it from the beam, or other defects which might as well account for this unexpected movement.

It may be, if the plaintiff below had shown by affirmative evidence that the eyebolt of this brake staff did rub tightly against the deadwood, or that the brake chain was so long as to double upon itself when the staff was turned, expert testimony tending to show that in one case the eyebolt releasing itself from the obstruction occasioned by the pressure against the deadwood, or in the other the slipping of the chain where it had doubled itself in winding, would be likely to produce a lurch or a jerk, might have been competent. But in the absence of such evidence, could such testimony, purely speculative in its character, be introduced? From the mere fact that the lurch or jerk was experienced in turning the brake staff, was it competent to show that this might have been occasioned by either of the conditions referred to above? As we have already seen, the plaintiff, in order to maintain this action, was bound to overcome the presumption which the law indulges in favor of the employer; and certainly, in the absence of all affirmative proof to meet those presumptions, it cannot be competent for him to rely upon a mere inference, drawn itself from a presumption. For illustration, in the present case these witnesses are permitted to say that they presume a defect in the brake staff, because in its turning it lurched and jerked; and on this presumption they then infer that it would not have done so, save for the existence of one of the defects alleged in the declaration, or some other defect. Inferences may be drawn from established facts, but never from mere presumptions. 2 Whart. Ev. § 1228. As said by the Supreme Court of the United States in *U. S. v. Ross*, 92 U. S. 281, 23 L. Ed. 707, these were "inferences from inferences—presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. * * * The law requires an open, visible connection between the principal and evidentiary facts and the deduction from them, and does not permit a decision to be made on remote inferences."

In line with this, the Supreme Court of California, in *Cosgrove v. Pitman*, 103 Cal. 268-278, 37 Pac. 233, said: "Unless facts are shown from which negligence may be reasonably inferred, a jury should never be permitted to infer arbitrarily and without evidence that there was negligence. When a fact is established, some other fact may be justly inferred therefrom; but when a plaintiff, instead of presenting a fact or facts from which the negligence of the defendant may be reasonably inferred, gives to the jury only a presumption drawn from other facts, the jury are not to be allowed to infer negligence from such presumption. The inferences cannot be drawn from a presumption, but must be founded upon some fact

legally established." To like effect is *Douglas v. Mitchell's Ex'r*, 35 Pa. 443. If it be true, therefore, that the jury would not be authorized to make an inference from a mere presumption, certainly it was not competent for a witness to give testimony to the jury which embraces the same vice. *Xenia Bank v. Stewart*, 114 U. S. 231, 5 Sup. Ct. 845, 29 L. Ed. 101. See many cases illustrating this rule cited in *Rose's Notes to U. S. v. Ross*, supra.

We think the testimony was incompetent, and should have been excluded by the circuit judge.

We also think that the circuit judge was in error in declining the following requests submitted by the plaintiff in error: Request 6: "If you are not able to determine whether accident was caused by a chain being too long, and wrapping and slipping off itself, or whether it was caused by the rubbing of the eyebolt or nut on the deadwood, and its sudden release therefrom, then I charge you that the plaintiff cannot recover on either of the two counts of his declaration." Request 7: "In an action for injuries claimed to have been sustained on account of defective appliances, it is presumed that the master has discharged his duty to the employé Walter Lindamood by providing suitable appliances, and by keeping them in proper condition; and the burden is on the plaintiff to show the contrary." Request 8: "The law furnishes a further presumption that, if the car was in good repair at a date prior to the accident, it continued to remain in a like good condition until the accident occurred. The burden is on the plaintiff to show that the contrary is true."

While it is true that the circuit judge gave in his charge to the jury some general rules applicable in such a case as the present, which were correct, yet, in view of the evidence upon which the plaintiff rested his right to recovery, we think the defendant below had a right to have applied for the guidance of the jury, in clear and explicit terms, the rules of the law invoked by it in its special requests to the facts of the case. Thus given, they would have afforded a safer guide than general rules embodied in a charge which embraces much else.

The assignments of error upon the action of the court with regard to the rule of estoppel invoked by the plaintiff in error upon pleading, as well as in the trial judge's declining to require a bill of particulars from the plaintiff below, are overruled. Other assignments of error predicated upon the idea that the testimony which we have said should not have been admitted was competent become by our ruling of no importance, and therefore need not be ruled on.

But for the errors indicated the case is reversed and remanded.

BEAN v. AETNA LIFE INS. CO.

(Supreme Court of Tennessee. Sept. 28, 1903.)
ACCIDENT INSURANCE—POLICY PROVISIONS—
REPUGNANCY.

1. Where an accident policy purported to insure complainant for a period of 12 months from noon on the 25th day of October, 1901, a subsequent clause, providing that the policy did not cover any disability from any disease contracted within 15 days from noon on the day the policy bore date, was repugnant to the first provision, and was therefore void.

Appeal from Chancery Court, Hawkins County; Hugh G. Kyle, Chancellor.

Action by James M. Bean against the Aetna Life Insurance Company. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Wolfe & Tarter, for appellant. Smith & Carswell, for appellee.

NEIL, J. This was an action brought in the chancery court of Hawkins county on a policy of insurance which contained, among other things, the following provisions:

"Aetna Life Insurance Co., of Hartford, Conn., Special Health Policy; Weekly Indemnity, \$5.00; Premium, \$2.00.

"In consideration of the warranties made in the application for this insurance, which is hereby referred to and made a part hereof, and of the sum of \$2.00, does hereby insure James M. Bean, of the town of St. Clair, County of Hawkins, State of Tennessee, under classification preferred, being a minister by occupation, for the term of twelve months from noon of the 25th day of October, 1901.

"Temporary Disability: In the sum of \$5.00 per week, against loss of time for the period of not less than seven days, nor more than twenty six weeks, during which he shall, independently of all other causes, be continuously and wholly disabled and prevented by acute meningitis, anthrax, appendicitis, apoplexy, Asiatic cholera, brain fever, carbuncle, cerebro-spinal meningitis, chicken pox, diabetes, diphtheria, epilepsy, erysipelas, hydrophobia, malignant pustule, measles, mumps, peritonitis, pleurisy, pneumonia, scarlet fever, varioloid, yellow fever, from transacting any and all kinds of business pertaining to his occupation above stated."

Then follow provisions concerning permanent disability, which need not be quoted here.

The policy then contains a provision, under the form of a condition, that the insurance begins and ends at 12 o'clock noon; another, "that the insurance does not cover temporary or permanent disability resulting from voluntary or unnecessary exposure to contagion or infection, nor from any disease resulting directly or immediately from the use of intoxicating liquors, or narcotics, nor from any disease or sickness other than those specified above, nor from any disease or sickness for which the insured is not regularly treated by

a physician, nor from any disease or sickness resulting from a surgical operation, or contracted during war, or while engaged in military or naval service."

Then follows this provision: "3. This insurance does not cover disability, temporary or permanent, from any disease if contracted within fifteen days from noon of the date of this policy," etc. The policy was dated October 25, 1901.

The bill alleges, upon the subject of plaintiff's illness, that on November 2, 1902, after taking out the insurance, "This complainant took down sick with diabetes, and was disabled by reason of said disease from pursuing his regular occupation or profession as a minister, or any other work or business, for pleasure or for profit, for at least 26 weeks, and continued in a weak and delicate state of health on into the following summer." For this illness the complainant sues and claims \$130, that is, for 26 weeks, at \$5 per week.

Numerous defenses were made by the demurrer, but we need not consider any of them, except in so far as they raise the question that the complainant could not recover because he contracted the disease of diabetes—one of the diseases insured against—within 15 days, above mentioned in the last quotation from the policy.

Of course, if this clause of the policy is valid, the demurrer must be sustained. It is insisted, however, that it is repugnant to a prior clause which expresses the main purpose of the contract, and should be rejected.

When two clauses of a contract are in conflict, the first governs rather than the last. *Wis. Marine, etc., Bank v. Wilkin*, 95 Wis. 111, 69 N. W. 354, 60 Am. St. Rep. 86, citing *Green Bay, etc., Company v. Hewett*, 55 Wis. 98, 12 N. W. 382, 42 Am. Rep. 701; *Hartung v. Witte*, 59 Wis. 285, 18 N. W. 175; 2 *Parsons on Contracts*, 513. In the case referred to, the court says, after stating the principle: "This is based on a very long and well established rule stated by Blackstone, in book 2 of his Commentaries, page 381: 'If there be two clauses so totally repugnant that they cannot stand together, the first will be received, and the last rejected.' To the same effect are *Chitty on Contracts* (11th Am. Ed.) 128, and *Straus v. Wanamaker*, 175 Pa. 213, [34 Atl. 648]. In the last citation the contract contained a distinct guaranty of fifty per cent. profit on a transaction between the parties, followed by a clause, the literal effect of which was to limit or partially destroy such guaranty. The court said: 'The obvious method of construing such a contract is to hold that the parties clearly stated their purpose in the beginning.' " See, also, authorities cited in a note to the above-mentioned case [60 Am. St. Rep. 86]. In this note it is said that the elementary rule above stated, that, when two clauses of a contract are in conflict, the first governs rather than the last, may not always apply as worded, unless

the instrument is formally and systematically drawn, as in the case of deeds, which are construed by the same rules as simple contracts; that, in cases of instruments irregularly drawn, it is probably more in consonance with authority to say that if clauses of a contract are repugnant, that one which expresses the chief object and purpose of the contract must prevail, while clauses containing provisions subordinate to the chief object and purpose of the contract must give way.

Further discussing the subject, it is said in the case of *Wis. Marine, etc., Bank v. Wilkin*, supra: "The law is so settled on the subject that it cannot be contended but that, if the last clause of the contract is so repugnant to the first that both cannot stand, the first must be taken as expressing the contract between the parties. But it is contended that a proviso merely limiting a previous clause of a contract, without destroying it, is not void, but must be considered as incorporated into and forming a part of the clause which it limits. On this, *Williams v. Hathway*, 6 Ch. Div. 544, is cited, and to that may be added *Chase v. Bradley*, 26 Me. 538; *Jackson v. Ireland*, 3 Wend. 99; *Butterfield v. Cooper*, 6 Cow. 481. Indeed, that is elementary. *Wharton on Contracts*, § 873; 1 *Addison on Contracts*, 186; *Story on Contracts*, § 810. 'But,' says Judge Story, 'if the subsequent stipulation of the contract should restrict what was distinctly stated, and constitutes a principal inducement to the contract, it will be of no effect.' That is really what is decided in *Williams v. Hathway*, 6 Ch. Div. 544. 'The distinction,' says *Jessel, M. R.*, 'has always been taken between a proviso which is repugnant to the covenant and therefore void, and a proviso which can be incorporated into the covenant and be consistent with it.' He limits the rule, that a proviso limiting a previous covenant may stand as an essential part of the contract, to such as may be reasonably considered as incorporated into and forming a part of the covenant, hence not repugnant to it. That is in perfect accord with the rule laid down by Judge Story to the effect that, 'if the subsequent clause contradicts what was distinctly stated, and constitutes a principal part of the contract, it has no effect upon it.'"

Now, to apply the principle to the present case, the first clause of the contract purports to insure the complainant for the period of 12 months from noon on the 25th day of October, 1901. The objectionable clause cuts down the term from 12 months to 11½ months; that is, takes off 15 days. Here is clear repugnancy, which no sort of construction can reconcile. We therefore hold that this clause must be rejected, and that on the face of the bill the complainant is entitled to recover. The decree of the court of chancery appeals holding otherwise must therefore be reversed, and the cause remanded to the chancery court of Hawkins county for further proceedings.

CHATTANOOGA MACHINERY CO. v. HARGRAVES.

(Supreme Court of Tennessee. Nov. 28, 1903.)

ACTION FOR DEATH OF EMPLOYE—DEFECTIVE EMERY WHEEL—EVIDENCE—SUFFICIENCY.

1. After a verdict has met the approval of the trial judge, it will not be reversed on appeal if there is any evidence to sustain it.

2. Evidence in an action for the death of an employé, caused by the bursting of an emery wheel, considered, and held sufficient to show the utility of the sounding test in determining defects therein, and that such test was in common use, and that defendant was negligent in not putting the wheel in question to such test.

Appeal from Circuit Court, Hamilton County; M. M. Allison, Judge.

Action by J. A. Hargraves, administrator of William A. Hargraves, deceased, against the Chattanooga Machinery Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Thomas & Thomas and Head & Anderson, for appellant. Pritchard & Sizer, for appellee.

McALISTER, J. J. A. Hargraves, as administrator of his deceased son, William A. Hargraves, brought this suit against the Chattanooga Machinery Company to recover damages for the negligent killing of his intestate. The cause of action, as outlined in the declaration, is that the defendant company is a domestic corporation engaged in running a machine shop in the city of Chattanooga. Plaintiff's said intestate, William A. Hargraves, was a young physician, and had been pursuing a course of medical studies in a college in Chattanooga. During vacation in 1901 said intestate determined to seek employment of some kind, and spend his vacation in earning wages; and, to this end, the defendant company employed him in its shops as a helper. Among the machines and appliances operated by defendant company in its shops is an emery wheel, which is attached to the running gear, and is operated by the steam from the engine and boiler. It revolves with great rapidity, and is used for grinding, smoothing, and polishing metals and other substances. The diameter of this wheel was 16 inches, and it was about 2¼ inches thick. The deceased went to work for defendant company June 3, 1901, and among other duties assigned him was that of grinding castings at the emery wheel. It appears that on the 15th of August, about noon, a new 16-inch emery wheel was substituted for an old emery wheel, which had been reduced, by a process of abrasion, from a diameter of 16 inches to a diameter of 8 inches. It appears that this new wheel was used by different employés during the remainder of that day, and up to noon of the next day, when Hargraves was given some castings to grind on this wheel; and, while engaged in grinding them, the emery wheel suddenly burst into three pieces, one of

which struck him on the head and instantly killed him.

The first trial resulted in a verdict and judgment in favor of the plaintiff for \$5,000, which on appeal was reversed by this court at the last term. Since then the case has been retried, resulting again in a verdict of \$5,000 in favor of the plaintiff. The defendant appealed, and has assigned errors.

On the first trial several theories were projected on behalf of the plaintiff as grounds of recovery, some of which were not sustained by any evidence whatever. The trial judge, however, in his instructions to the jury, covered all the different theories advanced tending to show liability on the part of the company. This court, in disposing of the case at the last term, through Mr. Justice Neil, wrote as follows:

"The present case is very peculiar in the wide scope which the declaration took, and the equally wide scope of the inquiry in the evidence. The plaintiff evidently had no clear idea in the beginning as to what was the cause of the accident, and so alleges many theories, as he had a right to do, which he did not subsequently prove—things which he inquired about in the testimony, and endeavored to prove, but did not succeed in getting any evidence to establish. Practically, the only point established, after showing the employment; that the deceased was working at the wheel at the time of his death, and was killed there by the explosion of the wheel—was that there was evidence tending to show that there was a crack in the wheel; that this crack, if there at all, was not open to outward observation before the wheel burst; that it might have been discovered, if present at all, by what is known as the 'sounding test'; that this sounding test was not used by the defendant, or known to the defendant, but that it was an ordinary test applicable to vitrified emery wheels, as shown, probably, by the testimony of Mr. Dillar, the manufacturer; and that the crack in the wheel, if present at all, made it dangerous, and probably caused the explosion." Again it was said: "The court finds the proof upon the subject of the crack in the wheel (the only ground upon which the verdict could, in any event, stand) of the very narrowest kind; that is to say, while the existence of the crack is made fairly probable by the testimony of the witness Connor, and the fact that the wheel could have been cracked in transit from the factory, or in the shop, yet it is shown that the crack was not open to observation from the outside, and could only have been detected by the sounding test; and the only proof supporting the position that the sounding test should have been applied by defendant, as an ordinary test, is that of Mr. Dillar, to the effect that it would have been negligent in the purchaser not to sound the wheel before putting it on the mandrel. From this testimony the jury was authorized to infer

that it was an ordinary test. * * * Under the rule of law applicable to the subject, the defendant would not be bound to apply a test not in ordinary use. In view, therefore, of the exceedingly narrow ground upon which the liability as to the alleged crack must rest (with the testimony), and the very great probability that the jury were confused by the instruction of the circuit judge upon points not covered by the testimony, we are of opinion that the judgment should be reversed, and the cause remanded for a new trial."

On the last trial, in accordance with the opinion pronounced by this court, all extraneous issues were discarded, and the utility of the sounding test, and whether or not it was in common use, was made the storm center of the case. In elucidation of that issue, much testimony was introduced by both sides. The trial, as already stated, resulted adversely to the contention of the company, and its first assignment is that there is no evidence to support the verdict; and, since this assignment presents the real controversy in the case, we will proceed at once to its consideration.

Says Mr. Wharton in his work on Negligence, § 46: "It is admissible for a party charged with negligence to prove what was the degree of diligence used by other business men of the same class under similar circumstances." *Brown v. Waterman*, 10 Cush. 117; *Lichtenhein v. Boston & P. R. Co.*, 11 Cush. 70; *Cass v. R. R.*, 14 Allen, 448; *Lane v. R. R.*, 112 Mass. 455; *Hoyt v. Jeffers*, 30 Mich. 182. As said by the Supreme Court of Pennsylvania in *Kilbride v. Carbon Dioxide & Magnesia Co.*, 201 Pa. 552, 51 Atl. 347, 88 Am. St. Rep. 829: "It is not negligence because a particular accident might have been prevented by some special device or application not in common use. * * * It is not enough that some people regard it as a valuable safeguard. The test is general use. * * * The unbending test of negligence in methods, machinery, and appliances is the ordinary usage of the business. No man is held by law to a higher degree of skill than the fair average of his profession or trade, and the standard of due care is the conduct of the average prudent man."

It may be conceded that no evidence was introduced on the last trial sufficient to sustain a verdict against the defendant company, unless it is found in the evidence tending to show that there was a fracture in the emery wheel, which caused it to burst under rapid revolutions, and that this fracture could have been discovered by the application of the sounding test, and that said test was in common use at the time.

It is conceded on the brief of learned counsel for defendant that there is evidence in the record from which a jury could properly find that the wheel was cracked at the time it was adjusted on the mandrel. It is estab-

lished by the evidence that this fracture was not discoverable by a superficial examination with the naked eye. The theory of the plaintiff is that this fracture occurred after the wheel left the hands of the manufacturer, either in the course of transportation, or by rough handling after it came into the hands of the defendant company. It is claimed on behalf of plaintiff that the fracture could have been discovered by the application of the sounding test, and it is conceded that no such test was made.

It is further insisted on behalf of plaintiff that this sounding test was in general use in well-regulated machine shops, and was practiced by experienced and prudent machinists. Hence it was an act of negligence for the defendant company to attach this wheel to the mandrel without subjecting it to the sounding test.

In overruling a motion for a new trial, the circuit judge said:

"To my mind, the proof shows that the emery wheel was a cracked and defective wheel. There is proof that the sounding or hammering test, if applied, would detect a crack, if one existed. It is possibly true that the weight of the testimony shows that this sounding test was not in common or ordinary use in the city of Chattanooga, but, in my opinion, the preponderance of the evidence shows that generally throughout the country it was the usual test, and in common and ordinary use by the operators of emery wheels."

While the circuit judge found that a preponderance of the evidence sustained the theory of the plaintiff that the sounding test was in general use, it is only necessary, under the established practice in this court, to find that the theory is sustained by some material evidence. After a verdict has met the approval of the circuit judge, this court will not reverse, if there is any evidence to sustain it. This court takes as true the strongest legitimate view of the testimony in favor of plaintiff, and discards all countervailing testimony, because the jury, whose exclusive province it is to pass upon the credibility of witnesses, has by its verdict resolved all conflicts in his favor. *Railroad v. Abernathy*, 106 Tenn. 723, 724, 64 S. W. 3. And in order to impeach it successfully on the ground that there was no evidence to sustain it, the complaining party must take as true the strongest legitimate view of the testimony against him, and show that it affords no support for the finding of the jury. *Citizens' Rapid Transit Co. v. Selgrist*, 96 Tenn. 124, 125, 38 S. W. 920. The reason of this is obvious. This court can see the case only as it appears through the imperfect medium of the bill of exceptions. The evidence is often not fully stated, or inaccurately stated. The manner, intelligence, and credit of the witnesses are of necessity obscurely and imperfectly represented, and, in considering the merits of the verdict, this court will hesitate to pronounce

against the opinion of the judge who tried the cause. *Nailing v. Nailing*, 2 Sneed, 631, 632.

Plaintiff, for the purpose of showing that this wheel was not cracked when it left the hands of the manufacturer, read the depositions of the manager and general superintendent of the manufacturing company, which had been taken on behalf of the defendant company, but which the latter declined to read. These witnesses explain the process of manufacturing vitrified wheels, and testify in respect of the care exercised by the company in testing its product before it leaves the factory. The company employs in its manufacture what is known as the "vitrified process." The wheels are made by mixing emery with clay and certain chemicals. The wheels are first subject to degrees of pressure varying from 100 tons down, determined by the size of the wheel, and are then tested by the superintendent, to be sure that the mixing is thorough. Next the wheels are put in kilns, and subjected to intense heat. They are then taken out of the kilns, and a second thorough examination is made, to determine whether the burning has been thorough. The wheels are then trued up, turned, burnished, and made ready for shipment. Another inspection is then made by the superintendent, and the wheel placed in a speed machine, and, if it be a 16-inch wheel, it is caused to revolve 1,500 revolutions per minute.

Now, according to the testimony of the manager and superintendent of the manufacturing company, this wheel was subjected to all these tests before leaving the factory, and no fracture or other defect in its construction was discovered. There is testimony tending to show that, before the wheel was put on the mandrel, it was examined with the naked eye, and no defect in it was discovered. Mr. Dillar, the manager of the manufacturing company, testifies: "If a wheel has the slightest crack in it, if you sound it the ear will hear what the eye cannot see." He was then asked the following question: "Then the supreme test by which you determine whether or not a crack exists in the body of the wheel, and renders it dangerous, is by sounding it? Answer. Yes; by sounding it, which will detect the minutest crack in it, which it is entirely impossible to see with the naked eye." Mr. Collum, the superintendent of the manufacturing company, was asked:

"Q. Is it easy or difficult to detect a small crack in an emery wheel?

"A. It is very easy.

"Q. How is it done?

"A. The testing is done by striking it."

According to these witnesses, this sounding test should be applied before the purchaser places the wheel on the mandrel, in order to ascertain whether it has been injured since leaving the manufacturer, in its loading or unloading or transportation, or

while lying in the shops awaiting use. According to these witnesses, a wheel may receive a crack after leaving the manufacturer.

It appears from the proof that three or four other wheels were embraced in the order for this wheel sent by the Chattanooga Machinery Company to the Peerless Machinery Company. The entire lot was shipped in the same box. When they were received, they were unpacked and deposited on the workbench. It appears that there were shelves in the toolroom of the defendant company, and it had been the practice to place all emery wheels on these shelves for their protection against injury. When this consignment of wheels was received, there was no room on the shelves, and hence the wheels were placed on the workbench, where they remained until they were brought into requisition. This particular wheel was taken from the workbench, and attached to the mandrel, without subjecting it to any test, except a superficial examination with the naked eye. As already stated, it burst within 24 hours after it was put on the mandrel, resulting in the death of the plaintiff's intestate. The witness Connor says that he happened to be in the building when the explosion occurred, and carefully examined a piece of the broken wheel. He testifies: "The best of my knowledge is that about two and one-half inches from the eye there was a crack; looked to be a shrinkage crack. The crack was in the shape of the letter 'S,' but the wheel was cracked at the eye. It may have been done in unpacking it, or in some other way." His testimony is that this fracture could not have been discovered by a superficial examination with the eye. He claims to have detected the crack from the fact that the wheel had been lying where there was oil, and the oil had been absorbed into the wheel clear through the crack. The crack was on both sides of the wheel, and extended through the wheel, and ran down into the eye of the wheel. According to the witness, a shrinkage crack is one that occurs under heat, when the wheel is being baked. It is claimed that this crack had occurred in the manufacture, and could not be detected by the naked eye. One of the wheels that came in the consignment with the wheel that afterwards exploded also had a crack in it, which was discovered by the naked eye, and returned to the manufacturer as unsound. This defective wheel was not discovered until after the explosion of the wheel resulting in the death of plaintiff's intestate. It was immediately shipped to the manufacturer without ever having been used.

But the cardinal and crucial inquiry in this case is whether there is any evidence to support the verdict that the sounding test was in common use by well-regulated shops. This inquiry necessitates a review of the evidence on this subject submitted on behalf of defendant in error.

A. P. Scanlan, introduced by plaintiff, tes-

tified that he had been a machinist since 1867, and had worked in a number of well-regulated shops. He was asked:

"Q. Mr. Scanlan, is there a test of any kind, called the sounding or hammering test, for emery wheels?

"A. The sounding test; yes, sir.

"Q. Now, I wish you would explain that to this jury. Please, in your own way, tell what it means, and why it is applied?

"A. Well, there are different methods of applying it, but my mode of applying it to a wheel is to suspend the wheel in the most practical manner, and then sound it by rapping on it with a hammer, or any other object that will make a sound; and then I am governed by the sound or ring of the wheel, as to whether it is cracked or not. Sometimes a crack may exist, and not be perceptible to the eye. A wheel may be partly fractured, while it is otherwise in perfect order; but by this sounding test you can discover that, while otherwise you might not be able to do so. Frequently there are cracks in emery wheels, that cannot be seen by the naked eye, that can be discovered by this hammer test. This test is usually applied before the wheel is put on the arbor of the machine. I don't know whether it is part of the test that is used by the manufacturers or not. I am not positively certain about that, but I know it is used by me. I have been applying the hammer or ring test for twenty-two or twenty-three years; in fact, ever since I have been handling emery wheels, or putting them in machines. I generally hang the wheel up, so that I can get the sound—so that it will ring clear. I use a hammer, or piece of metal, or anything, so that I can get the sound or ring from the wheel. If the wheel is not cracked, it will give a good, clear sound; and, if it is, it will give a peculiar sound, entirely different."

The witness further testified that, in three or four instances, by the use of the sounding test he had discovered cracks in the wheels that were not visible to the naked eye. The witness was then asked the following question:

"Q. Now, from your observation and experience as a machinist covering this period of service which you have mentioned, is this hammer or sounding test customary and usual in all well-regulated and well-managed machine shops?

"A. I cannot answer that question positively. It has always been the test I have used. I presume it is."

Counsel for the defendant objected to the witness testifying as to his experience and on presumption. The court sustained the objection for the present. He was further asked this question:

"Q. I'm not speaking about what they do in some particular shop, but I'm asking you if that manner of testing a wheel is customary and in general use in well-managed and well-regulated shops?

"A. I have seen it done often.

"Q. In all these shops you have mentioned?

"A. Yes; I have seen it in some shops I have worked in, and in some they didn't use it; but I say that, whenever I am putting on a wheel, I always give it the hammer test. I have always tried to apply that hammer or sounding test before they are put on. Often I have seen wheels when they were taken off, and I have applied the hammer test, and put it back on."

This witness was further asked:

"Q. What are the different things that are liable to cause a wheel to burst?

"A. Well, there are several causes that will cause a wheel to burst. One is to crowd the wheel too close; that is, to crowd something on the wheel between the wheel and the vest. Another is to have the wheel too tight on the mandrel. Another is to allow it to be too loose, so it can slip about. Another is, the wheel may be clamped too tight; that is, this washer that fits on there next to the wheel may clamp it too tight. Any of those defects I have mentioned may cause the wheel to burst."

On cross-examination the witness was asked if it is not a fact that the sounding test is in common or general use.

"A. I say that it has been in general use a great deal where I have worked, and I have seen it done for a number of years."

Again he said: "I don't say it is in general use throughout the country, because I have not worked in all the shops."

A. W. Rivette was asked:

"Q. When is this sounding test applied in reference to putting a wheel on the mandrel preparatory to operating it?

"A. Well, the foreman, or man putting it on, is the man that should make the test himself.

"Q. Now, Mr. Rivette, is the sounding test or hammer test a customary or usual test in well-regulated and well-managed machine shops?

"A. In all shops where I have ever been employed, I have always used that test. When I have been employed in any large concern, they have always had an experienced foreman in charge of the shops, and that test has always been applied.

"Q. Do you know of any well-managed or well-regulated machine shops that do not use that sounding test?

"A. Well, I can't say that all machine shops use that test.

"Q. I mean all well-managed and well-regulated machine shops?

"A. Well, that is a question I cannot answer, for the reason that I do not know what tests other machine shops or other men may have applied for determining about a wheel; but, in all the shops in the North and East where I have been employed, they have always used that test."

W. H. Rogers, who has been a machinist for 40 years, testifies:

"I have used that sounding test for years on every emery wheel I have used.

"Q. Is that sounding or hammer test a customary or usual test in well-managed and well-regulated shops?

"A. I always do it, but don't know whether it is a fact or not."

Counsel for defendant objected to the witness testifying to what he had done. Objection sustained by the court.

W. A. Fergus, who has been a machinist for 35 years, testifies:

"Well, I usually test a wheel before I put it on; examine it for any cracks, to see whether or not it is solid. I usually do that by suspending it, and then tapping it with some heavy instrument, and listen to the sound.

"Q. Do you know whether the sounding test or the hammer test is the test that is ordinarily used in well-regulated and well-managed machine shops where emery wheels are used?

"A. Well, to some extent it is. In some instances there might be defects that might require something else.

"Q. Is it not generally used?

"A. Yes; as far as I have noticed.

"Q. Does that extend to all you have noticed?

"A. Yes, sir."

August Lieneweber. Witness was asked:

"Q. From your experience in well-managed and well-regulated machine shops, is this sounding test one that is usually applied to an emery wheel?

"A. I would not pick up that wheel and use it— I would not put it on and use it without testing it. Yes; I test the wheel before I put it on the mandrel. You can't tell a good wheel by looking at it. So you have got to try it and test it before you put it on.

"Q. Is that test applied frequently by men employed in machine shops?

"A. Well, in my own shops. I don't know. I see so many of them use it; but I have used it in all the shops I have been dealing with, and whenever I put wheels on.

"Q. Is it not a fact that this test is the one in use in those shops where you have been, and where you have worked as a machinist?

"A. Yes, sir.

"Q. Do you know of any shops where it is not used?

"A. I do not know. I never worked in all the shops here in town, but in two of the shops here I know that every emery wheel that I put on I test it that way. I was the toolmaker, and when I put them on I test them in that way, and also test them to see if they were true."

Gus Krause: "I always apply the sounding test."

A. C. Jeffrey:

"Q. Now, I will ask you, Mr. Jeffrey,

whether it is customary, in shops in which you have worked, to apply that sounding test to emery wheels before putting them on the mandrels and using them?

"A. Yes; they always do that before they put them on.

"Q. What is the purpose of that test, Mr. Jeffrey?

"A. To find whether they were defective, or not, in any way."

George W. Morgan. Witness says: "I could not state for all shops, but I have seen shops where they did test wheels in that way. I have tried that test myself, and it always discloses the crack or imperfection of the wheel."

We are constrained to believe, from this review of the plaintiff's testimony, there is material evidence to support his theory that this sounding test was in very general use throughout the country, or at least sufficient evidence from which a jury might legitimately infer there was such a test in common use.

While it is impossible, in the nature of things, for witnesses to testify of their own knowledge that a majority of those engaged in the business practice a particular test, yet, where it is shown that a large number of persons in different sections of the country are accustomed to apply that test, it is admissible for the jury, by a process of induction, to infer that the practice is in common or general use. It is competent to establish the generality of a custom by the evidence of witnesses who testify from knowledge what the custom is, or by proving facts from which it may be inferred that the custom is in very general or common use throughout the country. We think, upon the testimony offered in this case, the jury were well warranted in inferring that the sounding test was in very general use throughout the country, although the evidence fell short of establishing affirmatively that a majority of those engaged in the business actually practice the test.

It is insisted on behalf of the plaintiff in error that the utter worthlessness of the sounding test to discover fractures in an emery wheel which are not discernible to the naked eye was demonstrated on the trial by certain experiments made by expert witnesses. One of the wheels so submitted to the expert witnesses was a cracked wheel, which had been obtained by defendant company from the manufacturer to be used in making this test. It is insisted that every one of plaintiff's expert witnesses, without hesitation, pronounced this a sound wheel. Counsel for defendant in error insisted that this test was unfair, for the reason that this cracked wheel had received its fracture before it was subjected to the heat process, and was afterwards baked. The insistence is that it was not a wheel which had received its crack after it had been manufactured, but that the crack had been baked in the wheel.

It is insisted that the parts being melted together again by intense heat, and vitrified, would restore the sound. The evidence establishes that this wheel used in the test was cracked when they put the wheel back and baked it. In other words, it was an old crack, and afterwards baked into the wheel. It was not a crack in the wheel which resulted from usage. It is probably true, as insisted by counsel for defendant in error, that a fairer test of the utility and efficiency of the sounding test would have been its application to a wheel which had received a fracture after its manufacture. However, these experiments were made under the observation of the jury, and doubtless were given due weight in the consideration of the case.

This disposes of the main question presented on the assignment in this court. The remaining assignments of error have all been considered, but no reversible error found. Affirmed.

LOW v. STATE.

(Supreme Court of Tennessee. Oct. 17, 1903.)

SPECIAL JUDGES—AUTHORITY—EXPIRATION—ELECTION—AUTHENTICATION—RECORD—REQUISITES—CRIMINAL LAW—JURISDICTION—CONSENT—AUTHORITY OF JUDGES—PRESUMPTION.

1. Under Shannon's Code, §§ 5730-5732, providing for the election "for the occasion" of a special judge when the regular judge fails to attend, or cannot properly preside, or is unable to hold court, the authority and jurisdiction of a special judge so elected expires with the adjournment of the term of court at which he is elected, and a conviction of crime at a trial held before him at a subsequent term is void.

2. A person charged with crime cannot be tried by another than a judge constitutionally elected and qualified, even by his consent.

3. An authentication by a special judge elected to try a particular case of a nunc pro tunc order reciting the election at a previous term of the court of another special judge to try another particular case is not a sufficient authentication, as such judge is not presumed to have any knowledge of the facts recited in the order, and has no authority to make the same.

4. The fact that the regular judge of a circuit signed the final adjourning order of a term is insufficient to authenticate a nunc pro tunc order entered during the term, reciting the election of a special judge at a previous term to try a particular case, in which the regular judge was disqualified to sit.

5. The power to hold an election of a special judge under Shannon's Code, §§ 5730-5732, declare the result, and administer the oath of office, is vested in the clerk, and must be exercised by him alone, whose duty it is also, both under such provisions and under the statute requiring him to keep a record of the proceedings of court, to make a record of the election at the time it is held, and authenticate the same by his official signature.

6. An order for the election of a special judge under Shannon's Code, §§ 5730-5732, to hold court on account of the absence of the regular judge, should be entered on the minutes as a part of the caption of the proceedings of the term, and should recite the failure or inability of the regular judge to hold court; that an election was held by the clerk, at which the person selected was duly elected by a majority of the

attorneys then present and residents of the state; that such person was also in attendance, a resident of the state, and possessed all the qualifications of judge; and that before entering on his duties the oaths of office, that against dueling (Shannon's Code, § 1073), and those prescribed for special judges (section 5731) (which should be copied in full on the record, and signed by the special judge), were duly administered to him; but where the election is to try a certain case or cases the entry should be made under the style of the case to be tried, and should show, in addition to the above facts, the disqualification of the regular judge, and that the attorneys therein interested took no part in the election.

7. The record of the election and qualification of the special judge should be verified by the official signature of the clerk, and will constitute a part of the record of the case.

8. While the special judge has no control over his election, nor authority to authenticate the record of the same, it is his duty to see that a proper record is made by the clerk before he signs the decree or judgment made by him.

9. The authority of the judge to preside must appear in all criminal cases, and should not be left to presumption in any case.

Appeal from Circuit Court, Anderson County; W. R. Hicks, Judge.

Finly Low was convicted of manslaughter, and appeals. Reversed.

C. J. Sawyers, Xen Z. Hicks, and Young & Young, for appellant. The Attorney General, for the State.

SHIELDS, J. Finly Low, the plaintiff in error, was indicted in the circuit court of Anderson county for the homicide of Miller McGee, and was there tried and found guilty of voluntary manslaughter, and his punishment fixed at five years' confinement in the penitentiary of the state. A new trial was refused, and from the judgment upon the verdict of the jury he has prosecuted an appeal in the nature of a writ of error to this court and assigns error.

Hon. G. McHenderson, judge of the Second Judicial Circuit, of which Anderson county is a part, was district attorney for that circuit when the indictment was preferred, and disqualified from presiding upon the trial of the case, necessitating the election of a special judge for that purpose. It is claimed for the state that John P. Rogers, Esq., one of the attorneys of that court, was elected at the March term, 1903, of the court, by the other attorneys then present, at an election held by the clerk under the authority vested in him by chapter 78, p. 125, of the Acts of 1870, to try the case; but no record was then made of such election upon the minutes of the court or elsewhere, other than a recital in an entry made March 19, 1903, continuing the case, to the effect that John P. Rogers, special judge, presided, which entry was signed by him as special judge.

The case was tried at the next regular term of the court, when the conviction was had of which the plaintiff in error now complains.

The general caption of that term shows that Judge Henderson was present and presiding, but all the entries made in this case

recite that John P. Rogers, special judge, presided.

After this case was disposed of, Judge Henderson being necessarily absent, X. Z. Hicks, Esq., one of the attorneys of the court, was elected to preside upon the trial of the case of the State against Will Smith, and upon the minutes of the court made while he was presiding there appears an entry under the style of this case purporting to be a nunc pro tunc record of the election of John P. Rogers, Esq., special judge at the previous March term.

The record also discloses that at a subsequent day Judge Henderson appeared, took charge of, and concluded the business for that term.

The contention of plaintiff in error is that the authority and jurisdiction of John P. Rogers, Esq., as special judge to try his case under the election held by the clerk at the March term, 1903, of the court, expired with the adjournment of that term; that he had no power or authority at a subsequent term to preside as judge, and that all proceedings had and the judgment entered while he was then presiding are null and void; and, further, if mistaken in this, there is no competent or sufficient evidence that he was at any time elected special judge to try the case.

The statute under which it is claimed Special Judge Rogers was elected, as carried into Shannon's Edition of the Code (sections 5730-5732, inclusive), is as follows:

"Sec. 5730: When from any cause, the judge of any court of record in this state except the Supreme Court, fails to attend, or, if in attendance, cannot properly preside in a cause or causes pending in such court, or is unable to hold the court, a majority of the attorneys of the court who are present and are residents of the state, shall elect one of its (their) number in attendance to hold the court for the occasion, who shall have all the qualifications of a judge of such court, and who shall accordingly preside and adjudicate.

"(1) The election shall be held by the clerk, and in case of a tie, he shall give the casting vote.

"(2) The person elected shall, during the period that he acts, have all the powers, and be liable to all the responsibilities, of a regular judge.

"(3) If the person elected to act as judge pro tempore, fails or refuses to act, or cannot properly preside, another election shall be held in like manner, from time to time, until a suitable person is chosen who can and will preside.

"Sec. 5731: Every special judge, before entering on the duties of his appointment, shall take an oath before the clerk of the court to support the Constitution of the United States and of the state of Tennessee, and also the following oath of office; 'I, A. B. solemnly swear that I will administer justice without respect to persons, and do equal rights to the

poor and the rich, and that I will faithfully and impartially discharge all the duties incumbent upon me as a judge, according to the best of my abilities."

"Sec. 5732: In the election of a special judge to try a particular case, the counsel concerned in the case shall not vote."

This statute is authorized by section 11, art. 6, of the Constitution, and a judge elected thereunder has all the powers of a regular judge during the time for which he is elected. *Ligan v. State*, 3 Heisk. 159; *Halliburton v. Brooks*, 7 Baxt. 319; *Hundhausen v. Insurance Co.*, 5 Heisk. 703; *Brewer v. State*, 6 Lea, 199.

There is no express provision in this statute providing when the authority of the special judge elected thereunder shall expire, but the election by the terms of section 5730 is for "the occasion," which clearly means for the term of court at which the election is held; and consequently the authority and jurisdiction of a special judge so elected expires with the adjournment of that term of the court.

This is obviously the proper construction of this statute.

It is intended for emergencies where the delay incident to procuring the presence of a chancellor or judge from another division or circuit, or a special judge appointed and commissioned by the Governor, would be inconvenient and prejudicial to the rights of the parties. The mode of the election is widely different from that in which regular judges are elected. The electors are confined to a limited number of persons, and the judge acts without commission, and it should be strictly construed, and its application limited to cases calling for its enactment.

That the General Assembly clearly did not intend to authorize the attorneys of the court to elect one of their number to hold the office of special judge for a longer time than the particular term at which he was elected, and which was required by the then existing emergency, is also evident from the enactment at the very next session of the Legislature of a statute authorizing the Governor to appoint and commission a person learned in the law and constitutionally qualified to discharge the duties of the office of judge or chancellor to hold a court or try any case or cases therein pending when the judge or chancellor shall certify to him that he is incompetent to do so, which appointment will continue in force until these cases are finally determined. Acts 1871, p. 140, c. 128; Shannon's Code, § 5734.

And it is well settled in this state that a person charged with crime cannot be tried by other than a judge constitutionally elected and qualified, even by his consent.

In the case of *Neil v. State*, 2 Lea, 674, where the special judge presided by consent, it is said:

"This was clear error. The criminal laws of the state can only be executed by the tribunals and judicial officers of the state con-

stitutionally and legally vested with the necessary authority. A person charged with crime ought neither to be required nor permitted to select a judge to try his case. And, even if the Legislature might constitutionally authorize a departure from the rule, there is no statute sanctioning the proceedings. The Code, § 3921, limits the right of the parties to elect a judge by consent to civil cases. The proceedings, as this court has heretofore held in a felony case, are void, and, the defendant never having been in jeopardy, the case must be remanded for trial."

It results therefore that John P. Rogers, Esq., where he presided upon the trial of this case, had no authority to do so, and that the trial and judgment of conviction of plaintiff in error was without authority of law, null and void, and must be wholly disregarded.

The record of the election of Special Judge Rogers at the March term of the court and its authentication are also very irregular and unsatisfactory.

The authentication of the nunc pro tunc order appearing upon the minutes of the court at the next term while Special Judge Hicks was presiding is insufficient. He was elected to try the case of the State against Smith, and is not presumed to have had any knowledge of the facts recited in the order, and had no authority to make an order in this case. His certificate is valueless. The fact that Judge Henderson signed the final adjourning order of the term is also insufficient to authenticate it. He was equally without authority in the matter.

The power to hold the election, declare the result, and administer the oath of office is vested in the clerk, and must be exercised by him, and by him alone. It is also his duty, both under this statute and that requiring him to keep a record of the proceedings of the court, to make a record of the election at the time it is held, and authenticate such record by his official signature.

Where the election is of a special judge to hold the court on account of the absence of the regular judge, the order should be entered upon the minutes as a part of the caption of the proceedings of that term, and it should recite and show the failure of the regular judge to attend, or his inability to hold the court; that an election was held by the clerk, at which the person selected to preside was duly elected by a majority of the attorneys of the court then present and residents of the state; that such person was also in attendance, a resident of the state, and possessed of all the qualifications of a judge of such court; and that before entering upon his duties the oaths of office, that against dueling (Shannon's Code, § 1073), and those prescribed for special judges (section 5731, above cited)—which should be copied in full upon the record and signed by the special judge—were duly administered to him.

Where the election of a special judge is to try a certain case or cases, the entry should be made under the style of the case to be

tried, and should show, in addition to the facts above stated, the disqualification of the regular judge to try the case, and that the attorneys therein interested took no part in the election.

This record of the election and qualification of a special judge should be verified by the official signature of the clerk, and will constitute a part of the record of the case. The nunc pro tunc order relied on is defective in many of these particulars, and is not so authenticated.

A special judge, while he has no control over his election, and is not authorized to authenticate the record of the same, should always be careful to see that a proper record is made by the clerk, for it is the authority upon which he has assumed to adjudicate upon the rights, property, liberty, and life, as the case may be, of others.

It is his duty to give this attention before he signs the decree or judgment made by him.

The authority of the judge to preside must appear in all criminal cases, and it should not be left to presumption in any case.

The reversal, however, of this case is rested upon the first question made.

The trial of the plaintiff in error and the judgment pronounced against him were without authority and warrant of law, and void, and the judgment will be set aside, and the case remanded to the circuit court of Anderson county, where plaintiff in error will be put upon his trial upon the charges in the indictment found against him, and tried in all things as if said proceedings had not been had.

**GEORGETOWN WATER CO. v. FIDELITY TRUST & SAFETY VAULT CO.
MONTGOMERY et al. v. SAME.**

(Court of Appeals of Kentucky. Jan. 15, 1904.)

CORPORATION—MORTGAGE—RENTS AND PROFITS—MORTGAGED PROPERTY—RIGHTS OF PURCHASER—BONDS—PRIOR EQUITIES—ASSIGNMENT.

1. Where, on an execution sale of property subject to a mortgage, it was held on appeal from an order confirming the sale that it should be confirmed unless the mortgagee should show that its security was thereby endangered, but no such showing was attempted, the sale was binding, and the purchasers are liable on their sale bond.

2. The holder of mortgaged property is entitled to the rents and profits thereof while it is still in possession after the court's refusal to appoint a receiver, though such appointment would have been proper.

3. Though a court might properly have appointed a receiver of a mortgaged water-supply plant, it could not require the holder thereof, over its objection, to operate the plant as receiver without compensation.

4. Coupon bonds issued by a company incorporated under the General Statutes are subject to prior equities in the hands of an assignee, though he took them in due course of business, and without notice.

5. Where a corporation, on the security of a mortgage, issues bonds, of which one creditor

holds 10 as security for \$5,000, and another holds 54 as security for \$10,000, the holders are entitled, as between each other, to share in the proceeds, on foreclosure of the mortgage, in proportion to the number of bonds held, not in proportion to their claims.

6. Where a corporation issues bonds on the security of a mortgage, and a creditor holds some of them as security for a claim equal to their face value, on foreclosure of the mortgage he is entitled to the payment of his entire claim before any of the proceeds go to the corporation, though the proceeds of his share of the bonds are not sufficient for the purpose.

7. To secure an issue of bonds, a corporation gave a mortgage on its water-supply plant, with a provision that worn-out machinery might be replaced, and the new machinery should be subject to the mortgage. The property was sold under execution subject to the mortgage. Held, that on foreclosure of the mortgage, after payment of such portion of the bonds as are a valid lien on the property, the execution purchaser is entitled to compensation, before any of the fund is paid to the corporation, for additions to the plant which might be removed without injuring the freehold, and which were not put in to supply the place of what was originally mortgaged, but was worn out, to the extent they increased the price brought at the foreclosure sale.

8. Where a corporation issues bonds on mortgage security, the assignment of one of them by a person who had no title to it, as security for a personal debt, will be treated, on foreclosure of the mortgage, as an assignment of a portion of his share of the proceeds sufficient to pay the debt.

Burnam, C. J., and O'Rear, J., dissenting in part.

Appeal from Circuit Court, Scott County.
"To be officially reported."

Bill by the Fidelity Trust & Safety Vault Company against the Georgetown Water Company and others to foreclose a mortgage. From the judgment distributing the proceeds of the foreclosure sale, all parties appeal. Reversed.

M. S. Tyler, H. P. Montgomery, Victor Bradley, A. T. Wood, J. W. Rodman, C. M. Thomas, and R. A. Mitchell, for plaintiffs. W. C. Bell and R. P. Jacobs, for defendants.

HOBSON, J. The Georgetown Water Company was incorporated June 21, 1889. The incorporators were R. A. Mitchell, John Nichols, and E. H. Patterson. The stock of the company was fixed at \$100,000, and was issued to the incorporators; they transferring to the corporation a contract made by them with the city of Georgetown in payment of the stock. They put into the company, each \$4,000. They bought ground, erected a plant, and laid mains. They also bought electrical machinery for an incandescent light system. They borrowed from a bank at Pineville \$10,000. They owed the Central Thomson-Houston Company of Cincinnati for machinery about \$8,000. In January, 1890, they organized the Georgetown Electric Light Company, but no business appears to have been done in the name of this company; everything being transacted in the name of the Georgetown Water Company. On April 15, 1890, the water company executed a mortgage to the Fidelity

Trust & Safety Vault Company, as trustee for the bondholders, to secure 70 bonds, of \$500 each, with interest at 6 per cent., having coupons attached, due in 20 years. The mortgage was upon all the property of the company, real and personal, including privileges and franchises then owned or thereafter to be acquired by it; "the said property [as recited in the mortgage] consisting in part of the waterworks plant, pipes, and mains of said first party in the county of Scott and town of Georgetown and its electric plant erected and to be erected with all appliances, machinery, &c., together with all other property of every kind as hereinbefore stated." The mortgage also provided that, when any of the machinery became worn out, the first party should have the right to replace it with new machinery of equal or better quality, and might then dispose of the old machinery; the clause concluding with these words: "And the lien of this mortgage shall attach to such new machinery or other property that may be acquired and added by said party of the first part." In July, 1890, they bought out the Georgetown Gas Company, and consolidated the three companies in the name of the Georgetown Water Company. In payment of the machinery bought of the Central Thomson-Houston Company, they delivered to it, according to contract, 10 of the mortgage bonds referred to, leaving a balance due it of about \$3,000. They ran the electric plant in the summer, and the gas plant in the winter; and it would seem from the evidence that the profit from the operation of the plants, including the waterworks, was small. On February 2, 1891, the Central Thomson-Houston Company filed an ordinary action in the Montgomery common pleas court against the Georgetown Water Company to recover the balance of its debt. The case was tried at the September term, 1891, of the court, and the plaintiff recovered judgment for the amount sued for. On November 6, 1891, the Georgetown Water Company borrowed from the Fidelity Trust & Safety Vault Company \$10,000, executing therefor its note, due in six months, with Nichols, Mitchell, and Patterson as sureties, and also securing the note by pledging with the company 54 of the mortgage bonds referred to. This \$10,000 was used to pay the debt to the Pineville bank, above referred to. They had still in their hands 6 of the 70 mortgage bonds, having delivered 10 to the Central Thomson-Houston Company, and 54 to the Fidelity Trust & Safety Vault Company. Of these 6 bonds, Mitchell took 2, and Nichols, 4. Nichols turned over the 4 he had to John L. Cassell, who was his security, and to whom he assigned all his interest in the company. On March 8, 1892, the Central Thomson-Houston Company, having had execution issued on its judgment, and returned "No property found," filed an equity action in the Montgomery common pleas court,

seeking to subject the property of the water company to its debt, and to have it placed in the hands of a receiver. In that case a judgment was entered directing a sale of the property of the water company, subject to the mortgage above referred to. The sale was had, and appellants H. P. Montgomery and others were the purchasers, at the price of \$3,525. The sale was reported to the court and confirmed. A writ of possession was issued in favor of the purchasers, and they were placed in possession of the property. After all this, the water company prosecuted an appeal to this court from the judgment in the ordinary action in favor of the Central Thomson-Houston Company, and also from the judgment in their favor in the equity action. The judgment in the ordinary action was reversed for an error in the instructions. *Georgetown Water Company v. Central Thomson-Houston Company*, 34 S. W. 435, 35 S. W. 636. The case was returned to the circuit court, where it was tried again, the plaintiff recovering as before; and this judgment, on a second appeal, was affirmed by this court. *Georgetown Water Company v. Central Thomson-Houston Company*, 49 S. W. 1113. On the original hearing of the equity case the judgment of sale and the confirmation of the sale were both reversed; but on petition for rehearing, the court's attention being called to the condition of the pleadings, the opinion was modified, and it was held that the sale must stand, except as to the trust company, and that, as to it, it should be permitted to stand unless the trust company showed that its security had been endangered. The court said: "Evidently the plant brought what it was worth. The purchasers are not complaining, the water company cannot do so, and, in our opinion, the trust company has not shown that its interests are at all prejudiced by the order confirming the sale. The order of confirmation, therefore, will not be disturbed here, and the former opinion is modified to that extent. While this modification is made in the original opinion, the judgment must stand reversed as to the Fidelity Trust Company, so that the rights of the bondholders it represents may not be affected or prejudiced by the sale to the appellees, and any lien it may have in its own right, or for those it represents, on the property of the water company, its rights and franchises, will be retained, as if no such judgment had been rendered. On the return of the case, the judgment, in so far as it affects the Fidelity Trust Company, will be set aside, with the right of the trust company to show, if it can, by appropriate pleadings and proof, that its security has been endangered by reason of the sale to appellees; and, if so, the sale will be set aside, and not otherwise." *Georgetown Water Co. v. Central Thomson-Houston Co.*, 35 S. W. 637.

No steps appear to have been taken by the

trust company in the circuit court to show that its security was endangered, but at the next term of this court a motion was made that the court withdraw the modified opinion. The motion was overruled. *Georgetown Water Co. v. Central Thomson-Houston Co.*, 38 S. W. 137. A year or more after this, on January 19, 1898, the Fidelity Trust & Safety Vault Company, as trustee for the bondholders, instituted an equity action in the Scott circuit court, making all parties in interest defendants, and seeking the foreclosure of the mortgage. Montgomery and his associates, who had organized themselves into the Georgetown Water Supply Company, were in possession of the property, and had been since they were put in possession of it under their purchase. The town of Georgetown had nearly doubled in size since the year 1889. The incandescent light system, which was originally put in, was suitable only for lighting residences and the like. To light the streets of the town, they had put in an arc light system in addition to the incandescent system. There were only about 50 poles up when they took charge. They bought and put up something over 300 more. They extended the lines until now they have about 15 miles of electric light lines. They also put in additional water mains, as demanded by the exigencies of the public service, in order to preserve the franchises of the company. The machinery of the arc system was separate from the machinery of the incandescent light system, and could be moved without injury to the freehold. They put it in upon the idea that they would have the right to remove it when they were required to give up the property. After this suit was brought, the court allowed them to remove all the machinery from the lot where it stood to the lot of the street railway company, upon their giving bond that they would return it to the original lot when required by the court. After they removed the machinery to the premises of the street railway company, they added other machinery, costing them \$4,800. When the court required the machinery which had been removed to be returned to the lot of the Georgetown Water Company, he allowed them to retain the additions which they had purchased and had on the lot of the street railway company, amounting to \$4,800, but refused to allow them to remove the arc light system or the other additions which they had made to the plant before its removal from the original lot, and ordered the whole property sold; giving them no compensation for their betterments, which had cost them something over \$12,000. He also held that they were responsible to the bondholders for the rent of the property while in their possession from the time that a motion to put the property in the hands of a receiver had been made and overruled in that action at a preceding term.

After the note for \$10,000 to the Fidelity

Trust & Safety Vault Company fell due, Mitchell, as surety, was forced to pay it. The notes and bonds pledged to secure it were then turned over to him. He turned over the bonds to E. S. Jameson, his brother-in-law, who was his surety, who held them for a while, and finally sent them to Mitchell, who pledged them to various parties to secure loans made in the main to his mother, Ann E. Mitchell. R. A. Mitchell sent one of the bonds to E. H. Patterson, in Philadelphia, to exhibit it to some persons there to whom they were trying to make a sale of the property. Patterson kept this bond, and hypothecated it to D. B. Logan to secure a debt of his own. The money which Patterson put into the concern belonged to his wife, and he transferred to her his interest in the corporation. The court, on final hearing, held that the mortgage included property acquired after it was executed, and not owned by the Georgetown Water Company when the mortgage was given; that H. P. Montgomery and his associates, having purchased subject to the mortgage, simply stood in the shoes of the Georgetown Water Company, and could not question the lien of the mortgagee on the after-acquired property; that \$27,000 had been put into the plant, made up of \$12,000 contributed by Nichols, Patterson and Mitchell, \$10,000 borrowed from the trust company, and \$5,000 of the account of the Central Thomson-Houston Company for the machinery furnished, which had been paid in the 10 bonds, of \$500 each, accepted by that company at par; that Nichols transferred to Cassell, and that Patterson transferred to Logan, the bonds referred to, in due course of trade; and that Cassell and Logan took them free of prior equities. He adjudged the property to be sold, and after the payment of certain prior debts, not here in dispute, $\frac{5}{27}$ of the proceeds should be paid to the Georgetown Water Supply Company, the assignee of the Central Thomson-Houston Company, as the part of the proceeds coming on the 5 bonds held by it; that $\frac{22}{27}$ of the proceeds should constitute a fund for the payment of the other bonds; that Cassell and Logan should be paid the part of the proceeds represented by their bonds; that, out of the proceeds of the 54 bonds held by the trust company as collateral, Mitchell should be paid the \$10,000 he had paid the trust company, with its interest; and that the remainder of the proceeds of these bonds belonged equally to Mitchell, Patterson, and Nichols, or their assigns. The water supply company offered to surrender the property to the court when the judgment was entered. The court refused to permit this, and ordered it to retain possession of the plant, and operate it upon the same terms as if the company had been appointed a receiver, until delivered to the purchasers, except the company should receive no compensation for its services as receiver, and keep a full and accurate account of the receipts and expendi-

tures in the operation of the plant, and report them to the court at the next term. From this judgment all the parties have appealed. The property was sold under the judgment, and brought \$80,000. The sale was confirmed. The court also ordered Montgomery and his associates to pay their bond executed upon their purchase of the property, subject to the mortgage above referred to; this bond having never been collected.

It was held by this court in the modified opinion that the order of confirmation of the sale to Montgomery and his associates would not be disturbed here, and that on the return of the case it might be set aside if the trust company showed, by appropriate pleadings and proof, that its security had been endangered, but that otherwise the sale should stand. The sale was therefore left in effect by this court. The trust company did not show by pleading or proof that its security had been endangered, and no order was made setting aside the sale. The court therefore properly ordered the purchasers, Montgomery and his associates, to pay their sale bond.

Their sale standing, and they being required to pay the purchase money, they held the property as purchasers, and are not liable to the Georgetown Water Company, or the bondholders, or the trustee for them, for the rents on the property. The mortgagee is only entitled to the rents from the time that he has a receiver appointed to save them for him. When the motion was made for a receiver, and was overruled, the remedy of the mortgagee was to appeal. He could not acquiesce in the decision of the court refusing to appoint a receiver, and then hold the defendant accountable for the rents. If the Georgetown Water Company had remained in possession, it would have been entitled to the rents up to the confirmation of the sale; and Montgomery and his associates, succeeding to all the rights of the water company, are entitled to the rents of the property while in their possession. This is what they obtained by their purchase. The court had no authority to order them to operate the plant as receiver without compensation. The court might have appointed a receiver for the property if he had seen fit to do so, but he could not require the defendant to act as receiver, and assume the responsibilities of the position over its objection.

The Georgetown Water Company was incorporated by articles filed in the county court under the General Statutes. It had no power by law to issue coupon bonds which should pass by delivery. The paper issued by it was not placed on the footing of a bill of exchange, as provided by the statute. Although the bonds had coupons attached to them, and were payable to bearer, they were, in legal effect, only promissory notes, and each assignee took them subject to prior equities. *Richie v. Oralle*, 108 Ky. 483, 56 S.

W. 963; *Fidelity Trust & Safety Vault Co. v. Carr* (Ky.) 68 S. W. 990, and cases cited. None of the bondholders, therefore, are protected by the fact that they took the bonds in the due course of business, and without notice. We find no evidence in the record, that the corporation ever disposed of the 4 bonds which Nichols took possession of and delivered to Cassell, or the 2 which Mitchell took possession of and disposed of as his own. These bonds were the property of the corporation, and, not having been disposed of by it, remain its property, and cannot be enforced in this action as a lien on its plant. The 10 bonds delivered to the Central Thomson-Houston Company, and the 54 bonds delivered to the trust company as collateral to the note of \$10,000, are the only bonds which constitute a lien on the property. After the prior claims as adjudged by the circuit court are paid, $10/64$ of the fund remaining should be applied to pay the 10 bonds sold to the Central Thomson-Houston Company, and $54/64$ of it to pay the 54 bonds pledged to the trust company to secure its note. The trust company had the right to look to the entire proceeds of these bonds for the payment of its debt, and, when Mitchell paid the debt as surety, he succeeded to all the rights of the trust company, and had the right to look to the entire proceeds of the 54 bonds for the repayment of his money and interest. The remainder of the proceeds of these 54 bonds, after the payment of Mitchell's debt, with interest, is, as between it and Mitchell, the property of the water company, for Mitchell has no claim on them except the lien for the repayment of his money, with interest. If the 10 bonds held by the Central Thomson-Houston Company are not paid in full by $10/64$ of the net proceeds of the sale above directed to be paid upon them, the remainder of the principal and interest of these bonds should be paid in full out of the funds set apart to the water company after the payment of Mitchell's debt out of the proceeds of the 54 bonds, as above indicated. For the water company is the obligor in the bonds held by the Central Thomson-Houston Company, and must discharge its obligation out of the funds coming to it before it can be allowed to withdraw any part of the proceeds of the sale. The substance of the situation, as between the Central Thomson-Houston Company and the water company, is that the former company holds the promise of the latter to pay it \$5,000, secured by a lien on the property in contest, and, as between the two, the water company's right to the proceeds of the sale is subordinate to the lien of the Central Thomson-Houston Company.

When all the bonds are thus paid off, so far as they are a valid lien on the property, the remainder of the fund, if nothing else appeared, would be the property of the water company; and the question arises whether this fund thus remaining should all be

adjudged to the water company, or whether Montgomery and his associates should be adjudged compensation out of it to the extent of its enhancement by reason of the betterments placed by Montgomery and his associates on the property. The proof leaves no doubt that Montgomery and his associates not only kept the plant in repair, replacing what was worn out, but put in the arc light system, extended the mains and lines; advancing a large sum of money for this purpose, and putting all the net earnings of the company into it; thus causing it to bring, when finally sold, \$30,000, when it was, at the time they got it, under the evidence, worth very much less. The rule is, as between vendor and vendee or mortgagor and mortgagee, that chattels attached to the realty by the vendee or mortgagor are not subject to the lien, when they are not intended as a permanent accession to the freehold, and may be removed without substantial impairment of the property. In *Clore v. Lambert*, 78 Ky. 224, a steam engine and planing mill, attached to a building by bolts and screws by the vendee, were allowed to be removed after a suit was brought to enforce the vendor's lien. Under the rule thus declared, the arc light system and other machinery bought by Montgomery and his associates, which might be removed from the building without injury to it, might, as between vendor and vendee, have been detached and taken away. But it is insisted that the mortgage in this case provides that it should cover after-acquired property placed on the land by the water company, and that, as Montgomery and his associates bought subject to the mortgage, they stand in the shoes of the water company, and cannot be heard to say that after-acquired property which they bought and placed on the land is not covered by the mortgage. Where negotiable bonds have been issued, secured by a mortgage of a railway company on property then on hand or thereafter to be acquired, the mortgage is upheld, in favor of the bondholders, as to after-acquired property; otherwise long-time bonds could not be issued, and money raised upon them. *Westinghouse Electric, etc., Co. v. Citizens' St. R. Co.* (Ky.) 68 S. W. 463; *Porter v. Steel Co.*, 122 U. S. 283, 7 Sup. Ct. 1206, 30 L. Ed. 1210; *Jones on Mortgages*, § 436. But where no bondholder is interested, and the controversy is between the bona fide occupants of the property and the mortgagor after the mortgage debt has been satisfied, a different question is presented. As between them, the occupants should have been allowed to remove from the premises all such fixtures as were removable as between vendor and vendee. To illustrate: If it had turned out in this action that none of the bonds were enforceable against the water company, and that there was no lien on the property under the mortgage, it would hardly be maintained, as between Montgomery and his associates, on

the one hand, and the water company, on the other, that they would not have the right to remove from the property such fixtures as are removable between vendor and vendee, for the stipulation in the mortgage as to after-acquired property is for the protection of the mortgagee, and affords no reason for putting into the treasury of the water company the property of the purchasers who bought subject to the mortgage, and placed the chattels on the property on the idea that they might remove them when they were required to surrender possession. If none of the bonds had been sold by the water company, the relation of mortgagor and mortgagee would, in effect, exist between the water company and the parties who bought subject to the mortgage, and held possession under their purchase. The water company would then be entitled to the benefit of the mortgage to the extent of the amount named therein, but this would not enable it to say that the stipulation of the mortgage as to after-acquired property placed on the land by it, made for the benefit of the bondholders, should inure to its benefit as against the purchasers who took subject to the mortgage, and give it a lien on their after-acquired property, which it would not otherwise have. If the water company had paid the note to the trust company, and had taken up the five bonds held by the Central Thomson-Houston Company, and had then filed this suit itself to have the mortgage foreclosed, and the amount of the mortgage debt paid to it, it could hardly maintain that it was entitled to have a foreclosure on anything more than its property, or that Montgomery and his associates could not remove anything in that event from the premises which would be removable between mortgagor and mortgagee. Yet this is, in substance, the case we have as to the surplus left after the payment of the bonds, as the bonds were not negotiable, and are not enforceable against the water company further than as indicated. 2 *Jones on Mortgages*, § 1491.

We therefore conclude that, out of the surplus left after the payment of the bonds which would otherwise be adjudged to the water company, compensation should be made to Montgomery and his associates to the extent that the price which the property brought at the sale was enhanced by the betterments placed thereon by Montgomery and his associates, which were removable by them under the rule laid down in *Clore v. Lambert*. This will include not only the machinery in the power house, but the additional water mains put in by them, and the additional electric lines put up by them, for these could be disconnected from the old mains and lines without any impairment of their value. Nothing will be allowed for repairs on the old plant, or the old mains or lines, or for anything which was put in to supply the place of what was originally mort-

gaged, but worn out. The amount of compensation to be allowed them is not the cost of the property which they added, but the extent to which these additions enhanced the price which the property brought at the sale, as near as it can be ascertained by proof of what the whole property consisted of, and its value, and proof of the value of the additions above referred to, and such other evidence as may be had. On the return of the case to the circuit court, it will be referred to a commissioner to report in detail what additions were made by Montgomery and his associates, for which they should be allowed as above explained, giving the value of each, the value of the other property covered by the mortgage, and to ascertain, as nearly as can be done, how much of the \$30,000 for which the property sold represents the additions made by Montgomery and his associates, for which they should be compensated, as above explained. After Montgomery and his associates are paid, the rest of the fund will be adjudged to Mitchell, Patterson, and Cassell, or their assigns; Mitchell being first paid \$296.95, as adjudged by the circuit court. The assignment of the bond to D. B. Logan should be treated as an assignment to Logan of \$250, with interest from April 1, 1897, out of Patterson's share of the proceeds. The assignments of the other bonds by R. A. Mitchell or his assignees should be treated as assignments of the proceeds of the bonds as herein adjudged, which should be paid accordingly. Patterson took no title to the bond which Mitchell sent to him simply to show to others, and Patterson's assignment of this bond to Logan should be treated simply as a transfer by Patterson to Logan of enough of his share in the surplus to pay Logan's debt of \$250. The court properly held that this surplus should be equally divided between Patterson, Mitchell, and Nichols, or their assigns.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

BURNAM, C. J., and O'REAR, J., dissent from so much of the opinion as gives Montgomery and his associates compensation for their betterments.

WATTS v. NATIONAL CASH REGISTER CO.

(Court of Appeals of Kentucky. Jan. 8, 1904.)

SALES—CONTRACT—CONSTRUCTION—SALE ON APPROVAL—REASONABLE TIME.

1. A writing given to a purchaser of a cash register by the agent effecting the sale, reciting that "we hereby agree that should you, after thirty days' use of the register, decide that it is not the machine for your business, to allow you to exchange same for any other register we make, or ship the register back to us," constituted part of the contract of sale.

2. The purchaser of a cash register, who had right to reject or exchange the machine within 30 days after delivery, notified the company

that the machine was not satisfactory about 12 days after the expiration of the 30 days, and asked what he should do with it, and was told that he would be held to the contract. He retained possession of it for about six months, using it as a cash drawer, and not as a register. Held, that he had failed to return the machine within a reasonable time, and had impliedly ratified the sale.

Appeal from Circuit Court, Scott County. "Not to be officially reported."

Action by the National Cash Register Company against G. H. Watts. From a judgment for plaintiff, defendant appeals. Affirmed.

Montgomery & Lee, for appellant. Victor F. Bradley, for appellee.

O'REAR, J. Appellee contracted to sell to appellant one of its cash registering machines for \$325, payable in installments. The contract was reduced to writing, and signed by appellant, but appellee's agent who negotiated the sale gave to appellant at the same time the following writing, which we hold constituted a part of the contract between the parties: "In consideration of the contract given us to-day, we hereby agree that should you, after thirty days' use of the register, decide that it is not the machine for your business, to allow you to exchange same for any other register we make, or ship the register back to us, thereby closing the account in full." The register was shipped to appellant, and received by him. The 30-days trial expired about the 1st of July. On the 12th of July appellant wrote a letter to appellees at their principal office at Dayton, Ohio, stating that the register was not satisfactory to him; but he did not offer to exchange it for another, nor did he ship the register back to them. He merely asked appellee what he should do with it. Appellee responded that it would hold him to the sale evidenced by the written contract which he had signed and delivered to it. Appellant retained possession of the machine for about six months, and continued to use it as a cash drawer, but says he did not use it "for the purpose for which it was made." The trial court, instructing the jury, told them that it was appellant's duty, after 30 days' trial, if he decided that it was not the machine for his business, to within a reasonable time notify the vendor company that the machine was not suitable for his business, and to demand an exchange for another register, or to ship that one back to said company, and that, if he failed after a reasonable length of time to do either of these things, they must find for the company. We are of opinion that this instruction was right, and that the verdict of the jury finding against appellant was authorized by the evidence and by the law. Where an article is sold on trial the sale is not complete until approval is given, either expressly or by implication, resulting from keeping the goods beyond the time allowed by the agreement

¶ 2. See Sales, vol. 43, Cent. Dig. §§ 312, 454.

for trial. If the goods should be retained for an unreasonable length of time after the period allowed for trial, the sale becomes absolute. *Benjamin on Sales*, 595, 596; *McCormick Harvesting Machine Co. v. Arnold* (Ky.) 76 S. W. 323. It was appellant's duty, if he would reject the conditional sale of the register to him, to have returned it to appellee, as by the terms of the contract it was stipulated that he might do. Having failed for an unreasonable length of time to do so, although the company was insisting that he was bound to take the machine anyhow, he impliedly ratified the sale under the contract.

Therefore the judgment is affirmed, with damages.

PACIFIC MUT. LIFE INS. CO. v. BAILEY.

(Court of Appeals of Kentucky. Jan. 19, 1904.)

INSURANCE — MISREPRESENTATION — MATERIALITY—PLEADING—APPEAL—OBJECTIONS NOT MADE AT TRIAL.

1. Ky. St. 1903, § 639, provides that all statements in any application for a policy of insurance shall be deemed and held representations and not warranties, and that misrepresentations, unless material or fraudulent, shall not prevent a recovery on the policy. *Held*, that where an answer in an action on an accident policy set up a misrepresentation as to the business in which plaintiff was engaged, but failed to allege any facts showing that plaintiff's engaging in the additional business not disclosed was material in any way to the risk, that it brought on the disease from which plaintiff suffered, was a more hazardous occupation, or that defendant would not have taken the risk if the facts had been truthfully disclosed, the answer was demurrable.

2. In an action on an accident policy, an answer setting up a misrepresentation as to plaintiff's business, and alleging that the additional business not disclosed by plaintiff materially increased the risk, without the facts from which such increase could be inferred, was insufficient to show that the misrepresentation was material.

3. In an action on an accident policy, an objection neither pleaded nor relied on in the trial court cannot be relied on on appeal.

Appeal from Circuit Court, Knox County.

"Not to be officially reported."

Action by J. R. Bailey against the Pacific Mutual Life Insurance Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

S. B. Dishmon and T. L. Edelen, for appellant. James D. Black & P. D. Black and B. B. Golden, for appellee.

HOBSON, J. Appellant issued to appellee, on September 2, 1901, a health policy by which it agreed to pay him an indemnity of twenty-five dollars (\$25) a week for a period not exceeding 26 weeks, if within a year, among other things, he was continuously disabled and prevented for that length of time from performing any and all kinds of duties pertaining to his occupation by reasons of cerebral apoplexy. In the application for the pol-

icy there is this clause: "(5) My occupation and duties required of me are fully described as: (state kind of goods) general merchandise, retail, proprietor." Appellee alleged that he was stricken with cerebral apoplexy on November 3, 1901, and was disabled for the full period of 26 weeks. Appellant denied the allegations of the petition, and in the second paragraph of its answer set up the clause quoted from the application, and alleged that in addition to the general merchandise business the plaintiff "also followed the occupation of a lumberman and contractor with railroad companies in getting out cross-ties and other timbers, and that his duties consequent thereto required him to supervise or oversee employes, travel over and through the country in looking after said business, and doing other things connected therewith, all foreign to the ordinary duties of general merchandise; that the duties connected with the other occupation of the plaintiff, other than those of his occupation of that of general merchandise, very materially increased the risk on the part of the defendant." The court sustained a demurrer to this paragraph of the answer, and, the case being submitted to the jury, the plaintiff recovered the amount sued for.

Section 639, Ky. St. 1903, is as follows: "All statements or descriptions in any application for a policy of insurance shall be deemed and held representations and not warranties; nor shall any misrepresentation, unless material or fraudulent, prevent a recovery on the policy." It is not averred in the answer that the disease of cerebral apoplexy, with which the plaintiff suffered, was in any manner brought about by his occupation as a lumberman or contractor, or that this contributed in any manner thereto. It is not averred that such an occupation was classed in a different way from that of general merchandising, or that it was a more hazardous occupation. It is not alleged that the defendant would not have taken the risk if it had known that the plaintiff was occupied also in getting out cross-ties and other timbers. No fact is pleaded showing that his engaging in this business was material in any way to the risk. The bare allegation that it very materially increased the risk is simply a conclusion of the pleader. The facts should have been stated, so that the court could see from the pleading that the misrepresentation was material to the risk. Were the rule otherwise, any omission in the application, however trifling or unimportant, might be pleaded in an answer in bar of an action on the policy. This would defeat the purpose of the statute. To make a good answer, the defendant must state in its answer facts showing that the misrepresentation was material. This not being done, the court properly sustained the demurrer.

The proof by the defendant on the trial tended to show that the plaintiff suffered from facial paralysis, while the proof for the plaintiff tended to show that the disease was cerebral apoplexy. The great weight of the

¶ 2. See *Insurance*, vol. 28, Cent. Dig. § 1617.

evidence, and the circumstances shown by it, sustain the verdict of the jury.

There was no evidence on the trial conducing in any way to show that the plaintiff's failure to state that he dealt in railroad ties and timber was in any manner material to the risk. In the brief filed in this court, reliance is placed on the fact that it is shown by the evidence that the plaintiff had had typhoid fever in the spring of the year 1901, and this was not disclosed in the application. But there was no plea of this fact, or of the clause in the application relating to the subject.

Judgment affirmed.

SMITH v. KENTUCKY LUMBER CO.

(Court of Appeals of Kentucky. Jan. 12, 1904.)

MASTER AND SERVANT—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY.

1. Plaintiff was in defendant's employ as one of a gang of laborers engaged in clearing away drift and in rolling logs owned by defendant into such a position that, when a flood came, the logs would be floated out and brought down the stream to defendant's mill. As the gang were going down the stream, they came to a drift near the edge of the water on the bank, which had lodged against two trees 25 or 30 feet apart, and the foreman directed one man to cut one of the trees and plaintiff the other, after the foreman had been on top of the drift and examined it. While chopping on the tree, plaintiff, who was standing below the drift in the bottom of the creek, told the foreman he thought the big log should be rolled out, as it might fall, and the foreman responded that he had walked from one end of it to the other, and that it was safe, and for him to proceed. From where plaintiff stood he could see but one side of the drift, while the foreman, who was on top of it, could see its entire bearings, and plaintiff therefore took it for granted that there was no danger of the log slipping, but he had only struck one or two strokes on the tree with his axe when the other tree fell, and the big log immediately slipped from its moorings, falling on plaintiff, and inflicting dangerous injuries. *Held*, that plaintiff was not guilty of contributory negligence.

Appeal from Circuit Court, Pulaski County.

"Not to be officially reported."

Action by Joe Smith against the Kentucky Lumber Company. From a judgment for defendant, plaintiff appeals. Reversed.

Denton & Robinson, for appellant. O. H. Wadel, for appellee.

BURNAM, C. J. The appellant, Joe Smith, instituted this action against the appellee, the Kentucky Lumber Company, to recover damages for a personal injury sustained by him while in their employ, which he alleges was due to the negligence of one of appellee's servants superior in authority to himself, and under whose direction he was at the time of the injury. The answer of the defendant was, first, a denial; second, a plea of contributory negligence; third, that appellant's injury was chargeable to the negligence of a fellow servant. Upon the trial of the case, at the conclusion of plaintiff's

testimony, a judgment was entered at the direction of the court in favor of the defendant, and this appeal is prosecuted by the plaintiff.

The testimony shows that plaintiff at the time he received the injury was in the employ of the defendant as one of a gang of laborers engaged in clearing away drift from White Oak creek, one of the tributaries of the Cumberland river, and in rolling logs owned by them into such a position that when a flood came in the river the logs would be floated out and brought down the stream to the defendant's mill at Burnside, Ky., under the direction of Richard Taylor as foreman. Appellant testified that as the gang were going down the creek, they came to a drift near the edge of the water on the bank of the creek, which had lodged against two trees 25 or 30 feet apart, and was some 8 or 9 feet high; that a number of saw logs belonging to the defendant had lodged in the drift; that one of them, about 25 or 30 feet long, extended out beyond the face of the drift about 6 or 8 feet, and that it looked like it might be easily loosened; that the trees against which the drift was lodged leaned towards the bed of the stream; that appellee's foreman, Taylor, got on top of the drift, and examined it, and directed George Davis and Sam Collier, the axmen of the party, to cut the two trees, remarking that when the rise came the drift would float out; that Collier began to cut on one tree and Davis on the other; that Taylor told Davis to cut from the under side, so that the drift would not hang on the stump; that Davis responded that it was unhandy for him to do so, and that Taylor thereupon directed him to cut the tree from the under side, as he was left handed; that he was standing at the time below the drift in the bottom of the creek, and that he told Taylor that he thought the big log referred to should be rolled out, as it might fall on him; that Taylor responded that he had walked from one end of it to the other, and that it was safe, and for him to proceed with the cutting; from where he stood he could not see but one side of the drift, while Taylor, who was on top of it, could see its entire bearing, and that he therefore took it for granted that there was no danger of the log slipping; that he had only struck one or two strokes on the tree with his axe, when the other tree, on which Collier was cutting, fell; and that the big log immediately slipped from its moorings, falling upon him, inflicting dangerous injuries. Under this state of fact appellee insists that, as appellant was aware of the danger from cutting the tree, he assumed the risk, and was guilty of such contributory negligence as to preclude recovery.

The rule on this subject, as frequently announced by this and other courts, is that, if the risk is such that a prudent man would have refused to do the work, under the circumstances, because of the danger, then the

servant acts at his peril in undertaking it. But where the probability of injury is such that the minds and judgment of prudent men might differ upon the certainty of its happening, and where the master insists, after the objection of the servant, that the servant proceed with the work, then the servant has the right to rely upon the master's presumed superior knowledge. See *Wake & Co. v. Price* (Ky.) 58 S. W. 519; *Southern Ry. Co. v. Hart* (Ky.) 64 S. W. 650; *Shearman & Redfield on Negligence*, 126; *Long's Adm'r v. I. C. R. R. Co.* (Ky.) 68 S. W. 1095, 58 L. R. A. 237; *Lasch, etc., v. Stratton*, 101 Ky. 672, 42 S. W. 756.

The appellant, from his standpoint below the drift, could only see the side of the drift next to the river, while Taylor, standing on the top of the drift, could see every side of it, and was therefore much better able to determine the probability of the log slipping than appellee. Under these circumstances, appellant did not have equal opportunities with Taylor to realize and appreciate the danger, and he had the right to believe that he would not require him to perform a dangerous act, especially after his attention had been called to this danger. We therefore conclude that the trial court erred in giving to the jury the peremptory instruction to find for the defendant, and the judgment is therefore reversed, and cause remanded for a new trial consistent with this opinion.

ROGERS v. COSTIGAN.

(Court of Appeals of Kentucky. Jan. 8, 1904.)

NOTE—RAISING AMOUNT—EVIDENCE.

1. Evidence held insufficient to support a finding that a note for \$600 had been raised from \$60 by the unauthorized addition of a figure.

Appeal from Circuit Court, Campbell County.

"Not to be officially reported."

Suit by M. J. Costigan to settle the estate of Phelim Rogers, deceased. From a judgment disallowing the claim of Della Rogers, she appeals. Reversed.

H. N. Dumont, for appellant. E. W. Hawkins, Jr., for appellee W. J. Costigan. Thos. Healey, for appellee executrix.

O'REAR, J. Appellant, Della Rogers, claims that on January 13, 1897, she loaned to Phelim Rogers \$600, and that he on that date executed to her the following promissory note: "I promise to pay to the order of Della Rogers \$600 at any time as she wants to force her claim. Signed in duplicate. January 13, 1897. Phelim Rogers." The maker of the note was appellant's uncle, and lived with her and her sister for several years just before his death. He left their home and took up his residence elsewhere a few months before his death. A few days before his death, appellant sued him upon the note, but he died before answering the suit. In the suit brought

by a creditor to settle Phelim Rogers' estate, appellant filed the note as a claim. The defense of the executrix is that the note is not the act and deed of Phelim Rogers, because it is alleged that it has been raised from \$60 to \$600 by the unauthorized addition of the figure naught to the \$60 after it was signed and delivered by Phelim. The commissioner, upon the proof heard before him, reported allowing the claim. Upon the trial of the exceptions the circuit court rejected the claim. The only question is whether the action of the circuit court is sustained by the evidence.

It is shown that appellant, Della Rogers, was a single woman, and has worked for a number of years in manufacturing establishments in Cincinnati, receiving \$8 or \$9 a week. Her sister, with whom she lives, is also a single woman, and works as an embosser, receiving about the same wages. For a time she also conducted a retail grocery store in Newport. They each testify that appellant, Della, had saved up through a number of years more than \$600; that Phelim Rogers, their uncle, who owned several small pieces of real estate, worth probably \$2,000 or \$3,000, sought to borrow \$600 from appellant with which to pay an assessment for street improvements he was owing to the city of Newport. They each testify that the money was in the house; and the sister Kate Rogers testifies that she delivered the cash (being currency and gold coin) to her sister Della, and saw Della deliver it to Phelim Rogers, and saw Phelim execute the note in question. Another witness, who had married a niece of Phelim Rogers, testifies that on several occasions the decedent had told him that he had borrowed \$600 from Della Rogers, and had executed his note for it. Another witness, a working girl, testified that she had some money saved up, and that Phelim Rogers about the time of the execution of this note applied to her to borrow several hundred dollars to pay a debt that he was owing the city for street improvements. A sister of this last witness testified that she heard Phelim Rogers tell her father shortly after the conversation last referred to that he had borrowed the money he needed from Della Rogers; that he had borrowed several hundred dollars. Another witness, a young man, testified that he had gone to the house of Della Rogers and her sister to pay a call, when Phelim Rogers drove him away, stating that he was satisfied that this caller had designs upon his \$600 note that Della held. It was shown that Phelim Rogers at that time did owe the city of Newport about \$600 for street improvement assessment, but that he did not pay it, and it was not paid at his death. Several of these witnesses, who, however, do not qualify themselves as experts, say that in their opinion the handwriting of the note is Phelim Rogers' handwriting, that they are acquainted with it, and that all of it is in his handwriting. The only witness against appellant was an expert in handwriting, who

testified that, in his opinion, the last cipher to the \$600 in the note had been added by a different pen, in somewhat different ink, and by a person making a different stroke from the other figures. This was all the evidence. We are of the opinion that the trial court erred in rejecting the claim. The preponderance of the evidence clearly supports the genuineness of the note, and of the indebtedness of its maker to appellant in the sum of \$600.

The judgment is reversed, and cause remanded, with directions to enter a judgment in favor of appellant against Phelim Rogers' executrix for the amount of the note sued on, and its interest.

LEWIS et al. v. SIZEMORE et al.

(Court of Appeals of Kentucky. Jan. 8, 1904.)

LEGITIMACY—BURDEN OF PROOF—TITLE BOND—EQUITABLE TITLE—DEED FROM VENDEE—CONSTRUCTIVE NOTICE.

1. The legitimacy of children is presumed, and one claiming the contrary has the burden of proof.

2. A title bond gives the vendee equitable title to the land, and, he having conveyed the land by deed recorded during the vendor's life, constructive notice thereof is given purchasers from the vendor's heirs.

Appeal from Circuit Court, Leslie County.
"Not to be officially reported."

Action by John Lewis and others against A. B. Sizemore and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

T. G. Lewis and D. B. Logan, for appellants. Hazelrigg & Chenault, for appellees.

SETTLE, J. Appellants sued appellees and obtained an attachment against them for the value of timber cut upon a tract of land lying on the Puncheon Camp Branch of Rock House creek, on the waters of the Middle Fork of Kentucky river, of which appellants claim to be the owners. The land was patented by the commonwealth to Edward Sizemore December 22, 1864, upon a survey made in September, 1863. Appellants claim title under a deed from the collateral heirs of the patentee, Edward Sizemore. The appellees also claim to own the land under a deed from John Sizemore, alias "Blue Buck," who was the only child of Edward Sizemore. It is, however, contended by the appellants that "Blue Buck" was a bastard son of Edward Sizemore, and therefore incapable of inheriting from the father. This is denied by appellees. It is claimed by appellees, and shown by abundant evidence, that Edward Sizemore, about the beginning of the Civil War, executed to his son "Blue Buck," a title bond for the land in controversy, having sold it to him for a gun and heifer. The bond was destroyed when "Blue Buck's" house was burned some years later. In 1876 Blue Buck conveyed the land by deed to Wm. Sizemore, Edward Gibson, and Thomas Gibson, and it is not denied that

this deed was regularly recorded. Appellees hold under it, and they insist that this recorded deed gave the appellants constructive notice of its existence and of appellees' claim of title before and at the time they (appellants) attempted to take title of the collateral heirs. It is not denied that "Blue Buck" was a son and the only child of Edward Sizemore. The only controversy on this point is as to whether or not he was a bastard. On this point the witnesses are many, and the evidence conflicting. Several persons testified that Edward Sizemore was never married to the "Muncie" woman, who was the mother of "Blue Buck," and that his father said he was a bastard; and others that the parents were married, and that the father said the son was his legitimate child. The law presumes the legitimacy of all children, and the burden of overthrowing that presumption rests upon the party claiming the contrary. We find the law on this question thus clearly stated by Judge Robertson in *Strode v. McGowan's Heirs*, 2 Bush, 621: "For obvious reasons the law presumes that every child in a Christian country is *prima facie* the offspring of a lawful, rather than a meretricious, union of the parents, and that, consequently, the mother, either by actual marriage or by cohabitation and recognition, was the lawful wife of the father, and, in the absence of any negative evidence, no supplemental proof of legal marriage will be necessary to legitimate the offspring. Mere rumor is insufficient to bastardize issue or require positive proof of actual marriage. If the presumption be false, repellant facts may be generally established; and, if such fact cannot be clearly proved, the presumption from mere filiation should stand." This case illustrates the propriety of the foregoing rule. The son, the legitimacy of whose birth is here attacked, was born about 1821. There are few persons yet living who would be able to testify of their own knowledge as to the facts connected with his birth or parentage. Mere rumor should not be allowed, therefore, to stamp his birth with illegitimacy. We are of the opinion that the presumption of the legitimacy of "Blue Buck's" birth, supported as it is by long lapse of time and some slight evidence from the lips of living witnesses, ought to be allowed to prevail as against the unsatisfactory evidence produced by the appellants to the contrary. In addition, it may be said that, though the title bond executed to "Blue Buck" by his father, being an unrecordable instrument, was insufficient to pass the legal title to the land, it did invest him with an equitable right or title, and by the deed which he made conveying the land to his vendees, which was duly recorded, before the death of Edward Sizemore, the vendor in the title bond, the alleged collateral heirs of the latter were constructively notified of the equitable title conferred by the bond; so, even if "Blue Buck" were only a bastard, it

¶ 1. See *Bastards*, vol. 6, Cent. Dig. §§ 4, 6.

would nevertheless be right to let the equitable title of the appellees, derived from his deed, prevail as against the claim of title attempted to be asserted by appellants.

As the judgment of the lower court is in accordance with the views herein expressed, the same is affirmed.

HAZELWOOD et al. v. WEBSTER et al.
(Court of Appeals of Kentucky. Jan. 12, 1904.)
WILLS—CONSTRUCTION—DEVISE OF FEE—EQUITABLE—TRIAL—ISSUE—ABSENCE OF ATTORNEY.

1. Where testator, after devising real property to his son subject to the widow's life estate and a charge of a certain sum of money bequeathed to another son, declared that the property given to his children was given to them and their "heirs" forever, the son to whom the land was devised took the fee, and his children did not take title with him.

2. Civ. Code, § 364, providing that equitable actions shall stand for trial at any term beginning 60 days after issue joined, applies only when there is an issue of fact, and does not prevent trial sooner where the only issue is one of law.

3. No substantial right was prejudiced by ordering a cause to trial when one of appellant's attorneys could not be present, where two or three other attorneys were associated with him, and a question of law was the only issue presented.

Appeal from Circuit Court, Taylor County.
"Not to be officially reported."

Bill to quiet title by Mary Hazelwood and others against A. C. Webster and others. From a decree for defendants, plaintiffs appeal. Affirmed.

J. W. Gore, L. B. Handley, and Haynes Carter, for appellants. J. T. Moss and Garnett & Garnett, for appellees.

O'REAR, J. Richard Hazelwood, by his last will, admitted to probate in July, 1859, devised all his estate. By the ninth clause he gave to his son James E. Hazelwood a certain tract of land, subject to the life estate of the testator's widow and to a charge of \$1,000 to another son of testator. The last clause of the will was: "All the property that I have given to my above named children, I give to them and their bodily heirs forever." A codicil, also probated with the will, and bearing date a few months after the date of the will, is as follows: "I have this day made the above change in my will as interlined, to-wit: the word heirs for bodily heirs." The life tenant, the widow of testator, is dead. The devisee, James E. Hazelwood, sold and conveyed the land, and it has since been conveyed to appellees, who brought this suit to quiet their title against appellants, children of James E. Hazelwood. The circuit court adjudged the case in favor of appellees, holding that by the will and codicil James E. Hazelwood took the fee-simple title, subject to the life estate and charge mentioned. It was the claim of appellants that they took title to this land under the will with their father. The original

draft of the will is not before us. But from the language of the codicil we take it that the words originally appearing in the will were "bodily heirs," and that testator intended by the codicil to substitute the word "heirs"; the latter being a word of purchase, and the former probably of limitation. The whole context of the will rather supports this conclusion, as it appears from the entire instrument that the testator really intended to invest his children with the absolute title to his property, a great part of which consisted of slaves and personality. Appellants' principal contentions on this appeal are over matters of practice. Appellees (plaintiffs) alleged that they were the owners of the land mentioned and described. Appellants denied that plaintiffs were the owners. A number of pleadings were filed, but the gist of them was as to the effect of the language of the will which we have quoted. No issue of fact was presented. Both parties claimed under the same title, viz., Richard Hazelwood's, and it was not necessary to go further than to construe the will on the point involved, purely a question of law.

Appellants complain that the case was ordered submitted and tried on its merits before the issue had been joined 60 days, and therefore did not stand for trial under section 364, Civ. Code. This section applies only where there is an issue of fact.

It is next complained that one of appellants' attorneys was unable, by reason of sickness, to attend at the term at which the case was tried. There were two or three other attorneys associated in the case with the one who was sick, and it does not appear that they were not fully competent to attend to the trial of the question of law presented, the only thing to be tried. We fail to see that the substantial right of appellants was prejudiced by the action of the court.

Judgment affirmed.

PULASKI COUNTY v. SEARS.
(Court of Appeals of Kentucky. Jan. 12, 1904.)
PUBLIC HIGHWAYS—SUPERVISORS—FAILURE TO APPOINT—FISCAL COURT—JUSTICES OF MAGISTERIAL DISTRICTS—APPOINTMENT AS ASSISTANTS TO COUNTY JUDGE—VALIDITY—COMPENSATION FOR SERVICES—LIABILITY OF COUNTY.

1. Under Ky. St. 1903, §§ 4313-4344, authorizing the fiscal court to appoint a supervisor of roads for the county, where the fiscal court did not appoint such supervisor, but entered an order investing the county judge with the general supervision of the roads, its action in attempting to invest the justices of the magisterial districts with power as assistants, and in allowing such justices who, under such order, superintended and controlled the keeping of the roads within their respective districts, pay for their services, was invalid, and the county was not liable therefor.

Appeal from Circuit Court, Pulaski County.

"To be officially reported."

Action by James Sears against Pulaski county. Judgment for plaintiff, and defendant appeals. Reversed.

E. T. Wesley, for appellant. Denton & Robinson and G. W. Shadoan, for appellee.

O'REAR, J. In Pulaski county the fiscal court had adopted the system of working the county roads by levying and collecting a tax known as the "road and bridge fund." The work was done and material furnished on the road at the expense of the county, and paid out of this fund at schedule prices fixed by the fiscal court. The fiscal court did not appoint a supervisor, but entered an order of record investing the county judge with the general supervision of the roads of the county, and attempted to invest the justices of the magisterial districts with the power as assistants. The various justices, acting under this order throughout their term of office, superintended and controlled the keeping of the roads within their respective districts, and were subsequently, by an order of the fiscal court, allowed a sum in payment for their services. The county refused to settle on this basis, and this suit was brought by appellee, one of the magistrates named, to collect for his said services. The statutes permit the appointment of the supervisor or supervisors. Sections 4313-4344, Ky. St. 1903. But the county did not do this. They attempted to create a different office, or perhaps the same office with a different name, and then attempted to fill it by electing themselves, and then attempted to vote themselves pay for their services. This they could not do, as was held by this court in the recent case of Daviess County v. Goodwin (decided December, 1903) 77 S. W. 185.

Judgment reversed, and cause remanded, with directions to dismiss the petition.

LOUISVILLE & N. R. CO. v. COMMONWEALTH.

(Court of Appeals of Kentucky. Jan. 19, 1904.)

OBSTRUCTION OF HIGHWAY — NUISANCE — INDICTMENT — SUFFICIENCY — SEPARATE OFFENSES — ORDINANCES — VALIDITY — JURISDICTION.

1. An indictment for the obstruction of a public street which fails to identify the street further than as a public highway in a certain town, crossing defendant's railroad track near the depot, is fatally defective, because failing to identify the street with sufficient certainty.

2. In a prosecution under an indictment for obstructing a highway, it is error to admit evidence of different obstructions on various streets within a year prior to the finding of the indictment, inasmuch as each obstruction constituted a separate offense.

3. Under Ky. St. 1903, § 768, making it unlawful for a railroad company to obstruct any public highway for more than five minutes at one time, a city ordinance imposing a fine for a locomotive or train remaining across a street for a longer period than ten minutes is void in so far as it conflicts with the statute.

4. The circuit court has jurisdiction of the common-law offense of obstructing a highway.

Appeal from Circuit Court, Hopkins County.

"To be officially reported."

The Louisville & Nashville Railroad Company was convicted of obstructing a highway, and appeals. Reversed.

C. J. Waddill and B. D. Warfield, for appellant. Jno. L. Grayot and N. B. Hays, Atty. Gen., for the Commonwealth.

HOBSON, J. Appellant was indicted for a common nuisance. The indictment charges that it was committed as follows: "The said Louisville & Nashville Railroad Company, in the said county of Hopkins, on the 16th day of May, 1903, and on many other days before the finding of this indictment, did create, suffer, and maintain a common nuisance in the city of Earlington, Hopkins county, Kentucky, by placing and running railroad cars, flats, box cars, and steam engines, and making up trains and switching cars and changing cars, unnecessarily and for unreasonable lengths of time, in, on, and across a public street and highway of said city of Earlington, where the track and side track of said railroad company crosses said street or highway near said railroad company's depot in said city, thereby obstructing said public street and highway for unreasonable lengths of time, and causing the people who pass over and drive teams over said public street and highway great inconvenience and trouble and delays, and making and causing said street and highway at said crossing to be dangerous and unsafe to all people traveling along same, and to the common nuisance of all the people of the commonwealth."

The court overruled the demurrer to the indictment. He also allowed proof to be given of various obstructions to the highway by different trains on different days within a year before the indictment was found, refusing to limit the commonwealth to one day or one obstruction. He also refused to allow the defendant to read to the jury the ordinance of the town imposing a fine if a locomotive or train remained across a street of the town for a longer period than 10 minutes, and instructed the jury, substantially in the language of the indictment, that if they believed from the evidence, beyond a reasonable doubt, the defendant had obstructed the street within 12 months, they should find it guilty. The jury found the defendant guilty, and fixed the fine at \$585.

The ground of the demurrer to the indictment is that it does not identify the highway charged to have been obstructed. The only allegation is that it was a public street or highway in Earlington, which crossed the railroad track near the company's depot. In Wood on Nuisances, § 857, it is said: "So, too, in an indictment for an obstruction of a public street or highway, the street or highway should be definitely described, as well as

the nature and extent of the obstruction." Unless the highway is identified, the judgment on the indictment could not be relied on as a bar to another prosecution, nor would the indictment inform the defendant of the nature of the accusation against him. Presumably there are other streets of the town crossing the railroad track near the depot. The proof heard on the trial shows there is another crossing 200 yards from this one. We therefore conclude that the indictment lacked certainty, and the demurrer to it should have been sustained.

In *Cincinnati Railroad Company v. Commonwealth*, 80 Ky. 137, which was, like this, an indictment for obstructing a public road, it was held that it was not necessary that the road should be obstructed repeatedly or continuously, but that each obstruction of it was a separate offense. In *Chesapeake & Ohio Railroad v. Commonwealth*, 88 Ky. 363, 11 S. W. 87, two indictments were found against the defendant on the same day, charging it with obstructing a certain road with its cars. Each charged that the offense was committed at the same time, substantially in the same language. The defendant was acquitted under one of the indictments, and, being placed on trial under the other, pleaded the judgment in the former case in bar. It was held that the judgment under the first indictment was not a bar to the proceeding under the second, unless the same obstruction which was relied on in the second case was proved or attempted to be proved in the first case. The court said: "It is true, the indictments were found upon the same day. They were for the same character of offense. They covered the same period of time, because the statutory limitation under our law to such a prosecution is one year; but the time named in them as being that when the offense was committed was not material, and each obstruction was a distinct offense. The state was not confined to any particular time, but had the right to show that the appellant had so offended at any time within a year previous to the finding of the indictment. This being so, a conviction or an acquittal would not, ipso facto, bar another indictment found at the same time, and charging the same character of offense. Whether the same act was proven or attempted to be proven upon the trial of the other one would be a question of fact, and the first trial would only be a bar to a further prosecution for such offenses as were then proven or attempted to be proven. This would, of course, have to be shown by extrinsic evidence." 88 Ky. 370, 11 S. W. 87. Further on in the same opinion the court also said: "In this character of case the state could, upon the trial of one indictment, select one particular act or offense and proceed for it; and under the other indictment, although found at the same time, it could prove a different one."

Any obstruction of a highway is a common-law nuisance, and is none the less a nuisance

if confined to one day. Thus it has been held an indictable nuisance for one traveler on a highway unreasonably to obstruct the passage of another by constantly interposing his team as an obstacle. *Wood on Nuisances*, § 292. So it is a nuisance to feed hogs near a highway, or to keep a ferocious dog near by, to the interruption of travel. *Wood on Nuisances*, § 293. Where each of several acts which terminates in itself is itself a nuisance, each is a separate offense. See cases above cited. When a train of the defendant unreasonably obstructed the highway on one day, this was a complete offense, and the fact that another train at another time unreasonably obstructed it added nothing to the offense. The commonwealth, therefore, could not prove all unreasonable obstructions by different trains within a year, and inflict under one indictment punishment for them all, for there was no continuity of the obstruction. The court should have required the commonwealth to elect which offense it would prosecute for. This subject was fully considered in *Smith v. Commonwealth*, 109 Ky. 685, 60 S. W. 531, and to the rule announced in that case we adhere.

Section 768, Ky. St. 1903, makes it unlawful for a railroad company to obstruct any public highway or street by cars or trains for more than five minutes at one time. This provision is not restricted to the construction of the road, but applies to obstruction by cars or trains. The town is only authorized to make ordinances consistent with the statutes of the state. Its ordinance, so far as it conflicts with the statute, is void. The circuit court had jurisdiction of the common-law offense of obstructing a highway. The case of *I. C. R. Co. v. Commonwealth*, 104 Ky. 362, 47 S. W. 255, only involved the question of variance. We have been referred to no statute, and can find none, relating to fifth-class cities, affecting the common-law jurisdiction of the circuit courts to punish for nuisances.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

HERMANN v. PARSONS et al.

(Court of Appeals of Kentucky. Jan. 8, 1904.)

WILLS — INTERESTS CREATED — CONTINGENT REMAINDER — JUDGMENTS AGAINST REMAINDERMEN.

1. A will giving testator's widow property for life provided that at her death the property should be sold, and divided among the children. The widow was empowered to disinherit any child unless she should marry, in which case they were all to take as heirs. She was to have no power to alienate or incumber the real estate, and the issue of a deceased child were to stand in the place of their parent. Held, that the issue of a deceased child took merely a contingent remainder interest, and were bound by a judgment and sale thereon, obtained during their parent's lifetime by a municipal lien claimant in an action to which they were not parties except as represented by their parent and testator's widow.

Appeal from Circuit Court, Jefferson County, Chancery Division No. 2.

"To be officially reported."

Action to sell real estate by the executors and heirs of C. B. Parsons against Carlton Parsons and others, in which defendants filed a cross-petition against P. G. Hermann. From a judgment for defendants Carlton Parsons and others, cross-complainant P. G. Hermann appeals. Reversed.

P. G. Hermann and E. L. McDonald, for appellant. Hargis & Duncan and J. C. Strother & Gordon, for appellees.

NUNN, J. In the year 1871 C. B. Parsons died in Jefferson county, Ky., leaving a will, which was duly probated, by which he made devises to each of his seven children; H. B. Parsons, the father of these appellees, being one of them. He also, by the eighth item of his will, made a bequest to his wife, Emily C. Parsons. We quote so much of this item as will aid in elucidating the question to be considered. After giving her the property for life, he used this language: "At the death of my wife, in her widowhood, all of my property reserved to her in this item, both real and personal, shall be sold by my executors, and the proceeds equally divided among my heirs. My wife shall have power for good and sufficient cause to disinherit from the interests embraced in this item, any of my children, but in the event of her doing so, the interest so retained shall not be devised or given to another, but shall be embraced in the general fund to be divided with the rest among my remaining heirs. Should my widow marry, it is my will that she shall have no power whatever to disinherit any one of my children so far as the property devised to her is concerned, but they shall take the property as my heirs under this will." "She shall not have power to alienate, sell or encumber any of the real estate whatever, but shall keep the same intact. Should any of my children die (and by heirs I mean children) leaving issue (lawful) of their own, such issue shall stand in the place of their dead parent, and take in equal division among them what would have been under this my last will, their parent's share in my estate." H. B. Parsons, one of testator's children, and father of these appellees, died in the year 1879. The widow of the testator died in the year 1898, and after her death the executors and heirs of C. B. Parsons brought an action in the chancery court to sell the real estate so devised to his widow for life for the purpose of a division of the proceeds among his heirs, as directed by the will. The appellees, as children of H. B. Parsons, were made defendants, and they answered and made their answer a cross-petition against appellant, P. G. Hermann, alleging that a certain parcel of real estate situated in Louisville, Ky., on the corner of Thirty-Third and Bank streets, describing

it, belonged to C. B. Parsons, and was by him devised to his widow for life under the eighth item above referred to in this opinion, and that their father, H. B. Parsons, died in the year 1879, and before his mother died, and by reason thereof, and under the provisions of the will of C. B. Parsons, they took a fee-simple interest in this real estate, and that appellant, P. G. Hermann, was in the possession of this piece of property on the corner of Thirty-Third and Bank streets, and was setting up some claim thereto; and asked that he be summoned to answer, and they be adjudged the owners of one-seventh interest therein, and that their interest be sold, and the proceeds be divided between them. The appellant answered, and alleged that he was the sole owner of this piece of real estate. That he derived his title in the following manner: That on the 12th day of September, 1874, there was instituted in the chancery court of Louisville an action by one T. Hansley against the widow of C. B. Parsons and his seven children, all of whom were served with process, in which action Hansley sought to enforce a lien held by him upon the property described in that and in this action, which lien existed for the cost of improving Thirty-Third street; the court in that action enforced the lien, directing a sale of the property, which was sold in satisfaction of the lien debt; Mary Parsons became the purchaser, and a deed to the property was made to her by the court's commissioner; and that he has obtained a fee-simple title to this property from the vendees of Mary Parsons. The parties filed other pleadings, which we deem unnecessary to explain. It is sufficient to say that the only question necessary to be determined on this appeal is whether or not, on the facts already stated, the appellant or appellees own this one-seventh interest in this lot on corner of Thirty-Third and Bank streets. It is agreed that these appellees were not parties to the Hansley suit, but that their father, H. B. Parsons, and his mother, the widow of C. B. Parsons, were parties to that action.

It is contended by the appellees—and the court agreed with them—that they had a remainder interest in this property under the will of their grandfather, and before they could be deprived of their interest in this property it was necessary that they should have been made parties to that action, and, as they were not parties thereto, they still owned their interest. We are of the opinion that the lower court erred. These appellees, under this will, merely held contingent remainder interests. Their grandmother held the life estate, and their father the fee, subject to be defeated by his death before his mother's death. The general rule is that it is sufficient to bring before the court the persons whose several interests combined make up the first estate of inheritance. As these appellees' grandmother and their father were parties to that action, and they owned to-

gether the first estate under the will at that time, it was unnecessary to have made appellees parties, as they were only contingent remaindermen, and were bound by representation. See Calvert on Parties, p. 251; Freeman on Judgments, § 172. The reason for this rule is stated in *Faulkner v. Davis*, 18 Grat. 690, 98 Am. Dec. 698, where the court said: "This rule of representation often applies to living persons who are allowed to be made parties by representation for reasons of convenience and justice, because their interests will be sufficiently defended by others who are personally parties, and who have motives both of self-interest and affection to make such defense, and they therefore consider it unnecessary to make such persons parties, and, indeed, improper to do so, and thus compel them to litigate about an interest which may never vest in them." Their father, who held the first estate subject to the life estate of his mother, was a party. He had a motive of self-interest and affection to cause him to make defense. We have not been able to find a case in point, decided by this court, but there are several cases which appear to recognize the correctness of the rule stated. A distinction has been pointed out, however, in Kentucky, between cases where contingent remaindermen's rights are affected by a judgment obtained by one in privity with his estate and by a stranger to the instrument by which such contingent remainder has been created. This distinction has been clearly pointed out in the case of *Johnson v. Jacob*, 11 Bush, 646. In that case the court said: "It has frequently been held that a stranger to the instrument by which contingent limitations upon the title to real property are created may by a judgment regularly obtained against the life tenant in possession bar the contingent remaindermen. The reason for this rule is obvious. If such was not the rule, the deed or will of a grantor or testator might so limit the title passed as to leave the holder of an outstanding and paramount title without remedy because of his not being able, until after the happening of some remote event, to ascertain the persons against whom to institute his action. * * * Our attention has been particularly called to the case of *Gifford v. Hart*, 1 Sch. & Lef. 407; *Faulkner v. Davis*, 18 Grat. 684, 98 Am. Dec. 698. In each of these cases the complainant was a stranger to the title under and through which the contingent remaindermen claimed title." In the case of *Fritsch v. Klausning* (Ky.) 13 S. W. 242, the court said: "All the parties having a vested interest were represented and had their day in court. The sale was made, and A. S. Klausning became the purchaser, and, we presume, complied with the terms of the sale. It was not necessary to make those who might be heirs of Anderson parties to the action. Their interests, if any they had, were of so remote a character as not to be esti-

mated or defined." Also, see *R. A. Robinson's Sons v. Columbia Finance & Trust Co.* (Ky.) 44 S. W. 631; *Park v. Humpech* (Ky.) 47 S. W. 768. T. Hansley, who enforced this improvement lien on this lot, was a stranger to the instrument or will by which the contingent limitations upon the title to this real estate were created, and did so by reason of his judgment regularly obtained against the life tenant in possession and H. B. Parsons, who held the first estate in remainder. Consequently, under the authorities referred to, we are constrained to hold that appellees have no interest in the lot described.

Therefore the judgment of the lower court is reversed, and cause is remanded for further proceedings consistent with this opinion.

PENNSYLVANIA FIRE INS. CO. v. C. D. YOUNG & CO.

(Court of Appeals of Kentucky. Jan. 8, 1904.)

FIRE INSURANCE—ACTION ON POLICY—PROOFS OF LOSS—WAIVER—INVOICE CLAUSE—SUBMISSION TO JURY—DEFENSES—NEW TRIAL—DEFAULT JUDGMENT—SETTING ASIDE—PRACTICE—PLEADINGS—AMENDED ANSWER—DISCRETION OF COURT.

1. Civ. Code Prac. § 340, providing, "A new trial is a re-examination in the same court of an issue of fact after a verdict by a jury or decision by the court," and giving the grounds on which a new trial may be granted, and section 342, providing that the application therefor shall be made within three days after the verdict or decision is rendered, etc., do not apply where there was no issue of fact tried and decided by the court, nor a verdict of a jury, and a motion to set aside a default judgment may be made at any time during the term at which it was rendered.

2. Where, in an action against an insurance company, process was served on the insurance commissioner, and a judgment by default was rendered against defendant, the court had power to grant defendant's motion, made during the same term of court, to set aside the judgment and permit it to file its answer.

3. Where, in an action to recover on a fire insurance policy, defendant company set up in defense plaintiffs' failure to take an invoice of stock as required by the policy, but introduced no proof in support thereof, and plaintiffs proved the taking of the invoice, producing it on the trial, which proof was uncontradicted, the court had nothing to submit to the jury except the value of the property at the time it was destroyed.

4. Where defendant insurance company, in an action on a fire policy, by its original answer admitted a waiver of proofs of loss by its denial of any liability whatever, and a refusal to adjust or pay the loss in any manner before the action was brought, and, in addition to these admissions, denied any liability whatever on the policy, insisting that it was void for an alleged failure to comply with the "inventory clause," and in its proposed amended answer denied liability for the additional reason that plaintiffs' interest in the property was mortgaged, there was a waiver of the preliminary proofs of loss.

5. In an action on a fire policy it appeared that the fire occurred November 10, 1902; suit was brought February 16, 1903; summons was served, and a default judgment was rendered March 3, 1903, which, on March 16th, was on defendant's motion set aside, defendant filing

¶ 4. See Insurance, vol. 28, Cent. Dig. § 1391.

its answer alleging the policy was void for non-compliance by plaintiffs with the "invoice clause" therein; that a reply was filed the same day, and on March 26th plaintiffs filed invoices of goods bought after the date of the policy; that on April 1st, when the case was called for trial, an amended answer, alleging the giving by plaintiffs of a mortgage on the property prior to the issuance of the policy, and the concealment of such fact from defendant, was offered, the only reason assigned for its not being sooner offered being that "the original answer was written by their attorney, who was not at the time in possession of all the facts constituting their defense herein"; and it appeared on the trial that defendant's agents knew of the mortgage months before the suit was begun. *Held*, that there was no abuse of discretion in refusing to allow the amended answer to be filed.

Appeal from Circuit Court, Graves County.
"Not to be officially reported."

Action by C. D. Young & Co. against the Pennsylvania Fire Insurance Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

W. J. Webb, for appellant. D. G. Park, for appellees.

NUNN, J. This action was instituted in the Graves circuit court on February 16, 1903, by appellees C. D. Young & Co. against appellant, to recover losses sustained by fire on an insurance policy issued June 28, 1902, on their stock of goods and fixtures at Boaz Station, in Graves county. A total loss was alleged, and they sought to recover \$700 on the stock and \$100 on fixtures, the full amount of the policy, \$800. The fire occurred November 10, 1902, and no proof of loss was ever furnished, though immediate notice in writing of the loss was given. In the petition, after setting forth the terms and amount of the policy and the loss and value of the property, it was alleged: "That by the terms of the policy the defendant (appellant) agreed to pay to them the full amount of insurance on the stock of merchandise, furniture, and fixtures, aggregating \$800, but it has failed and refused, and still refuses, to pay plaintiffs any part of such loss, and has denied and still denies any liability whatever on such policy; that the defendant company was immediately notified by plaintiffs in writing of a loss by fire, and defendant, through its agents, induced plaintiffs to believe an adjuster would be sent to adjust the loss from time to time, until the sixty days had expired for making proof of loss within the terms of the policy, but has since failed and refused to send an adjuster to settle or adjust the loss in any manner, and denies liability as aforesaid, and refuses to pay any part of such loss." Process was served on the insurance commissioner, and on March 3, 1903, judgment was rendered by default against appellant for \$800, with interest from that date, and the costs of the action. On March 10, 1903, and during the same term of court at which the default judgment was rendered, the appellant, by its attorney, moved the court to set aside this

judgment, and permit it to file its answer to the petition of appellees. The court heard evidence on the trial of this motion, and set aside the default judgment, and permitted appellant to file its answer, to which appellees excepted. This is the first question to be settled on this appeal.

This was not a case in which a motion to set aside a judgment should have been made within three days after the judgment was rendered. There was no issue of fact tried and decided by the court, nor a verdict of a jury, as a basis for this judgment; and therefore sections 340 and 342 of the Civil Code of Practice do not apply, and this question is governed by the common-law rule by which courts have control over their judgments during the term at which they are rendered, and motions to set aside such judgments may be made at any time during the term at which they are rendered. See 102 Ky. 609, 44 S. W. 118, case of Riglesberger v. Bailey. It was within the power and discretion of the court, upon the facts as shown in the record, to set aside the judgment and permit appellant to file its answer, and, in our opinion, the lower court did not abuse its discretion to such an extent as would authorize this court to interfere.

Appellant, in its answer, filed March 16, 1903, did not controvert the allegations of appellees' petition as to proof of loss and denial of any liability whatever and its refusal to pay or adjust the loss, but alleged "that it was part of the contract of insurance that plaintiffs, being the assured under the policy, would take an inventory of stock on hand at least once in each calendar year, and, unless such inventory had been taken within twelve months prior to the date of the policy, one should be taken in detail within thirty days thereof, or the policy should then be null and void, and upon demand of the assured any unearned premium from that date should be returned. That defendant denies that such inventory was taken by the plaintiffs at the time of the issue of the policy, and none was taken within thirty days after the issue thereof, which time it says expired before the time of the alleged destruction of plaintiffs' property; and that by reason of plaintiffs' failure to comply with this condition of the policy the policy was forfeited, and became null and void, and no action can be maintained thereon." It was also denied by the answer that the stock insured was of the value alleged in the petition, but averred that \$300 was its full value at the time it was destroyed by fire, and that the appellant, if liable for any part of the loss, was only responsible for three-fourths of the value of this stock, to wit, \$225. Appellees filed their reply to this answer, to which appellant filed a rejoinder. On the 1st day of April, 1903, on the day this case was tried, but before entering the trial, appellant presented and offered to file an amended answer, to the filing of which

the court sustained an objection, and refused to allow it to be filed, to which appellant excepted. A trial was had, and the jury returned a verdict for appellees, for the sum of \$750. The appellant filed reasons and moved the court to grant it a new trial, which the court refused. The court gave to the jury only one instruction, which, in substance, is as follows: To find for the appellees three-fourths of what they might believe from the evidence was the reasonable cash value of their stock of goods and of their fixtures destroyed by fire on the 10th day of November, 1902, not to exceed \$700 for stock and \$100 for fixtures, and in no event more than \$800. The appellant complains because the court refused to instruct on its plea that appellees failed to take an invoice of its stock as required by its policy. Even though this had been a defense to the action—which it is not necessary to here decide—the court was right in this, as appellant failed to introduce any proof to sustain this allegation; but, on the other hand, appellees proved that the invoice was taken, and produced it on the trial, with the original bills of all purchases of goods made by them after the date of the policy, together with a report of the daily sales made by the firm. With this uncontradicted proof, and the condition of the pleadings, the court had nothing to submit to the jury except the value of the property at the time it was destroyed, and upon this question the testimony sustained the verdict of the jury.

The only remaining question to be determined is: Did the court err in refusing to allow appellant to file its amended answer, in which it denied that it had waived by any act the proof of loss as required by the contract, or that it had denied its liability thereon, and also alleged that there was a provision in the policy as follows: "This entire policy, unless otherwise provided by agreement endorsed thereon, or added thereto, shall be void if the interest of the insured be other than unconditional and sole ownership; or if the said insurance be personal property, and be or become encumbered by chattel mortgage," and then averred that appellee C. D. Young, on the 27th day of June, 1902, the day before the property was insured, executed and delivered a mortgage to Beulah Young on his half interest in the stock of goods and fixtures, to secure her in the payment of \$300 owing by him to her, and then used this language: "Defendant says that in negotiating and procuring said policy of insurance the plaintiff wrongfully and fraudulently concealed the existence of said mortgage from it and from its agent from whom it was procured; and it nor its agent did not know the existence of said incumbrance; that the same was material to the risk, and that it would not have issued the policy if it had known of the incumbrance." With reference to the first proposition contained in the amended answer, it is sufficient to say that by its original answer it admitted a waiver of proof of loss by

its denial of any liability whatever on the policy and a refusal to adjust or pay the loss in any manner before the action was instituted; and, in addition to these admissions, it denied any liability whatever on the policy, and insisted on the policy being void for the alleged failure to comply with the "inventory clause"; and again in its proposed amended answer it again asserts that it is not liable for any part of the sum claimed by reason of the destruction of this property for the additional reason, as it claims, that C. D. Young's interest in the property was mortgaged to secure \$300. We are of the opinion that under the facts of this case there was a waiver of the preliminary proofs of loss. In the case of *Home Insurance Company v. Gaddis*, 3 Ky. Law Rep. 161, the court said: "By the terms of the policy the assured could not maintain action thereon without making the required preliminary proofs; but when the company deny their liability, and refuse to pay upon other grounds which would not have been removed by such proofs, then the proofs would have been vain and futile, and therefore need not be made." In the case of *Insurance Co. v. Monroe Jefferson, etc.*, 101 Ky. 18, 39 S. W. 435, the court, in discussing a demurrer to a petition on a prior policy which failed to allege that the preliminary proofs had been made, or to state any reason why they had not been made, said: "And again we must say that good pleading required such averment or a statement of facts showing a waiver by the company of the notice and proof required by the terms of the policy. The company, however, did not stand by its demurrer, and, looking to the answer, we find that its real defense to the action, besides the issue as to value, is that the existence of certain mortgages on the property was concealed from the company and its agents, by reason of which the policy is claimed to be void from the beginning. The question of notice and proof of loss, therefore, become unimportant, as the giving of the notice and the production of the proof must have been unavailing to the policy holders in the face of the contention that the policy was void in any event." The lower court had discretion in the matter of allowing the amended answer to be filed. The only question to be determined is, did the lower court abuse the discretion to such an extent as this court ought to interfere? We think not. The fire occurred November 10, 1902. The suit was brought February 16, 1903. Summons served and default judgment rendered March 3, 1903. On motion of defendant this judgment was set aside March 16th, and on that day it filed its answer, alleging the policy was void because assured failed to comply with the "invoice clause." On that day appellees filed reply, and on the 26th of March filed invoices and bills of purchases of goods bought after the date of the policy. On the 1st of April, when the case was called for trial, then this amended an-

swer was offered. The only reason presented why it was not offered before was as follows: "Defendant would beg leave to amend the original answer herein, and say that the original answer in this case was written by their attorney, who was not at the time in possession of all the facts constituting their defense herein." There was no statement made why the attorney was not in possession of all the facts at the time—whether it was by mistake, or oversight, or inadvertence. From the language used, the court had reason to believe that appellant at the time of the filing of its original answer knew of the existence of the mortgage, and intentionally withheld this fact from its attorney, and determined to base its defense alone on the failure of the assured to comply with the "invoice clause" of the policy, and it was developed on the trial that appellant's agents knew of this mortgage months before this suit was instituted.

For this reason the judgment is affirmed.

=====

CINCINNATI SOUTHERN RY. CO.'S TRUSTEES v. SOCIETY OF SHAKERS' TRUSTEES.

(Court of Appeals of Kentucky. Jan. 8, 1904.)

BOUNDARI —CONSTRUCTION OF CALLS IN DEED.

1. Calls in a deed were as follows: "Beginning at a white oak (marked) on the top of the cliff, thence up the river on the top of the cliff with its meanders, south 52° east 35 poles south 66¼° east 23.8 poles to an oak and cedar on the top of the cliff." The testimony showed that a perpendicular precipice rose at the base of the cliff, 250 feet high, and then by a more gradual ascent the top of the cliff was reached, 200 feet away. From the top of the precipice to the top of the cliff several sharp ascents intervened, and the whole topography was rugged and uneven. The marked white oak and the "oak and cedar on the top of the cliff" were located by a number of witnesses as on the top of the cliff, and not at the top of the vertical precipice. It was a physical impossibility to run these calls if the beginning corner was taken at the top of the precipice, and the full amount of land which the deed purported to convey would be made out by running the calls along the top of the cliff. The strip of land between the edge of the precipice and the top of the cliff, claimed by the grantees under the deed, had been in possession of the defendant for more than 15 years. *Held*, that the calls should be run on top of the cliff, and that the land in question was not embraced in the deed.

Appeal from Circuit Court, Jessamine County.

"Not to be officially reported."

Action by the Cincinnati Southern Railway Company's trustees against the Society of Shakers' trustees. Judgment for defendants, and plaintiffs appeal. Affirmed.

W. L. Bronaugh, for appellants. Ben P. Campbell, for appellees.

BURNAM, C. J. The trustees of the Cincinnati Southern Railway Company brought this suit against the appellees, the Society of Shakers, to recover the possession of about

2 acres of ground embraced in a narrow strip fronting the turnpike road near High Bridge, Ky., which they allege constitutes a part of a tract of 14.6 acres of land which was conveyed by Joseph Curd in 1857 to the Lexington & Danville Railroad Company, and subsequently by his vendees to them.

The solution of the controversy between the parties depends on the proper location of the line shown in the first two calls in the deed from Curd to the Lexington & Danville Railroad Company, which are as follows: "Beginning at a white oak (marked) on the top of the cliff, thence up the river on the top of the cliff with its meanders, south 52° east 35 poles south 66¼° east 23.8 poles to an oak and cedar on the top of the cliff." In 1859, Curd conveyed the adjacent tract of land bordering on the line in controversy to W. I. Moberly, and through successive grantors the Society of Shakers obtained possession thereof. The corresponding call in the deed from Curd to Moberly is as follows: "Thence along the cliff with their line 52° east 35 poles, south 66¼° east 23.8 poles to an oak on the top of the cliff."

It appears from the testimony, and from the maps filed in the record, that a perpendicular cliff 250 feet high rises from the base of the mountain, and then by a more gradual ascent the top of the cliff or mountain is reached, about 200 feet away. Appellees contend that the call "beginning at a white oak (marked) at the top of the cliff, thence up the river on top of the cliff with its meanders to an oak and cedar on top of the cliff," is on top of the highest point of the cliff or mountain, while appellants contend that these lines are run along the rocky face of the vertical cliff. The land in dispute lies between the top of the vertical cliff and the top of the cliff or mountain, which varies from 100 to 200 feet in width: If this line is run on top of the cliff, the land belongs to appellees; if it runs at the top of the perpendicular precipice, it is included within the boundary of appellants. The appellants point to the fact that the dictionary defines the word "cliff" as a precipice, and therefore it could not apply to the top of the mountain or hill. In answer to this contention, it is proven by a number of witnesses that from the top of the vertical precipice to the top of the cliff several cliffs intervene, which, however, are not so high as the one contended for by appellants, and that the whole topography of the soil is rugged and uneven. They also rely upon the testimony of Mr. W. A. Gun, an eminent engineer, who claims to have made the survey for the railway company in 1857. On the other hand, the contention of appellees as to the true location of the call is supported by the testimony of quite a number of witnesses, who definitely locate the "marked white oak" called for as the beginning corner, and the "oak and cedar on the top of the cliff," as being on the top of the cliff, and not upon

the top of the vertical precipice. They also point to the fact that it is physically impossible to run these calls if the beginning corner is taken on the top of the vertical cliff, and show by several surveyors that appellants have the full amount of 14.6 acres covered by their boundary, stopping the line at the top of the cliff. In addition to these facts, it is conclusively shown that appellees have exercised acts of ownership over this narrow strip of land since 1875, by the erection of houses, stables, etc., which they have rented out. The house in which the post office is kept at High Bridge was erected by appellees on this strip of land, and has been rented from them for this purpose for many years.

We have reached the conclusion that the land in dispute is covered by the deed of appellees, and that they have been in the continuous, adverse, and uninterrupted possession thereof, claiming same as their own, for more than 15 years before the institution of this suit, and the judgment is therefore affirmed.

DEMOCRAT PUB. CO. v. PATTERSON,
Clerk.

(Court of Appeals of Kentucky. Jan. 19, 1904.)
MUNICIPAL CORPORATIONS—CITIES OF SECOND CLASS—OFFICIAL NEWSPAPER—TERM OF APPOINTMENT.

1. Acts 1894, p. 268, c. 100, art. 5, § 12; provided that the mayors of cities of the second class should on the first Monday in April select the official newspaper of the city for the term of one year. Acts 1898, p. 154, c. 63, § 1, amended this statute so as to provide merely that the mayor should annually select a daily newspaper as the official newspaper of the city, and made no reference to the time of the selection. Acts 1902, pp. 70, 71, c. 32, §§ 1-3, further amended the statute so as to provide that the city attorney should select the paper, but made no further change, and by section 3 declared that the act should take effect from its passage, because the selection of the official newspaper would occur before 90 days after the adjournment of the Legislature. *Held*, that the term of the official newspaper is until the first Monday in April of the year following the appointment, and is not for a full year from the date of the appointment.

Appeal from Circuit Court, McCracken County.

"Not to be officially reported."

Action by the Democrat Publishing Company against William H. Patterson, as clerk. From a judgment for defendant, plaintiff appeals. Affirmed.

J. C. Flournoy, Wheeler & Hughes, and Flournoy & Harrison, for appellant. Bloomfield & Crice, for appellee.

HOBSON, J. The question involved in this case is whether the term of the official newspaper in second-class cities is for one year from the time the appointment is made, or until the first Monday in April the next year. The question turns upon the proper construction of the statutes. Section 12, art. 5, of

the original act for the government of second-class cities, was, so far as material, in these words:

"The mayor, on the first Monday in April of each year, shall hear such proof as may be offered to him by sworn statement, oral and written, as may enable him to determine the daily newspaper having the largest bona fide circulation in the city, and the newspaper having such circulation shall be selected and known as the official newspaper of the city, and in such official newspaper for the term of one year shall regularly and promptly publish a correct and full abstract of the proceedings of both boards of the general council and of all ordinances, resolutions and notices which, under this act, or the ordinances of the city, may be required to be published; but the price for such printing shall not exceed the regular advertising rates of such newspaper. The mayor may examine the subscription books and other evidences offered by competitors to enable him to reach a just determination; and the determination of the mayor shall be final." See Acts 1894, p. 268, c. 100.

By section 1 of an amendatory act passed in 1898 it was provided as follows:

"That section twelve of article five of the act mentioned in the title of this act be amended and re-enacted so as to read as follows: 'The mayor shall annually select a daily newspaper to be known as the official newspaper of the city, and in such official newspaper for the term of one year shall be regularly and promptly published a correct and full abstract of the proceedings of both boards of the general council, and of all other ordinances, resolutions and notices which, under this act, or by the ordinances of the city, may be required to be published; but the price for such publication shall not exceed the regular advertising rates for such newspaper. The mayor may examine the subscription books, and other evidences offered by competitors, to enable him to reach a just determination, and the determination of the mayor shall be final.'" See Acts 1898, p. 154, c. 63.

This was in turn again amended as follows:

"Section 1. That section one of an act which became a law March twenty-fifth, one thousand eight hundred and ninety-eight, and is entitled 'An act to amend an act, entitled "An act for the government of cities of the second class in the commonwealth of Kentucky," approved March nineteenth, one thousand eight hundred and ninety-four,' and now being section three thousand one hundred and seventeen of the Kentucky Statutes, be amended and re-enacted so as to read as follows: That the city attorney shall annually select a daily newspaper to be known as the official newspaper of the city, and in such official newspaper for the term of one year shall be regularly and promptly published a correct and full abstract of the

proceedings of both boards of the general council, and all ordinances, resolutions and notices which, under this act, or the ordinances of the city, may be required to be published; but the price for such publication shall not exceed the regular advertising rates for such newspaper. The city attorney may examine the subscription books and other evidence offered by competitors to enable him to reach a just determination, and his determination shall be final. No ordinance or resolution appropriating or paying less than fifty dollars shall be published, nor shall ordinances for street or other public improvements or proposals or bids for such improvements include details of specifications, but these shall in the proper office be open to examination, and the notices shall so state.

"Sec. 2. All acts or parts of acts inconsistent herewith are hereby repealed.

"Sec. 3. Whereas the selection of the official newspaper under the present law will occur before ninety days after the adjournment of this session of the General Assembly, therefore an emergency is declared to exist, and this act shall take effect from and after its passage and approval by the Governor."

See Acts 1902, pp. 70, 71, c. 32.

Appellant was appointed on July 6, 1902, and claims its term continued for one year from that time, while appellee maintains that it expired on the first Monday in April, 1903, when another appointment was made. By the original act the appointment was directed to be made by the mayor on the first Monday in April of each year for the term of one year. By the act of 1898 it was provided that the mayor should annually make the appointment for the term of one year, and, while this act was silent as to the time when the appointment was to be made, it was enacted four years after the preceding act, under which the term of the incumbent would expire on the first Monday in April; and, as no change is made in the time of the appointment, the natural construction is that the Legislature contemplated that the new appointment should be made at the expiration of the current term. The act of 1902 makes no substantial change in the preceding act, except to substitute the city attorney for the mayor as the person to make the appointment, so far as the questions involved in this case go. By the third section of that act the reason for the emergency requiring that the act should take effect from its passage is that: "the selection of the official newspaper will occur before ninety days after the adjournment of this session of the General Assembly." The act was approved March 18th, and the Assembly adjourned shortly thereafter. The act, therefore, in the reason given for its taking effect from its passage, recognized that the selection was to be made at the time named in the original act. Taking the three acts together, we conclude that the Legislature did not contemplate changing

the time when the selection was to be made, and that appellant's term expired when the new appointment was made by the city attorney, on the first Monday in April, 1903. *Hoke v. Richie*, 100 Ky. 66, 37 S. W. 266, 38 S. W. 132.

Judgment affirmed.

DAY v. EXCHANGE BANK OF KENTUCKY.

(Court of Appeals of Kentucky. Jan. 19, 1904.)

PRINCIPAL AND AGENT—IMPUTED KNOWLEDGE—STATUTE OF LIMITATIONS.

1. While knowledge acquired by an agent, in purchasing bank stock from a bank, of the institution's impaired condition, will be imputed to his principal, so as to start limitations against an action for false representations inducing the purchase, similar knowledge acquired some years later, where the same person became agent to effect the stock's sale to third persons, will not be so imputed, the transactions being separate and distinct.

Appeal from Circuit Court, Montgomery County.

"To be officially reported."

Action by J. T. Day against the Exchange Bank of Kentucky. Judgment for defendant, and plaintiff appeals. Reversed.

A. T. Wood, W. M. Beckner, and Beckner & Jouett, for appellant. Henry R. Prewitt, for appellee.

BURNAM, C. J. On the 2d day of January, 1883, the appellant, J. T. Day, who lived in Campton, Ky., purchased from the Exchange Bank of Kentucky, a banking corporation doing business in Mt. Sterling, Ky., through his agent, J. G. Trimble, 25 shares of its capital stock, at the price of \$2,750; and on the 2d of January, 1884, he purchased from the bank, through the same agency, 40 shares of its stock, at the price of \$4,800. J. G. Trimble, who represented him in these transactions, lived in Mt. Sterling, was a director of the bank, and the father-in-law of appellant. Appellant held this stock, and drew the dividends, which were regularly declared thereon semiannually, until 1887. During the year 1887 he sold out his entire holding in the bank to different parties, his father-in-law, Trimble, who was at that time president of the bank, acting as his agent. Twenty-five shares were sold by J. G. Trimble to E. S. Cunningham, and 20 shares to Mrs. E. C. Ward. Subsequently these vendees instituted suit against both Trimble and Day, alleging that they were induced to make these purchases by false statements made to them by Trimble as to the condition of the bank at the date of the purchase, and by false statements published by the bank as to its condition when Trimble was a director, and recovered thereon. In these suits appellant was compelled to refund to Cunningham and to Mrs. Ward the difference between the value of the stock of the bank

as represented, and as subsequent developments established its true value to be. On the 20th of December, 1892, J. T. Day brought this suit against the bank, alleging that he had been induced to purchase the stock from them by the publication of false reports as to the financial condition, and also by false and fraudulent statements of W. W. Thompson, cashier of the bank, who represented it as its agent in making the sales of the stock to him. The only defense relied on by the bank in its answer is a plea of the lapse of time and the statute of limitation. In support of this plea it alleges that J. G. Trimble was the agent of the appellant, J. T. Day, both in the purchase and sale of the stock, and continued to act as his agent between these respective dates; and that Trimble knew of and was familiar with the true condition of the bank, both at the date of the purchase and sale; and that his knowledge should be imputed to his principal, the plaintiff. They also allege that Trimble, as the agent of the defendant, actually communicated to plaintiff information as to the true condition of the bank more than five years before the institution of this suit, and that the cause of action was barred under section 2519 of the Kentucky Statutes of 1903, which provides that: "In action for relief for fraud or mistake or damages for either, the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake. But no such action shall be brought ten years after the time of making the contract or the perpetration of the fraud." Both of these allegations were controverted by reply, and a trial before a jury resulted in a verdict and judgment for the defendant bank.

Upon the trial the court instructed the jury as follows: "(3) The court instructs the jury that if either plaintiff, J. T. Day, or his agent in the transaction of buying and selling the stock in question, to wit, J. G. Trimble, actually knew of the discrepancies complained of as impairing the value of the bank stock, and had such knowledge more than five years before the bringing of this suit, the law is for the defendant, and the jury will so find; provided such agent's knowledge was acquired by him while engaged in the transactions affecting said stock, or had previously been acquired by him, and was in mind at that time. (4) The court instructs the jury that the law imputes to the principal, J. T. Day, and charges him with, all notice or knowledge relating to the subject-matter of the agency which the agent, J. G. Trimble, acquired or obtained while acting as such agent and within the scope of his authority, or which he may previously have acquired, and which he then had in mind, or which he had acquired so recently as to reasonably warrant the assumption that he still retained it. (5) The court instructs the jury that if they believe from the evidence that the plaintiff, J. T. Day, did not know,

and that his agent at the time of and in the course of his agency did not know, of the discrepancies in the condition of the Exchange Bank of Kentucky, for more than five years before the bringing of this suit, then they will find for the plaintiff. (6) The court instructs the jury that before they can find for the plaintiff they must believe and find from the evidence that plaintiff did not know, for more than five years before the bringing of this suit, and that his agent, Trimble, at the time and in the course of his agency in the buying and selling of plaintiff's said stock, did not know, of the discrepancies in the condition of the Exchange Bank of Kentucky. (7) Reasonable diligence is such diligence as ordinary and prudent persons exercise in the management of their own affairs." These instructions charge the plaintiff with any knowledge which J. G. Trimble may have had as to the true condition of the bank at any time between his original purchase for the plaintiff in January, 1883, until the final sale of the last 20 shares of plaintiff's stock by him to Mrs. Ward in July, 1887, and are in this respect, in our opinion, erroneous and prejudicial to the rights of the plaintiff. It may be stated as a general proposition that notice to an agent, while acting for his principal, of facts affecting the transaction in which he is at the time engaged, is constructive notice to the principal, as it is his duty to communicate such fact to his principal, and the law presumes that he has done so. *Bramblett v. Henderson* (Ky.) 41 S. W. 575. "But notice must be given to or the information acquired by the agent in the course of the same transaction which is sought to be affected by the constructive notice; that is, the same transaction from which the principal's rights and liabilities arise which it is claimed depend upon or which are modified by the constructive notice imputed to him." See 2 *Pomeroy on Equity Jurisprudence*, § 671. The rule is stated by *Mechem on Agency*, 718, as follows: "The notice which shall be imputed to the principal is that one which relates to the subject-matter of the agent's authority; or, in other words, is that one which relates to the business or transaction in reference to which the agent is authorized to act by and for the principal." *Perry on Trusts* (volume 1, § 22) says: "The general rule is that notice to an agent is notice to his principal. But the notice, if to an agent, must be to an agent for the purpose of the purchase, and the notice must be to him while engaged in the transaction." The appellant, Day, is chargeable with any knowledge possessed by Trimble of the condition of the bank at the time he bought the stock in 1883 and 1884, when he seeks to recover from the bank for alleged fraudulent misrepresentations made to him as to its condition; and he would also be chargeable with the knowledge of Trimble, when he sold the stock to Cunningham and Mrs.

Ward, in a controversy with those vendees growing out of misrepresentations made to them by Trimble to induce the purchase of the stock. But we know of no principle of law which would impute to Day the knowledge of Trimble at the date of these transactions, so as to put in operation the statute of limitations, in so far as the bank is concerned. There was no connection between the two transactions, and there is no evidence in the record which conduces to show that Trimble represented Day as an agent in so far as this stock was concerned, except in its purchase and sale. If it can be shown that Day had actual knowledge of the true financial condition of the bank, after his purchase of the stock in controversy, for more than five years before the institution of this suit, the plea of limitation relied upon by the bank would effectually defeat recovery.

For reasons indicated, the court erred in instructions 3, 4, 5, and 6 in the particulars pointed out, and the judgment is therefore reversed, and cause remanded for a new trial consistent with this opinion.

WILLIAMS v. COMMONWEALTH.

(Court of Appeals of Kentucky. Jan. 22, 1904.)

MURDER — EVIDENCE — ADMISSIBILITY — INSTRUCTION—APPEAL—HARMLESS ERROR.

1. Any error in admitting evidence on a trial for murder—that there had been a fight between the accused and the deceased about a year before her death was harmless where it was proved that a similar fight had taken place between them a few hours before her death.

2. An instruction in a murder trial that if such violence as the accused used was not necessary, and did not to the defendant "at the time" reasonably appear to be necessary, etc., was not too indefinite as to the time referred to.

3. Where evidence of a murder was entirely circumstantial, the court properly instructed the jury on every phase of the law regarding homicide.

Appeal from Circuit Court, Fayette County.

"Not to be officially reported."

Ed Williams was convicted of murder, and appeals. Affirmed.

Geo. Denny, for appellant. N. B. Hays and L. Mix, for the Commonwealth.

BURNAM, C. J. The appellant, Ed Williams, having been indicted and convicted of the murder of Bettie Green and sentenced to the penitentiary for life, has appealed to this court, and asks a reversal upon several grounds.

Appellant and the deceased had lived together as husband and wife for eight or nine years, but they had never been legally married. The facts shown by the testimony are that on the evening of the 9th day of August, 1903, the appellant came to the house of the deceased about half past 10 o'clock at night, and found her absent; that he crossed the street, and engaged in conver-

sation with Mary Hawkins for a short time, and whilst so engaged the deceased came home, went into the house, and lighted the lamp. She was not friendly with the Hawkins woman, and called to the appellant to come to her. It also appears that while appellant was talking to the Hawkins woman the name of the deceased was called, but it does not appear in what connection. The testimony for the commonwealth is to the effect that immediately after appellant entered the house of the deceased there were heard groans, cries for help, mercy, etc., and the witness Eva Marshall, who lived in the next house, testifies that she ran over to the house of decedent, and looked in the window, and saw that appellant had the deceased down on the floor, beating her, and that the deceased begged her to come to her assistance, but that she could not get him to stop; that she went for deceased's brother, and that upon her return she found both the appellant and deceased sitting in the front door, the deceased rubbing the side of her face, and that she asked her for some witch hazel or arnica; that about 15 minutes after 3 o'clock she heard noise in the room where appellant and deceased were sleeping; that she went to the front door, and tried to get in, but that it was locked. Another witness testifies that she heard groans and cries for help way in the night, and that she notified the police. Julia Anderson, a sister of the deceased, testified that she went to the house about half past 6 o'clock the next morning, and found the shutters of the room occupied by the deceased slightly ajar; that she opened the window and saw appellant standing up on the floor with his hat on, in his night clothes, with his pants in his hand; that he called to her to come in, and said, "Bettie has taken something and killed herself," and that the deceased was lying on the bed dead. An autopsy held by the coroner disclosed clots of blood on either side of the larynx, which indicated that she had met her death from strangulation. The appellant testified that when he crossed, after talking to the Hawkins woman, the deceased met him in the hall, and immediately struck him over the head with an empty water pitcher; that he slapped her, and pushed her down, but that peace was soon made between them, and they retired to bed; that some time during the night he heard her move about; and that he discovered an empty bottle the next morning, which the testimony disclosed contained oil of cloves; that no further trouble occurred between them during the night; that he offered her no violence of any sort, and was greatly surprised to find her dead the next morning. There was also testimony conducing to show that she was the subject of indigestion and a species of heart failure. The jury were instructed upon the law of murder and voluntary and involuntary manslaughter.

Upon the trial the commonwealth proved

by the witness Julia Anderson that she had witnessed a fight between appellant and the deceased about a year before her death. There was also evidence conducing to show that the domestic life of the parties was not always peaceable, although in the main their relations seem to have been kind and affectionate. Appellant complains that the court erred to his prejudice in the admission of the testimony of Julia Anderson detailed by her. While there may be some doubt about the competency of this testimony, it clearly could not have been prejudicial to the appellant in view of the overwhelming testimony that a similar altercation had occurred between them at 11 o'clock on the night preceding the discovery of her dead body.

Appellant also objects to the phraseology of the first instruction, which is as follows: "If the jury believe from the evidence beyond a reasonable doubt that the defendant * * * killed Bettie Green by choking," etc., "and that such violence was not necessary and did not to the defendant at the time reasonably appear to be necessary." It is insisted that the words "at the time" were too indefinite; that they might as well have referred to the fight 12 months before, or to the difficulty in the early part of the evening, as to the time when the alleged strangulation which produced the death of the deceased occurred. The criticism is hypercritical. The time referred to is manifestly the time when the deceased was killed by choking, strangling, or suffocation.

Appellant also complains because the court instructed the jury upon the law of voluntary manslaughter and self-defense, on the ground that there was no proof on which to base such an instruction. As the evidence of the commonwealth in this case was altogether circumstantial, we think the court properly instructed the jury on every phase of the law, and on the whole case we see no error in the record to the substantial prejudice of the accused.

Judgment affirmed.

CHESAPEAKE & O. RY. CO. v. TOPPING.

(Court of Appeals of Kentucky. Jan. 12, 1904.)

CARRIER OF PASSENGERS—PASSENGER'S INJURY WHILE ALIGHTING—CONTRIBUTORY NEGLIGENCE—AGREED POINT OF STOPPAGE—CARE REQUIRED OF COMPANY.

1. A passenger who leaves his seat and goes forward to the door of the coach as the train is slowing up to stop at his station, but before it has become stationary, is not negligent per se.

2. Where a passenger and the conductor of the train agree that the passenger, having been carried past his station, shall leave the train at a water tank, the carrier is bound to use the same care for his safety in stopping at the water tank as if it were stopping at the station.

Appeal from Circuit Court, Lawrence County.

"Not to be officially reported."

Action by Thomas Topping against the Chesapeake & Ohio Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

W. H. Wadsworth, for appellant. R. T. Burns and W. S. Burns, for appellee.

O'REAR, J. Appellee was a passenger on appellant's mixed train, with a ticket from Catlettsburg, Ky., to Curnutt's Station, in Lawrence county. The conductor failed to stop the train at the last-named station, and carried appellee beyond. When the conductor's attention was called to it, he offered to take appellee back, or to return him on the next train. Appellee elected, however, to get off at a near-by water tank, where the train was to stop to take water for the locomotive. In stopping at the last-named point, and while appellee was in the act of leaving the car, he claims the train gave an unusual and very hard jerk or jolt, throwing him, and cutting off the end of his thumb. There were two trials of the case. There was not very material conflict of evidence, except upon the point whether the train had fully stopped before appellee attempted to leave the car; it being the theory of appellant that, until it had, it was contributory negligence for appellee to leave his seat and go to the door of the car, where he was hurt by the door being shut to, catching his hand. Each trial resulted in a verdict for appellee. The lower court granted a new trial from the first verdict. The court instructed the jury that "in riding on a mixed train plaintiff assumed the ordinary danger of that mode of travel, and that to entitle him to recover they must believe from the evidence that his injury was caused by more than the usual bumps and jerks of such train." Appellant asked the court to tell the jury, also, that "it was the duty of the plaintiff to remain in his seat until the train had made its customary and usual stop at the water tank, and if the jury believe from the evidence that plaintiff arose from his seat before the train had so stopped, and placed himself where he was injured, and that but for so placing himself in such position he would not have been injured, he was guilty of contributory negligence, and the jury will find for the defendant." We cannot say that, as a matter of law, if a passenger leaves his seat and goes forward to the door of the coach to leave it as the train is slowing up to stop at his station, it is per se negligence on the part of the passenger. No authority has been cited in support of the proposition. The trial court on this point told the jury that "it was the duty of the plaintiff to exercise reasonable care to protect himself from injury while leaving the defendant's cars," and that his failure to do so, if otherwise the injury would not have occurred to him, although the defendant was also negligent in the manner of stopping the train, would be such contributory negligence as required a

¶ 1. See Carriers, vol. 9, Cent. Dig. § 1334.

verdict for the defendant. We are of opinion that this instruction, taken in connection with the others given, fairly stated the law applicable to this matter. When appellant and appellee agreed that appellee was to leave the train at the water tank instead of the station to which he bought his ticket, the carrier undertook to use the same care for the safety of its passenger in making the stop at the water tank as if it were making it at the station.

The complaint of other errors does not appear to us to have substantial basis.

Judgment affirmed.

HEY v. HARDING.

(Court of Appeals of Kentucky. Jan. 19, 1904.)

ATTACHMENT—DISCHARGE—SATISFACTION ORDER—APPEAL—SUPERSEDEAS.

1. Code, § 228, provides that on discharge of an attachment defendant is entitled to a return of the property or its proceeds, and section 747 declares that an appeal shall not stay proceedings on the judgment unless supersedeas be issued. *Held*, that where an attachment under which sale had been made was discharged, and defendant entered an order of satisfaction on the sale bond before supersedeas issued, the supersedeas and appeal did not affect the validity of the payment, and on reversal plaintiff was not entitled to a rule against the obligees on the sale bond.

Appeal from Circuit Court, Harrison County.

"Not to be officially reported."

Attachment proceedings by Benjamin Hey against C. M. Harding. From a judgment refusing plaintiff a rule against the purchaser at the sale under the attachment, plaintiff appeals. Affirmed.

J. T. Simon and W. S. Pryor, for appellant.

BARKER, J. This action is here on appeal for the second time. It was instituted by appellant in the Harrison circuit court to recover of appellee, C. M. Harding, judgment on three bills of exchange aggregating \$1,623.15. Harding pleaded, among other things, that these notes were a partnership matter existing between himself and Hey; that the partnership had not been settled, and that he did not then know how the partners stood with reference to the final settlement of their accounts; and prayed that the cause be referred to the commissioner to settle the partnership. On final hearing the court below dismissed the petition without prejudice, and discharged an attachment which had been sued out by appellant against C. M. Harding, who was a nonresident of this state. From this judgment an appeal was prayed by appellant, Hey, and the case was reversed, the court delivering the opinion to be found in 53 S. W. 33, where the facts are elaborately set forth, and which obviates any further statement here. Upon the return of the case to the court below, a settlement of the partnership accounts was had, and upon final submission a judgment was rendered in

favor of appellant for the sum of \$2,598.36, with 6 per cent. interest from April 1, 1895, until paid, and the attachment sued out at the commencement of the action was sustained. This attachment had been levied upon certain horses belonging to C. M. Harding, which were sold at sheriff's sale, for sums aggregating \$4,000; Mrs. C. M. Harding, the wife of appellee, being the purchaser, and for the purchase price executed bond with surety. After the final judgment in appellant's favor, he entered a motion, June 7, 1902, for a rule against Mrs. Harding, the principal, and John Dunlap, administrator of N. M. Frazier, deceased, J. T. Blanton and B. D. Berry, sureties on the sale bond herein, requiring them to pay into the court the amount of the judgment and costs, which was overruled, from which this appeal is prosecuted.

The sale under the attachment was had prior to the entry of the original judgment on June 13, 1896. After the original judgment dismissing the petition without prejudice and discharging the attachment, C. M. Harding, on June 20, 1896, entered an order of satisfaction of the sale bond in question. Afterwards, on July 9, 1896, appellant filed the record in the clerk's office of the Court of Appeals, prayed an appeal, executed bond, and superseded the judgment. The order of satisfaction was entered, however, before judgment was superseded. Section 228 of the Code is as follows: "If a judgment be rendered in the action for the defendant, or if the attachment be discharged—first, the property attached, or its proceeds, shall be returned to him." Section 747: "An appeal shall not stay proceedings on the judgment, unless supersedeas be issued." The judgment discharging the attachment, under section 228 of the Code, entitled Harding to the return of the attached property or its proceeds. If appellant desired to prevent this from being done, it was incumbent upon him to supersede the judgment. Having failed to do this, Harding became entitled to the proceeds of the sale of the attached horses. As this was made to him before the supersedeas, the appeal or the supersedeas afterwards had no retroactive effect upon the validity of the payment. In the case of *Runyon v. Bennett*, 4 Dana, 598, 29 Am. Dec. 431, it was said: "A supersedeas suspends the efficacy of the judgment, but does not, like a reversal, annul the judgment itself. Its object and effect are to stay future proceedings, and not to undo what is already done. It has no retroactive operation, such as to deprive the judgment of its force and authority from the beginning, but only suspends them after and while it is itself effectual. A consequence of this is that whatever is done under the judgment after and while it is superseded, being done without authority from the judgment, which is then powerless, and against the authority and mandate of the supersedeas, should be set aside as improperly

and irregularly done; but that whatever is done according to the judgment, before the supersedeas takes effect, is upheld by the authority of the judgment, and is not overreached by the supersedeas."

For the reasons indicated, the judgment refusing the rule against Mrs. Harding and her bondsmen is affirmed.

NEVIAN v. HERR.

(Court of Appeals of Kentucky. Jan. 20, 1904.)

APPEAL—JURISDICTIONAL AMOUNT.

1. Where the judgment in an action makes an allowance for services to the commissioner and to an expert accountant, providing that it shall be taxed as costs, half to plaintiff and half to defendant, the judgment in that respect against defendant, as regards the question whether the amount in controversy is sufficient to allow his appeal under Ky. St. 1903, § 950, is only half the allowance.

Appeal from Circuit Court, Jefferson County, Second Chancery Division.

"Not to be officially reported."

Action by the New Albany Ice Company against John O. Nevian. From a judgment for R. W. Herr against defendant for services in the action, defendant appeals. Dismissed.

A. E. Wilson, for appellant. J. G. Sachs, for appellee.

BARKER, J. This appeal is prosecuted from the following judgment entered in the case of the New Albany Ice Company, plaintiff, against John O. Nevian, defendant, pending in the Jefferson circuit court, chancery branch, Second Division: "This action having been heard and submitted on motion of R. W. Herr, commissioner of this court, and Ben C. Weaver, expert accountant, for allowances, respectively, for their services, it is considered and ordered by the court that said Herr, commissioner, be, and he is hereby, allowed for sixty days' services, at \$3 per day, and said Weaver for forty-five days' services, at \$3 per day; said sum to be taxed as costs herein, one-half to plaintiff and one-half to defendant. To all of which the defendant excepts, and prays an appeal to the Court of Appeals of Kentucky, which is granted." The amount of the allowance to R. W. Herr under the foregoing judgment is \$180; that to Ben C. Weaver is \$135. The judgment against appellant was for the payment of one half of these respective sums. Section 950 of the Kentucky Statutes of 1903, in so far as it applies to the case in hand, is as follows: "No appeal shall be taken to the Court of Appeals from a judgment for the recovery of money or personal property, if the value in controversy be less than two hundred dollars, exclusive of interest and costs. * * * Whether the amounts allowed to the commissioner and the expert accountant be considered separate judgments, or added together, appellant's one-half thereof is less than the jurisdictional amount prescribed by the statute, and therefore the appeal is dismissed.

PIKE, MORGAN & CO. v. WATHEN.

(Court of Appeals of Kentucky. Jan. 20, 1904.)

CORPORATIONS—ACTION—ALLEGATION OF INCORPORATION—DENIAL—AFFIRMANCE—REHEARING—REVERSAL.

1. Where, in an action against a party alleged in the complaint to be a corporation, its incorporation is denied in the answer, and there is no proof offered to show its corporate capacity, a judgment for plaintiff is erroneous.

2. Where a judgment is affirmed by the Court of Appeals, and afterwards paid and settled, that fact does not prevent the court's consideration of a petition for a rehearing and reversal of the judgment for error disclosed by the record.

"Not to be officially reported."

On rehearing. Reversed.

For former opinion, see 76 S. W. 322.

NUNN, J. The appellants, by their petition for a rehearing, raise a question that was not presented on the former hearing. The appellant company was sued in the lower court as a corporation. Appellee alleged in his petition "that the Bank of Uniontown, Ky., and Pike, Morgan & Co., are and were corporations organized under the laws of Kentucky, and that S. Pike was president of both," etc. The answer reads: The defendants, the Bank of Uniontown, and Pike, Morgan & Co., deny that Pike, Morgan & Co. were ever incorporated, and deny," etc. Upon the issue of fact as to whether Pike, Morgan & Co. was a corporation, there was no proof introduced. So we have the corporation of Pike Morgan & Co. sued; in the answer, a positive denial of any such corporation; no proof on the subject; and judgment for the plaintiff. Under the pleadings, the burden was on appellee to prove that appellant was a corporation, and, having failed to make the proof, he should have failed to recover. In the case of *Soper v. Clay City Lumber Co.*, 53 S. W. 267, this court, in an opinion by Judge Paynter, said: "First. The appellee not being a corporation, it had no such existence in fact and in law as would enable the plaintiff to sue it in the name of Clay City Lumber Company, and take judgment against it." If Pike, Morgan & Co. is not a corporation, but is or was a partnership doing business under that name, then the proceeding was defective, for all suits against a partnership must be brought against the members by name. See *Parsons on Partnership*, § 375; *Story on Partnership*, § 241; and *Fox v. Grocery Co. (Ky.)* 61 S. W. 265.

Appellee, by counsel, objects to the appellant filing this petition for a rehearing, or the court's taking action thereon, for the reason, as he claims, that appellant has, since the opinion in this case was rendered and filed, paid and settled the judgment appealed from. This, if true, cannot avail appellee, for this court, in an opinion reported in 10 Bush, 216, said: "Replevying or satisfying a judgment is no waiver of the right to prosecute an appeal for its reversal."

On the return of this case, the court should

permit the parties to amend their pleadings, if they desire.

For these reasons, the judgment of the lower court is reversed, and cause remanded for further proceedings consistent with this opinion.

BOGARD v. TYLER'S ADM'R et al.

(Court of Appeals of Kentucky. Jan. 13, 1904.)

ATTACHMENT—CLAIMS BY THIRD PERSON—ESTABLISHMENT—ATTORNEY'S FEES—RECOVERY.

1. Where plaintiff claimed certain property attached as the property of another, and was successful in maintaining his claim against the attaching creditors, he was not thereafter entitled to recover attorney's fees expended in defending his right to the property in an action against the attaching creditors.

Appeal from Circuit Court, Trigg County.

"Not to be officially reported."

Action by W. A. Bogard against J. D. Tyler's administrator and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Sims & Thomas, for appellant. R. A. Burnett, for appellees.

PAYNTER, J. The facts essential to be stated, as admitted by the demurrer, are as follows: The appellant advanced William Parks certain sums of money on lumber which was to be delivered on the bank of the Cumberland river. The appellant was to have a lien upon it for the sums so advanced, and which was to be shipped for account of appellant. Part of the lumber was placed upon board of a steamer. W. J. Fuqua and John D. Tyler obtained an order of attachment against the property of Parks, and had it levied upon the lumber. The appellant became a party to the action, and claimed the lumber under his contract with Parks. The question thus raised was whether the property was subject to the attachment; in other words, whether the appellant was entitled to it, under his contract with Parks, as against the attaching creditors. The courts finally sustained the appellant's claim. He now seeks to recover by this action the amount which he expended for attorney's fees in successfully asserting his claim to the property.

The action is not based upon the attachment bond, for the order of attachment was not against the property of the appellant. It was not for maliciously obtaining the attachment, because it was not sued out against him. The money paid out as attorney's fees was in defense of his right to the property. Substantially the same question was involved in *Worthington, etc., v. Morris' Executrix*, 98 Ky. 54, 32 S. W. 269. The court there held that, when one successfully resists an action against him seeking to subject his property to the payment of another's debt, he cannot recover attorney's fees as a part of the dam-

ages for the wrongful seizure of his property under an attachment. Where the property of one is wrongfully seized under an order of attachment against another, attorney's fees paid by the person whose property was so seized are not part of the damages which are recoverable for the wrongful seizure. *Farmers' & Shippers' Warehouse Co. v. Gibbons* (Ky.) 55 S. W. 2. We are of the opinion that the court properly sustained the demurrer to the petition.

The judgment is affirmed.

WILHITE v. CONVENT OF GOOD SHEPHERD.

(Court of Appeals of Kentucky. Jan. 12, 1904.)

CORPORATION—ACTION AGAINST—INCORRECT NAME—CHANGE OF NAME—PLEADING.

1. In an action in which a defendant corporation is not correctly named, sheriff's return of service of process on it should not be quashed for that reason on an affidavit which does not show its true name; the proper method to take advantage of the defect being by plea in abatement showing the true name.

2. A petition alleged that plaintiff had been detained against her will by a corporation, and compelled by it to perform hard labor continuously from 1887 to 1900, and that it had been doing business under various names, which referred to one and the same corporation. The answer alleged that the corporation sued was not organized till 1901, and was not guilty of the acts alleged. Held, that judgment should be given for the plaintiff on the face of the pleadings; the answer failing to specifically deny the acts alleged, or that the different corporations named were one and the same.

3. An action against a corporation by its former name cannot be defeated by showing that it has changed its name, unless it clearly appears that there has been a change in its membership.

4. A change of a corporation's name does not exonerate it from liabilities previously created, if it is substantially the same concern.

Appeal from Circuit Court, Jefferson County, Common Pleas Division.

"To be officially reported."

Action by Rosa Wilhite against the Convent of the Good Shepherd. From a judgment dismissing the petition, plaintiff appeals. Reversed.

W. T. Burch, for appellant. Kinney & Fitzgerald, for appellee.

BURNAM, C. J. The appellant, Rosa Wilhite, brought this action against a corporation which she styled the "Convent of the Good Shepherd," which she alleged owned and operated a laundry on Twenty-Third and Bank streets, in the city of Louisville, and that their place of business was inclosed by a brick wall, 12 or 13 feet high; that in 1887 she was brought from Hardin county and delivered to the possession of the defendant against her will and consent, and that she had been illegally detained by defendant within its inclosure and compelled to perform hard labor for them continuously

¶ 1. See Attachment, vol. 5, Cent. Dig. § 1386.

¶ 3. See Corporations, vol. 12, Cent. Dig. § 1955.

until the 19th of April, 1900, without legal authority on their part; that she had never received any compensation for any part of the labor so performed by her, which she alleged was reasonably worth \$5,000, for which sum she prayed judgment. The summons which issued on this petition was executed on Mary Bigley, who was designated by the sheriff as the "mother superior of said convent, and chief officer." Thereupon Mary Bigley appeared in court, and filed an affidavit in which she stated that she was not at the time of the service of said process, and was not then, "the mother superior of the Convent of the Good Shepherd," or connected with it as an officer in any way. Thereupon the plaintiff filed an amended petition, making the "Sisters of the Good Shepherd of Louisville" defendant, and alleging its place of business was on Bank street, between Twenty-Third and Twenty-Fourth, in the city of Louisville; that their name appeared in the city directory as the "Convent of the Good Shepherd"; that defendants had not complied with the law in having their corporate name placed over its door or upon its billheads, or had any one designated with the Secretary of State upon whom process might be served; that defendants had been and were doing business under the name of the "Convent of the Good Shepherd" and "St. Xavier Laundry"; that the convent of the Good Shepherd and the Sisters of the Good Shepherd of Louisville and the St. Xavier's Laundry were one and the same corporation; and that Mary Bigley was the mother superior thereof, and its chief officer and agent—and reaffirmed all the averments of the original petition. Thereupon Mary Bigley again appeared in court, and made affidavit that she was not at the date of the service of process upon the amended petition the mother superior or chief officer of the Sisters of the Good Shepherd of Louisville, and moved the court to quash the officer's return upon the process, which was sustained. To which the plaintiff excepted, and thereupon stated that the true corporate name of the institution doing business on Bank street, between Twenty-Third and Twenty-Fourth, was the "Sisters of the Good Shepherd, Bank Street, Louisville, Kentucky," of which Mary Bigley was the chief officer and mother superior. The appellee then filed an answer in which it alleged that the Sisters of the Good Shepherd, Bank Street, Louisville, Ky., was incorporated on the 13th of May, 1901; that it was not theretofore a corporation, or organized as such, and was not guilty of the acts complained of in the original and amended petitions. Thereupon plaintiff moved for judgment upon the face of the record, which the court overruled, and instead thereof entered a judgment dismissing plaintiff's petition, and from that judgment this appeal is prosecuted.

When a defendant corporation is not correctly named in an action against it, it can

only be taken advantage of by a plea in the nature of a plea in abatement; and, to make this plea good, it is bound to give its true name, so that plaintiff's mistake may be corrected by amendment. See *En. of P. & P.* 68; 1 Chitty on Pleadings, 447; *L. & N. R. Co. v. Hall*, 75 Ky. 131. As the affidavit of Mary Bigley, the chief officer of appellee, on the motion to quash the original return made by the sheriff in this case, and also in the process which issued upon the first amended petition, failed to comply with this requirement of good pleading, the trial court erred in quashing the sheriff's return upon the summons which issued upon the original and amended petitions.

We think the trial court also erred in overruling plaintiff's motion for judgment upon the face of the record, and in dismissing her petition, after appellee had filed its answer in the name of the Sisters of the Good Shepherd, Bank Street, Louisville, Ky. This answer does not specifically deny the allegation of the original and amended petitions that it had detained the plaintiff and compelled her to perform hard labor for them continuously for nearly 14 years against her will, and without legal authority, or that it had been doing business under the name of the Convent of the Good Shepherd and the Sisters of the Good Shepherd, Louisville, and as St. Xavier's Laundry.

Our attention is called to an act of the General Assembly approved January 29, 1867 (1 Acts 1867, p. 155, c. 1148), incorporating the Sisters of the Good Shepherd of Louisville, and conferring upon them the same powers as upon the Sisters of the Good Shepherd, Bank Street, Louisville, Ky., as disclosed by its charter filed with its answer in this case. The original and amended petitions, taken together, charge, in substance, that the defendant, whether operating under the name of the "Convent of the Good Shepherd," or "Sisters of the Good Shepherd, Louisville," or "Sisters of the Good Shepherd, Bank Street, Louisville," or "St. Xavier's Laundry," is in reality one and the same corporation. The law is well settled that an action against a corporation by its former name cannot be defeated by showing that it had changed its name, unless it also clearly appears that there has been in fact a change in its membership. Nor does such change exonerate it from liabilities previously created, if in fact it is substantially the same concern. See section 560, Ky. St. 1903; *McGregor v. Fuller Implement Co.*, 72 Iowa, 143, 33 N. W. 464; *Welfley v. Shenandoah Iron, etc., Co.*, 83 Va. 768, 3 S. E. 376; *Kansas, etc., R. Co. v. Smith*, 40 Kan. 192, 19 Pac. 636.

For reasons indicated the judgment dismissing plaintiff's petition is reversed, and the cause remanded, with instructions to allow both parties to amend their pleadings, if they so desire, with a view of pleading to an issue, and for other proceedings consistent with this opinion.

JABINE et al. v. SAWYER et al.

(Court of Appeals of Kentucky. Jan. 15, 1904.)

WILLS—CONSTRUCTION—DEFEASIBLE FEE—
CONTINGENT REMAINDER.

1. Testator's will gave his wife the income of his property for life, and provided that at her death it should be divided between the children, and the real estate be held by each of the children, and that at their death it should descend to their children. *Held*, that the children of testator, having survived the widow, upon her death became vested, not with an indefeasible fee, but with a life estate, with remainder in fee to their children; the contingency being whether they died childless during the life of the widow.

Appeal from Circuit Court, Daviess County.

"Not to be officially reported."

Suit between James S. Jabine and others and C. A. Sawyer and others. From the decree, Jabine and others appeal. Reversed.

Joseph T. Noe and J. A. Dean, for appellants. Wilfred Carico, for appellees.

BARKER, J. James S. Sawyer died testate at his residence, in Owensboro, Daviess county, Ky. His will, which was admitted to probate, is as follows:

"Owensboro, Feb. 21st, 1893—I, James Sawyer, of Owensboro, Ky., being as I believe of sound and disposing mind and realizing my time here on earth must necessarily be short, do make and declare this to be my last will and testament.

"Item 1st. After my funeral expenses and other few debts are paid, and by agreement with my wife and desiring that she should enjoy the same comforts which she has received during my lifetime, I hereby bequeath to her during her lifetime or so long as she remains my widow the income of all my property, real, personal and mixed, to be used by her to support herself and our children, assuming she would prefer this to the one-third of my estate allowed by law.

"Item 2nd. At her death it is my wish that said property shall be equally divided, share and share alike, amongst our own children and little grandson, James S. Jabine, if then surviving, or to those who may survive in equal shares. I refrain from making any division of the property now, as values of same may be altogether different at time of apportionment, and not wishing there should be any partiality shown, devise that the division be made at their mother's death and when this shall be done it is my wish, so far as the real estate goes, it shall be given to them and held by each one of my children as well as my grandson as separate estate, and to be free from the control (so far as my daughters are concerned) from any husband they may have, for their support and that of their children, and at the parents' death descend to said children.

"Item 3rd. And it is also my wish that the real estate my son and grandson shall acquire by this instrument shall be devised for their own use and that of their children also

and it is understood that in the event of any of our children or grandson dying without issue their share or shares of my estate shall be divided equally amongst those remaining. Should all die, however, which is not at all probable, it is my wish then that such property as may be left shall go to my own family in England or wherever they may be.

"Item 4th. I give to my wife authority, on the advice of her best friends, in the event of its appearing that any of my present investments can be substituted for others offering greater inducements, that she may make a change whenever that is best, always, of course, looking fully to safety of principal.

"This will being written in my own handwriting and in testimony whereof I have signed my name the above day and date.

"[Signed]

James Sawyer.

"All other disposition of my property previously made is hereby cancelled.

"[Signed]

James Sawyer."

This action was instituted to obtain a construction of this will. The widow is now dead, and neither of his children, nor his grandson, James S. Jabine, have any children; and the question is what estate these named devisees take under the will. The cardinal rule for the construction of wills is to ascertain and carry into effect the intention of the testator, and as these instruments are frequently written under the stress of illness on the part of the testator, and often, of necessity, by persons unskilled in the drafting of legal documents, it results that the courts, in order to reach the intention of the testator, place a popular, rather than a technical, construction upon the meaning of the words used, and, viewing the instrument as a whole, seek to effectuate his intentions by giving a reasonable construction to every part.

The court below "adjudged that the testator, James Sawyer, by his will, invested his children, C. A. Sawyer, Virginia Sawyer, and Ann Lockett, and his grandson, J. S. Jabine, with a defeasible fee, subject to the life estate of his widow in all the real estate owned by the testator, and that the period of defeasance was the death of his widow. It is further adjudged that the said three children and grandson of testator, having survived the widow and life tenant, upon her death became vested with an indefeasible fee in all the real estate owned by the testator, taking a separate estate therein." In this conclusion we think the learned chancellor erred. There is no dispute that the testator's widow took a life estate, but, it seems to us, considering the instrument as a whole, that, instead of a defeasible fee, the children and the grandson of the testator took only a contingent remainder for life, with remainder in fee to their children; the contingency being whether they died childless during the life of the testator's widow. After the death of the first life tenant, the estate of the children and grandchildren became vested. The position that the children and grandson took a defeasible

ble fee is not upheld by the line of authorities cited, wherein the testator devised his estate to his "children" and "to their heirs," or to "the heirs of their body," and wherein this court held that the language used vested the children with a fee-simple estate. Ordinarily the words "heirs" or "heirs of their body" are words of limitation, and by their own force convey the idea of a fee-simple estate. On the contrary, the word "children," when used in a like connection, is a word of purchase, and shows an intention to invest the first devisee with a particular estate, with remainder over to the "children" in question. We do not mean to say that this is an unalterable rule as to these words. There are cases when, in order to effectuate the manifest intention of the testator, the word "children" is construed as if the word "heirs" was used. *Williams v. Duncan*, 92 Ky. 125, 17 S. W. 330. But unless it is necessary to effectuate the manifest intention of the testator after a survey of the whole will, the word "heirs" is a word of limitation, and the word "children" is a word of purchase.

By the second item, the testator, after providing that his property shall be divided after the death of his widow, because of the uncertain values, and expressing the desire for an impartial division to be made between his children and grandson, uses this language: "It is my wish, so far as the real estate goes, it shall be given to them [children and grandson] and held by each one of my children, as well as my grandson, as separate estate, and to be free from the control (so far as my daughters are concerned) from any husband they may have, for their support and that of their children, and at the parents' death descend to said children." In the case of *Calmes v. Eubank* (Ky.) 40 S. W. 669, the testator conveyed certain real estate to his daughter, and at her death to descend to her children. It was held that the daughter took an estate for life, with remainder to the children in fee at her death. In the case of *Bedford v. Bedford's Adm'r* (Ky.) 35 S. W. 926, real property was devised to the testator's daughter; the property to go to her child or children at her death. It was held that the daughter took a life estate, with remainder in fee to her child or children. This is a very instructive case, as affording an apt illustration of the difference between the use of the words "heirs" and "children" in wills. The testator left other real estate, than that above mentioned, to his daughter Elizabeth Bedford, and her heirs forever. This language was held to invest the daughter with a fee-simple estate in the devised property.

We conclude, then, that since the death of the testator's widow his children and grandson have a vested life estate in the devised real property, with remainder over in fee to their children.

For the reasons above indicated, the judgment is reversed for proceedings consistent with this opinion.

MOORE v. MOORE.

(Court of Appeals of Kentucky. Jan. 15, 1904.)

WIDOW'S HOMESTEAD—ABANDONMENT—CONDITIONAL SALE—PAROL EVIDENCE—CONTRADICTION OF DEED.

1. Where a widow agrees with her tenant that if she has the right to sell the land which constitutes her homestead she will do so, and makes him a deed under that agreement, it does not constitute an abandonment of the homestead.

2. Parol evidence is admissible, as against creditors, to show that a deed by a widow of her homestead to a tenant was made under an agreement that she would sell to him if she had the legal right to do so.

Appeal from Circuit Court, Franklin County.
"Not to be officially reported."

Action for the settlement of the estate of J. W. Moore. From a decision and judgment that the widow, Mary E. Moore, had abandoned her homestead, she appeals, making L. P. Moore appellee. Reversed.

J. A. Violet, for appellant. Wm. Cromwell, for appellee.

PAYNTER, J. The appellant, Mary E. Moore, is the widow of J. W. Moore, deceased, and as such was entitled to a homestead in the small tract of land left by him, with about \$500. This action was instituted to settle decedent's estate, and pending the action the widow, as claimed by the creditors, made an unconditional sale of the homestead, and had thus abandoned and forfeited it. Whether she did, is the question for consideration.

If she had made an unconditional sale of her homestead and surrendered possession thereof, she would have forfeited it. *Freeman, etc., v. Mills, etc.* (Ky.) 39 S. W. 826. One Gorin occupied the land as a tenant, and the widow agreed with him that if she had the right to sell the land she would do so for a certain consideration. She made him a deed with that agreement, and, if it was accepted (and it was denied that it was), it was done with the agreement above stated. This transaction did not show an abandonment of the homestead, but that she was willing to do so if she had the right to vest another with title thereto. Under such circumstances Gorin continued her tenant, unless she had the right to sell and vest him with title to the homestead, and this right did not exist. Under the statutes the widow was entitled to the homestead, whether she occupied it by herself or tenant. An unconditional sale of the homestead furnishes evidence of an abandonment of it. When the sale is conditional, there may or may not be an abandonment of the homestead, depending upon the happening of some event. Gorin and the widow agree as to the contract which they made in regard to the land and the deed in question. It is no contradiction of the terms of the deed to show the contract with reference to its execution and lodgment in the clerk's office. Appellee does not claim under the deed, and is not a party thereto. Neither can he complain because the appellant

shows such a state of facts as do not work a forfeiture to her homestead.

The judgment is reversed for proceedings consistent with this opinion.

HOWARD v. McNEIL.

(Court of Appeals of Kentucky. Jan. 13, 1904.)

PROMISE TO PAY—CONSIDERATION.

1. A promise given, after the making of a contract of sale, by the purchaser, to pay the vendor a sum in addition to the consideration mentioned in the contract, and which was not considered in fixing the price, is without consideration.

Appeal from Circuit Court, Laurel County.

"Not to be officially reported."

Action by W. M. Howard against Jonathan McNeil. Judgment for defendant. Plaintiff appeals. Affirmed.

Sam C. Hardin, for appellant. W. R. Ramsey, for appellee.

PAYNTER, J. A. P. Settle, as assignee of the Queen City Coal Company, sold certain coal mining property to appellant for \$2,550, for which he executed three notes, for \$850 each, payable to the trustee, with appellee, McNeil, and B. F. Howard as sureties. Some payments were made on the notes by the appellant and McNeil, when appellant sold and transferred to McNeil certain coal mining property, etc., which contract of sale was evidenced by a writing in which the consideration of the sale was recited as follows: "In consideration that J. McNeil will pay off the notes executed by me to A. P. Settle as Trustee of America Howard, one note executed by me to A. L. Howard or his son, also one note to J. G. Phillips and Company and all accounts I owe J. & E. S. McNeil or J. McNeil pr Star Coal Company." Previous to the time the property was sold to appellee, the appellant had paid at one time \$210 on the debt. By this action he seeks to recover that amount and interest, (1) upon the idea that he did not recollect this payment at the time he sold to McNeil; (2) that McNeil, subsequent to the purchase of the property, promised to reimburse him for the sum so paid and interest.

It will be observed that it is not recited in the contract that McNeil was to pay appellant any part of the contract price, but that he assumed to pay to others, as a consideration for the property, certain debts for Howard, particularly specified in the contract. The language employed in the contract excludes the idea that McNeil was to pay anything except such debts as were specified in the contract. It is fairly inferable from the testimony of appellant that McNeil at the time of the purchase did not agree to reimburse him the sum in question, because he said that he had forgotten having paid it until long after the contract of sale was made. This shows that it was not part of the

consideration for the sale of the property that McNeil was to reimburse the appellant the sum claimed. It therefore was no part of the consideration for the sale of the property, nor was it estimated in fixing the contract price in its purchase. This being true, no subsequent promise of McNeil (if one was made) could be enforced, because there was no consideration to uphold it. This view obviates the necessity of discussing the question as to whether such a promise was made, or not, after the sale of the property.

The judgment is affirmed.

SPECHT v. LOUISVILLE WATER CO.

(Court of Appeals of Kentucky. Jan. 22, 1904.)

WATER COMPANY—FURNISHING WATER TO CONSUMER—REASONABLE REGULATIONS.

1. A water company cannot be compelled to violate its regulations under which it furnishes water on the meter plan, but with reference to only one building or residence, by furnishing water to one consumer through one meter for his place of business, residence, and four tenant cottages.

Appeal from Jefferson Circuit Court, Jefferson County, Chancery Division.

"To be officially reported."

Suit by William Specht against the Louisville Water Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Lane & Harrison and H. M. Lane, for appellant. Burnett & Burnett, for appellee.

NUNN, J. The purpose of this suit was to obtain a mandatory injunction against the appellee, the Louisville Water Company, requiring it to deliver by and through a meter belonging to and constructed by it in the month of May, 1901, opposite the lot of appellant, into the pipe of the appellant on his premises, water with which to sprinkle and clean the streets in front of his saloon, hall, residence, and four cottages, all located upon a lot of land owned by appellant; the saloon, hall, and residence occupied by appellant, and the four cottages by his tenants. The appellant contends that appellee, as a quasi public corporation, should be compelled to furnish him water for the uses named at the price he had been paying for eight or nine years, to wit, 10 cents per day for not exceeding 700 gallons per day; and if he used exceeding that amount he was to pay in proportion. He further contends that, having received and paid for the water under the meter system, he was entitled to use it as he saw fit, or at least for the benefit of his tenants. Appellee contends that it had the right to establish under its charter reasonable rules and regulations in the conduct of its business in supplying all persons along the line of its mains without discrimination, and that all persons along the line of its mains were entitled to the same service at uniform rates; that, having such right, it adopted two methods for its customers to purchase

water—one the assessment and the other the meter plan. The assessment plan is estimated by the number of rooms in the house, the number of bath tubs, sinks, closets, faucets, and the size and depth of the lot upon which the building is located. The meter plan is to measure the amount of water and charge for the amount used. In either plan the reference is to one building or residence. It appears from this record without material contradiction that appellant, in the year 1901, received water from the appellee under the meter system, and that a hose box was situated in front of or by his saloon, to which he attached his hose for his individual use, and also attached a pipe under the ground and near the bottom of the hose box (this seems to have been attached without the knowledge of the water company), and extended this pipe along in front of and into the yards of his four cottages, and attached a water faucet about 18 inches from the ground in each cottage yard within easy access to the inmates thereof and to the general public. In the year 1902 the appellee refused to renew the contract with appellant and furnish him water that year unless he would detach the pipe that extended along the front of the four cottages and agree not to furnish water from this hose box to his tenants in the cottage, it having previously extended from its main service pipes into the yards of these cottages. Appellant refused to accede to this demand, and instituted this action. The lower court refused appellant the injunction, and dismissed his petition.

We are of the opinion that he had no right to connect the pipes to his cottages and supply them with water from the service pipe to his house for dwelling purposes, and we think the rule of the company complained of by appellant is a reasonable one. There is no allegation in the pleadings nor evidence showing that appellee had violated its rules and regulations in any particular, or had discriminated against appellant in any manner. The substance and effect of his contention is that it would not violate its rules and furnish him and his tenants all the water he desired through this one hose box by the meter plan; in other words, to discriminate in his favor.

Wherefore the judgment is affirmed.

GARDNER v. T. J. WINTER & CO.

(Court of Appeals of Kentucky. Jan. 20, 1904.)

SALES—SEED—FAILURE OF CROPS—BREACH OF WARRANTY—COMPLAINT—CONSISTENCY OF PARAGRAPHS—QUESTION FOR JURY.

1. In an action against dealers in seeds for damages for failure of plaintiff's millet crop, two paragraphs of complaint, one counting on breach of express warranty, as to the variety, and the other on breach of implied warranty as to the quality of the variety ordered, are not inconsistent.

2. Where plaintiff, relying on his own judgment and past experience, bought of defend-

ants, who were dealers in seeds, a specific article, known as "Western German Millet Seed," there was no implied warranty that the seeds would germinate, and produce good crops, nor that they were reasonably fit for the purpose to which they were to be applied.

3. Where plaintiff, relying on his own judgment and past experience, ordered of defendants, who were dealers in seeds, a specific article, known as "Western German Millet Seed," the question, in an action for damages for breach of warranty, whether the seed sold to him actually belonged to that variety, is for the jury.

Appeal from Circuit Court, Mason County.
"To be officially reported."

Action by J. D. Gardner against T. J. Winter & Co. From a judgment for defendants, plaintiff appeals. Affirmed.

A. D. Cole, for appellant. Clarence L. Sallee and C. D. Newell, for appellees.

BURNAM, C. J. The appellant, J. D. Gardner, brought this action against the appellees, T. J. Winter & Co., for a breach of warranty and deceit in the sale of 18 bushels of Western German millet seed. In the first paragraph of his petition he relies upon a warranty by the defendants that the seed sold to him was Western German millet seed, suitable for seed purposes; and alleges that the seed was not of the quality warranted, and that, in consequence thereof, his crop grown therefrom was worthless, entailing upon him a loss of \$600. In the second paragraph he alleges that the defendants fraudulently represented that the seed was of the best quality of Western German millet seed, suitable for seed purposes, when in fact it was not Western German millet seed, or suitable for sowing, and that the defendants knew it was not—alleging special damages as in the first paragraph. The defendants, in their answer, admit that they sold to the plaintiff 18 bushels of Western German millet seed, but deny the alleged warranty and deceit. The trial resulted in a verdict and judgment for the defendants. The plaintiff proved by a number of witnesses that his crop was almost an entire failure, and that this was not due to any defect in the preparation of the ground to receive the seed, or in its subsequent cultivation. He testified that he had had large experience in the growth and cultivation of Western German millet seed, and that he had uniformly previous to this time had good success with it; that when he purchased the seed from defendants he asked for Western German millet; that the defendants showed him two different kinds of millet seed, one known as "Southern German Millet," and the other as "Western German Millet," and advised him to purchase Southern millet, which was higher in price, but that, relying upon his previous experience with Western German millet, he decided to buy that seed; that the defendants, not having enough of this seed on hand, ordered from a wholesale seed house in Cincinnati, and had it delivered to him in the packages in which

¶ 1 See Sales, vol. 43, Cent. Dig. § 775.

it was put up by the firm in Cincinnati. The testimony of the defendants was to the effect that there were two qualities of German millet seed—one grown in the South, which was raised almost entirely for seed purposes; that this seed was cultivated in hills like corn; and that the seed was sent west and resown, and produced what was known to the trade as Western German millet seed to distinguish it from the genuine southern seed; that, after the Western German millet seed had been resown for several years, it had a tendency to run out and deteriorate, so that it did not produce so luxuriantly as the southern seed. They also introduced testimony to the effect that the seed had germinated all right, but that early in June a severe drouth set in, which lasted until November, and that this prevented the millet, a hard crop on land, from growing on thin land like the plaintiff's. At the conclusion of the testimony plaintiff asked the court to instruct the jury on the warranty set out in the first paragraph of his petition, and also on the alleged deceit practiced upon him set out in the second paragraph. The court thereupon gave to the jury the following instructions: "(1) The court instructs the jury that if they believe from the evidence that the defendants, Winter & Co., sold to plaintiff, Gardner, a quantity of millet seed as Western German millet seed, and that said seed was not Western German millet seed, then they will find for plaintiff such sum as they may believe from the evidence plaintiff has been damaged by reason of the seed not being Western German millet seed, not exceeding the sum of \$600, the amount claimed in the petition." "(3) If the jury believe from the evidence that the seed sold and delivered by defendant to plaintiff was of the kind and quality of millet seed commercially known under the description of 'Western German Millet Seed,' then they will find for the defendants."

The first question for decision is the refusal of the trial court to require plaintiff to elect whether he would proceed upon the express or implied warranty relied upon in the first and second paragraphs of the petition. This motion, we think, was properly overruled, as there is nothing inconsistent in the pleas, and we know of no rule of pleading which would estop the plaintiff from relying on both in a suit for damages based upon the same transaction. It is contended for appellant that he was entitled to an instruction based upon the alleged implied warranty set up in the second paragraph of his petition, on the ground that a manufacturer or dealer who sells an article at a fair market price, knowing the purchaser designs to apply it to a particular purpose, impliedly warrants it to be fit for that purpose. The appellant did not testify to the allegations contained in both paragraphs of his petition that the defendants warranted and represented the seed to be "fit and suitable for seed purposes" and for sowing on his land, but only that the seed was warranted or represented

by the defendants to be Western German millet seed. The general rule applicable to the question is well settled by all the leading text-writers. In 2 Benjamin on Sales, §§ 987, 988, the rule is stated as follows: "Where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term of warranty that it shall be reasonably fit for the purpose to which it is to be applied. * * * But when a known, described, and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser, for a particular purpose, still, if the known, defined, and described thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer." In Leake on Contracts, 404, the same rule is stated thus: "If an order be given for the manufacture or supply of an article to satisfy a required purpose, that purpose, and not any specific article, being the essential matter of the contract, the seller is then bound, as a condition of the contract, to supply an article reasonably fit for the purpose, and is considered as warranting that it is so. But if an order be given for a specific article of a recognized kind or description, * * * and the article is supplied, there is no warranty that it will answer the purpose described or supposed, although intended and expected to do so." 1 Parson on Contracts, 586, 587, states the rule thus: "If the thing be ordered of a manufacturer for a special purpose, and it be supplied and sold for that purpose, there is an implied warranty that it is fit for that purpose. This principle * * * must be limited to the cases where a thing is ordered for a special purpose, and not applied to those where a special thing is ordered, though this be intended for a special purpose." Lawson on Contracts, § 57, subsec. 8, states the rule as follows: "Where goods are sold for a particular purpose (that purpose, and not any specific article, being the essence of the contract), there is an implied warranty that the article is reasonably fit for that purpose." There is no evidence in this case of any intended fraud or deceit by the defendants in the sale of the seed to plaintiff. On the contrary, it is quite clear that, relying upon his own judgment and past experience, plaintiff bought of the defendants a specific article, known and recognized as "Western German Millet Seed." Under these circumstances there was no implied warranty that the seeds would germinate, and produce good crops, or that they were reasonably fit for the purpose to which they were to be applied. The only issue between the parties was whether the seed sold actually belonged to the variety of Western German millet seed. The instructions fairly submitted this issue to the jury. Whether the failure in plaintiff's crop was

due to defective seed or was to be attributed to the poverty of his soil, the scarcity of rain, or the other innumerable risks which attend the sower, is hard to determine. Plaintiff's experience is aptly described in the parable of the sower and the seed: "Behold, a sower went forth to sow; and when he sowed, some seeds fell by the way side, and the fowls came and devoured them up; some fell upon stony places, where they had not much earth; and forthwith they sprung up, because they had no deepness of earth; and when the sun was up, they were scorched; and because they had no root, they withered away."

For reasons indicated, the judgment is affirmed.

OWENS et al. v. MERIDETH et al.

(Court of Appeals of Kentucky. Jan. 21, 1904.)

ADVERSE POSSESSION—PEREMPTORY INSTRUCTION—PROPRIETY.

1. Where, in an action to recover land, eight witnesses testify without contradiction or questioning of their credibility to defendant's adverse possession for more than 15 years, it is no error, though perhaps irregular, to peremptorily instruct for defendant.

Appeal from Circuit Court, Edmonson County.

"To be officially reported."

Action by Maria W. Owens and others against J. H. Merideth and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

J. S. Lay, Wm. Cromwell, Wright & Logan, and Wilkens & Lay, for appellants. J. S. Wortham, for appellees.

BARKER, J. The appellants instituted this action to recover of the appellees a boundary of land situated in Edmonson county, Ky., alleging themselves to be the owners and entitled to the possession of it, and that appellees were in possession, and wrongfully withholding it from them. Appellees denied the title of appellants, and pleaded title in themselves by adverse possession. Upon trial of the case appellants introduced in evidence deeds and oral testimony, which, in our opinion, established a prima facie title in them, from the commonwealth of Kentucky, to the land in question. At the close of appellants' evidence the appellees moved the court for a peremptory instruction to the jury to find for them as in case of nonsuit. This motion was evidently based upon some objection to one or more of the deeds constituting appellants' title, but the record does not show definitely which deed, or the objection thereto. The court declined to rule upon the motion until the close of the testimony, whereupon appellees (who were the defendants below) themselves testified, and also John Hester, George Sanders, Ples Priddy, Harding Sanders, John Sanders, and Thomas

S. Sanders, that the appellees, and those under whom they claimed, had been in the actual, continuous, and adverse possession of the land in controversy, residing upon and claiming it as their own to a well-defined marked boundary, against all the world, for more than 15 years next before the institution of this action. After the introduction of this evidence the court sustained appellees' motion for a peremptory instruction. Of this action on the part of the court appellants are complaining.

Having reached the conclusion that appellants, by their evidence, made out a prima facie title from the commonwealth of Kentucky to the land in question, it only remains to decide whether or not the court erred in giving the peremptory instruction in favor of appellees at the close of all the testimony in the case. It may be conceded that appellants were entitled to a verdict in their favor, unless appellees made out a sufficient title by adverse possession. This they undertook to do by introducing some eight witnesses, who, without contradiction, testified to facts which showed that appellees had title to the land by adverse possession. No effort was made by appellants to disprove this testimony, or to in any way call in question the credibility of the witnesses. It would have perhaps been more regular for the court to have submitted the question of appellees' title by possession to the jury, based upon their belief in the truth of the evidence; but where, as in this case, the evidence is all one way upon a given question, and the number of witnesses so great as to preclude the suggestion either of the falsity of the testimony or mistake on the part of the witnesses, the error of the court in assuming the truth of the testimony and giving an instruction based thereon, if error at all, is not of sufficient magnitude or importance to warrant a reversal of the case based thereon. In the case of Turpin's Heirs v. McKee's Ex'rs, 7 Dana, 301, upon a question similar in principle to that in hand, this court said: "Although, therefore, the instruction would have been more formally correct if it had submitted the assumed facts hypothetically to the jury, and based the conclusion upon their being found true by the jury; yet, as the facts were clearly proven, and there was no countervailing testimony, the plaintiffs were not prejudiced by the assumption of the facts on the part of the court." In the case of Chiles v. Boothe et al., 3 Dana, 566, it is said: "There are many cases in which the court may instruct the jury, upon the whole evidence, to find for one or the other party; and, although such a practice is not to be encouraged, yet when a verdict found under such instruction is conformable to law, the evidence, and justice of the case, it is rarely disturbed. The instruction in the present case, considering the state of the evidence, was equivalent to a general instruction to find for the defendant, and, there being no

contrariety of evidence with regard to the nature and effect of the arrangement between Allen and Chiles, which is in fact the decisive, if not the single, question upon which the whole controversy depends, this was a case, if there is any such, in which the court had a right to pronounce at once the conclusion of law upon the evidence in the form of the peremptory instruction." And in the case of *Evans' Adm'r v. Spillman*, 6 B. Mon. 334, the rule on this question was thus announced: "The jury, then, having been bound to find the facts on which the efficacy of the five-years adverse possession by the defendant depended, the assumption of those facts by the court, or the failure to submit them to the jury, does not constitute such an error in the instruction, nor so affect the verdict found under it, as to furnish ground for a new trial." In the case at bar, the testimony for appellees on the question of their title by adverse possession, considering the number and evident credibility of the witnesses, having been so overwhelming, and there being no countervailing evidence whatever on this point, the jury were bound to have found this crucial question in their favor; and, this being true, we think the court did not err in giving the peremptory instruction.

Wherefore the judgment is affirmed.

WASHINGTON LIFE INS. CO. v. GLOVER.

(Court of Appeals of Kentucky. Jan. 7, 1904.)

LIFE INSURANCE—LAPSED POLICY—SURRENDER VALUE—LAW OF WHAT STATE APPLIES—CREDIT TO LAWS OF ANOTHER STATE.

1. In a life policy providing that, though it shall be forfeited for the nonpayment of any premium, yet, on demand made, with the surrender of the policy, within six months after the lapse, the company will issue a paid-up policy, time is not of the essence of the contract.

2. Where a life policy provides that, though it lapse for nonpayment of a premium, yet, on demand within six months, the company will issue a paid-up policy, a demand within two years after such a lapse is within such reasonable time as to require the issuance of the paid-up policy, though the company after six months distributed the reserve to continuing policy holders.

3. The refusal of the courts of the state to adopt that construction of a life insurance contract made in the state by a foreign insurance company which is adopted in the state where the company is incorporated is not a failure to give full faith and credit to the laws of that state, within the federal Constitution.

4. A statute of another state requiring a surrender value on lapsed life policies does not apply to a contract in Kentucky by a company incorporated in the foreign state.

5. Where a life insurance contract made in Kentucky provides, on its forfeiture for nonpayment of a premium, for a paid-up policy, on demand therefor within six months, for as many twentieths of the face of the original policy as there have been premiums paid, and that this is agreed on as full compliance with a statute of the state in which the insurance company is incorporated, which statute is then

copied, and which conflicts with the provision, the operation of the statute on the contract is excluded by the terms of the contract.

Appeal from Circuit Court, Jefferson County, Chancery Division.

"Not to be officially reported."

Action by Walter E. Glover against the Washington Life Insurance Company to compel the issuance of a paid-up policy. From a judgment sustaining a demurrer to the answer, defendant appeals. Affirmed.

Hazelrigg & Chenault and Grubbs & Grubbs, for appellant. Leopold & Pennebaker, for appellee.

BARKER, J. On the 13th day of July, 1896, the appellant issued to appellee, in Louisville, Ky., a policy on his life for the sum of \$7,000. Among other things, this contract contained the following:

"This policy is issued and accepted by the assured upon the conditions and agreements printed by the Company on the inside of this policy, and such conditions and agreements are referred to and accepted by the assured as part of this contract, and it is agreed that they shall have the same force and effect as if printed in full over the signature hereto."

One of the stipulations thus agreed to is this:

"(3) Notwithstanding this policy shall lapse and become forfeited for the nonpayment of any premium upon the day which it falls due, according to the terms thereof as hereinbefore contained, yet, after the payment of three annual premiums, and upon demand made with surrender of this policy within six months after such lapse by such nonpayment, this company will issue a non-participating paid-up policy for as many twentieth (20th) parts of the original amount hereby insured as there shall have been complete annual premiums paid; and the paid-up insurance purchased by such surrender of this policy shall be payable at the same time, and under the same conditions, except as to payment of premiums, and the return of premiums, and the guarantee of the full reserve as a cash value, as the original policy.

"The above is determined and agreed by the Company and the assured as full compliance with the terms of chapter 690 [page 1830] of the laws of New York of 1892."

In addition to the foregoing, there was printed on the inside of the policy what purported to be a part of the statutes of New York concerning the surrender value of lapsed or forfeited policies, containing provisions materially variant from the agreement made between the contracting parties, the terms of which is as follows:

"Sec. 88. Surrender Value of Lapsed or Forfeited Policies: Whenever any policy of life insurance issued after January first eighteen hundred and eighty, by any domestic life insurance corporation, after being in force three full years, shall, by its terms,

lapse or become forfeited for the nonpayment of any premium or any note given for a premium or loan made in cash on such policy as security, or of any interest on such note or loan, the reserve on such policy computed at the rate of four and one-half per cent. per annum shall, on demand made, with surrender of the policy within six months after such lapse or forfeiture, be taken as a single premium of life insurance at the published rates of the corporation at the time the policy was issued and shall be applied, as shall have been agreed in the application or policy, either to continue the insurance of the policy in force at its full amount so long as such single premium will purchase temporary insurance for that amount, at the age of the insured at the time of lapse or forfeiture, or to purchase upon the same life at the same age paid-up insurance payable at the same time and under the same conditions, except as to payment of premiums, as the original policy. If no such agreement be expressed in the application or policy, such single premium may be applied in either of the modes above specified at the option of the owner of the policy, notice of such option to be contained in the demand hereinbefore required to be made to prevent the forfeiture of the policy." Laws 1892, p. 1969, c. 690.

Appellee paid three annual premiums, and then made default. About two years after default of payment, appellee instituted this action in equity to enforce the issuance to him by appellant of a paid-up policy for three-twentieths of the full amount of the stipulated insurance, or \$1,150, notwithstanding he had not complied with the terms of the contract to surrender the policy within six months after the default in payment.

The appellant filed an answer in four paragraphs:

(1) It denies that demand for paid-up insurance was made within a reasonable time, and alleges that the demand made was unreasonable.

(2) Treating time as of the essence of the contract, it urges the failure to surrender the policy and make demand within six months after the lapse, in bar of the action.

(3) It alleges that, under its charter and contract, appellant must annually set a reserve fund out of its income, ascertain its net profits, determine who of the policy holders are entitled to share in its profits, and distribute profits among its persistent policy holders; that appellee did not present his policy and make demand for a paid-up policy until long after the fund with which such paid-up policy was to have been carried had been distributed among the persistent policy holders; that, by this laches on the part of appellee, appellant had been put in a position to be injured by having to issue and carry the paid-up policy in question, and therefore time was of the essence of the contract.

(4) That appellant is a New York corporation, organized under its laws, and necessarily conducting its business with reference to its charter and the statutes of its home state, and setting forth the statute of the state of New York in reference to forfeited and lapsed policies before alluded to, as governing the contract in question.

The trial court sustained a general demurrer to all of these paragraphs, and, appellant declining to plead further, judgment was rendered as prayed in the petition. From this judgment, this appeal is prosecuted.

This court has often construed the particular provisions of the policy involved in this action; uniformly holding that time is not of the essence of the contract, and that, after a failure to make payment of the stipulated premiums, if the insured surrenders his policy and makes demand within a reasonable time—fixed by the court to be five years—he will be entitled to receive a paid-up policy. The last adjudications on this question are *Mutual Life Insurance Company of Kentucky v. O'Neil*, 76 S. W. 839; *Equitable Life Assurance Society of the United States v. Warren Deposit Bank*, 75 S. W. 275, wherein all the cases on the subject are collated.

The question raised by the third paragraph of the answer arose, and was decided adversely to appellant, in the case of *Washington Life Insurance Company v. Miles* (Ky.) 66 S. W. 740, where the identical contract in this case was involved and construed. We adhere to the ruling in that case.

We are unable to agree with counsel for appellant that the refusal of this court to adopt the construction of the New York courts as to the six-months contract under discussion is a failure to give full faith and credit to the laws of New York, within the meaning of the Constitution, that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other State." Const. U. S. art. 4, § 1. The New York statute printed on the back of the policy does not purport to have any extraterritorial force. It simply regulates the subject-matter of the value of lapsed and forfeited insurance policies in the state of New York. The contract in question is a Kentucky contract, and, as said by the Supreme Court in the case of *Mutual Life Insurance Company of New York v. Cohen*, 179 U. S. 262, 21 Sup. Ct. 106, 45 L. Ed. 181, on the question as to whether the statute of New York, or the law of the state where the contract was to be enforced, should prevail: "The presumption is in favor of the law of the place of contract. He who asserts the contrary has the burden of proof. The New York statute does not purport to change any insurance company charter. On the contrary, its obvious purpose is only to reach business transacted within the state. Proceeding on the accepted principle that a state may determine the conditions, the meaning, and limitations of contracts executed within its borders, the language of the

statute reaches contracts made within the state." So it may be said of the statute relied upon by appellant in the case before us. It clearly is intended to regulate insurance business within the state of New York, and not that done in other states. But it is said the New York statute is made a part of the contract by being printed on the policy, and adopted in the language of the stipulations of the parties. Conceding that this end may be accomplished in the manner indicated, that question is not here. A part of the New York statute has, indeed, been printed on the policy, and it is, perhaps, included in the general language of the contract over the signatures of the parties; but section 3 of the stipulations, which constitutes the basis of this action, is agreed, by the express language of the parties, to be entered into as a full compliance with the statute. This clearly means that, in lieu of the provisions of the statute, section 3 is adopted. Section 3 and the statute are essentially different, and the former supersedes the latter. We conclude, therefore, that, by the express language of the parties, the operation of the statute on the contract is excluded.

Perceiving no error in the record, the judgment is affirmed.

**BREATHITT COAL, IRON & LUMBER CO.
v. GREGORY.**

(Court of Appeals of Kentucky. Jan. 22, 1904.)

ATTORNEY AND CLIENT—DISCHARGE OF ATTORNEY—RECOVERY FOR SERVICES.—EMPLOYMENT BY CORPORATION—OPINION EVIDENCE.

1. Though an attorney is employed to conduct suits on a contingent fee, the client may discharge him at any time, he, however, being entitled to recover a reasonable compensation for services rendered, considering the contract price and the services performed and to be performed.

2. The president or directors, but not the stockholders, may employ an attorney to represent the corporation.

3. Opinions of witnesses as to what would have been the result of cases which plaintiff was employed to conduct on a contingent fee, and which were successfully prosecuted by others after his discharge, is not admissible in an action for his services.

Appeal from Circuit Court, Kenton County.
"Not to be officially reported."

Action by F. D. Gregory against the Breathitt Coal, Iron & Lumber Company. Judgment for plaintiff, and defendant appeals. Reversed.

S. D. Rouse and W. A. Price, for appellant.
B. F. Graziani, for appellee.

NUNN, J. This action was brought by appellee against the appellant to recover attorney's fees. He alleged that he was employed by appellant to assist in the prosecution of two suits in the United States Court at Covington, Ky., in each of which actions the appellant was plaintiff, and in one of the suits E. H. McTrain was defendant, and in the

other Arthur D. Bright. With reference to his services he alleged as follows: "He says it was thereupon agreed between the defendant and the plaintiff that in case defendant succeeded in the actions it was to pay this plaintiff for his services the sum of \$500, and in case the actions were decided adversely to defendant, then defendant was to pay this plaintiff the sum of \$150. The defendant did thereupon pay to plaintiff as a retainer the sum of \$100." He further averred that before the termination of these suits in the United States court he was superseded by other attorneys, and was prevented from carrying out his contract in prosecuting these two actions, and asked judgment for \$400, the balance due him on his contract. In another paragraph he alleged that the appellant, by its president, employed him to aid in making a sale of the company's property to a syndicate; that it was about to sell and convey by deed, when under his advice the stockholders were induced to sell and transfer their stock, and in this way avoided making a conveyance, which was greatly to the interest of the company, as it owned 129,000 acres of land in Breathitt and Knox counties, and several thousand acres of it were in the actual possession of persons who professed to have some kind of a claim on same, and, if a conveyance by deed had been made, the plea of champerty could have been interposed and maintained. That he gave much of his time and attention to this matter for appellant from about the 1st of May to the 15th of July, and drew the contract of the sale of stock, which realized for the company, \$70,000, and that the syndicate, "Unger & Co.," not only paid the \$70,000, but also agreed to assume and pay all the liabilities of the company, including all attorney's fees. That for his services as attorney in this matter, considering the successful termination of same, he claimed and asked judgment for \$5,000. Appellant answered, admitting the contract as alleged in the first paragraph of the petition, but denied that it was indebted to appellee in the sum of \$400, or any sum in excess of \$50, but alleged that appellee did not prosecute the two actions named to a successful termination. Appellant denied that appellee was employed to represent it in the matter of disposing of its property, or that he represented it in that matter, and alleged that his only employment was with reference to the two suits named in the first paragraph. The issues were completed, a jury trial was had, and resulted in a verdict and judgment for appellee in the sum of \$400 on the first paragraph of the petition and \$3,000 on the second paragraph, of which appellant complains, and asks a reversal for the following reasons: (1) That the court refused to give a peremptory instruction to the jury to find for it, except for \$50. (2) The court erred in giving instructions Nos. 1 and 2 to the jury. (3) The court erred to its prejudice in refusing to allow it to prove that the two actions in the United States court could not

have been prosecuted to a successful termination on its behalf.

The court did not err in refusing the peremptory instruction, because there was evidence introduced which supported appellee's cause of action. The court only gave two instructions, Nos. 1 and 2, which read as follows: "(1) The jury is instructed to find a verdict for plaintiff in the sum of the reasonable value of his services to defendant in the two suits in the United States court, provided the jury finds his said services to be of the reasonable value of more than \$100; and if the jury so find, the jury will credit its verdict for said services with the sum of \$100 paid to said plaintiff. (2) If the jury believe from all the evidence that the plaintiff, from May to July, 1902, rendered legal services to the defendant concerning the sale and transfer of the stock of said company, and that he advised and counseled with said company in said matter, or with its officers, or any of them, or that he performed any other legal services in connection with the sale and transfer of said stock, in attending meetings for that purpose, or in advising as to the mode and method of said sale and transfer, or in preparing contracts in reference thereto, and further believe that the said plaintiff was employed or requested to perform said services by the president of said company, or believe that the performance of said services was received and accepted by the said defendant company's president, or its directors or stockholders, then the jury should find a verdict for plaintiff in the sum of the reasonable value of services rendered, as the jury, from all the evidence, may find such value to be, not exceeding the sum of \$5,000." We are of the opinion that the court in these instructions erred, to the prejudice of the appellant. The case of *Henry v. S. B. & R. D. Vance* (Ky.) 63 S. W. 273, was one where the attorneys agreed to perform services for a sum equal to 35 per cent. of the amount recovered, which amounted to \$19,000. The attorneys sued for the contract price, and Henry answered, and averred that they did not perform any services under the contract. That within a few days after the execution of the contract he discharged them. The attorneys replied that the discharge was without any fault on their part. The court decided that the client had the right at any time to discharge his attorney with or without cause, even in a case where a contingent fee has been agreed upon, and then said: "The question should be submitted to the jury as to what, under the circumstances, would be a reasonable compensation to appellees for the services actually rendered before notice of their discharge. And in estimating such value the jury should consider the extent of services rendered and those to be rendered, allowing the contract price, abated by such sum as is reasonably represented by the unperformed part of the labor." Tested by this rule, the first instruction is erroneous.

The court should have. In its second in-

struction, said in substance to the jury that if they believed from the evidence that appellee was employed or requested by the appellant's president or its board of directors to perform the services, or that appellee performed such services with the intention at the time to charge therefor, and that appellant company's president or directors received and accepted such services with reason at the time to believe that appellee would charge therefor, then they should find for him, etc. A stockholder has no power to employ an attorney to represent the corporation. The instruction, except as herein indicated, is correct.

The court was right in rejecting the evidence as to what, in the opinion of the witnesses, would have been the result of the cases in the United States court, provided appellee had been permitted to continue in the prosecution of them.

Wherefore the judgment of the lower court is reversed, and the cause remanded for further proceedings consistent herewith.

HALLEY et al. v. SCOTT COUNTY FISCAL COURT.

(Court of Appeals of Kentucky. Jan. 20, 1904.)

EASEMENTS—DEDICATION—PAROL DEDICATION—REVERTER—EVIDENCE.

1. Where a turnpike company erected a tollhouse on a piece of land which had formerly been a part of a farm, and for many years thereafter the owner of the farm and members of the household passed through the tollgate free of charge, the circumstances showed a parol dedication of the use of the land to the turnpike company.

2. In the absence of any showing to the contrary, a dedication of a piece of land to a turnpike company as a site for a tollhouse was to be presumed to have been a dedication of an easement only.

3. A dedication of an easement to a public use may be by parol.

4. Where an easement was dedicated to a public use, on the abandonment of the use for which the easement was granted title and right of possession reverted to the grantor, though no reverter was provided for in the grant.

Appeal from Circuit Court, Scott County.

"Not to be officially reported."

Action by E. P. Halley and others against the Scott county fiscal court. From a judgment in favor of defendant, plaintiffs appeal. Reversed.

S. M. Wilson, for appellants. Thos. S. Gaines, for appellee.

O'REAR, J. The Frankfort, Georgetown & Paris Turnpike Road Company, formerly owning a turnpike road running from Georgetown to Paris, was sued by appellants to recover the possession of a small lot of land, it being alleged that the lot had been dedicated by appellants' ancestor to the turnpike company for a tollhouse site, upon the condition that it was to be used as such

¶ 3. See Dedication, vol. 15, Cent. Dig. § 12.

in connection with the operation of that road, and that when it came to be no longer used for that purpose it was to revert to the former owner. It was alleged that the turnpike company had sold and conveyed its road in Scott county to the fiscal court of that county, and that the tollhouse was abandoned, and no longer used for the purposes of the turnpike. Pending the suit the Scott county fiscal court was substituted as the real defendant, and claimed the lot by its purchase and conveyance from the turnpike company, which latter, it was alleged, had acquired the fee-simple title by an adverse possession of more than 15 years. An issue was joined whether the possession of the turnpike company had been adverse or amicable. The circuit court adjudged the case in favor of the appellee upon the theory that, as no deed or grant was shown, the long-continued possession of the road company—for more than 40 years in fact—gave it the fee-simple title. It was not shown that the fiscal court was either using the lot, or had use for it, or contemplated using it in connection with the operation of the road. It was merely renting it to tenants for \$5 per month. The abandonment is shown by the evidence. But whether it was or not, the fiscal court did not, in its answer, deny the abandonment. The sole issues tendered were upon the nature of the dedication made by appellants' ancestor James Combs—that is, whether it was a fee-simple title or an easement merely—and then the plea of limitation. James Combs owned the farm of which the lot in controversy is a part as early as 1829, and continued to live upon it and exercise the ownership of it till his death in 1852. The road was completed about 1840. There is no deed or other writing conveying or dedicating the lot. It was claimed to be, and is admitted to have been, by parol. The terms of the dedication are not proven. There is no living witness who knows them, so far as the record discloses. But the fact is conceded—at least conclusively shown—that James Combs was the owner of the farm from which the lot was taken. The tollhouse was built upon it, and within a quarter or third of a mile from James Combs' residence. He or some member of his household passed through this tollgate nearly every day for a great many years—in fact, till his death. It follows that either the house was built there and used for the road company's purposes by his permission, or it was a hostile and adverse user. The latter is improbable. Besides, it is shown that James Combs, his family, and servants, so long as he lived, and after his death his widow and her family, and then his daughter and son-in-law, who came to own the farm, all continued to pass through that gate free of toll. No other right is shown than the one claimed by them, viz., that it was in consideration of the use of the lot by the turnpike company. This would imply an

amicable arrangement, under which the possession of the turnpike company was begun and continued from year to year. As stated, the express terms of that arrangement are not shown. But the circumstances all do show that there was a parol dedication of the use of the lot to the turnpike company. In the absence of a showing to the contrary, this dedication must be presumed to be of an easement only—the only thing the company required. If it had wanted a greater title, it would have taken a deed showing its character. A lawful dedication of an easement to a public use may be by parol. Being an easement only, it was not necessary that the reverter should have been provided for by the grant. The law implied it. When the property was abandoned, and no longer used for the purpose for which the easement was granted, by operation of law the title and right of possession reverted to the grantor and his assigns. The principles herein applied are to be found stated in *Harrison v. Lexington & Frankfort R. R. Co.*, 9 B. Mon. 470; *Mitchell v. Bourbon County (Ky.)* 76 S. W. 16; *Cynthiana & Raven Creek T. P. Co. v. Hutchinson (Ky.)* 60 S. W. 378; *Kendall v. Hillsboro & Poplar Plains T. P. Co. (Ky.)* 67 S. W. 376; *Green's Adm'r v. Irvine (Ky.)* 66 S. W. 278; *Hawkins v. Nicholas County (Ky.)* 76 S. W. 329.

The judgment of the circuit court is reversed, and cause remanded, with directions to enter a judgment for appellants for the possession of the lot and for proceedings not inconsistent herewith.

CUMBERLAND TELEPHONE & TELEGRAPH CO. v. FOSTER.

(Court of Appeals of Kentucky. Jan. 20, 1904.)

ADJOINING LANDOWNERS—INJURIES TO BUILDING—LATERAL SUPPORT—TENANT IN DOWER—EVIDENCE—DAMAGES.

1. Where, in an action for injuries to a building, plaintiff's witness testified that it would cost from \$400 to \$600 to repair the same, while defendant's witness fixed the cost of repairs as low as \$50, a verdict in favor of plaintiff for \$400 was not excessive.

2. In an action for injuries to a building, evidence held to justify a verdict finding that the injury was caused by defendant's act in withdrawing lateral support, and not from inherent defects in the construction of the building, in addition to the effect of a violent windstorm thereon.

3. Where a husband left, him surviving, his widow and an infant son, who lived with her, and she was in possession of a building which was a part of her husband's estate, and was entitled to dower therein, and to control the same, but dower had never been allotted to her from any of her husband's real estate, her infant son was not a necessary party to an action by her to recover for injuries to the building.

Appeal from Circuit Court, Green County.
"To be officially reported."

Action by Lena Foster against the Cumberland Telephone & Telegraph Company.

From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Jno. McChord, for appellant. Noggle & Graham, for appellee.

SETTLE, J. Appellant seeks the reversal of a judgment of \$400 recovered against it by the appellee in the Green circuit court in an action wherein it was averred in the petition that it had, without her consent, injured a brick building, of which she is the owner, to her damage in the sum of \$1,000, by negligently digging into the ground on her lot adjacent to the foundation thereof, and sinking a log anchor for the support of its poles and wires, whereby the natural lateral support of the wall was weakened, causing the foundation to give away, and the wall of the building to crack and become so shattered as to render it unsafe and greatly impair its value. The averments of the petition, except as to appellee's ownership of the house and lot, were specifically denied by the appellant's answer, which, in addition, admitted that there was slight injury to the building, but that such injury was caused alone by the defective construction of the building and a violent windstorm. The affirmative matter contained in the answer was controverted by reply, and upon the issues thus formed the parties proceeded to trial, with the result mentioned. Numerous grounds were urged in support of the motion for a new trial, all of which were regarded by the lower court as insufficient; consequently a new trial was refused.

One of the grounds was that the verdict of the jury was flagrantly against the evidence, and the amount thereof excessive; another, that the court erroneously refused to give the peremptory instruction asked by the appellant, and, instead, misinstructed the jury; another, that the court further erred in refusing to permit the filing of an amended answer offered by the appellant at the conclusion of all the evidence, and before the beginning of the argument to the jury.

As to the first ground, it is sufficient to say that all the witnesses for appellee testified fully and intelligently as to the nature and extent of the injury to her building. Some of them were the builders of the house, and many of them testified that the cost of repairing and restoring it to its former state would amount to \$600, and others to not less than \$400, the sum allowed by the jury. And practically all of them agreed in their testimony as to the fact that the work of appellant's servants in digging the hole and placing the anchor near the foundation of the building had produced the injury complained of. It is true that the witnesses introduced in behalf of the appellant testified to the effect that the building was defectively constructed, and that its defective construction, together with a violent windstorm, caused the injury complained of; furthermore, that the cost of replacing it would fall

far short of the amount fixed by the appellee's witnesses. In fact, some of appellant's witnesses fixed the cost of repairing the building as low as \$50. It will be seen, therefore, that the evidence was conflicting. But it was the province of the jury to reconcile it, and to determine the weight and effect to be given to the testimony of each set of witnesses, or any one or more of them; and, besides, they were permitted to view the building and premises, in charge of an officer of the court, whereby they were the better enabled to arrive at a correct verdict. But while the evidence was conflicting as to the cause of the injury to appellee's building, there can be no doubt that it was injured to such an extent as to render it unsafe for occupancy. It appears from the evidence that the ground floor of the building was used by appellee, her father and brother, as an office, and the second floor by appellant as an office and telephone exchange, and, further, that the latter's servants in charge of the exchange realized that the building was unsafe, and communicated that fact to appellee, for it gave appellee written notice thereof, and that it would remove its office and exchange therefrom unless the building was immediately repaired, and in fact did remove the same without allowing appellee opportunity to make the repairs necessary to restore the building. Under such circumstances, we think it would have been improper for the trial court to have disturbed the verdict upon the ground that it was unsupported by the evidence, or that the amount thereof was excessive. It is equally clear that a peremptory instruction would have been improper. Such an instruction in behalf of the defendant is proper only when there is no evidence upon which to base a verdict for the plaintiff.

As to the refusal of the court to give instructions, "a," "b," and "c" asked by the appellant, it may be said that instruction "a" would have been unobjectionable, but for the use therein of the word "independent." Instructions "b" and "c" properly expressed the law, but, as both were fully included in the language of instructions 1, 2, and 3 given by the court on his own motion, it was not error to reject them. The instructions that were given covered every aspect of the case, contained all the law necessary to be presented to the jury, and were doubtless readily understood by them.

But appellant's principal contention is that the lower court erred in refusing to permit it to file the amended answer offered. The amended answer was not offered until all the evidence was in, and the argument to the jury was about to begin. It, in substance, denied the appellee's sole ownership of the building in controversy, and averred that it had been owned by her husband, who died intestate, leaving an infant child—a son—and that this building, together with such other real estate as was left by the husband, de-

scended, under the statute, to his infant son, subject to appellee's right of dower; that dower had not been allotted to her out of the realty left by her husband, and that her only interest in the building, for injury to which she was suing in this action, was that of dower; and, further, that these facts were first discovered by appellant during the hearing of the evidence. As will be seen from the authorities cited further on in this opinion, the fact set up by the amended answer would not have defeated a recovery by the appellee. The court did not err, therefore, in refusing to allow it to be filed.

It is admitted by counsel for appellant that appellee is entitled to dower in the house and lot in controversy, that she is now in the possession and control of the property, and that dower has not been allotted her from any of the real estate owned by her husband at his death. We may assume, therefore, that she is legally in possession of the house and lot, and will be entitled to its possession until dower is assigned her. If so, it was her duty to protect the same from injury at the hands of appellant and all others. In 1 Washburn on Real Property, § 294, it is said: "With the above exception [injuries resulting from accident, by the act of God, public enemies, or of the law], the tenant is bound to protect the premises from waste, even against strangers, or is responsible to the reversioner for the same, and may have his remedy against the wrongdoer. * * * "Tenant by curtesy," says Lord Coke, "tenant in dower, tenant for life, years, etc., shall answer for the waste done by a stranger, and shall take their remedy over." 1st Inst. 54a; 2d, 145-303. In Cook v. The Champlain Transportation Co., 1 Denio, 91, which was an action on the case by the assignees of an unexpired lease for a term of years for negligently destroying a mill erected by the plaintiffs on the premises, it was held that "the destruction of such building by means of the negligent acts of a third party was waste, for which the tenant was responsible to the lessor, and that the lessee or his assignee was entitled to recover the whole value of such building in an action against the party guilty of the negligence." The same rule was followed in Austin v. Hudson River R. Co., 25 N. Y. 334. "The tenant by curtesy and in dower, and for life or years, are answerable for waste committed by a stranger, and they take their remedy over against him; and it is a general principle that the tenant, without some special agreement to the contrary, is responsible to the reversioner for all injuries amounting to waste done to the premises during his term, by whomsoever the injuries may have been committed. * * * " 4 Kent's Com. 77. "The tenant is not responsible for damages done by the act of God, the public enemies, or by the law. But he is obliged to protect the premises from waste by strangers, and for the acts of such persons he is

responsible to the reversioner." Tiedeman on Real Property, § 78.

Foster T. Foster, the infant son of appellee and her deceased husband, lives with her. She is his statutory guardian, and owes to him the duty of caring for him and the property which he inherited from his father, and in which she is entitled to dower. Though he might properly have been made a party to the action, he was not a necessary party. For any injury that may be done the property by others, she, as tenant in dower, and also by virtue of section 2328, Ky. St. 1903, will be responsible to the reversioner; consequently the person inflicting injury to the property will be responsible to her therefor. The injury to the property for which she recovered a verdict and judgment in this case was not so much an injury to the inheritance, for which an action might have been brought by the infant heir or for him, but rather an injury which affected appellee's enjoyment and use of the property as tenant in dower; and upon this principle, as well as upon the theory of responsibility to the reversioner, we think she was entitled to recover in this case. The injury to the building, though serious, is one that can be repaired, and, it is to be presumed, will be repaired by her out of the sum which may be paid her in satisfaction of her judgment against the appellant. At any rate, if such repairs are not made, she, and not the appellant, will be liable to the infant heir.

For the reasons herein given, the judgment is affirmed.

POWERS' EX'R et al. v. POWERS et al.
(Court of Appeals of Kentucky. Jan. 20, 1904.)

WILLS—CONTEST—UNDUE INFLUENCE—ADMISSIONS AGAINST INTEREST—DECLARATIONS OF TESTATOR.

1. Where in a will contest it was claimed that testator's wife, to whom testator devised a large part of his estate, had exercised undue influence to induce him to disinherit two of his sons because they had married non Catholics, evidence of admissions made by the wife tending to show ill-will towards the sons for that reason, and to the effect that she would see that the sons did not get a dollar of testator's wealth, was admissible as admissions against interest.

2. Where in a will contest it was claimed that the will was the result of undue influence exercised by testator's wife, statements by testator that he had been influenced, and that he had made the will and disinherited his sons in order to keep down "hell at home," were admissible.

3. Where testator made a will disinheriting two of his sons, which was the result of undue influence exercised by testator's wife, and thereafter he made another will containing practically the same provisions as to the disinherited sons, such undue influence was available to defeat the second will, though exercised at a period remote from the date of its execution.

Appeal from Circuit Court, Boone County.
"Not to be officially reported."

Will contest by John Powers and others against the executor of the estate of Jeffrey

Powers, deceased. From a judgment disallowing the will, the executor and others appeal. Affirmed.

Olore, Dickerson & Clayton, J. M. Lassing, M. D. Gray, and Edson Riddell, for appellants. J. S. Gaunt and S. W. Tolin, for appellees.

O'REAR, J. A paper purporting to be the last will of Jeffrey Powers, bearing date July 3, 1889, was offered for probate in the Boone county court. On appeal to the circuit court, the paper has been twice rejected by juries impaneled to try the issues of the mental capacity of the testator, and of the undue influence alleged to have been exercised over him by his wife and children who were favored by the will. The formal execution of the paper is sufficiently proved. Nor are we able to find in the evidence any substantial ground for doubting the testamentary capacity of the testator. The ground upon which the jury evidently rejected the paper was that of undue influence. The instructions given were substantially those approved by this court on the former appeal. 52 S. W. 845. It was shown upon the trial that the testator and his wife and daughters were members of the Roman Catholic Church when the two oldest sons of the testator married, in 1872 and 1874, respectively. Those events are shown to have provoked violent opposition on behalf of their mother, the wife of testator. These two sons were disinherited by the will. They each married a Protestant woman. It was in evidence that Mrs. Powers stated to her son John, one of the disinherited, and to others, that if he (John) married that Jane Waller, a Protestant that eats meat on Good Friday, he should never get a dollar of their wealth, and she would see to it that it was put in black and white; that she had rather see John cut his throat than to break the Catholic faith by marrying Jane Waller. Some of these conversations did not occur in the presence of the testator, but it was shown that at one time at least it was said in his presence by his wife. It was also proven that the testator had said that he had made his will and had left his sons William and John out, and that he had to do it to keep down hell at home. By other witnesses it was shown that the testator had said that John was a good boy and deserving. There was undoubtedly an estrangement between the families of these two sons and their father's family from the date that they married and left their home. The first will of the testator was written not a great while after those marriages. When the last will was written, some slight change from the first one was made for the benefit of his wife, but it was left the same as the first one with respect to the two disinherited sons. The will gave all the estate to the wife, two daughters, and the youngest son, all of whom remained at home and were unmarried.

It is complained for appellants that this evidence was inadmissible because it was immaterial, and because it was too remote from the time of the making of the will in dispute. The character of evidence, that is, the admissions of devisees against their interest, and statements by the testator that he had been influenced, have been so often held by this court to be competent in the trial of the issue of undue influence that we do not deem it necessary to again state the reasons that support the rule. The last case in which the relevancy of this evidence is discussed is *Wall v. Dimmitt* (Ky.) 72 S. W. 300, where the previous cases on the subject are cited. We do not regard the fact that the influence is not shown to have been exerted with reference to the execution of this particular will at the time when it was prepared as material, because the evidence does show that when the original will was prepared, of which this one is a copy in the particular of disinheriting these two sons, the influence of the wife is shown to have been exerted. If the testator had conceived that on account of the infidelity or apostasy of his sons they were not fit subjects of his bounty, his right to exclude them by his will is not doubted. But it is not shown in this case that the testator had such views of his own, but there was evidence to the effect that his wife was so bigoted in her religious belief that it induced her to believe that her children who were apostates ought not to share in the distribution of their father's property, and that, actuated by this belief, she brought her influence to bear upon her husband so that he yielded to her importunities, and made a will different from what he himself would have done if left to his own inclination. The discrimination was not just. The testator himself did not so regard it, but he yielded, according to some of the evidence, to influences which he could not withstand. The fact that this occurred many years ago, instead of weakening the case against the will, seems to us rather to strengthen it, because it tends to show the weight and the persistence of the influence that was brought to bear against the paternal instinct of affection and justice, so as not only to overturn it at the time, but to keep it suppressed until the last. The question is not so much whether the testator's disposition of his property is equitable, but whether it is his own arrangement; not whether the reasons upon which the discrimination rests are in themselves sound, but whether they are his reasons. The question of religious prejudice, against which counsel for appellants so earnestly and eloquently inveigh, is a material matter only when it is to be decided whether the alleged prejudice was that of the testator, or that of some one else, who, because of it, put into effect an influence over the mind of the testator which his will power was unable to resist.

We have not stated nor discussed all of

the evidence. We have thought it necessary to discuss only that which was especially objected to at the trial. The ground of misconduct of counsel in the argument to the jury appears to us to be immaterial. The digression complained of and quoted in the bill of evidence could not probably have had any effect in shaping the verdict.

The judgment of the circuit court overruling the grounds for a new trial is affirmed.

TERRY et al. v. WARDER.

(Court of Appeals of Kentucky. Jan. 21, 1904.)

WORK AND LABOR—PERSONS IN FAMILY RELATION—BOARD—HUSBAND AND WIFE—WIFE'S SEPARATE PROPERTY—CLAIMS AGAINST HUSBAND—SET-OFF.

1. Where a daughter resided with and performed services for her mother, prior and subsequent to her marriage, as a member of the family, it would be presumed that such services were gratuitous, in the absence of clear proof of an express contract to pay therefor.

2. Where defendant's daughter lived with her after her marriage, and performed services for defendant as a member of her family, defendant was not entitled to recover for board furnished the daughter, in the absence of an express contract to pay therefor.

3. Where defendant borrowed certain money from her daughter, for which notes were executed, and after the daughter's marriage she would have been entitled, on an equitable settlement between her and her husband, to the whole sum, whether the husband had reduced it to possession or not, defendant was not entitled to set off a claim against the daughter's husband against the notes.

Appeal from Circuit Court, Barren County. "Not to be officially reported."

Action by T. B. Terry and others against Mary F. Warder. From a judgment in favor of defendant, plaintiffs appeal. Modified.

W. L. Porter, for appellants. Geo. T. Duff, for appellee.

HOBSON, J. On June 5, 1891, appellee, Mary F. Warder, executed to her daughter Jeannie a note for \$150, due in 12 months, with interest from date. Mrs. Warder had two other daughters, younger than Jeannie, and was a widow, owning for life a farm worth about \$10,000, on which she resided, in Barren county; her daughters owning the remainder. Jeannie had been teaching for some years, and out of her earnings had sent her two younger sisters to school; expending in this way \$700 or \$800. She did not feel able to give all of this to her mother, and the note for \$150 was accordingly executed to her; she giving up all the rest of the amount she had spent. Jeannie continued to teach until she was married to W. A. Terry on August 2, 1893. Terry lived on an adjoining farm, one-third of which his mother held for life, and which, subject to this, belonged to him and his brother and sister. After they were married, Terry continued to take his

meals at home, as he had done before, and slept at night at Mrs. Warder's, where his wife remained. Things ran along in this way until the year 1898, when Terry took charge of the Warder farm, and ran it for the years 1898 and 1899. He and his wife in the year 1900 moved to another farm. After they were married, Mrs. Warder borrowed, on November 15, 1893, from Mrs. Terry, \$180, and executed to her a note therefor, due in one year, with interest from date. In July, 1900, Mrs. Terry assigned both the notes which she held on her mother to T. B. Terry, an uncle of her husband's, and he filed suit against Mrs. Warder to recover thereon. By way of defense to the suit, Mrs. Warder set up that she had boarded Mrs. Terry and her husband from the time of their marriage until January 1, 1898, under an agreement that they would pay her \$—— per week so long as they remained; that they remained with her until January 1, 1898, their board amounting to \$937; and that the husband had converted the notes of the wife to his own use, and was the owner of them. She pleaded the board bill as a set-off to the notes. The plaintiff, in his reply, denied the allegations of the answer, and alleged that Jeannie Terry, while living with her mother after her marriage, did the sewing and dressmaking for the family, and also housework, shopping, and bookkeeping, and furnished her a buggy and horse to use; also sold her a binder and mower, canned fruit, eggs, etc., while living in her house—in all, amounting to \$1,000, which was pleaded as a counterclaim to the set-off. Mrs. Warder denied the allegations of the reply, and pleaded limitation to it. The plaintiff then offered an amended answer, pleading limitation to the board bill. The court refused to allow the amendment to be filed. W. A. Terry then filed an action against Mrs. Warder, alleging that he had paid for her and at her request, on the tuition of her daughter, \$160; that he had pastured her cattle and hogs; furnished her the use of a wheat drill; sold and delivered to her hams, beef, molasses, and other things; also that he was half owner in a crop of tobacco which she had sold for \$210 in the year 1901; all the items amounting to something over \$500. Mrs. Warder denied the allegations of the petition, and again pleaded limitation as to the items over five years old. Mrs. Terry then filed suit against her mother, in which she set up, in substance, the same items which had been pleaded by T. B. Terry as a counterclaim to the set-off in the first suit, and there was an answer in this case substantially the same as in the suit by the husband. The three suits were transferred to equity and consolidated. On final hearing the court allowed Mrs. Warder \$491.96 for board, and gave judgment against her in favor of T. B. Terry for \$6.04, the balance of the amount of the notes, including interest, over and above the amount allowed for board. He gave judgment also against her for one-half

¶ 2. See Parent and Child, vol. 37, Cent. Dig. § 58.

of the tobacco crop, with interest from the time it was sold, May 30, 1901. From this judgment the Terrys appeal.

Mrs. Terry, when she was not teaching, lived with her mother as a member of the family up to the time that she married. Between mother and daughter, in the absence of an express contract, clearly proven, the presumption is that all services rendered by the daughter to the mother were rendered gratuitously, and as a member of the family. This rule holds good whether the daughter is single or married. The court therefore properly dismissed the entire claim of Mrs. Terry against her mother. Mrs. Terry had been very liberal in the education of her sisters, but this matter was settled when the note for \$150 was executed, and no claim can be made now for the balance of the money she expended. The services that she rendered for her mother after her marriage were such as might be expected of a daughter living in her mother's house. The same is true of the services of her husband during the same period. But we see no reason why the same reason should not apply to Mrs. Warder's claim against them for board. To sustain such a claim, there must be clear and satisfactory proof of an express contract, for the presumption is, as between mother and daughter, against the charge, where the mother is not keeping a house of entertainment. While the proof is conflicting, it seems to us the circumstances do not sustain the claim. It is evident from the proof that Terry did not take his meals at Mrs. Warder's, because he was unwilling to pay board there. It is also clear from the proof that he was a man of moderate means, and had to keep up the family at home, or help to do so; this family consisting of his mother, brother, and a widowed sister. The fact that he came over every night after supper, and went away in the morning before breakfast, can only be accounted for upon the idea that he had to contribute to the family at home, and was unwilling to take his meals at Mrs. Warder's. It is also evident from the proof that Mrs. Terry remained at her mother's because her mother wished it, and she was not on good terms with her husband's widowed sister, who lived with him. It is also pretty clear that Mrs. Terry after her marriage occupied the same relation to the household as before. One of her sisters was at school, and the other went off on visits; leaving at times nobody there but her and her mother. Mrs. Terry kept the accounts of the hands, she did the shopping, she cut and fitted the girls' clothes, and did other housework, as would be expected of a daughter living with her mother in the country. Her husband paid \$160 on the tuition of one of the girls. He hauled the wood that his wife burned, having it cut at home; and, until there was a falling out between them in the year 1900 about some straw, no demand seems ever to have been made for board, although admittedly they

had ceased boarding more than two years before; and, beside all this, while they were living there in the house under the arrangement, whatever it was, Mrs. Warder borrowed of Mrs. Terry the \$180, and executed a note therefor. We are by no means satisfied that what the daughter and husband did for her mother, or furnished to her, was not of value as much as it cost her to keep her daughter in her own house during the time referred to; and, under all the evidence, we conclude that the claim for her board should not be allowed to override the written promises of Mrs. Warder to pay her daughter the money stipulated in the notes sued. But aside from this, the notes were the property of the wife. While the husband might, as the law then was, reduce his wife's chose in action to possession, if he saw proper, there is no evidence that he did so. On the contrary, it would seem that Mrs. Terry always claimed the notes as her own, and, so far as the proof shows, her husband acquiesced in this claim. If the husband had undertaken to reduce the notes to possession, the chancellor, on the application of the wife, would have decreed to her an equitable settlement, and the fund was so small that the whole of it might have been settled upon her. If there was any contract to pay board, it was the contract of the husband, not of the wife. Mrs. Warder, as the creditor of the husband, cannot be adjudged the payment of her debt out of the wife's money, when the wife was entitled to hold the fund, and have it settled upon her, as between her and her husband.

We therefore conclude that, on the facts shown, the chancellor should have entered a judgment on the notes subject to the credits indorsed thereon. In other respects, the judgment complained of is affirmed.

Judgment reversed, and cause remanded for a judgment as herein indicated.

ELLISON et al. v. DUNLAP et al.

(Court of Appeals of Kentucky. Jan. 21, 1904.)

EQUITY JURISDICTION—COMPLICATED ACCOUNTS—PLEADING—VARIANCE—NECESSITY OF REVERSAL—LOST INSTRUMENT—SECONDARY EVIDENCE.

1. Where an action has been transferred to the equity docket, under Code Prac. § 10, subd. 4, as involving a complicated account, the fact that the account is subsequently simplified by agreement will not oust the equity side of the court of jurisdiction, no motion to remand being made.

2. Code Prac. § 129, provides that no variance is material which does not prejudicially mislead a party on the merits, and that a party relying on a variance must show that he was misled, and then the court may order an amendment on such terms as are just. Section 130 provides that, if the variance is not material, the court may direct the fact to be found according to the evidence, and order an immediate amendment. Section 134 provides that the court must disregard any error not affecting the substantial rights of the parties, and that no judgment shall be reversed by reason of such error. *Held*, that a variance between the

petition and the proof which was not material and did not mislead the defendants was not a ground for reversal on appeal.

3. In an action on a written contract made with a corporation, and which has been lost, parol evidence is admissible to show its contents, though the minutes of the board of directors accepting the contract are not produced, as it is not presumed that the contract was set out therein verbatim, and, even if it were, the minutes would not be evidence, except on proof by the person who made them that he did so from the contract.

Appeal from Circuit Court, Jefferson County, Second Chancery Division.

"Not to be officially reported."

Action by John L. Dunlap, as assignee, and others, against Andrew Ellison and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Forcht & Field and O'Neal & O'Neal, for appellants. Clayton Blakey, for appellees.

HOBSON, J. In May, 1896, as found by the circuit judge, appellants made a contract with the Mechanics' Building & Loan Association to the effect that, in consideration of the association lending money to purchasers for property in the Ellison Subdivision with which to build houses, appellants would guaranty the loans, and hold the association harmless from loss thereon. The property lay in the outskirts of Louisville, and the association was unwilling to lend the money on the property, as it was so far out. The purchasers failed to pay the association the money borrowed, and the property, when sold, was insufficient to cover the debts. This suit was then filed upon the guaranty, and, judgment having been rendered in favor of the plaintiffs, the defendants appeal.

The circuit court properly transferred the action to the equity docket. By subsection 4 of section 10 of the Code of Practice, an ordinary action may be transferred to the equity docket when the case involves accounts so complicated, or such detail of facts, as to render it impracticable for a jury to try the case intelligently. As the action stood at the time the transfer was made by the court, it involved a complicated account, and the transfer was properly ordered. It is true that by a subsequent agreement of parties the account was very much simplified, but no motion was then made to remand the case to the ordinary docket, or for a jury to determine the issue of fact as to the nature of the contract between the parties.

While it is true that there is a variance between the allegations of the petition as amended and the testimony of Angus Allmond as to what the contract was, the contract as alleged in the pleading is substantially proved by the witness Giltner. Section 129 of the Code provides that no variance between pleading and proof is material which does not mislead a party to his prejudice in maintaining his action or defense upon the merits; also that a party relying

on the variance must show to the satisfaction of the court that he was misled, and then the court may order the pleading to be amended upon such terms as may be just. By section 130 it is provided that, if the variance is not material, the court may direct the fact to be found according to the evidence, and may order an immediate amendment. By section 134 it is further provided that the court must in every stage of the action disregard any error which does not affect the substantial rights of the adverse party, and that no judgment shall be reversed by reason of such error. Under these provisions of the Code if the circuit court had concluded that there was a variance between the terms of the contract alleged in the petition and that shown by the evidence, as the variance was not material, and did not mislead the defendants in maintaining their defense upon the merits, it would have been the duty of the court to order an immediate amendment, and direct the facts to be found according to the evidence. The question seems not to have been presented to the circuit court, and, if the judgment was reversed here therefor, it would be with directions to the circuit court to order an immediate amendment, and find the facts according to the evidence. But this is unnecessary, as the substantial rights of appellants were not affected, and no judgment shall be reversed for an error not affecting the substantial rights of the party complaining.

The written contract having been lost, parol evidence as to its contents was properly admitted. The minute made by the board of directors accepting the contract would only have shown, if produced, that the company had accepted the contract. It is not presumable that the contract was set out in the minutes according to its words; and the minute would only be evidence for the company of what the contract was, even if it set out the contract in full, upon proof of the person who made the minute that he made it from the contract. The defendants might have produced the minute, if they had desired it as evidence on their behalf of what the contract was. But there being no issue as to the acceptance of the contract by the corporation, there was no necessity for the plaintiff to produce it.

The weight of the evidence sustains the chancellor's conclusion on the facts, and, on the whole case, we see no reason for disturbing it. Judgment affirmed.

HARRIS' ADM'R v. ADAMS et al.

(Court of Appeals of Kentucky. Jan. 21, 1904.)

DECEDENTS' ESTATES—SETTING ASIDE EXEMPTIONS—RIGHTS OF WIDOW AND INFANTS.

1. Under Gen. St. c. 31, art. 36, § 11 (5), providing that, in case of intestacy, certain articles are exempt, and shall be set apart to the

widow or infant children, and that, if there are infant children and no widow, they shall be set apart to the infants, the setting apart, where there is a widow, is to her alone, and vests in her complete title.

Appeal from Circuit Court, Todd County.
"To be officially reported."

Action by Bessie Adams, by guardian, and others against M. E. Harris' administrator. From an adverse judgment, defendant appeals. Reversed.

W. L. Reeves, for appellant. Perkins & Trimble, for appellees.

BURNAM, C. J. P. S. Greenfield died a resident of Todd county, Ky., on the 31st day of October, 1885, intestate, leaving a widow and two children, a homestead of less value than \$1,000, and a small amount of personal property, all of which, under the statute, was exempt from execution. It consisted of two mules, a cow, and a few articles of household furniture. On the 22d of October, 1890, the widow, M. E. Greenfield, married R. L. Harris, and from that time until her death, on the 28th of December, 1891, they occupied the homestead which had belonged to P. S. Greenfield. At the date of her marriage, Mrs. Greenfield had possession of the same personal property which had been set apart to her upon the death of her first husband. One of the infant children had in the meantime died, and the other lived with her mother, Mrs. Harris, until her death. At his death P. S. Greenfield owed a little money; and the widow, previous to her marriage to Harris, had also contracted a few debts, and her husband was also chargeable subsequent to her death with her burial expenses and doctors' bills. After the death of Mrs. Harris, her brother T. H. Stokes was appointed her administrator, and, by agreement with R. L. Harris, took possession of and sold the personal property on hand, which had been set apart to his decedent as widow of P. S. Greenfield, realizing therefor, in the aggregate, \$301.85, \$201.65 of which was applied by him to the discharge of the debts due by P. S. Greenfield and Mrs. Harris, above spoken of, the largest items of which were for doctors' bills for services rendered to P. S. Greenfield and Mrs. Harris, and for the burial expenses of Mrs. Harris. After her death her brother was also appointed statutory guardian for her infant daughter, Bessie Greenfield, and rented her land for one year for \$40. He was subsequently removed, and the appellee George W. Rudd appointed guardian in his stead. Bessie shortly before the institution of this suit married G. M. Adams, both of whom were then and are now infants. On the 13th of March, 1902, Rudd, as guardian for Bessie Adams, instituted this suit against the appellant, Thomas H. Stokes, as administrator of Mrs. Harris, to surcharge the settlement made by him, and alleged that the personal property which came into his hands

as administrator was the same property which had been set apart, under subsection 5 of section 1401 of the Kentucky Statutes, to the widow and children of P. S. Greenfield, and that at the death of her mother, in 1891, the title to this property vested in her, under the statute, and was not liable to the debts of either her father or mother, and that her stepfather, R. L. Harris, had no interest therein; that the defendant had wrongfully and illegally taken possession of and sold it—and sought a judgment for the entire proceeds thereof. The defendants answered that at the death of P. S. Greenfield the property in question was set apart to his widow, and that the plaintiff had no interest therein; that by her marriage to R. L. Harris, in 1891, it vested in him, as her husband, and he had taken possession thereof by virtue of this right, and had subsequently turned it over to the defendant, with direction to sell it, pay the indebtedness of P. S. Greenfield and Mrs. Harris, and turn the surplus over to the plaintiff.

The question presented for decision by the appeal is, to whom, where the father and husband dies intestate, leaving a widow and infant children, does the personal property directed by the statute to be set apart to the "widow or infant child or children" belong. In construing section 11 of chapter 30 of Stanton's Revised Statutes, which reads as follows: "If an intestate leaves a widow, the following property shall be set apart by the appraisers of his estate, and vest in such widow for the use and benefit of herself and the infant children of the intestate, if any, residing in the family, one work beast; * * * but if there are no such infant children residing with the widow, and there are adult or infant children not residing with her, the provision contained in this section for the widow, or the value of such portion thereof as she receives, shall be charged to her in the distribution"—the superior court, in *Burgett v. Clarke*, 4 Ky. Law Rep. 518, decided that the property passed jointly to the widow and the infant children residing with her, to be held in trust by the widow while she lived, with power of disposition, use, and control for the purposes named in the statute, but at her death such of the property as had not been consumed or disposed of, and such as was the product, by increase or exchange, of the exempt property, vests in the surviving child in preference to the surviving husband. The decision in this case was followed in *Price v. Nichols*, 12 Ky. Law Rep. 421, by the superior court.

The statute was subsequently changed by the General Assembly, and the rights of the parties must be determined by the provisions of the new statute (Gen. St. c. 31, art. 36, § 11, subd. 5), which reads as follows: "The following list of articles are exempt from distribution and sale, and shall be set apart to the widow or infant children or child, by the appraisers of the estate, to-wit:

* * * If there is an infant child or children and no mother surviving, they shall set apart for the separate use of such infant child or children the articles aforesaid." In *Alexander's Guardian v. Alexander's Adm'r*, 86 Ky. 688, 7 S. W. 156, it was decided that the property set apart by this statute belonged exclusively to the widow. And in *Mallory's Adm'r's v. Mallory's Adm'r*, 92 Ky. 316, 17 S. W. 737, A. W. Mallory, the appellee's intestate, was a widower with children, and C. L. Mallory, the appellant's intestate, was a widow with one child—a son. Both of these persons owned property, and married each other. The husband died, and in a few days thereafter, and before the personal property that the statute gives to the widow, and which is to be set apart to her, was set apart, the wife died. Suit was then instituted by appellant to recover of the appellee the value of this personal property on hand at the death of A. W. Mallory, but disposed of by appellee. The claim was resisted, and in the decision of the case the court said: "It is a mistake to say that the property that chapter 31, art. 36, § 11, of the General Statutes, directs to be set apart to the widow, only vests in the widow upon the setting the same apart to her. By said statute the right to a certain kind of property, if on hand—if not on hand, its value, etc.—vests eo instante by operation of law in the widow upon the death of her husband. The setting apart of said property is merely for the purpose of designating the individual pieces of property and valuing them, and supplying their places with other property, etc., when required. Said property vests in the widow, and must be set apart to her, whether or not she has any infant children; the only difference being that, if there are no children residing in the family, there shall be nothing set apart for her support." In *Commonwealth, by, etc., v. Bracken, etc.* (Ky.) 32 S. W. 609, it was expressly decided that the widow took the exempt property, or money set apart in lieu thereof, against both the creditor and heirs at law, and one-third of the rest of the estate, after deduction of debts and the exempt property. In *Nall, etc., v. Wuertley, etc.* (Ky.) 30 S. W. 208, it was decided that the widow could devise a note for the price of a horse sold by her, which had been set apart to her out of her husband's estate. The decisions cited above, coupled with the change in the phraseology of the statute by the General Assembly, leave no doubt in our minds that the setting apart is to the widow alone, and she is vested with the complete title to the property. In the event there is no widow, then the property goes, under the statute, to the surviving infant children; and it was decided in *Wilson v. Parson's Adm'r* (Ky.) 50 S. W. 684, that, the proceeds of this property having been set apart for the support of two infant children, on the death of one of them its share went to the surviving child, and not

to the administrator of the deceased infant. But in this case there was no widow.

The widow, being named first, became the sole owner of the property; and after her marriage to her second husband, R. L. Harris, under the rule of the common law, the title passed, with the possession, to him. See *Hall v. New Farmers' Bank's Trustee* (Ky.) 32 S. W. 400; *Brewer v. Hobbs* (Ky.) 44 S. W. 1129; *McKay v. Mayes, etc.* (Ky.) 29 S. W. 327; *Carpenter v. Hazelrigg*, 103 Ky. 538, 45 S. W. 668. The property having been turned over by him to the appellant, Stokes, under an agreement that it was to be sold, and the proceeds applied to the payment of certain debts, and the overplus secured to Bessie Adams, appellees were entitled to have the provisions of this trust enforced, and, after the payment of the debts enumerated, to have the surplus paid to her.

For reasons indicated herein, the judgment is reversed, and cause remanded for proceedings consistent herewith.

DRAKE et al. v. HOLBROOK.

(Court of Appeals of Kentucky. Jan. 21, 1904.)

DECEIT—SALE OF STOCK—MISREPRESENTATION—EVIDENCE—RELEVANCY.

1. In an action for damages for deceit in the sale of corporate shares, defendant having falsely represented that the outstanding accounts due the corporation were sufficient to pay off all its indebtedness, evidence as to the intrinsic value of the stock, and tending to show that plaintiff had received his money's worth notwithstanding the misrepresentation, was irrelevant.

2. In an action for damages for deceit in the sale of corporate shares, defendant having made false representations as to the assets of the corporation—it appearing that defendant took plaintiff to the store of the corporation, and told the bookkeeper to tell plaintiff anything that he wanted to know, and that the bookkeeper showed plaintiff a paper which purported to contain information as to the assets of the company—it was error, the loss of the paper having been shown, not to permit plaintiff to testify as to its contents.

Appeal from Circuit Court, Ohio County.

"Not to be officially reported."

Action by W. P. Drake and others against Rowan Holbrook to recover damages for deceit. From a judgment in favor of defendant, plaintiffs appeal. Reversed.

Settle & Slack and M. L. Heavrin, for appellants. Glenn & Ringo and H. P. Taylor, for appellee.

BARKER, J. This is the second appeal in this case. The former opinion of this court is to be found in 68 S. W. 512. The rulings on the former appeal, in so far as applicable, constitute the law of this; and, as the facts on the two trials were practically the same, it only remains to ascertain what has been decided, in order to dispose of the case before us. The rights of the parties litigant, under the doctrine of *res adjudicata*, are circum-

scribed by the principles announced in the first opinion.

Appellants allege in their petition that the appellee sold to them 20 shares of the capital stock in the Field Coal Company, of the par value of \$100 each, for the sum of \$4,500, and, as an inducement to them to make the purchase, fraudulently represented that the collectible outstanding accounts due the company were sufficient to pay off all its indebtedness, except about the sum of \$700; that they, relying upon these representations of appellee, made the purchase in question; that these representations as to the financial standing of the corporation were false, and made with the intent to deceive appellants, and to induce them to make the purchase; that the indebtedness of the corporation at the time these representations were made exceeded by far its collectible assets; and that, by reason of the fraud and deceit practiced upon them by appellee, they were damaged in the sum of \$4,500. Appellee denied making the representations as alleged by appellants, or that the representations he actually made were fraudulent or false, or that appellants had been damaged in any sum whatever, and alleged affirmatively that they made the purchase in question relying alone upon their own examination into the financial standing of the company. We have not undertaken to state the allegations of the pleading in this case with minute particularity, as their elaborate statement in the original opinion renders this unnecessary.

In the instructions of the court in the original trial below, the liability of appellee was made to turn upon the question as to whether or not he, "as an inducement to appellants to purchase his stock, falsely and fraudulently represented to them that the debts due the company, owed by good and solvent parties, were sufficient to pay all debts owed by said company at the time, and," etc. Upon this subject this court said: "It was pleaded, and not denied, that the appellee, Holbrook, was the owner of one-half the stock, and was the secretary and treasurer of the company. This being true, he cannot be heard to say he did not know the resources and liabilities of the company. It was his business, as secretary and treasurer, to know the financial condition of the corporation, and any statement made by him as to the financial condition of the corporation to the appellants would authorize them to rely thereon as the truth. Appellee, being in condition to know, and it being his business to know, will not be permitted to say he in fact did not know the truth, as against his own statements to appellants." And in the next paragraph it is said: "We are of opinion that, in addition to the error in the instructions as above indicated, there was also error in the measure of damage." The error thus pointed out in the instructions was the fact that it made the liability of appellee to turn upon the question as to whether his representations were false or fraudulent; it

being decided that he, from his position in the corporation, was bound to know its condition, and his representations were therefore, in effect, warranties, if appellants relied upon them.

The next error pointed out was the measure of damage, the court saying: "If, under the facts found by the jury, the plaintiffs were entitled to recover at all, they were entitled to recover for the difference between the value of the stock with the company in its actual financial condition at the time, and its value if the company had been in the condition represented by the defendant." It will be observed that the false representations alleged to have been made by appellee were not as to the intrinsic value of the property of the corporation, but only in the amount of the indebtedness owed by it at the time of the purchase of the stock. It follows, therefore, that, with the question involved here, the intrinsic value of the property has no relevancy. To illustrate: If A. sells to B. a farm for \$5,000, and warrants it to be without lien, and afterwards it develops that there is a lien on it for \$5,000, it is no answer to an action on the warranty to show that the farm was really worth \$10,000, and that, after all, the purchaser got the full value of his money. Practically, we have under the first opinion the same question here. Appellants allege that appellee sold them the stock, representing the company to be out of debt. Afterwards it developed that the company owed, say, \$5,000. It is manifest that the whole stock of the company is worth \$5,000 less than it would have been if the representations of appellee had been true; and it is no answer to appellants to say that, although there was \$5,000 of indebtedness due from the company, more than was represented, still the intrinsic value of the property represented by the stock is so great that appellants have their money's worth, despite the false statements as to the indebtedness. On this subject, in the former opinion, the court said: "Appellants are entitled to what they were induced to believe they were getting by their purchase. If they actually received less than they were induced to believe they were purchasing, they were damaged. If they were induced to believe they were getting a bargain, it is no answer to say that they got the value of their money. They are entitled to the bargain—the profits actually represented to exist." It follows, therefore, that all the evidence which the court permitted to be introduced on the subject of the intrinsic value of the property, or tending to show that appellants obtained their money's worth despite the misrepresentations, if any, in regard to the indebtedness, was irrelevant and improper.

We think the court also erred in refusing to permit appellants to testify as to the paper drawn up by Foster, the bookkeeper of the Field Coal Company, showing the finan-

cial status of the corporation. In regard to this, appellant states: "I asked him [appellee] about the standing condition of the company, and he said the company was up in good shape, and he said, if I wanted to examine the books, I could do so; and he took me in the store, and told Mr. Foster to show me the books, and tell me anything I wanted to know about it, and I started to examine the books after Mr. Foster had thrown them down on the table, and about that time Mr. Foster showed me a piece of paper." After showing that this paper had been lost or destroyed, appellant was asked what it contained. Upon objection by appellee, the court ruled it inadmissible, whereupon it was avowed by appellant "that the witness, if permitted to answer, would state that Mr. Foster exhibited to him a paper containing a statement of the liability of the Field Coal Company, and the collectible accounts due to it, and that by said statement it appeared that the debts of the company amounted to about twelve hundred dollars; that the collectible assets due to it amounted to about the same sum; and that Mr. Foster stated he had made said statement from the books of the company, and that the books showed the same to be true and correct." We think this evidence was admissible. Appellant showed that he had been taken to Mr. Foster by appellee, and the former requested to "tell him anything he wanted to know about it." This paper purported to contain the exact information which appellant desired to know, and was given to him by Foster as the agent of appellee, and in pursuance of specific instructions so to do.

We are of opinion that the court, in order to make its rulings consonant with those of this court in the former opinion, should have given instructions "a" and "c" asked for by appellants in lieu of instruction No. 1, and, after striking out the words "and fraudulent" in No. 2, should have given instructions 2, 3, and 4 in the form in which they were given upon the trial.

For the reasons above indicated, the judgment is reversed for proceedings consistent with this opinion.

LOUISVILLE & N. R. CO. v. SMITH et al.

(Court of Appeals of Kentucky. Jan. 19, 1904.)

RAILROADS—DESTRUCTION OF CROSSING—MANDATORY INJUNCTION—ESTOPPEL—ADEQUATE REMEDY AT LAW.

1. Plaintiffs, in a proceeding to compel a railroad by injunction to restore a crossing over its tracks, without alleging or proving irreparable injury, admitted that when the work of double tracking the railroad was in progress, which necessitated a cut 8 or 10 feet below the original crossing, they went to the superintendent in charge, interviewed him on the subject, and acquiesced in his proposition to secure the necessary right of way and build a road so that the pike could be reached without

crossing the railroad at all. With this understanding, and at great expense, the railroad finished its double tracking, lowered its tracks, and destroyed the crossing. It appeared that to restore the crossing would be very expensive, and that, if restored, the danger from accidents, owing to the steepness of the grade, would be almost impossible to guard against. *Held*, that plaintiffs were estopped to invoke mandatory injunction.

2. Injunction will not lie to compel a railroad company to restore a crossing over its track, where plaintiffs have an adequate remedy at law.

Appeal from Circuit Court, Bullitt County.

"To be officially reported."

Action by Helen C. Smith and others against the Louisville & Nashville Railroad Company. From a decree for plaintiffs, defendant appeals. Reversed.

Fairleigh, Straus & Eagles, E. W. Hines, and B. D. Warfield, for appellant. Chapeze & Halstead, for appellees.

BARKER, J. This action was instituted by the appellees for a mandatory injunction requiring the appellant to restore a railroad crossing over its tracks and right of way near Gap in Knob Station in Bullitt county, Ky., which it had destroyed in changing the grade of its road at that point. In their petition the appellees allege, in substance, that they own property, in Bullitt county, within a mile or two of the crossing in question; that theretofore, and for many years in excess of the statutory period, they had used and occupied, under a claim of right, a passway from their lands across intervening lands to the railroad crossing in question, and over said crossing to the Louisville & Shepherdsville Turnpike Road; that this exercise by them of the easement in question had been continuous and adverse to all the world for more than 15 years next before the injury complained of. Appellant, by its answer, controverted appellees' title to the passway, and pleaded in estoppel an agreement on its part with appellees whereby it acquired land, and made for them an outlet to the turnpike in question, at a point some 1,400 feet further south than the original crossing over its right of way, which afforded an entrance into the pike without crossing over its line; that appellees stood by and saw it change the grade of its tracks at great expense, and acquire, by purchase, the right of way, and the building of a road which secured to appellees an outlet to the turnpike without crossing the railroad track.

Without setting forth the allegations of the pleadings in detail, we think they sufficiently present, first, the title of appellees to the easement claimed by them, and, second, the question of estoppel of appellees by their conduct with reference to the change of grade and the destruction of the crossing in question. The evidence shows that the passway in question, from the lands now owned by the appellees across all intervening lands to the turnpike at

¶ 2. See Injunction, vol. 27, Cent. Dig. § 15.

or near the crossing in question, have been exercised by them, their tenants and grantors, and the public generally, under a claim of right, continuously for 40 or 50 years. This, in our opinion, sufficiently established their title by prescription to the easement.

About two years before the institution of this action, appellant found it necessary, in order to transport along its line from Louisville to the South the enormous traffic committed to its care, to double track its line from Louisville to Shepherdsville, and, to overcome a steep grade existing in its line at and in the neighborhood of the crossing in question, to make a cut and lower its tracks some 8 or 10 feet below the level of the original crossing, thus effectually destroying it. When this work was in progress, W. A. Foreman, one of the appellees, visited appellant's superintendent, Daniel Breck, who was in charge of the work, and interviewed him on the subject of the destruction of the passway; and while the superintendent did not, in terms, recognize appellees' legal right to the crossing in question, he said to Foreman that he would secure the necessary right of way, and make a road from the passway where the old crossing on appellees' side existed along the line of appellant's track, so that the new road would strike the Louisville & Shepherdsville Turnpike at a point 1,400 feet north of the old crossing, and thus obviate the crossing of appellant's line at all. It is admitted by both Foreman and his cousin, Helen Clay Smith, that they acquiesced in this proposition, whether or not they affirmatively agreed to it; or, to use Miss Smith's own language, "If he made a good road, she would not be stubborn about it." With this understanding, at great expense appellant finished the work by which it changed the grade of its line, lowered its tracks, and destroyed the crossing. It also obtained the right of way, and made a road along the route indicated in the conversation between Breck and Foreman, thus affording appellees an exit into the turnpike without crossing its tracks. Appellees were not satisfied with the new road as made, claiming that, by reason of the steepness of its grade, it is impassable. The evidence on this point is contradictory; the weight, perhaps, being in favor of appellant. The evidence conclusively shows that it would be impossible to restore the crossing, except at an enormous expense in labor and money to appellant, and that even then it would be an exceedingly dangerous one, because of the fact that, in order to make it at all, it would be necessary to make a deep cut so as to get down to the grade of the track; and as appellant's road, even when lowered as it is at present, is on a steep grade, it would be almost impossible, according to the testimony, to overcome or guard against the danger of accident. We think the appellees are estopped from invoking the extraordinary remedy of a mandatory injunction against appellant, requiring it to restore the crossing, under these circumstances, and that they should have been

remitted to an action at law for damages for whatever wrong or injury they may have suffered.

In the case of *Byron v. Louisville & Nashville Railroad Company (Ky.)* 59 S. W. 519, a somewhat similar question in principle arose, and this court said: "The proof shows that appellant stood by and saw that the appellee was building the wall to hold the filling, and thus expended large sums, without complaint or proceeding to stop the work, and when the work was nearing completion he seeks an injunction. If he had a right to an injunction he should have asserted it earlier, and before appellee had expended so much on the work. To grant an injunction when applied for would have necessarily damaged appellee greater than to refuse would damage appellant. There is no claim for damage made, and hence no question of recovery of damages before us." For the reason given, among others, the judgment refusing the injunction was affirmed.

And in the case of *Herr, etc., v. Central Kentucky Lunatic Asylum (Ky.)* 61 S. W. 284, which was an action instituted by property holders to enjoin the asylum from polluting the waters of Goose creek by emptying its sewerage into it, it was said: "The question first to be determined under this state of facts is, whether appellant has an adequate remedy at law for the injuries complained of by an action for damages, as the rule is settled that an injunction will not be granted where the remedy at law is full, adequate, and complete. It was held in *Hauns v. Asylum (Ky.)* 45 S. W. 890, that an individual could maintain a common-law action against appellee for injuries identical in character with those herein complained of, and that an execution sued out upon a judgment in such a proceeding could be levied upon the property of appellee, unless the sale of such property would render the corporation wholly unable to care for the insane under its charge. And, even if it be conceded that appellee had no property which came under this head that would be liable to such an execution, we think it must be conclusively presumed that the Legislature would make suitable provision for the payment of such a judgment, as it is in reality a claim against the state, when it has been properly ascertained and determined in the courts of the state. But even if it be conceded that appellant's claim for an injunction could not be defeated on this ground alone, 'it is a rule practically without exception, that a court of equity will not grant relief by injunction, where the party seeking it, being cognizant of his rights, does not take those steps to assert them which are open to him, but lies by and suffers his adversary to incur expenses which would render the granting of the injunction a great injury to him. This rule is especially applicable where the granting of the injunction will operate injuriously to the public as well as to the party

against whom the injunction is sought.' 16 Am. & Eng. Encycl. of Law, p. 356, and authorities there cited. Pomeroy, in his work on Equity Jurisprudence, §§ 816, 817, announces the general doctrine as follows: 'Acquiescence is an important factor in determining equitable rights and remedies, in obedience to the maxim, "He who seeks equity must do equity, and he who comes into equity must come with clean hands." * * * Acquiescence in the wrongful conduct of another by which one's rights are invaded may operate often upon the principles of and in analogy to estoppel, to preclude the injured party from obtaining many distinctively equitable remedies to which he would otherwise be entitled. This form of quasi estoppel does not cut off the party's title, nor his remedy at law; it simply bars his equitable relief, and leaves him to his legal action alone.' Mr. High, in his work on Injunctions, § 786, says: 'He who seeks relief against a nuisance must show due diligence in the assertion of his rights, and where complainant has allowed the defendant for a long period to continue in the erection of his obnoxious structure, at great expense, equity will not interfere. * * * Complainants who have long slept on their rights will not be allowed to enjoin the nuisance, and thus put themselves in a position from which their own laches has debarred them.' This principle was applied in *Southard v. Morris*, 1 N. J. Eq. 518; *Logansport v. Uhl*, 99 Ind. 531 [49 Am. Rep. 109]; *Attorney General v. N. Y. & L. B. R. Co.*, 24 N. J. Eq. 49; *Traphagen v. Jersey City*, 29 N. J. Eq. 650; *Swaine v. Great Northern Ry. Co.*, 9 Jur. 1196. It has also been frequently applied by this court. *Murphy v. Stanford Water, Light & Ice Co.* (Ky.) 50 S. W. 835. An injunction ought not to be granted where the benefit secured by the party applying therefore is comparatively small, whilst it will operate oppressively and to the great annoyance and injury of the other party and to the public, unless the wrong complained of was so wanton and unprovoked as to properly deprive the wrongdoer of all consideration for its injurious consequences. *Jones v. City of Newark*, 11 N. J. Eq. 452."

The case of *Murphy v. Stanford Water, Light & Ice Co.* (Ky.) 50 S. W. 835, was instituted to obtain an injunction to prevent the diversion of water from its natural channel, to the injury of the plaintiffs. The facts established the wrong complained of. This court affirmed the judgment refusing a perpetual injunction, and said: "If the appellants' damage is clearly shown to be caused by the appellee, still we think there is an ample legal remedy, and this great public benefit should not be crippled or hindered unless it be absolutely necessary to protect appellants' rights." High, in his work on Injunctions, § 643, says: "As in all cases of the exercise of the strong arm of equity by injunction, the right to the relief may be lost

by one's own negligence and delay in seeking protection. And where the owner of land over which a railway has been constructed has stood quietly by and neglected to insist upon compensation at the time his land was taken, and has waited until the road was in full operation before asserting his rights, he will not be permitted to restrain its operation. In such cases an injunction, if granted at all, should only be allowed as a last resort, and after all ordinary means of relief have proved ineffective." Section 640: "Where the owner of lands has conveyed to a railway company a right of way through his premises, upon a verbal assurance that the company would construct the necessary cattle gaps for the passage of cattle, a failure on the part of the company to comply with such an agreement will not warrant an injunction to prevent the operation of its road until the agreement is complied with, since the indirect effect of such relief would be to compel the company to construct the cattle gaps, and the power to thus enforce a specific construction is one which is rarely exercised by a court of equity."

In the case at bar, appellant is engaged in carrying on a great railway system. In its successful operation the general public is deeply interested. It is neither alleged nor proved that appellees have suffered irreparable injury by reason of the wrong complained of. They stood by and saw the enormous outlay of money, time, and labor on the part of appellant in order to improve its track and facilitate the necessities of commerce and travel. They have an adequate remedy at law for whatever damage they may sustain by reason of the injury complained of, and, under all the circumstances of this case, under the principles announced in the authorities supra, we think that they should have been confined to compensation for the injury, which may be presented upon the return of the case.

For the reasons above indicated, the judgment is reversed for proceedings consistent with this opinion.

GADDIE v. COMMONWEALTH.

(Court of Appeals of Kentucky. Jan. 29, 1904.)

BURGLARY—BREAKING.

1. One may not be convicted of breaking a warehouse, though he removes a window strip, where his action does not, without additional effort, make entry possible.

Appeal from Circuit Court, Hardie County.
"To be officially reported."

Ed Gaddie was convicted of breaking a warehouse, and appeals. Reversed.

G. K. Holbert, for appellant. N. B. Hays, Atty. Gen., and Loraine Mix, for the Commonwealth.

BARKER, J. Appellant was indicted, charged with the offense of unlawfully break-

ing a warehouse belonging to Leischardt & Murdock, in Vine Grove, Hardin county, Ky., with intent to steal therefrom. A trial resulted in a verdict of conviction, and a sentence of the defendant to five years in the penitentiary, of which he is now complaining. The bill of exceptions consists of the following agreement of facts: "It is agreed that the evidence herein showed that the act done was committed in Vine Grove, Hardin county, Kentucky, upon the storehouse of Leischardt & Murdock; that one outside window strip, which fixed and held the window firmly in place, had been prized open from the bottom, and some of the nails drawn out of it, by the defendant, Ed Gaddie, and the strip left hanging loose from the top; that the window remained unmoved in its place, but was left unprotected on one side, so it could have been easily lifted out, but that there was no opening made to the interior of the building. It is further agreed that the evidence showed that the said act was done with intent that stealing should be committed therefrom."

No entry could have been made into the warehouse after the window strip was loosened. Undoubtedly appellant began to break into the house, but he did not finish the attempt. The term "breaking," as used in the statute, has a well-known and definite meaning at common law, with reference to the offense of burglary; and, in order to constitute it, the action of the defendant must have been such as would, without additional effort, have made an entry possible. The term is used in the statute in its common-law sense. Roberson, in his work on Kentucky Criminal Law & Procedure, § 302, after defining burglary at common law, says: "As we shall hereafter see, the statutes of this state provide against breaking into dwelling houses and other buildings, whether in the night or day, and the foregoing statement as to breaking, entry, etc., applies equally to these statutory cases." In section 303 he says: "'Breaking,' as used in this connection, implies force, but the slightest force is sufficient. Thus the lifting of a latch, or the turning of a knob in opening a door, the picking of a lock, or opening with a key, or pushing open a closed door, though it is neither latched, bolted, nor locked, the hoisting of a window, the removal or breaking of a pane of glass, or unloosening any other fastening of a door or window which the owner has provided for securing the house from an actual breaking. * * * But any breaking which enables the defendant to take the property out through the breach with his hands is sufficient breaking, if the intent was felonious. On the other hand, there is no breaking where the entering is through an open door or window, or other aperture, or even pushing further open a door partly open, or raising a window partly raised; and it is held that merely breaking the blinds is not sufficient to warrant conviction, when there has been no

entry beyond the sash of the window." Bishop, in his new work on Criminal Law, § 91, says: "A breaking, in the law of burglary, is any disrupting or separating of material substances in any inclosing part of a dwelling house, whereby the entry of a person, arm, or any physical thing capable of working a felony therein may be accomplished." Subsection 2 of section 95: "If there are inside shutters, it is enough to pass in the hand for the unaccomplished purpose of opening one of them, but the breaking of an outside shutter is not sufficient while the place remains unbroken." Greenleaf, in his work on Evidence (16th Ed.) vol. 3, § 76, thus states the rule: "The breaking of the house may be actual, by the application of physical force; or constructive, where an entrance is obtained by fraud, threats, or conspiracy. An actual breaking may be by lifting a latch; making a hole in the wall; descending the chimney; picking, turning back, or opening the lock with a false key or other instrument; removing or breaking a pane of glass, and inserting the hand, or even a finger; pulling up or down an unfastened sash; removing the fastening of a window by inserting the hand through a broken pane; pushing open a window which moved on hinges and was fastened by a wedge; breaking and opening an inner door after having entered through an open door or window; or other like acts. * * * The breaking must also be into some apartment of the house, and not into a cupboard, press, locker, or the like receptacle, notwithstanding these, as between the heir and executor, are regarded as fixtures." In the case of *State v. McCall*, 39 Am. Dec. 314, it appears that the accused had broken open the outside shutters of a window, but had proceeded no further, leaving the window still intact. The court said: "It cannot be that the common security of the dwelling house is violated by breaking one of the shutters of a door or window which has several. True, it weakens the security which the mansion is supposed to afford, and renders the breach more easy. But as additional force will be necessary before an entry can be effected, there can, under such circumstances, be no burglary committed. Suppose the shutters of a door, made by placing plank upon each other until it is two or three double; if the thickness of one of the plank be removed by one intending to commit a burglary, and an entry thus far made, can it be said that the offense was completed? What, in point of principle, is the difference between such a case and one where there are several shutters, an inch or two apart from each other? In neither case can such an entry be made as will enable the aggressor to commit a felony. * * * To constitute burglary, an entry must be made into the house with the hand, foot, or an instrument with which it is intended to commit a felony. In the present case there was nothing but a breach of the blinds, and no entry beyond

the sash window. The threshold of the window had not been passed, so as to have enabled the defendant to consummate a felonious intention; and, according to the principle we have laid down, the charge to the jury was erroneous." The case of *Rose v. Commonwealth* (Ky.) 40 S. W. 245, cited by the Attorney General, has no application to the case at bar. There, the accused received a prop which constituted the fastening of a door; thus opening the door, and leaving nothing further to be done, in order to effect an entrance. In the case at bar, in order to make an entrance into the warehouse, it was necessary to remove the window by additional force. The effort on the part of the accused to break the warehouse in question was incomplete, and constituted no more than a trespass.

At the close of the commonwealth's testimony, a peremptory instruction should have been given the jury to find the accused not guilty.

The judgment is reversed for proceedings consistent herewith.

VAUGHN v. DUFF.

(Court of Appeals of Kentucky. Jan. 28, 1904.)

APPEAL—FINDINGS OF TRIAL COURT—CONCLUSIVENESS.

1. Where on all the proofs the mind is left in doubt as to whether a mortgage was genuine or fraudulent, the Court of Appeals will not disturb the finding of the trial court in that regard.

Appeal from Circuit Court, Barren County.

"Not to be officially reported."

Action between J. M. Vaughn and H. W. Duff. From a judgment for the latter, the former appeals. Affirmed.

J. Lewis Williams and Williams & Underwood, for appellant. Duff & Hutcherson and G. M. Bohannon, for appellee.

NUNN, J. The only question in this case is priority of mortgage liens. The appellant and appellee each held a mortgage on the same property of J. A. Vaughn, a brother of appellant. Appellee's mortgage was executed September 8, 1900, and recorded March 14, 1901. Appellant's mortgage was executed January 29, 1901, and recorded January 30, 1901. As appellant's mortgage was recorded first, appellee charged that it was fraudulent and was without consideration, and that appellant had actual notice of his mortgage before the execution and recording of his (appellant's) mortgage. The proof was heard, and the lower court adjudged that appellee's mortgage was prior to that of appellant, and from this judgment appellant appeals.

Appellant did not testify in the case. It appears from the testimony of J. A. Vaughn, the mortgagor, and Nat Nickols, the person who represented appellant in taking this mortgage, that it was made known to Nickols

that appellee held a mortgage on this property before the mortgage to appellant was executed. Considering all the proof in the case, the mind is left in doubt as to whether appellant's mortgage was genuine or fraudulent, and we do not feel authorized to disturb the action of the lower court. Wherefore the judgment is affirmed.

FRIEND et al. v. MEANS.

(Court of Appeals of Kentucky. Jan. 27, 1904.)

VENDOR'S LIEN—FORECLOSURE—PARTIES DEFENDANT.

1. Where the holder of an unrecorded deed to real estate, subject to a remote vendor's lien, is not made a party defendant to the proceedings foreclosing the lien, her remedy for loss sustained is on the warranties she holds, and not an action for damages against such remote vendor.

Appeal from Circuit Court, Boyd County.

"Not to be officially reported."

Action by Emma L. Friend and another against C. W. Means. From a judgment for defendant, plaintiffs appeals. Affirmed.

D. W. Steele, Jr., for appellants. Thos. R. Brown, for appellee.

BARKER, J. The appellee, C. W. Means, sold a tract of land in Ashland, Boyd county, Ky., to a corporation known as the "Ashland Improvement Company," reserving a lien for the unpaid purchase money, amounting to the sum of \$5,000. Subsequently the corporation borrowed a sum of money from S. B. Buckner, and, to secure payment of the debt, executed and delivered to him a mortgage upon the land in question. Afterwards it sold lot No. 6, in block 809, size 50x142½ feet, on Fifteenth street, to A. C. Campbell, who sold it to appellant Emma L. Friend. The latter, for some reason, failed to put her deed to record. The Cattlesburg National Bank instituted an action in the Boyd circuit court against the Ashland Improvement Company, seeking a sale of its property and effects. In this action S. B. Buckner, on his petition, was made a party defendant, and sought, by cross-petition, to enforce his lien against the property mortgaged to him, which included the lot involved in this action. To this cross-petition appellee, C. W. Means, was made a defendant, and required to set up his lien for the unpaid purchase money upon the lot and realty covered thereby, which he did. Appellant, not having placed her deed upon record, was not made a party defendant to these proceedings. Afterwards the action proceeded to judgment, wherein appellee's vendor's lien for the unpaid part of the purchase money due him, being the sum of \$5,000, was enforced, as well as the mortgage lien to Buckner, and a judgment rendered, decreeing a sale to satisfy the debts in question. In the sale so had, appellant's lot was sold to Robert Russell for the sum of \$150. Afterwards Robert Russell received from appellant the sum of \$168.20, that being the

amount of the purchase money paid by him, together with accrued interest and costs. In order to make this payment, appellant received \$85 from her remote vendor, the Ashland Improvement Company; the balance she furnished herself. Having settled with Russell, and in this way quieted her title to her lot, she instituted this action against appellee, substantially alleging the foregoing facts, and claiming that she had been damaged in the sum of \$1,050 (that being the amount paid by her to Campbell for the lot) by reason of the fact that he had wrongfully failed to make her a party defendant to the suit in which he enforced his vendor's lien, and praying judgment for the sum sued for.

There is no basis in law for such an action as this. On the agreed facts, appellant has lost only the difference between \$168.20, the amount she paid Russell, and \$85, the amount furnished her by the Ashland Improvement Company, or \$83.20; and her damage, in any event, does not exceed that amount. Appellee was under no duty to make her a party defendant to the action in which he set up his vendor's lien, even if he had known she owned an interest in the land. No legal right of hers could be prejudiced in an action to which she was not a party and properly before the court. That she was not made a party was due to the fact that she had not placed her deed to record, and those who were in charge of the litigation had no knowledge of her interest. If she had been made a party, she could not have fared better than she did, as, under the agreed facts, she had no defense, either to the vendor's lien of appellee or the mortgage lien of S. B. Buckner. Her only remedy for the loss she sustained is upon the warranties she holds from her immediate and remote vendors.

This action is both unique and untenable; wherefore the judgment, peremptorily instructing the jury to find in favor of the appellee, is affirmed.

NORTH v. ROGERS.

(Court of Appeals of Kentucky. Jan. 28, 1904.)

VENDOR'S LIEN—ESTOPPEL.

1. Where one who held a vendor's lien on land was present at a sale of it, and told the purchaser that he would not look to him for payment, and, at the time of the first and second payments on such purchase, refused to accept any sum from the purchaser, saying he would look to his own vendee for payment of the amount due him, he cannot enforce his vendor's lien for the recovery of any sum greater than is still unpaid on the last sale.

Appeal from Circuit Court, Franklin County.

"Not to be officially reported."

Action by Henry Rogers against Joseph North and others. From a judgment sustaining a demurrer to the answer of defendant North, he appeals. Reversed.

J. A. Violet, for appellant. Ira Jullion, for appellee.

NUNN, J. On the 7th day of October, 1898, the appellee sold to J. H. Ethington a tract of land for the price of \$800. Ethington paid a part of the purchase price, and executed several notes for the balance. Two of the notes, for \$178.33 each, remain unpaid, for the recovery of which the appellee brought this action against J. H. Ethington, Green McCarty, and appellant, Joseph North; Ethington having sold this land to Green McCarty, and he having sold and conveyed it to appellant. The appellee's petition was in the ordinary form, by which he sought to enforce a lien for his unpaid purchase money upon the land of appellant. Appellant filed his answer, to which a demurrer was sustained. Then he amended his answer, and that part of it material to the question involved in this case is as follows: "Defendant says that the aforesaid conveyance was made by McCarty to him, and before he had paid McCarty on said land, and before the contract of purchase had been completed, the plaintiff, Henry Rogers, said to this defendant that the defendant Ethington was at that time sawing him (the plaintiff) a large bill of lumber, the sawing of which would about come to as much as Ethington was owing him on that land, and that whatever Ethington owed him would be settled by him in that way, and defendant should buy said land from this McCarty, and pay for same, if he desired to do so, and that he (the plaintiff) would give him no trouble, and would not look to him for the payment of the unpaid purchase money on said land, if any, but would look to Ethington, and make his payments out of him, and not either he or McCarty. Defendant says that relying upon said statements of the plaintiff that he would look to Ethington, and not to him, and that the plaintiff would give him no trouble about said land, he bought the tract of land from McCarty in the presence of plaintiff, and made the first payment thereon to McCarty in his presence, and that McCarty then and there offered to pay to the plaintiff, and tendered him the money in any sum the defendant then owed him, and the plaintiff refused to take said sum, or any part thereof, and said again that he looked to Ethington, and not to either of these defendants. Defendant says that on the 1st day of March, 1902, when his second payment was due to the defendant McCarty, he went with the defendant McCarty to the plaintiff, and paid the said McCarty the second payment in the presence of the plaintiff, and the said McCarty again offered to pay the plaintiff any sum that was due from Ethington to him on said tract of land at that time, and the plaintiff refused to accept said money or any part thereof. Defendant says that, before he paid the said McCarty the last payment, he offered to pay the plaintiff the said sum, but

he failed and refused to accept same, or any part thereof, from him. Defendant says that relying upon said statements and conduct of the plaintiff in telling him that he would not bother him or look to him for the money or the said McCarty, and he refusing to take said payments, he purchased said land, and paid therefor the money paid thereon, and all that is due the defendant McCarty, and all with the exception of \$350, \$100 of which is now due, and remainder will be due on the 1st day of March, 1903. He did not know that Ethington was indebted to said Rogers. Defendant says that by all of which Henry Rogers is estopped to assert any lien against his land for the payment of the debt against Ethington and McCarty, and is estopped to have said land sold." To this amended answer the lower court sustained a demurrer.

The statements in this amended answer by demurrer are admitted to be true. These allegations being true, it is impossible for us to see how, in equity and good conscience, the appellee is entitled to enforce a lien on appellant's land, unless it be by subrogation to the rights of Ethington and McCarty. Under this pleading he is certainly estopped from the recovery of any greater sum than \$350, and then only for such interest as North agreed to pay McCarty.

Wherefore the judgment of the lower court is reversed, and the cause remanded for further proceedings consistent herewith.

WEBB et al. v. WEBB et al.

(Court of Appeals of Kentucky. Jan. 20, 1904.)

LIFE INSURANCE—MISTAKE IN POLICY—ACTION FOR RELIEF—LIMITATIONS.

1. An application for life insurance named insured's wife as the beneficiary. The policy made her the beneficiary, if living; otherwise insured's children. She died before insured, and he remarried, and at his death left children by both marriages. *Held*, in an action between the children of the two marriages, more than 13 years after the death of the first wife, to determine their rights to the proceeds of the policy, that the children of the first wife could not have relief on the ground of mistake; an action therefor being barred by Ky. St. 1903, § 2515, in 10 years after the making of the contract, notwithstanding the first wife was under coverture till her death, and her children attained their majority less than 10 years before commencement of the action; and section 2525 provides that, if a person entitled to bring an action is, at the time the cause of action accrues, an infant or married woman, the statute shall not run till the removal of the disability, as, under section 654, had the policy been made payable to the first wife only, her children would not have taken under the policy, but by descent from her; and her interest in the policy was a chose, which her administrator would have been entitled to, and in whom was the right of action to correct the mistake; and by section 2527 he is deemed to have qualified not more than three years after her death.

"Not to be officially reported."

On rehearing. Denied.

For former report, see 64 S. W. 839.

O'REAR, J. The attention of the court has been called to an error in the original opinion (64 S. W. 839), wherein it was stated that Mrs. Irene S. Webb lived some years after the policy was paid up. In fact, she lived only about six months after the policy was issued. The error is, however, an immaterial one as affecting the rights of the parties. The court, in considering this case did not determine, and we do not now decide, whether the mistake in issuing the policy alleged by appellants, and which they sought by this action to correct, existed or did not. The court found then, and is compelled to adhere to the conclusion, that the plea of limitation must prevail. In the original opinion the court merely cited section 2515 of Kentucky Statutes of 1903 (which is a part of article 3) that an action for relief on the ground of fraud or mistake must be brought within five years from the perpetration of the fraud or mistake, or within five years from its discovery, but in no event later than ten years. Counsel for appellant, in their petition for rehearing, insist that this section cannot be applied to this case, because of section 2525, Ky. St. 1903, which reads: "If a person entitled to bring any of the actions mentioned in the third article of this chapter * * * was, at the time the cause of action accrued, an infant, married woman, or of unsound mind, the action may be brought within the like number of years after the removal of such disability * * * that is allowed to persons having no such impediment to bring the same after the right accrued." The policy stated that upon the death of John W. Webb the amount for which his life was insured was to be paid to Irene S. Webb for her sole use, if living, and, if she was not then living, to the children of John W. Webb. It was the contention of appellants that the contract in fact was that the policy was to be payable to Irene S. Webb as the sole beneficiary, and that the mistake consisted in the insertion of the clause that, in the event she was not living at the death of the insured, this sum was to be paid to his children. It is now argued that, Mrs. Webb being under disability or coverture during the whole time of her right to sue to correct this mistake, the statute of limitation did not run. It is also argued that appellants, her children, were under the disability of infancy at the same time and at the time of her death, and that, however their right might be derived, whether directly as beneficiaries under the policy or as taking through their mother under the statute, their disability protected them against the running of the statute during their minority. They did not discover the mistake at all until just before the filing of this suit, which was within less than 10 years of the time of their coming to maturity. It is insisted that under section 654, Ky. St., which is a substantial re-enactment of sections 30 and 31 of the act of March 12, 1870 (1 Acts 1869-70,

p. 71, c. 645), the children took under the policy as beneficiaries. The material parts of that section are as follows: "A policy of insurance on the life of any person expressed to be for the benefit of * * * or made payable to any married woman * * * shall inure to her separate use and benefit, and that of her children, free from any claim of her husband or others." This court had occasion to construe the section of the statute last quoted as affecting the rights of married women as the sole beneficiaries of life insurance policies, and as to what right the children had in the policies. The question arose in the case of *Wigman v. Miller*, 98 Ky. 620, 33 S. W. 937. The point under consideration was disposed of as follows: "The statute is not construed as giving any new right to either the wife or children, but as protecting the rights given them by the contract of insurance from subjection to the debts of the husband or father, or any other person. It follows, therefore, that the rights of the children under this contract are exactly what they would have been had the statute not been quoted; that is, they have no interest whatever, for neither the contract of insurance nor the charter, so far as this record shows, gives them any interest. The contract gives the wife the right to the proceeds of the policy, conditional upon her survival of her husband. The children of the wife had no more interest in the proceeds than they had in any other personal property of hers." From this it would seem that the court was of opinion that the only effect of the language was to create a separate estate in the beneficiaries' interest in the policy. If the strictest construction of this opinion be applied, it would follow that the children never had an interest under the policy in any event, for, under the statute then in force (section 11, art. 36, c. 31, Gen. St. Ky.), a husband inherited the whole of the surplus of the deceased wife's personal estate, including her separate personal estate, unless he was expressly prohibited by the instrument creating it. *Brown v. Alden*, 14 B. Mon. 141. John Webb would therefore have been the heir at law of his wife, and as such have inherited her interest in that policy. But, if the other construction be allowed, that the language of the section not only created a separate estate, but was also a statute of descent, controlling the ultimate inheritance of the married woman's interest in the life insurance policy, then her interest in the policy is a chose, which her administrator would have been entitled to, and in whom was the right of action to correct the mistake.

If it be said that no administrator was appointed for Mrs. Webb, and therefore there was no person who might have maintained this action, a sufficient response is found in section 2527, Ky. St. 1903, which provides that, if a person dies before the time at

which the right to bring any action mentioned in the third article of the chapter on limitation would have accrued to him if he had continued alive, and there is an interval of more than three years between his death and the qualification of his personal representative, such representative, for the purpose of that chapter, shall be deemed to have qualified on the last day of such period of three years. Applying this section, it has been more than 13 years since the death of Mrs. Webb, and therefore the action is barred.

The petition for rehearing must be overruled.

LOUISVILLE & N. R. CO. v. COMMONWEALTH.

(Court of Appeals of Kentucky. Jan. 15, 1904.)

RAILROADS—RACE DISCRIMINATION—INDICTMENT—SEPARATE COACH LAW—CONSTRUCTION.

1. An indictment under Ky. St. 1899, § 796, making it a penal offense for a railroad to discriminate between the white and colored races in furnishing separate cars therefor, alleging that a colored passenger was compelled to travel and remain in a baggage car, which had no fire, seats, or other accommodations like those of the car or partition set apart for the white passengers, but not alleging that the baggage car was set apart for the use of colored passengers, is demurrable.

2. Under the separate coach law (Ky. St. 1899, §§ 795-801), a railroad company is not required to carry a separate coach or have separate compartments for white and colored passengers with a freight train carrying a combination car used as a caboose.

Appeal from Circuit Court, Hopkins County.

"To be officially reported."

The Louisville & Nashville Railroad Company was fined \$500 for violation of the separate coach law, and appeals. Reversed.

C. J. Waddill, E. W. Hines, and B. D. Warfield, for appellant. John L. Grayot and N. B. Hays, for the Commonwealth.

PAYNTER, J. The trial under the indictment resulted in the imposition of a fine of \$500. The indictment reads as follows: "The grand jurors of the county of Hopkins, in the name and by the authority of the commonwealth of Kentucky, accuse Louisville & Nashville Railroad Company of the offense of making a difference and discrimination in the quality, convenience, and accommodation in the cars, coaches, and partitions set apart for white and colored passengers, committed in manner and form as follows, to wit: The said Louisville & Nashville Railroad Company, in the said county of Hopkins, on the — day of September, 1902, and before the finding of this indictment, did make a difference and discrimination in the quality, convenience, and accommodations in a car, coach, and partition set apart for white and colored pas-

sengers, in this, that a colored passenger was forced and compelled to travel and remain in the baggage car or partition from Madisonville, Ky., to Providence, Ky., which had no fire, seats, or other accommodations like those of the car or partition set apart for the white passengers." The court held the indictment good on demurrer.

The first question for review is the action of the court on the question raised by demurrer, to determine which requires a brief review of the separate coach law. By section 795, Ky. St. 1899, railroad companies are required to furnish separate coaches for white and colored passengers; and it is provided therein that each compartment divided by a substantial wooden partition, with a door therein, shall be deemed a separate coach. By section 796, Ky. St. 1899, it is provided that railroad companies shall make no discrimination in the quality, convenience, or accommodations in the cars or coaches or partitions set apart for white and colored passengers. Section 799, Ky. St. 1899, requires conductors to assign a white or colored passenger to his or her respective car or coach or compartment. For a failure of such duty, section 800, Ky. St. 1899, imposes a penalty upon the conductor. Section 801, Ky. St. 1899, excepts from the operation of the separate coach law "the transportation of passengers in any caboose car attached to a freight train." The railroad company is liable for the failure to provide separate coaches or compartments for white and colored passengers. The failure to do so is in violation of section 795, Ky. St. 1899. If it provides the separate coaches or compartments, and is guilty of discrimination in quality, convenience, or accommodations in the cars thus provided, it is guilty under section 796. The indictment in this case is not under section 795, Ky. St. 1899, for the failure to provide separate coaches or compartments for white and colored passengers, but is under section 796 for discrimination. A case of discrimination arises when the railroad company has provided the separate coaches or compartments for white and colored passengers, respectively, for, if no separate coaches are provided, the offense is not for discrimination, but for the failure to provide separate coaches or compartments. The indictment does not charge that there was no separate coach or compartment provided for colored passengers, but that there was a difference and discrimination in the quality, convenience, and accommodations in the cars set apart for white and colored passengers. The discrimination alleged in the language of the indictment is "that a colored passenger was forced and compelled to travel and remain in the baggage car from Madisonville, Ky., to Providence, Ky., which had no fire, seats, or other accommodations

like those of the car or partition set apart for the white passengers." It is not charged that the baggage car was set apart for the use of colored passengers, but that a colored passenger was forced and compelled to travel therein. If the conductor wrongfully compelled the colored passenger to ride in the baggage car, the conductor, and not the railway company, violated the statute. *Louisville & Nashville R. Co. v. Commonwealth*, 99 Ky. 663, 37 S. W. 79. The averment that the colored passenger was forced to ride in the baggage car is not equivalent to a charge that the railroad company failed to provide a car or compartment for colored passengers like that provided for white passengers. While the indictment charges discrimination in general terms, yet, when the acts constituting the offense are described, they do not show a discrimination in providing a car or compartment, for colored passengers. The demurrer should have been sustained to the indictment.

The evidence shows that the train in question was scheduled to run as a passenger train between Providence and Earlinton, except Sundays. When so run, it consisted of two coaches, one of which was a combination baggage and passenger car, divided by a partition into two compartments, one of which was used for baggage, mail, and express, and the other compartment for colored passengers. The train was not scheduled to run on Sundays, but on that day was run as a coal train. It had no caboose, but used the combination car described as a caboose. It was so run on the day the colored passenger was put in the baggage compartment. It was a freight train. Under section 801, although it carried a caboose for employes and passengers, the railroad company was under no duty to provide separate coaches for white and colored passengers. The law does not prescribe how a "caboose car" shall be constructed. It may be constructed with or without compartments. It may have one or more compartments. A caboose car is a car attached to the rear of a freight train fitted up for the accommodation of the conductor, brakemen, and chance passengers. The combination car in this case was used for the brakemen and chance passengers. The Legislature evidently intended to relieve railroad companies from furnishing separate coaches where a freight train is operated, although it carries passengers in the caboose car. We are of the opinion that the company was under no obligation to carry a separate coach or have separate compartments for white and colored passengers in the train in question, for it was a freight train carrying a combination car used as a caboose.

The judgment is reversed for proceedings consistent with this opinion.

CITY OF BARDSTOWN v. NELSON COUNTY.

(Court of Appeals of Kentucky. Jan. 20, 1904.)

BOARD OF HEALTH—LIABILITY FOR EXPENSES—CONTRACTS—RECORDS.

1. Under Ky. St. 1903, §§ 2047-2072, providing for a State Board of Health, required to appoint county boards of health, which shall quarantine persons with contagious diseases, the county is liable for expenses of quarantining by the county board, though a town council incurs the expenses at the direction of the county board.

2. A county board of health may bind the county for goods and services furnished the county at the instance of the board, without making a record of its contract; there being no statute to the contrary.

Appeal from Circuit Court, Nelson County.
"Not to be officially reported."

Action by the city of Bardstown against Nelson county. Judgment for defendant. Plaintiff appeals. Reversed.

Jno. A. Fulton, Geo. S. Fulton, and R. C. Cherry, for appellant. Nat W. Halstead and F. E. Daugherty, for appellee.

O'REAR, J. Bardstown, in Nelson county, is a city of the fifth class, with less than 2,500 population, and therefore is not required to have a separate health board. Section 2059, Ky. St. 1903. The State Board of Health regularly appointed three persons as the local health board of Nelson county. A case of smallpox developed in Bardstown. The person was poor, and probably a tramp. The local board of health called upon the town council to take steps to isolate and quarantine the case. A house was provided, and guards, medicine, food, and clothing were furnished by the town, to the amount of something over \$200. The fiscal court of Nelson county was not notified of the case, nor of the incurring of the expense. Afterward Bardstown presented a bill of expenses incurred as above stated, and asked the fiscal court to pay it, which was refused. Nor would the court allow any part of it. The rejection of the claim does not appear to have been because it was unreasonable or improvident in its charges, but because the court deemed the city, and not the county, to be liable therefor. The city brought this suit to collect its bill.

The county urges that there is no statute making the county liable for such expenses; therefore that it is not liable. The statutes (sections 2047-2072, Ky. St. 1903) provide a State Board of Health, with large and important duties and powers conferred upon it. Its members, excepting the secretary, are appointed by the Governor, and upon the advice and with the consent of the Senate. They, besides personal duties devolved, are required to appoint local or county boards of health in each county to assist in the execution of such sanitary and precautionary measures against epidemics and contagious diseases as the State Board may promulgate,

or the county boards deem necessary. The powers conferred upon these boards by the statute are extraordinary, and justified, in so far as they will be sustained, only by the extreme exigencies calling for their existence. Among the duties of these boards is to require sanitary cleansing and disinfection of the premises; the isolation and quarantine of persons afflicted with certain highly contagious diseases, such as smallpox. The State Board is composed of doctors of medicine, supposedly qualified to deal intelligently with that particular situation. It is true, there is no express provision of the statute for paying any of the expenses necessarily incurred by these county boards, except for the services of the members. It can scarcely be supposed that the Legislature has done a thing so idle as to provide such an elaborate system for dealing with infectious diseases which threaten the health of the public, without intending that the expenses necessarily incurred by the boards should be paid for. It was competent for the Legislature, in the exercise of the police power of the state, to provide for the detention of persons infected with contagious diseases, and for their treatment at the public expense. If the Legislature had required the several counties or cities to do it, as they are with reference to their paupers, it would not be questioned that the counties and cities would be liable for the expenses.

The State Board of Health are state officers, with fixed terms, jurisdiction, and duties. The state pays them, and provides for their expenses. The county boards of health are county officials, having duties to perform toward the public within their counties. Their compensation is required to be fixed and paid through the fiscal courts of the counties. It was competent for the Legislature to create these governmental agencies, and to impose upon them the discharge of certain duties to the state and counties. If the Legislature see proper to have the police laws of the state looking to the preservation of the health of the public executed by a body of officials selected and chosen with reference alone to their fitness for that delicate and important task, instead of imposing it on the fiscal courts or town councils, it is clearly within their power to do so. But when they do so, the county board become an auxiliary department of the county government. The express authority with which they are clothed by statute carries with it every implied authority necessary to execute it. As they could not execute the statute for the benefit of the county without incurring a liability to pay it, and as no other means are provided, it follows that the liability must be paid by the county as its other obligations are—by money derived from county taxes levied by the fiscal court, the only tribunal authorized by statute for levying county taxes. The judgment and action of the county board of health concerning matters

within their jurisdiction ought to be and are as conclusively binding upon the county as would be the judgment and action of the fiscal court in making allowances for paupers. A corrupt abuse of their power would be and ought to be punished as other official corruption is.

Probably it would have been better if the county board of health had called on the fiscal court in the first instance for the necessary aid in executing the quarantine, and support of the subject. It was doubtless an honest error of the board, as to which municipality would ultimately have the bill to pay, that led to their calling on the town council instead of the fiscal court. But that error does not change the liability of the one legally bound for it. It merely subjected the town to the chance of losing part of the bill, if any of it should be unreasonable in its charges.

The county board of health seems not to have kept a record of its proceedings at that time. It is urged with much earnestness and force that a body exercising the power and duty of incurring almost unlimited debt against the municipality for whom they were acting must make and keep a record of it, not only for the protection of the people who must pay it, but as a basis of impeachment if they act improvidently or dishonestly. It is pointed out that no county or city, or even school district, can become indebted by contract, or act at all, save as it speaks through its records, and that impliedly this governmental agency, if it would bind the public for whom it acts, must likewise act by record. We would be glad if we could hold that such was the law. But we find that in all the instances enumerated where the municipality is bound only when its records bind, it is because of an express statute to that effect. It is a singular oversight in legislation that a similar safeguard, found wise and proper in the instance of every other body that contracts debts on behalf of the public it serves, should have been omitted. But it has not been required, and we cannot hold that those furnishing the services and goods for the county at the proper instance of the county board of health should lose their claim because those officials have not done what they were not required to do.

The rulings of the trial court were in accord with the views herein expressed, except that it left the question to the jury to find whether the local board of health "had met and organized as such." On the trial, appellant offered to prove the affirmative of that fact by parol evidence; appellee objecting, insisting that it could be shown by the record of the local board only. The objection was sustained. The action of the county board of health in quarantining the subject, and asking the council to defray the expenses, was also sought to be proved by parol, and rejected by the court. All the evidence was in favor of a verdict for appellant,

but the verdict was for appellee. A new trial should have been awarded.

Judgment reversed, and cause remanded for proceedings not inconsistent herewith.

GLEASON v. KENTUCKY TITLE CO. et al.
(Court of Appeals of Kentucky. Jan. 27, 1904.)

MORTGAGES—FORECLOSURE—SALE IN BULK—INADEQUACY OF PRICE—VACATION.

1. Defendant, who was the owner of a lot on which he had erected three cottages, worth from \$4,500 to \$5,000, mortgaged the same to secure an indebtedness of \$1,235. After default of payment, proceedings were brought to foreclose the mortgage; and defendant, either by reason of his ignorance, or by a misunderstanding between him and his agent, took no part in the proceedings until after the property had been sold in bulk for \$2,167, after being appraised at \$3,250, when defendant objected to confirmation of the sale. *Held*, that since the property might easily have been sold to better advantage in parcels, and the price was grossly inadequate, the sale should be set aside.

Appeal from Circuit Court, Jefferson County, Chancery Division, No. 2.

"Not to be officially reported."

Suit by the Kentucky Title Company and others for the foreclosure of a mortgage on certain real estate. From a judgment confirming the sale thereof, Stephen A. Gleason appeals. Reversed.

B. F. Washer, for appellant. Ed. M. Louis, for appellees.

BARKER, J. The appellant, Stephen A. Gleason, owned a lot on Smyser avenue, in Louisville, Ky., being 137 feet front by 140 feet deep, upon which he had erected five cottages, and which is shown to be worth from \$4,500 to \$5,000. To secure an indebtedness of \$1,235, this property was mortgaged to the Kentucky Title Company. Appellant having made default in payment, the company instituted this action to enforce its lien. Although properly served with process, appellant for some reason took no notice of the action until after judgment and sale. The property was purchased by appellee Solomon Bloom for the sum of \$2,167. Prior to the sale it was appraised at \$3,250. Appellant filed exceptions to the sale, first, because of the inadequacy of the price; second, because the judgment was ordered to be executed immediately, without any reason therefor; third, the property was sold as a whole, when it was susceptible to division without impairing its value. These exceptions were overruled by the court, and the motion of the purchaser to confirm the sale to him was sustained, from which orders this appeal is prosecuted.

The record shows appellant to be a hard-working, ignorant man, wholly unused to the methods of legal procedure, never before having been engaged in litigation. He seems to have taken no notice of the action against him, and allowed the proceeding to go on without any supervision or attention on his

part, or without employing counsel so to do. It appears that the first time he looked into the matter was after the sale had taken place. He did not know, as a matter of fact, that the sale was ordered, and did not attend to protect his interests. There seems to have been some misunderstanding between him and his agent on this subject; he evidently thinking that his agent would attend to the matter, as he did to the collection of his rents and the repair of his houses. The price realized at the sale was grossly inadequate to the real value of the property, and, while we adhere to the rule so often announced, that judicial sales will not be set aside for mere inadequacy of price, yet we think the surrounding circumstances in this case afforded ample ground for the interposition of the chancellor; it having always been the rule that, while inadequacy of price alone is not sufficient ground to set aside a sale, if there be other elements of substantial hardship or irregularity the court will seize upon them in order to prevent spoliation. That the property in question was susceptible of division needed no evidence. It was 137 feet front by 140 feet deep, and had five separate cottages, each with a lot of 27 feet front. To sell this property as a whole manifestly worked a great injustice upon appellant. Purchasers who have large sums to invest in real property, as a rule, do not buy cottages, whereas purchasers who desire cottage property are not generally able to buy five at a time. Thus the very persons who would have been most apt to invest in the property in question, had it been sold in separate lots, were by the conditions of the sale excluded as bidders.

This case seems to come within the pale of the principle announced in *Van Meter v. Van Meter's Assignee*, 80 Ky. 448, 11 S. W. 80, 289, and, for the reasons stated in that case, the judgment in this is reversed for proceedings consistent herewith.

SPARKS v. DEPOSIT BANK OF PARIS et al.

(Court of Appeals of Kentucky. Jan. 20, 1904.)
CHATTEL MORTGAGES—OF PART OF A LOT OF CATTLE.

1. A mortgage of 36 head of cattle on a certain farm is good to that number against a purchaser from the mortgagor, though there are more cattle of the same description on the place, and this is not disclosed by the mortgage.

Hobson, J., dissenting.

"To be officially reported."

On rehearing. Modified.

For former opinion, see 74 S. W. 185.

O'REAR, J. A re-examination of the record discloses that there were in fact 44 head of cattle of the description contained in the mortgage in this case—i. e. "yearling cattle on the farm of Leonard Drane, now occupied

by said Dundon, near Lair station, Harrison county, Kentucky"—whereas the mortgage embraced only 36 of the number. The mortgage does not disclose that there were any other cattle of that description on that farm. This altered state of facts presents in part a different question from that decided, although the principles announced in the original opinion (74 S. W. 185) are adhered to, and are deemed by the court to be pertinent in the consideration of the question now presented.

The first question for decision is whether the description in the mortgage is in itself sufficient to constitute a valid mortgage. For the reasons heretofore stated in the opinion by Judge Settle, we hold that it is.

The next is, granted that the description is sufficient, will the mortgage be valid if it undertakes by such description to mortgage an unseparated and unidentified number of a greater number of articles? If a mortgage is given to cover only part of a lot or mass of chattels of the same kind and description, it cannot be material, as affecting the validity of the mortgage, whether the fact that it discloses only a part of the lot is embraced, or whether that fact is shown otherwise, for it is the fact that affects the mortgage, and not the statement of it. The authorities are not uniform as to whether such mortgage is void. As between the parties to it, it is generally held to be valid. *Call v. Gray*, 37 N. H. 428, 75 Am. Dec. 141; *Williamson v. Steele*, 3 Lea, 527, 31 Am. Rep. 652; *Stephens v. Tucker*, 14 N. J. Law, 600. In some cases it has been held valid even as against purchasers or creditors when the parties to such mortgage, conceded to be invalid, have designated the property to be included by setting it apart, or separating it from the general bulk, or by the mortgagee's taking possession of a part which the parties thereby show an intention to designate as the part embraced by the mortgage. *Parsons Savings Bank v. Sargent*, 20 Kan. 576; *Jno. S. Brittain Dry Goods Co. v. Blanchard*, 60 Kan. 263, 56 Pac. 474; *Pruett v. Warren*, 87 Mo. App. 566; *Inter-State Galloway Cattle Co. v. McLain*, 42 Kan. 690, 22 Pac. 728. A number of cases hold mortgages such as this to be void; others that they are valid. We are inclined to take the latter view. The reasoning supporting it may be found in the oldest cases, as well as some of the latest. *Heywood's Case*, 2 Ooke on Littleton, 145; *Bacon's Abridgment*, "Election" (B); *Mervyn v. Lyds*, *Dyer*, 91; *Wofford v. McKinna*, 23 Tex. 46, 76 Am. Dec. 53; *Call v. Gray*, 37 N. H. 428, 75 Am. Dec. 141; *Oxsheer v. Watt*, 91 Tex. 124, 41 S. W. 466, 68 Am. St. Rep. 863. It is called the doctrine of selection or election, for by such instrument the grantor impliedly invests his grantee with the right to select the stated number or quantity from the greater. Injustice to neither mortgagor nor purchaser nor creditor can result from this rule; for, unless the

§ 1. See *Chattel Mortgages*, vol. 9, Cent. Dig. § 100.

election is made before the rights of the purchaser or creditor intervene, the latter will be entitled to at least the average of the whole, or maybe to themselves have choice, leaving enough of the average of the whole to satisfy the mortgage.

The purpose of the mortgage in this case was to give the mortgagee a lien on 36 yearling cattle on the Dundon farm to secure the debt named. That was the agreement of the parties. It ought to be enforced as between them, and the weight of the best-reasoned authorities seems to sustain this statement. The selection of the particular 36 cattle in that case, there being 44 of the same description, would be, and ought to be, with the mortgagee; for the reason that, as it was the purpose of the parties to secure the debt, and that only, such cattle as will fulfill that purpose, if any 36 will do it, ought to be selected; as, if there should be an excess of value, it belongs or reverts to the mortgagor after the payment of his debt, while, if there is a deficit in value, the mortgagee would lose, and the object of the mortgage fail. Another reason is that in a chattel mortgage, as in a deed, the grant shall be taken most strongly against the grantor. The purpose of recording the mortgage is to give to intending purchasers or creditors notice of its existence; notice that the owner of the cattle has given the lien mentioned for the purpose stated. The object of the mortgage is to protect the mortgagee, and insure the fulfillment of the original agreement of the parties. The object of the recording is to warn purchasers that they may refrain from buying until the lien is discharged, or until the mortgagor and mortgagee have set apart the particular chattels to be held under the mortgage. The original opinion holds, and is fully sustained by all the text-writers and cases, that the mortgage need not of itself identify the mortgaged property. It is enough if it puts the purchaser on inquiry which, if reasonably pursued, will result in his obtaining the exact information as to what property the mortgage incumbers. So here the mortgage notifies the purchaser that the mortgagee, the bank, had a mortgage lien upon 36 yearling cattle on the Dundon farm. It is conceded that, if there had been only 36 cattle of that description there when the mortgage was given, it would have been a sufficient description, even though others of the same description were subsequently added to the lot by the mortgagor. In this last supposed state of case the purchaser would have been bound to inquire as to what 36 cattle were embraced by the mortgage, and would have been bound to take notice of whatever that inquiry would have led to. In the case as it is the purchaser's inquiry would have got him the information that Dundon had only 8 head of yearling cattle that were not embraced in the mortgage. His next inquiry would have been, which 8 head are free? The objection

of appellant is that no particular 8 head could be certainly pointed out, and therefore that the purchaser was at liberty to buy not only any 8 head of the cattle, but to buy 18, or the whole 44, for that matter. If he did, he would certainly know that the mortgagee was being defrauded. It would be better if the parties would always execute papers of perfect description. But if they don't the penalty is not a forfeiture of their contracts. So long as they can be enforced, the courts will do it. When they are so imperfectly drawn as that others have been misled thereby to alter their condition, then the party most negligent should suffer most. In this case the form of the mortgage under the facts was such that the purchaser (appellant) could not have learned which eight head of the yearling cattle were unincumbered. Therefore he ought to be permitted to buy any eight of them. Beyond that his claim to protection as against even the negligent mortgagee is absolutely without merit. We conclude that appellant's purchase of eight of the cattle was free from the mortgage lien, and to the extent of their value appellee has no right of action against him. But for the remaining ten appellee should be adjudged their value, and the costs in the circuit court.

Judgment reversed, and remanded for proceedings consistent herewith. In other respects, the petition for rehearing is overruled.

HOBSON, J., dissents.

SIGHTS v. LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky. Jan. 27, 1904.)

RAILROADS—CROSSINGS—ACCIDENTS—NEG-
LIGENCE—EVIDENCE—SUFFICIENCY
—FLAGMAN'S DUTIES.

1. It is the duty of a railroad in running its trains through a city to give the usual signals of their approach to street crossings, and the failure to do so is actionable negligence; and when gates and flagmen have been maintained by a road at a street crossing the public may presume, in the absence of knowledge to the contrary, when the gates are open, or the flagman not in his accustomed place, that the gateman or flagman is properly discharging his duties, and that they will not be exposed to danger, and may act on that presumption without being guilty of negligence.

2. It is negligence for a gatekeeper or flagman at a crossing to leave his post, knowing that an engine is approaching the crossing, without giving some signal of danger.

3. One driving on a street towards a railroad crossing must be on the lookout himself, and exercise ordinary care to prevent an accident.

4. In an action against a railroad for negligence resulting in plaintiff's horses taking fright and throwing him out of his buggy at a crossing, evidence held sufficient to authorize the submission of the issue of defendant's negligence to the jury.

Appeal from Circuit Court, Henderson County.

"To be officially reported."

Action by A. B. Sights against the Louisville & Nashville Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed.

Clay & Clay, for appellant. Yeaman & Yeaman, and B. D. Warfield, for appellee.

BURNAM, C. J. The appellant, A. B. Sights, brought this suit against the appellee for damages for a broken leg, which he alleges was occasioned by his horses taking fright and throwing him out of his buggy in consequence of the negligence of appellee's servants in charge of one of its trains in the city of Henderson. Appellee filed a general demurrer to plaintiff's petition, which was overruled. It thereupon filed an answer, which was a traverse and a plea of contributory negligence. The trial court gave the jury a peremptory instruction to find for the defendant at the conclusion of plaintiff's evidence, and he has appealed.

The alleged acts of negligence on the part of the defendant consisted in driving its engine across one of the most frequented streets of the city of Henderson without giving any signals of its approach, and in the failure of their flagman, who was stationed at the crossing in conformity with one of the ordinances of the city of Henderson, to give the warning of the approach of the engine until too late to avoid the injury; third, in causing the engine to emit violent and unusual noises when close to and in front of plaintiff's horses. The testimony of appellant, which was corroborated by that of Mr. Johnson, who was driving with him, was to the effect that the railway company had maintained at their crossing of Second street in the city of Henderson, in conformity with the requirement of a city ordinance, a flagman, whose duty required, when trains were approaching the street, that he should stand in the middle thereof, and give notice of their approach to travelers by waving his flag; that a small house had been erected between the tracks of the Louisville & Nashville Railroad Company and those of the Illinois Central Railroad Company for his accommodation, and when the way was unobstructed he usually retired to his house; that on the date of the accident appellant was riding in a buggy pulled by two horses, which were being driven by Mr. Johnson, along Second street in the direction of the railroad crossing; that when they arrived at within 200 yards of the crossing they discovered an engine backing a train across the street south, and they stopped their horses, and remained standing until the engine train had disappeared behind a train of box cars which were standing upon the track; that after the train passed out of view, not seeing the flagman in the street, they concluded that it was safe to approach, and drove their horses slowly and cautiously towards the crossing; that when they had ar-

rived at within about 15 or 20 feet of the track of the Illinois Central Railroad Company they saw the flagman standing near his shanty, on the side of the street, with his back to the railroad, and his flag across his shoulders, holding it with both hands; that suddenly, and without warning of its approach, the engine reappeared from behind the train of box cars, and simultaneously with its appearance the engine emitted a succession of violent and unusual noises, and that at this time for the first time the flagman began to wave his flag; that their horses became frightened at the noise of the train, and immediately turned around, throwing appellant out of the buggy, and running away; that as a result of the accident appellant's leg was broken, and he was for some time confined to his house, and unable to perform his duties.

This court has frequently held that it is the duty of a railroad company, in running its trains through a city, to give the usual and customary signals of its approach to street crossings, and that a failure to do so was actionable negligence. See *L. & N. R. Co. v. Penrod's Adm'r*, 56 S. W. 1, 66 S. W. 1013, and the authorities there cited. "And when gates or a flagman have been maintained by railway companies at the crossing of streets in cities and towns, the public have a right, when the gates are open, or the flagman not in his accustomed place of duty, to presume, in the absence of knowledge to the contrary, that the gateman or flagman is properly discharging his duties; and it is not negligence on their part to act on the presumption that they will not be exposed to a danger which could only arise from the disregard of his duties; and it is negligence for a gatekeeper or flagman to leave his post, knowing that an engine was approaching a crossing, without giving some signal of danger." See *Evans v. Lake Shore & M. S. R. Co.* (Mich.) 50 N. W. 386, 41 L. R. A. 223; *Richmond v. Chicago & W. M. R. Co.*, 87 Mich. 374, 49 N. W. 621; *Glushing v. Sharp*, 96 N. Y. 676; *C., C. & I. R. Co. v. Schneider*, 45 Ohio St. 687, 17 N. E. 321; *Woehrlie v. Minnesota Transfer Co.* (Minn.) 84 N. W. 791, 52 L. R. A. 348. It seems to us that it would be a very narrow construction to hold that the purpose of a flagman was solely for the purpose of preventing collisions upon the crossings, and not also to give notice to approaching vehicles, drawn by horses, of the danger which might arise from fright in the horses occasioned by suddenly coming in the immediate vicinity of engines. However, we do not mean to hold that an individual approaching a crossing of this character can rely exclusively upon the railway company doing its duty as to giving signals. He is bound to be on the lookout himself, and to exercise ordinary care to prevent accidents. But we have reached the conclusion in this case that the demurrer was properly overruled, and there was sufficient evidence

of negligence on the part of the defendant to have authorized the submission of the case to the jury.

For reasons indicated, the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

TIPTON v. COMMONWEALTH.

(Court of Appeals of Kentucky. Jan. 27, 1904.)

CRIMINAL LAW—CONFESSION—INSTRUCTION—APPEAL—INSUFFICIENCY OF EVIDENCE.

1. Under Cr. Code, § 340, providing for reversal of a judgment of conviction for crime, for any error of law appearing on the record, such a judgment cannot be reversed on the sole ground of insufficiency of the evidence.

2. Officers testified that when accused was arrested in May, 1903, he asked what it was for, whether it was the old charge of breaking into a car back in 1902, and that, on being answered in the affirmative, he said that if they arrested him on that charge they would have to arrest two others. *Held*, that these statements did not constitute a confession, so as to require an instruction as to confessions out of court, under Cr. Code, § 240, requiring corroboration of confessions out of court to warrant a conviction.

Appeal from Circuit Court, Jefferson County, Criminal Division.

"Not to be officially reported."

Richard Tipton was convicted of breaking and entering a railroad car and stealing railroad car brasses, and appeals. Affirmed.

J. P. Edwards, for appellant. N. B. Hays, Atty. Gen., and Loraine Mix, for the Commonwealth.

BURNAM, C. J. The appellant, Richard Tipton, James Kerr, and James Sullivan were indicted by the grand jurors of Jefferson county of the crime of breaking and entering a railroad car of the Illinois Central Railway Company, and feloniously stealing and carrying away therefrom "four railroad car brasses." The separate trial of the appellant, Richard Tipton, resulted in a verdict and judgment fixing his punishment at three years' confinement in the penitentiary, and he has appealed, and asks a reversal upon these grounds: First, because there was no competent evidence conducing to show guilt; and the refusal of the trial court to direct a jury to find him not guilty.

Three witnesses were introduced in chief by the commonwealth. M. J. Owens, a private watchman of the railroad company, testified that a caboose car belonging to the company, in its yard at Fourteenth and Kentucky streets, was broken into on the 14th of May, 1902, and some car brasses taken therefrom. William Cockerell, also an employé of the company, testified that he had heard that the caboose had been broken into; that he saw three persons crossing the yard, and, suspecting them of the crime, followed them to the coalyard of Byren & Speed; that one of them went down the alley, and two into the yard; that these parties dropped the brasses which had been stolen from the ca-

boose, inside of the gate leading into the coalyard, about 3:20 in the afternoon of the 14th of May, 1902. Charles Pendleton testified that he saw the appellant, Tipton, James Kerr, and James Sullivan cross the yard of the Illinois Central Railway Company in the afternoon of the 14th of May, 1902; going in the direction of the caboose which was robbed, and that 8 or 10 minutes afterwards he saw them running back, pursued by Mr. Cockerell, who was a short distance behind them; that he recognized each of them as the same men he had seen crossing the yard a few minutes before. At this point the commonwealth closed its testimony in chief, and the attorney for defendant asked the court to direct a verdict of not guilty, which was properly overruled, as the testimony appeared sufficient to warrant a conviction of the defendant. This court has uniformly decided that, under section 340 of the Criminal Code, it had no power to reverse a judgment of conviction in a criminal case upon the sole ground that there was not sufficient evidence before the jury conducing to show the guilt of the accused. See *Vowells v. Commonwealth*, 83 Ky. 193; *Tipper v. Commonwealth*, 1 Metc. (Ky.) 6; *Patterson v. Commonwealth*, 86 Ky. 313, 5 S. W. 887.

The appellant then testified that he was not in the city of Louisville on the 14th of May, 1902, and did not commit the offense; that he was not arrested on this charge until May, 1903; and that after his arrest he was tried in the police court and discharged. The commonwealth then offered, in rebuttal, Officers Cook and Hessian, who testified that when they arrested appellant in April or May, 1903, he said at the time to them: "What are you arresting me for? That old charge of breaking into a Illinois Central caboose, away back in May, 1902?" that they answered "Yes"; and that appellant then said: "If you arrest me on that charge, you will have to arrest James Kerr and James Sullivan too." This testimony was objected to, and is made the basis of a claim for reversal on two grounds: First, that, if competent at all, it was substantive evidence, and should have been offered in chief; second, that, if admitted, it was only competent upon the theory that it was a confession of appellant, and that the trial court erred in not instructing the jury as to confessions out of court, as required by section 240 of the Criminal Code. There is no admission of guilt in the statement of appellant testified to by the officers; on the contrary, it scouts at the idea of his guilt. If it tended to prove any fact or was competent for any purpose, it was to show that appellant knew, at the time of his arrest in April, that he had been previously charged with the crime for which he was arrested.

Upon the whole case we have found no error of law prejudicial to the substantial rights of the defendant. Judgment affirmed.

**KENTUCKY LAND & IMMIGRATION CO.
v. SLOAN et al.**

(Court of Appeals of Kentucky. Jan. 26, 1904.)

**ADVERSE POSSESSION—SUPERIOR TITLE—UN-
INCLOSED LAND.**

1. Possession of any part of a tract of land under a superior title extends to the whole boundary and claim therein, except such part as may be in the actual adverse possession of another; and hence, where land is not inclosed, and the entry under the junior grant is not within the conflict, adverse actual possession will not be construed to attach to the claim of tenancy under the junior title.

Appeal from Circuit Court, Lee County.

"Not to be officially reported."

Action by the Kentucky Land & Immigration Company against Preston Sloan and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Gourley & Roberts, for appellant. J. M. Beatty and Beckner & Jouett, for appellees.

NUNN, J. This suit was instituted in 1888 by the appellant against appellee Preston Sloan in ejectment for the recovery of 57 acres of land. The appellee Sloan answered, and put in issue the allegation of the petition, and averred that he was the tenant of the Beattyville Mineral & Timber Company. Appellant filed an amended petition, making the Beattyville Mineral & Timber Company a defendant to the action; alleging that it was claiming by some pretended right or title a much larger area of land than the 57 acres which belonged to appellant, and that Preston Sloan was its pretended tenant, and that the claim of the appellee was casting a cloud upon the title of the appellant. The appellees answered, denying title in appellant to any part of the land claimed by it, and the Beattyville Company set forth the derivation of its title from the commonwealth. Both parties also claimed the land by adverse possession for more than 15 years. The proof was heard, and the lower court adjudged in favor of the appellees.

It appears from the record that one John Carnan obtained a patent from the commonwealth for nearly 30,000 acres of land, which is now situated in Lee county, Ky. This land lies in nearly a square bordering on the Kentucky river. It appears from the oral proof that the patentee, Carnan, sold and conveyed the western portion—something like one-half of the survey—to one Cowland, who sold and conveyed to one Champney, who sold it to one Shumway. These deeds, however, were not filed with the record—at least, not copied therein. It also appears that Carnan, the patentee, sold and conveyed the balance of his survey to one Flahaven, the eastern half of which balance is now owned by the St. Helens Coal & Iron Company. The western half of the said balance includes the land in controversy, which is claimed by the appellee mineral company, and its derivation of title is that which is fully stated in 70 S. W. 31, in the case of Kentucky Land

& Immigration Co. v. Crabtree, etc., with the addition that Davis Pryse sold and conveyed this land to one Bush, who conveyed it to the appellee Beattyville Mineral & Timber Company. It further appears from the record that the line beginning on the Kentucky river at Mirey Branch, running N., 9 W., over 3,000 poles, is well-marked, and the established line between the Cowland and Flahaven surveys, as conveyed to them by the patentee, Carnan. But it appears that Shumway, vendee of Champney, in making a conveyance to one Thomas Duckham, who conveyed the same to one Meadows, did not stop at the Flahaven line, but included in these conveyances considerable land beyond this line, situated on the northern end of the Flahaven survey; and it is this land on the northern end of the Flahaven survey which is in controversy in this action.

The appellant does not show any title deducible from commonwealth for any part of the land contained within the Flahaven deed which is claimed by appellees. The appellees have shown a perfect title from Carnan, the patentee, on down to themselves. The great preponderance of proof shows that the appellees and their immediate and remote vendors have held the adverse and actual possession of the land in controversy for more than 30 years, and that the appellant and its vendors have not been in the actual possession of any part of this land. Its claim that its tenants and the tenants of its vendors, being in the actual possession of this land west of the Flahaven line, conveyed by Carnan to Cowland, and claiming all the land in the deed from Shumway to Duckham which extended across the Flahaven line, gave it the actual possession to the boundary of its deed, is erroneous. Appellant holding the inferior title, the possession of its tenants ended when it reached the superior title in possession. "The possession of any part of a tract under the better title extends to the whole boundary and claim therein, except such part as may be in the adverse actual possession of another. This adverse, actual possession will not be construed to attach to the claim of tenancy under the junior holding, where it is not inclosed, and where the entry under the junior grant is not within the conflict." See the case of Ky. Land & Immigration Co. v. Crabtree (Ky.) 70 S. W. 31, and the cases therein cited.

Wherefore the judgment of the lower court is affirmed.

**ILLINOIS CENT. R. CO. v. WATSON'S
ADM'R.**

(Court of Appeals of Kentucky. Jan. 19, 1904.)

**RAILROADS—NEGLIGENCE—PERSONS NEAR
TRACKS—EVIDENCE—STATEMENTS OF
ENGINEER—DERAILMENT OF TRAIN—NEGLI-
GENT DEATH—DAMAGES.**

1. Plaintiff's intestate, a boy nine years of age, was killed, while standing in cooperation

yards within the limits of a city, by a rick of staves falling over upon him. The rick was one of a series placed at intervals of some 8 or 10 feet, extending from the yard in which plaintiff was out onto defendant's right of way. The accident was caused by the derailment of defendant's train, which was backing around a curve at the rate of about 20 miles an hour; the train striking the first rick, which fell over, striking the second one, which fell and struck plaintiff's intestate. There was evidence of negligence in the condition of the track and speed of the train. *Held*, that a peremptory instruction for defendant was properly refused.

2. In an action for negligent death of a person near the right of way, caused by the derailment of a train, evidence that witness said to the engineer about two minutes after the accident, "It looks like that engine could have been stopped before that," and that the engineer answered, "Well, * * * that won't bring the boy back," was improperly admitted, as what witness thought was immaterial, and the answer of the engineer was not a statement of fact.

3. In an action for negligent death of one standing near a railroad right of way, caused by the derailment of a train, the fact that the watchman was absent from the crossing was immaterial, where deceased was not on the crossing, and the absence of the watchman had nothing to do with his injury.

4. In an action for negligent death of one standing near a railroad right of way, caused by the derailment of a train, evidence that the cars got off the track once in a while at other places than that of the accident was incompetent.

5. In an action for negligent death of a boy nine years of age, a verdict of \$18,000 was palpably excessive.

Appeal from Circuit Court, McCracken County.

"To be officially reported."

Action by Harry Watson's administrator against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Pirtle & Trabue and J. M. Dickenson, for appellant. Taylor, Gilbert & Lucas and Hazelrigg & Chenault, for appellee.

HOBSON, J. Harry Watson, a little boy nine years old, was killed in Paducah by a rick of staves which were knocked over upon him by a car of the Illinois Central Railroad Company, which became derailed and ran against the staves. This suit was filed by his personal representative to recover for his death, on the ground that it was caused by the negligence of the defendant. The track of the railroad was curved. The outer rail was not raised, as it should have been, to keep the outer wheel from jumping off the track as it passed around the curve. The track was also wavy, as stated by the witnesses; that is, it was not level, and there were high and low places in it. The train was backing, and the evidence for the plaintiff tended to show that it was running as fast as 20 miles an hour. It was 95 feet from the point where the boy was hurt to the point where the car left the track. The ground was plowed up by the wheels about 40 feet, the wheels sinking in the ground about halfway to the boxing. The staves

were ricked in rows, leaving an aisle every 8 or 10 feet. There were five piles of staves. The child was in between the second and third. Three ricks were knocked over, and the weight of the staves killed him. The child was in the yard of the Paducah Coopersage Company, but some of the staves were ricked up beyond the line of its yard, and over on the railroad's right of way. The car, when derailed, came in contact with the fifth rick of staves, knocking it over on the fourth, the fourth over on the third, and it over on the child, who was a licensee on the grounds of the coopersage company. He had been employed there, but at the time of his injury was playing in the yard. He did not have steady work. The jury returned a verdict in favor of the plaintiff for \$18,000.

It is insisted for appellant that a peremptory instruction should have been given, because no duty was owed to the boy until his peril was discovered, and after it was discovered no amount of care could have saved him. The boy was rightfully in the yards of the coopersage company, and whether the staves were stacked out beyond the line of the right of way, or not, is immaterial for the purposes of this case, for, if they were stacked over the line, and extended upon the right of way, this was consented to by the railroad company, or acquiesced in by it, and its liability here is the same as if it had put the staves there itself. The right of way was only 18 feet wide. It was incumbent on the defendant, in operating so dangerous an instrumentality as a railroad train, to keep it under control, and not allow it to leave the track and knock down structures on the lands of adjoining owners. The coopersage yard was a place where the presence of persons should have been anticipated, for people were regularly employed there, working on the staves, and passing along the aisles between the ricks. It was within the limits of the city, and it was incumbent on the company, in handling so dangerous an instrumentality where the population is crowded, to exercise proper care for the protection of human life. There was evidence sufficient to go to the jury as to the negligence of the company in the condition of the track and in the speed of the train. It was the duty of the company to build its track on the curve so that the cars could be safely operated on it with proper care. It was also its duty, in backing these cars around the curve with the switching engine, to move them at such a rate of speed as a due regard for the safety of others required. It is true, it has been held that trespassers on the track at places where the presence of persons on the track should not be anticipated cannot recover for an injury received by them, unless it might have been avoided by proper care on the part of the defendant after their peril is discovered; but this rule only applies when the cars are running on the right of way. It has no application

where they are negligently permitted to leave the right of way and trespass on another. And it has also been held that, at places where the presence of persons on the track should be anticipated, ordinary care must be exercised to prevent injury to them, and a recovery may be had if such care is not exercised, and by reason of this they are injured. While the presence of the particular little boy was not to be anticipated between the ricks of staves, it was a place where the presence of persons, and probable injury to them from the knocking down of the staves by reason of the running of the cars against them, should have been anticipated. If the little boy, standing where he was, had been struck by the car itself, on elementary principles the defendant would be liable, for manifestly the company could not negligently run its cars on the property of the adjoining proprietor, and commit a trespass on the person of another, lawfully there, without being responsible for the injury done him. The rule is elementary that he who negligently sets a force in motion is accountable for all its consequences directly flowing from it until exhausted. The force of the car was imparted to the fifth rick of staves, and from it to the fourth, from it to the third, and from it to the boy. The force that killed the boy came from the car, and the defendant was liable therefor. 1 Bishop on Noncontract Law, § 45; Cooley on Torts, § 70.

The injury in *Holland v. Sparks*, 92 Ga. 753, 18 S. E. 990, occurred under very different circumstances. The deceased was walking along the railroad track. He was on the right of way, and at a place where those in charge of the train had no reason to expect any one. There was no evidence of negligence in the management of the train, except its speed, and of that he could not complain. In *Dillon v. Connecticut River Railroad Co.* (Mass.) 28 N. E. 899, the decedent was a trespasser on the right of way. And in *Woolwine v. C. & O. R. Co.*, 38 W. Va. 329, 15 S. E. 81, 16 L. R. A. 271, 32 Am. St. Rep. 859, the decedent was visiting an employé of the company on its right of way, and where the presence of persons was not to be anticipated, and was killed by the train leaving the track. None of these cases are therefore in point. The case of *Cumberland Telegraph, etc., Co. v. Martin's Adm'r* (Ky.) 76 S. W. 394, is also relied on. But that case differs from this, in that the wire there which caused the injury was in itself harmless, while the freight train, rapidly moving backward, was of itself dangerous. The death of the decedent was due there to the force that came from the clouds, while here it was due to the force that came from the car. This distinction was pointed out. In the response to the petition for rehearing in that case the court said: "He who handles an agency which is of itself dangerous to human life is responsible for injuries

therefrom not caused by extraordinary natural occurrences or the interposition of strangers. But as to things which are not of themselves essentially instruments of danger the rule is different, and for them the negligent party is not responsible to strangers. If the telephone company had used over its wires a current of electricity which was of itself dangerous to life, a different question would be presented." *Cumberland Telegraph, etc., Co. v. Martin's Adm'r*, 77 S. W. 718. In the case before us the rapidly moving train was not only an instrument of danger, but at a point where the danger of the train leaving the track on the outside of the curve, and the presence of others in the staveyard near by, and injury to them, should have been anticipated. The force which killed the boy came from the train, and this force was projected beyond the right of way; there inflicting an injury for which, had not death resulted, an action of trespass would have lain at common law. The motion for a peremptory instruction was therefore properly refused.

The court erred in allowing the plaintiff to prove by Fred Collins that he said to the engineer about two minutes after the accident, "It looks like that engine could have been stopped before that," and that the engineer said, "Well, damn it! that won't bring the boy back." What Collins thought about the stopping of the engine was immaterial, and the answer of the engineer was a statement of no fact, and was incompetent.

The absence of a watchman from the crossing was immaterial, as the deceased was not on the crossing, and this had nothing to do with the injury.

The fact that the cars got off the track now and then at other places was not competent as evidence for the plaintiff.

There was sufficient evidence of gross negligence to submit the case to the jury, but we all concur in the conclusion that the verdict for \$18,000 is palpably excessive, and should be set aside. *L. & N. R. Co. v. Creighton*, 106 Ky. 42, 50 S. W. 227; *Board of Internal Improvements v. Moore* (Ky.) 66 S. W. 417.

Judgment reversed, and cause remanded for a new trial.

HODGES v. METCALF COUNTY COURT.

(Court of Appeals of Kentucky. Jan. 28, 1904.)

INTOXICATING LIQUORS—LICENSE—QUALIFICATION OF APPLICANT—BURDEN OF PROOF—APPEAL—HARMLESS ERROR.

1. Under Ky. St. 1903, §§ 4203-4214, authorizing the granting of liquor licenses to tavern keepers, distillers, druggists, and merchants, section 4205 providing that licenses shall be granted only upon satisfactory evidence that the applicant is in good faith a merchant, etc., the burden of showing that the applicant is in good faith a merchant or druggist, etc., is on him.

¶ 1. See *Intoxicating Liquors*, vol. 29, Cent. Dig. § 68.

2. Although it is the duty of the circuit court, on appeal from the action of the county court in refusing a liquor license, to determine the question on the bill of exceptions, and either affirm, or remand with instructions to grant the license, yet remandment for a new trial was not prejudicial to the applicant, where, on the facts shown, he was not entitled to the license.

Appeal from Circuit Court, Metcalf County.
"Not to be officially reported."

S. B. Hodges applied to the Metcalf county court for a liquor license, and appealed to the circuit court from its judgment refusing the license. From so much of a judgment of the circuit court, reversing the judgment of the county court, as remanded the cause for a new trial, he again appeals. Affirmed.

J. W. Kinnaird and M. O. Scott, for appellant.

BURNAM, C. J. The appellant, S. B. Hodges, applied to the Metcalf county court, at its February term 1903, for a license to sell spirituous, vinous, or malt liquors in quantities of not less than a quart at the residence of Allen Hodges. He testified himself, and showed by other witnesses that he had given notice of his application, as required by section 4203 of the Kentucky Statutes. The county attorney thereupon produced and filed a remonstrance, signed by 42 legal voters in the neighborhood of the place where the liquor was to be sold, against the granting of the application. Upon this testimony the motion was submitted, and the county judge refused the license. Appellant prosecuted an appeal on a bill of exceptions to the Metcalf circuit court. Upon the trial of the appeal in that court, the judgment of the county refusing the license was reversed, and the cause remanded with directions to grant appellant a new trial. The appellant objected to so much of this judgment as directed the county court to grant a new trial, insisting that the cause should be remanded with directions to issue the license. On this appeal, he insists that the burden to show that a majority of the legal voters of the neighborhood had protested against his application was upon the representatives of the county, and, this fact not having been established, he was entitled to the license applied for.

We know of no statute authorizing county courts to license the sale of spirituous, vinous, or malt liquors outside of an incorporated city or town, except as contained in subdivision 2 of article 10 of chapter 108 of the Kentucky Statutes of 1903, which are embraced in sections 4203 to 4214, inclusive, of the Kentucky Statutes of 1903. This statute only authorizes the granting of a license to tavern keepers, distillers, druggists, and merchants. Section 4205 provides: "License to merchants, druggists, or distillers shall be granted only upon satisfactory evidence that the appellant is in good faith a merchant, druggist or a distiller, and that the applicant

has not assumed the name or the business for the purpose of retailing liquors." In his application to the court, appellant offered no testimony conducing to show that he was in good faith either a merchant, druggist, distiller, or tavern keeper. As we construe the law, the burden of showing these facts was upon him, and, having failed to do so, the county court properly refused the license applied for, and its judgment should have been affirmed. It was the duty of the circuit court upon this appeal to try and determine the question upon the bill of exceptions, and either to have affirmed the judgment of the county court, or to have remanded the cause with instructions to grant the license. As the judgment of the circuit court remanding the cause for a new trial is more favorable to the appellant than the facts warranted, he has no ground of complaint. We therefore conclude that the judgment should be affirmed, and it is so ordered.

MATTINGLY'S ADM'R et al. v. HAZEL.

(Court of Appeals of Kentucky. Jan. 20, 1904.)

HOMESTEAD—WAIVER OF EXEMPTION.

1. Under St. 1903, § 1702, exempting to a debtor with a family the homestead on which he lives, and section 1706, prescribing the manner for waiving the exemption, which shall be in writing signed by the debtor and his wife, where two mortgages are given thereon, the first executed by him alone, the second by both, waiving the exemption, she cannot thereafter waive the exemption in favor of the first mortgage, as against the second mortgage.

Appeal from Circuit Court, Daviess County.
"To be officially reported."

Contest between W. S. Hazel and C. Mattingly's administrator and others as to priority of mortgages. Judgment for Hazel, and the others appeal. Reversed.

W. E. Aud, Sweeney, Ellis & Sweeney, and J. B. Aud & Bro., for appellants. La Vega Clements and Birkhead & Clements, for appellee.

O'REAR, J. The owner of a tract of land worth less than \$1,000 undertook to mortgage it to appellee's assignor in 1888 to secure a debt of \$190. The owner was then a married man, and with his wife and family occupied the land as a homestead. The wife was named as a grantor in the mortgage, but failed, she says by oversight, to sign or acknowledge it, though willing and intending to do so. In the mortgage it is stated that the homestead exemption is expressly waived. In 1898 the owner and his wife mortgaged the same land to Aud & Bro. to secure two named debts. This mortgage was duly executed and recorded, and in express terms waived the homestead exemption of the mortgagors. The owner died without paying either of the mortgage debts. There were no infant children. This suit is a contest between appellee, the owner of the \$190 debt

secured by the first mortgage, and the second mortgagee, as to which has the prior lien upon the land. The widow of the mortgagor has undertaken by a writing signed and acknowledged by her, and by a pleading filed in the case, to give full effect to the first mortgage by disclaiming any title or interest in the land, and attempting to relinquish whatever homestead right she had to the first mortgagee.

Ky. St. 1903, § 1702, exempts to a debtor with a family the land on which he resides as a homestead, not exceeding \$1,000 in value. It creates no new estate in the debtor. It merely negatives the right of his creditor to subject that part of the debtor's land to his debts excepting those contracted before the purchase of the land or the erection of the improvements upon it. Section 1706 provides the manner for waiving this exemption. It has been frequently held by this court that the exemption can be waived only in the manner pointed out by the statute; that is, the waiver shall be in writing, subscribed by the debtor and his wife, and acknowledged and recorded in the same manner as conveyances of real estate. *Thorn v. Darlington*, 6 Bush, 448; *Ballinger v. Lester* (Ky.) 67 S. W. 286; *Wing v. Hayden*, 10 Bush, 276; *Meade v. Wright* (Ky.) 56 S. W. 523; *Hensley v. Hensley's Adm'r*, 92 Ky. 164, 17 S. W. 333; *Lear v. Totten*, 14 Bush, 101; *Hemphill v. Haas*, 88 Ky. 492, 11 S. W. 510. Section 1702 relieves the property known as the "homestead" from debt absolutely, except for purchase money, debts created prior to the purchase of the land, and for debts created before the erection of the improvements thereon. Those are the only exceptions. But for the provision of section 1706, land so occupied could not be subjected at all for debts. Whether the homestead is an estate or a privilege is not so material to determine. The fact is that the Legislature has made such lands not liable for the owner's debts except as stated. By section 1706 a method is provided which, if adopted, will make that land liable for the debts specified in the writing. Unless the method given by section 1706 is taken advantage of, then section 1702, which makes an absolute exemption, remains in force. It is not in the power of the debtor to waive the law in any other manner than that expressly required by the statute. From this it follows that the first mortgage of 1888, which the wife did not sign, was void in so far as it attempted to create a lien upon the land of the mortgagor which he occupied as a homestead. It being void for that purpose, the subsequent mortgage to Aud & Bro., in which the wife did join, and which was executed in strict conformity to section 1706, Ky. St. 1903, constituted the first lien upon the land. It was not competent thereafter for the wife of the mortgagor to give the first mortgagee a preference over Aud & Bro., by then signing and acknowledging a conveyance of her homestead right. Aud & Bro.'s

lien had attached, and nothing that the mortgagor or his wife could do thereafter could defeat or diminish the perfect lien of the mortgagees.

The judgment of the circuit court, not being in accord herewith, is reversed, and cause remanded for judgment consistent with this opinion.

DALMAZZO v. SIMMONS et al.

(Court of Appeals of Kentucky. Jan. 28, 1904.)

WILLS—ESTATES CREATED—REMAINDERS—
FEE SIMPLE—DIVESTMENT OF ESTATE—BONA
FIDE PURCHASERS—FACTS PUTTING ON IN-
QUIRY.

1. Where a testator devised property to plaintiffs' father in trust for plaintiffs, but gave the father the rents and profits thereof during his natural life, and the will was duly probated and admitted to record by the county court of the county of testator's residence, as required by Ky. St. 1903, § 4849, a remainder interest, subject to their father's life estate, vested in plaintiffs, of which they were not divested by a partition suit to which they were not parties, or by a conveyance from their father to defendant.

2. Where the records showed that property conveyed to a grantee had been by him conveyed to each of his six children, one of whom had died, a purchaser of one claiming to own the interest of such decedent was put on inquiry as to the interest of such deceased child, and, in the exercise of ordinary prudence, should have examined the records of the county where such child had died, to see if he had disposed of his interest by will.

3. Under Ky. St. 1903, § 2342, providing that, unless a different purpose appear from express words or necessary inference, estates in land created by deed or will, without words of inheritance, shall be deemed a fee simple, or such estate as the grantor had the power to dispose of, an interest vested in children, to whose father land has been devised in trust for them, subject to the father's enjoyment of the rents and profits for his life, is a fee simple, except in case of their death after the execution of the will and prior to the death of testator.

Appeal from Circuit Court, Nelson County.

"Not to be officially reported."

Action by Maggie May Simmons and others against W. J. Dalmazzo. From the judgment rendered, defendant appeals, and plaintiffs prosecute a cross-appeal. Affirmed.

C. T. Atkinson, for appellant. John T. Kelly, for appellees.

BURNAM, C. J. Joseph G. Simmons, Albert Simmons, Lillie Simmons, Nathan R. Simmons, William S. Simmons, and George W. Simmons, Jr., held the fee-simple title to five tracts of land in Nelson county, which aggregate 710.75 acres, subject to the life estate therein of George M. Hays and his wife, Margaret Hays. None of them, however, resided in Nelson county prior to 1884. One of them, Albert, died a citizen and resident of Bullitt county in the year 1881, leaving a will which was duly probated in the Bullitt county court, which reads as follows:

"I, James Albert Simmons, of Bullitt County Kentucky, being in bad health, but of good mind and memory, deem it my duty as well as my privilege to make such disposi-

tion of my worldly affairs as I may deem best for my sisters and brothers, namely, Lillie Simmons, Joseph Simmons, Nathan R. Simmons, Willie Simmons, George W. Simmons, Jr. It is my will and desire that they shall have all of my property both real, personal and mixed, and share equally in the distribution of my effects. That portion of my property that shall fall to my oldest brother, Joseph G. Simmons, it is to be held in trust by him for the benefit of his child or children. He is, however, to have the rents and profits of same so long as he shall live, to help to support him during his natural life. Lastly, I hereby constitute my father, George W. Simmons executor of this my last will, and also empower him to act as guardian of Nat, Willie and George during their minority. This 7th of October 1878.

"[Signed] Albert Simmons.

"Witnessed J. B. Morris."

After the death of George M. Hays and his wife, Peggy Hays, the life tenants, Joseph G. Simmons, Nat R. Simmons, Lillie H. Simmons, and William W. Simmons, brought an action against their infant brother, O. W. Simmons, in the Nelson county court, for a partition of these five tracts of land into five equal parts. There was allotted to J. G. Simmons as his one-fifth interest therein a tract of 75 acres, and a deed for the fee-simple title was duly executed to him. He took possession of it and moved his family thereon, and resided there until the 25th day of January, 1898, when he and his wife sold and conveyed this 75-acre tract of land to W. J. Dalmazzo in fee simple, with covenant of warranty, in consideration of \$1,800 paid cash in hand. On the 10th of January, 1903, the appellees, Maggie May Simmons, a daughter of J. G. Simmons, and J. G. Simmons, as trustee for his five children, Maggie, Lowdy, Courtney, Lillie, and Sarah Simmons, brought this action against the appellant, W. J. Dalmazzo, to recover from appellant one-sixth of the 75 acres, claiming the ownership thereof under the will of their uncle, Albert Simmons, and to have the deed to appellant corrected to that extent, and also to recover one-sixth of the rents and profits for the use of the land during the time that it had been in the possession of appellant. Defendant in his answer pleaded, first, that he was a bona fide purchaser of the land for value, without notice of the will of Albert Simmons; second, that, under the will of Albert Simmons, J. G. Simmons was entitled to the use of the interest devised to him during his life, which fact he pleaded in bar of the claim for the rent or use of the property; third, he alleged that two of the children of J. G. Simmons and his wife had died in infancy subsequent to the will of Albert Simmons; that each of these children were vested at their birth with a one-seventh interest in the land in controversy, and at their death their shares descended to their parents, Joe G. Simmons and Mary M. Simmons, one half

each, and was covered by their deed to him. He also pleaded that Joe G. Simmons had made improvements upon the land subsequent to its allotment to him, which had increased its salable value at least \$634, which he claimed should be ratably taken from the interest of the infant plaintiffs. It was adjudged by the circuit court that J. G. Simmons owned a life estate under the will of his brother, Albert, in the one-sixth of the land, and that it was included in the conveyance to appellant, and that he and his wife inherited the fee-simple title to the interest of their two children, who died in infancy, and that this interest passed by their deed to the appellant; that appellant was entitled under his deed to the use and occupation of the 75 acres during the life of J. G. Simmons, and that on the death of J. G. Simmons his five children would be entitled to five-sevenths of this one-sixth. The defendant, Dalmazzo, has appealed, and plaintiffs prosecute a cross-appeal.

Appellant insists that the children of J. G. Simmons are chargeable with his negligence and fraud as against his rights as an innocent purchaser for value, and that they have lost in consequence thereof the land willed to them by their uncle; second, it is claimed that as the will of Albert Simmons was not recorded in Nelson county, where the land was located, their claim to the land in controversy is equitable, and that in this contest between equities he has the better one. We cannot concur in either contention. The will of Albert Simmons was properly proven and admitted to record by the county court of the county of his residence, as required by section 4849, Ky. St. 1903, and vested in the children of J. G. Simmons living at that time, or when they subsequently came into existence, a vested interest in remainder, subject to the life estate devised to their father; and they were not divested of this interest, either by the partition suit in the Nelson county court, to which they were not parties, or by the deed from Joseph G. Simmons and wife to the appellant, Dalmazzo. He was bound to take notice of the facts disclosed by the records. They show that this land had been conveyed to George W. Simmons and his wife, Margaret E. Simmons, by G. M. Hays and wife, that there was no subsequent conveyance by Margaret Hays of her interest, and that George W. Simmons had conveyed his interest to each of his six children, Albert included. These facts were sufficient to give appellant notice of the interest of Albert Simmons, and ordinary prudence on his part would have suggested an examination of the records of the county in which he died, for the purpose of ascertaining whether he had made disposition of his interest by his will. It certainly cannot be fairly contended that those infants should lose the provision made for them by the will of their uncle by the negligence of appellant or the fraud or carelessness of their father.

Counsel for appellees has made a very ingenious argument to show that the interest of the children of J. G. Simmons is a defeasible fee and not a fee simple. Section 2342 of the Kentucky Statutes of 1803, provides: "Unless a different purpose appear from the express words, or necessary inference, every estate in land created by deed or will without words of inheritance shall be deemed a fee simple, or such estate as the grantor has the power to dispose of." In construing provisions of wills containing provisions similar to that of Albert Simmons, this court has uniformly held that the interest in remainder was a fee simple, unless the remainderman died, after the execution of the will, prior to the death of testator. See *Baxter, etc., v. Isaacs* (Ky.) 71 S. W. 907, and the authorities there cited.

As the judgment of the circuit court is in conformity with the conclusions here reached, it is affirmed.

ELLIS' ADM'R v. BLACKERBY.

(Court of Appeals of Kentucky. Jan. 28, 1904.)

NOTES—POSSESSION BY PAYOR—PRESUMPTION—NONPAYMENT—BURDEN OF PROOF—JUDGMENT ON PLEADINGS.

1. Possession of a note by the payor creates a presumption of its payment.

2. Where a note is in possession of the payor, the burden of proof in an action thereon, to show that it has not been paid, rests on the payee.

3. In an action on a note the answer was a plea of payment with an averment that the note, when paid, was delivered to the payor, and the note was filed with the answer and made a part thereof. The reply denied payment, and also delivery of the note to the payor, and it admitted possession of the note by the defendant, and averred that defendant got the note from the private papers of the payee after her death. *Held*, that a contention that plaintiff was entitled to a judgment on the pleadings because there was no rejoinder filed, controverting the averment of the reply as to how defendant got the note, is without merit.

Appeal from Circuit Court, Pendleton County.

"Not to be officially reported."

Bill by Martha Ellis' administrator against Harriet Blackerby. From a decree for defendant, plaintiff appeals. Affirmed.

Lealie T. Applegate, for appellant. G. H. Fossett and Jno. H. Barker, for appellee.

SETTLE, J. Appellant, as administrator of the estate of Martha Ellis, deceased, sued the appellee in the lower court upon a note of \$521.83, which she executed to his intestate May 4, 1887, and the payment of which was secured by a mortgage of the same date upon a house and lot in the town of Falmouth, Pendleton county, described in the petition. It was averred in the petition that the note had been lost, but was not such an instrument as would pass by delivery, and that it was due and wholly unpaid. In the

answer filed by the appellee it was averred, in substance, that the note was paid in full by her in the year 1895, with certain accounts and claims that she held against the intestate upon which the latter was indebted to her, and which she took up in full satisfaction of the note. It was not, however, averred in the answer that the note was then delivered to her by the intestate, or that it was in appellee's possession when the answer was filed. A reply was filed to the answer, simply denying the plea of payment. At the next term of the court the appellee filed an amended answer in which it was denied that the note had been lost, and this denial was followed by the averment that the note was delivered to her by the intestate at the time of the settlement set out in the original answer; that it was in her possession; and the note was in fact filed with and made a part of the amended answer. By his reply filed to the amended answer the appellant denied that the note sued on was ever paid or in any wise settled by the appellee, or that it was ever turned over to her by his intestate, or that appellee came into possession of same during the lifetime of the intestate. These denials are followed by the averment that appellee and the intestate were sisters, and that all the personal property of the intestate, including her private papers, was in the possession of appellee from the death of the intestate until the appellant qualified as administrator of the latter's estate, and that appellee in that way obtained possession of the note. No rejoinder was filed to the reply to the amended answer. After the taking of proof by depositions the case was submitted to the court; and by the judgment rendered the petition was dismissed, and the appellee allowed her costs. From that judgment the administrator has appealed.

There were but three depositions taken in the case. They contain the testimony of appellant, appellee, and one J. U. Riggle. Appellant testified that he had two conversations with appellee in 1896, soon after his qualification as administrator of the decedent's estate, in each of which he says she admitted that she "owed the money, but was not able to pay it, as the house that the mortgage is on was the only source of revenue she had for making a living." The appellant further testified that no one was present at the time of either conversation except the appellee and himself. It also appears from his deposition that appellant is a creditor of the decedent's estate to the amount of \$335.50, and perhaps an account for whisky in addition, and that the only assets belonging to the estate besides the note claimed to be owing by appellee was one-half of \$435, realized from the sale of a house and lot in Falmouth, of which the decedent was joint owner with another person, of which house and lot appellant became the purchaser at its sale. The witness Riggle, whose deposition was taken in appel-

¶1 See Bills and Notes, vol. 7, Cent. Dig. § 1004.

lant's behalf, testified: That he married the daughter and only child and heir at law of the decedent, Martha Ella. His wife had no children. She died in March, 1896, and her mother in December, 1895. That he and his wife lived with her mother from 1878 until her death. He remained in the house of the mother-in-law until his wife's death, and when he left the premises he gave some personal effects that had belonged to his mother-in-law to appellee and a Mrs. Watson, who removed them, but some of the things were in the house when one Buck Morris thereafter moved into it. At a later date the witness saw his mother-in-law's bureau and a trunk, which had belonged to his wife, in the house of appellee. The witness also testified that appellee had access to the furniture of his mother-in-law after her death while he and his wife occupied the house, but his deposition contains no statement to the effect that the appellee did in fact go into any article of furniture in which the decedent's papers were kept, or that she thereby got possession of the note in controversy. In fact, there was no statement from the witness that he knew where the papers of the decedent were kept, or that he ever saw the note in controversy. The appellee's deposition contains the positive denial that she made to appellant any such admissions of liability upon the note as were testified to by him. Further than this she could not go, as she would not have been allowed to testify as to any conversation or transaction that occurred between herself and her deceased sister.

The possession of a note by one named therein as payee, or such possession by his assignee, furnishes presumptive evidence of its nonpayment. If, in an action upon the note by the payee or assignee, the payor interposes the defense of payment, the law places upon him the burden of overcoming the prima facie case made by the payee in possession of the note. In such a case, if the payor fail to introduce any evidence, or that introduced by him be not sufficient, to establish payment of the note, the presumption of its nonpayment created by the payee's possession of the note will entitle the latter to a judgment. Upon the other hand, possession of the note by the payor creates a presumption of its payment by him, and in that state of case the burden of proving that it has not been paid rests upon the payee.

In the case at bar we take it for granted that the lower court found that the testimony of the appellant as to appellee's alleged admissions of indebtedness upon the note in controversy was not sufficient to overthrow the presumption of its payment furnished by her possession thereof, especially as this presumption was backed and strengthened by her positive denial that she had ever made to the appellant any admission of liability thereon. If appellant was told by appellee as far back as 1896, in sub-

stance, that she was not able to pay the note, and would never be able to do so, why did he delay the bringing of the suit until the year 1899, and what did he hope to accomplish by the delay? The unreasonableness of this delay upon the part of the appellant, together with the fact that the decedent took no steps during her lifetime to collect the note, though it was executed as far back as the year 1887, may have had some weight with the chancellor in determining the rights of the parties, and doubtless served to strengthen in some degree the presumption of payment created by the appellee's possession of the note.

But it is insisted for appellant that, as there was no rejoinder filed controverting the reply to the amended answer, the appellant was entitled to a judgment upon the pleadings. Payment of the note was averred in the original answer. The amended answer contained the additional averment that at the time the note was paid by the appellee it was delivered to her by the decedent, that it was in her possession, and it was thereupon filed with the amended answer, and by apt language made a part thereof, as evidence of its payment. The reply denies the fact of payment, also the delivery of the note by the deceased to appellee, but admits the appellee's possession of the note, and avers that she got it from the private papers of deceased after her death. The issues were sufficiently made without the averment as to how the appellee got the note. If it was not paid by her and not delivered to her by reason of her payment of it, it is wholly immaterial how or in what other way she got it. If she got it from the decedent's papers after her death, it was admissible for appellant to prove that fact under the denial contained in the reply that it had been delivered her by the decedent at the time of its payment. Evidence need not and should not be pleaded. When an affirmative averment, as in the reply in this case, is in effect a denial of an averment in the amended answer, a traverse is unnecessary. *Logan County National Bank v. Barclay* (Ky.) 46 S. W. 675; *Wise v. Covington & O. Street Ry. Co.*, 91 Ky. 537, 16 S. W. 351; *Smith v. L. & N. R. R. Co.*, 95 Ky. 11, 23 S. W. 652, 22 L. R. A. 72.

Being unable to say that the judgment of the chancellor is against the weight of the evidence, the same is affirmed.

DONNELLY v. DONNELLY.

(Court of Appeals of Kentucky. Jan. 27, 1904.)
DIVORCE — ALIMONY — APPEAL — CONSIDERATION OF MERITS—EVIDENCE—LETTERS
—COUNSEL FEE.

1. While the Court of Appeals has no jurisdiction of a judgment granting a divorce, on appeal from a judgment for alimony it will look into the merits of the judgment for divorce for the purpose of ascertaining whether or not all-

mony was properly awarded, and, if the divorce is without legal basis, the award of alimony will be reversed.

2. In a suit for divorce on the ground of adultery, certain letters introduced, without evidence as to whom they were written by, or that they were addressed to or received by defendant, were incompetent.

8. Under Ky. St. 1903, § 900, providing that, in an action for divorce, the husband shall pay the costs of each party, unless it appear that the wife is in fault and has ample estate to pay the same, a judgment against the husband, allowing the wife \$250 counsel fee on granting her a divorce, was proper, although the divorce was improperly granted.

Appeal from Circuit Court, Logan County.
"Not to be officially reported."

Action for divorce by Emma Donnelly against K. T. Donnelly. There was a judgment of divorce, and for alimony and counsel fee; and from the judgment for alimony and counsel fee, defendant appeals. Judgment for alimony reversed, and for counsel fee affirmed.

W. P. Sandedge and Jno. S. Rea, for appellant. E. B. Drake, for appellee.

BARKER, J. This action was instituted by appellee for an absolute divorce from her husband, the appellant, on the ground of adultery. By amended petition she set up the additional ground of cruel and inhuman treatment, but, as no effort was made to substantiate this, it may be dismissed from further consideration. Appellee left the home of her husband upon the ground mentioned in her pleading, and notified him of her determination never to return. Upon final trial the chancellor awarded appellee a divorce a vinculo matrimonii, the sum of \$750 alimony, and to her counsel the sum of \$250 as attorney's fee.

As this court has no jurisdiction to entertain an appeal from a judgment granting a divorce, appellant has appealed from so much of the judgment as awards alimony and attorney's fee. We have often held that, while we have no jurisdiction of a judgment granting a divorce, yet we will look into the merits of the judgment for the purpose of ascertaining whether or not the award of alimony is proper, and, if it be found that there was no legal basis for the divorce, the award of alimony would be reversed. *Lee v. Lee*, 1 Duv. 197; *Beall v. Beall*, 80 Ky. 675; *Woolfork v. Woolfork* (Ky.) 29 S. W. 742. While entertaining the highest respect for the opinion of the chancellor, we are utterly unable to perceive upon what evidence the judgment of divorce is predicated. There was no testimony on this subject which could, at best, more than raise a suspicion of improper conduct; and, without going into the matter in detail, we can say that a careful reading establishes the conviction that appellee wholly failed to prove the allegations of her petition. The letters which were introduced were incompetent, as there was no evidence as to whom they were written by, or that they were

addressed to or received by appellant. Appellant's daughter, whose testimony was the medium for the introduction of the letters in question, could only state that they were shown to her by appellee. She did not know who wrote them, that her father had ever received them, or where appellee obtained them. One would hold his character by a precarious tenure if it could be broken down by such evidence as these letters afford, coming in the questionable shape they do; and especially is this true where the law seals the lips of him at whom they are aimed, and in this way would place him at the mercy of appellee if she chose to concoct and introduce them against him. There having been no foundation laid for the introduction of the letters, they were incompetent.

We are of opinion that the court erred in granting the divorce, and, this being true, it was also erroneous to award alimony.

The sum of \$250 allowed appellee's counsel seems to have been established by sufficient evidence, and is not excessive in amount. This part of the judgment is correct. Section 900, Ky. St. 1903; *Whitney v. Whitney*, 7 Bush, 520.

Wherefore so much of the judgment as allows to appellee's counsel a fee is affirmed; so much as awards her alimony is reversed.

UNITED LOAN & DEPOSIT BANK OF CAMPBELLSBURG v. BITZER et al.

(Court of Appeals of Kentucky. Jan. 27, 1904.)

MUNICIPAL CORPORATIONS — IMPROVEMENT WARRANTS — LIEN CREATED — WITNESSES — COMPETENCY — TRANSACTIONS WITH DECEDENTS.

1. Under the express provisions of Code, § 606, one cannot testify for himself as to transactions with a person deceased at the time the testimony is offered.

2. Where a contractor, pursuant to agreement with his surety to secure him for advances made, assigned him apportionment warrants which were drawn in favor of himself against his own property, as such warrants created no obligation in his own favor, the assignment of them gave the surety no lien which he could enforce against a mortgage executed by the contractor.

Appeal from Circuit Court, Jefferson County, Common Pleas Division.

"To be officially reported."

Suit by the United Loan & Deposit Bank of Campbellsburg against Peter Bitzer and others. From a judgment for defendant Bitzer, plaintiff appeals. Reversed.

Carroll & Carroll and Wallace & Miller, for appellant. Alfred Selligman, for appellees.

HOBSON, J. On July 18, 1892, Michael Gleason executed to John I. Calloway his note for \$2,000, and a mortgage to secure it on some lots on Floyd street, in the city of Louisville. The note and mortgage were assigned by Calloway to appellant, the United

Loan & Deposit Bank, who filed this suit to enforce its lien. Peter Bitzer was made a defendant to the action, and set up the fact that Michael Gleason in the year 1893 made a contract with the city of Louisville for the improvement of Floyd street between the center line of Magnolia avenue and the center line of Burnett avenue; that, upon the execution of this contract, Gleason desired to borrow money from Bitzer to purchase the necessary materials and to pay for the work required in the construction of the improvement as provided by his contract; that, with the express agreement between him and Gleason that Gleason should assign over to him the contract with the city, and all the warrants to be received thereunder, Bitzer advanced to Gleason, in money, the full value of the contract, and of all warrants to be received thereunder, and Gleason assigned to Bitzer all his rights under the contract, and all money and warrants to be received thereunder, of all which the city of Louisville had due notice; that, under Bitzer's supervision, and by his direction, and with his means and money, the improvement was made; that Bitzer paid with his own means for all of the material used in, and the work done on, the improvement; that Gleason did not furnish any of the material, or pay for any of the material or work, but the improvement was wholly constructed by Bitzer, and at his expense; that three warrants were issued by the city for the cost of the improvements, which was chargeable to Gleason's property, and these warrants were issued to Bitzer. On these facts, Bitzer claimed a lien on the land for the amount of the warrants. A demurrer having been sustained to this pleading, Bitzer filed an amended pleading, in which he alleged that the improvement in front of the property of Gleason enhanced its value to the extent of its cost. The court thereupon overruled the demurrer to the answer as amended, and, the case being submitted for final hearing, entered judgment giving Bitzer preference over the mortgage executed to Calloway, and from this judgment the bank appeals.

We need not consider whether the allegations of the answer as amended were sufficient to entitle Bitzer to precedence over the mortgage. The allegations of the answer were aptly denied by a reply, and the only proof taken to sustain the allegations of the answer is the deposition of Bitzer himself and the deposition of his clerk, Wilkes. Exceptions were filed to the evidence of Bitzer on the ground that, Gleason being dead, he could not testify for himself as to any transaction between him and Gleason. This exception was well taken. The testimony of Bitzer as to transactions between him and Gleason, who is dead, cannot be considered, for he cannot testify for himself, under section 606 of the Code, as to a transaction with the decedent. *Turner v. Mitchell* (Ky.) 61 S. W. 468; *Trail v. Turner* (Ky.) 56 S. W.

645; *Murray v. East End Improvement Company* (Ky.) 60 S. W. 648. Wilkes states that he kept books for Bitzer; that Bitzer was the surety of Gleason in the contract; that Bitzer furnished groceries and money to Gleason to do the work with, commencing in the first part of April, 1893; that they were furnished under the agreement that Bitzer was to have an apportionment warrant for enough to cover the amount advanced, the arrangement having been made before the work was done or the advances made. He filed with his deposition an itemized account, running from April 11, 1893, to August 31st and footing up \$1,766.64. This, he says, is the correct account of the advances. The entire amount of Gleason's contract was \$6,012.92. There were three warrants issued against the property of Gleason—one for \$119.19, another for \$1,631, and the third for \$182.91. All the other warrants, 19 in number, appear to have been collected by Gleason or by E. F. Finley, his assignee. Only the three warrants against Gleason's own property appear to have come into the hands of Bitzer. These were directed by the city to be issued to Gleason, and were indorsed by Gleason to E. F. Finley, and by Finley to Bitzer. Each of them orders M. Gleason to pay to M. Gleason the amount therein specified for improving Floyd street from Burnett to Magnolia avenue. The warrant of the city in favor of Gleason on himself must stand as a note where the same person is both the obligor and the obligee. When Gleason received the warrant from the city, directing himself to pay himself so much money, he, being both the payor and the payee of the paper, could not, by assigning it, vest any right of action in his assignee, or give him any lien on the land as against third parties. Thus, where a note has been paid off, which is secured by a lien on land, the obligor cannot again put it out in circulation, and thus create a lien on the land as to third persons. If Gleason had continued to hold these warrants, he could not have set them up himself, as against the mortgage executed to Calloway, and Bitzer, as his assignee, is simply substituted to his rights. *Allin v. Shadburne's Ex'r*, 1 Dana, 68, 25 Am. Dec. 121; *Morrison v. Stockwell*, 9 Dana, 172; *Muhling v. Sattler*, 3 Metc. 285, 77 Am. Dec. 172; *Logan County Bank v. Barclay*, 104 Ky. 97, 46 S. W. 675. It is true, Bitzer was Gleason's surety in the contract, and he made advances to him upon the promise of an apportionment warrant. His account seems to consist, in the main, of merchandise to the hands, or feed, and ran along from day to day, in small amounts, from April to August. By furnishing this money to his principal, he stood in no different light than any other surety making advances to his principal in carrying out the contract. The fact that Gleason promised to assign him an apportionment warrant to secure him does not help him, when this promise was not carried out

in the making of a valid assignment. This assignment by Gleason of the warrants payable to himself on himself was, as to third parties, in law, no assignment. There is nothing in the case to sustain the allegations of the answer that Bitzer, as surety, took charge of the work, and performed the contract at his expense. The authorities relied on for appellee are therefore inapplicable, and we have the case simply of a debtor assigning to his creditor, for his security, a paper which, as to third parties, was unenforceable. *Ryan v. Doyle*, 79 Ky. 363; *Thompson v. George*, 86 Ky. 311, 5 S. W. 760.

We therefore conclude that, as to the mortgage executed by the decedent to Calloway, Bitzer has no lien on the land by reason of the apportionment warrant assigned to him by Finley. The judgment is therefore reversed, with directions to enter a judgment in favor of the bank.

FITCH et ux. v. DUCKWALL.

(Court of Appeals of Kentucky. Jan. 28, 1904.)

MORTGAGES—PAYMENT—EVIDENCE—HOMESTEAD—SALE AND REIMBURSEMENT—ASSIGNMENT FOR CREDITORS—RIGHT OF ATTACHMENT—CHANGE IN LAWS.

1. Evidence in an action, with attachment of real estate, held insufficient to sustain a finding that a mortgage thereon had been paid, so that the attachment was not subject thereto.

2. A homestead may not be sold, the proceeds invested in personalty, and used in trading for an indefinite time, and then invested in another homestead, exempt from antecedent debts.

3. A general deed of assignment for creditors was executed before enactment of Act March 18, 1894 (Ky. St. 1903, §§ 74-96), on the subject, and, under the prior statute, being for the purpose of hindering and delaying creditors, gave grounds for attachment. Held, that the rights of persons interested were fixed under the prior statute, and that an attachment could be made after enactment of the act of 1894; it not being intended to be retroactive, so as to disturb rights and liabilities incurred before its passage, though, so far as practice is concerned, it applies in winding up assigned estates.

Appeal from Circuit Court, Jefferson County, Chancery Division.

"Not to be officially reported."

Action by Fred Duckwall against B. F. D. Fitch and wife. From an adverse judgment, Fitch and wife appeal. Reversed.

W. A., D. A. & J. G. Sachs, for appellants. John S. Jack, for appellee.

O'REAR, J. Fitch and wife executed a mortgage on his lot to Brierly in 1881 to secure two notes, of \$1,500 each. The notes were some years afterwards assigned by Brierly to W. A. Duckwall, who was the father of Mrs. Fitch. W. A. Duckwall died in 1893, and his executor, by the consent of all his devisees, and in a settlement of a family litigation among them, assigned these notes to Mrs. Fitch. After that, appellee Fred Duckwall brought this suit, and attached the property covered by the mortgage, claiming that Fitch had in fact paid it

off before the attempted assignment to his wife, and that the assignment to her was without consideration; that the mortgage was transferred to W. A. Duckwall, by collusion with Fitch, to defeat and delay the latter's creditors; and that Mrs. Fitch knew those facts when she took the assignment. B. F. D. Fitch and D. T. Duckwall, the executor of the will of W. A. Duckwall, and the principal devisee therein, who is also the brother of appellant Mrs. Fitch, testified concerning that transaction. That the original mortgage to Brierly was executed for a full, valuable consideration, is not denied. But it is asserted that Fitch, with his own means, paid it off to Brierly, thereby extinguishing the debt and lien; and, if that was so, his delivery of it afterward to W. A. Duckwall could not give it any validity, as creating a lien on the property. D. T. Duckwall, who showed considerable feeling, and took quite an active and unnatural part in the case against his sister and her husband, testified that he knew that Fitch paid off the Brierly mortgage with his own means, because he saw him do it, and knew where he got the money used for that purpose. He fixes the time and place, and names those present. None of those were living when this suit came to be tried, except D. T. Duckwall and B. F. D. Fitch. The latter testified that he was not present, and did not furnish the money, or any of it, to pay off the debt; that he was very much pressed for money, even for necessities, and was hopelessly insolvent; and that W. A. Duckwall, who knew the situation, bought in the mortgage notes, and held them to save his daughter her home. It is shown conclusively that Col. W. A. Meriwether wrote the assignment of the notes. He testified that he wrote the assignment, and remembered the transaction; that it occurred in his office, and not at the place fixed by D. T. Duckwall; that neither D. T. Duckwall nor B. F. D. Fitch were present; that the consideration was paid to Brierly by W. A. Duckwall in the presence of the witness. In the record is the assignment of the notes by D. T. Duckwall, as executor of W. A. Duckwall, to Mrs. Fitch, in part settlement and compromise of the suit attacking the will, and D. T. Duckwall's interest under it. Nothing appears in that paper to discredit the validity of the notes and mortgage. This was all the evidence on this point. We think the weight of it is clearly with appellants, and the circuit court should have adjudged the lien in favor of Mrs. Fitch.

2. The consideration for appellee's debt was labor done in 1873 to 1875. This was settled by a note dated 1877, and later reduced to a judgment. Appellant bought the lots in contest in 1876. He claims a homestead exemption from appellee's debt. Before 1873 appellant owned a farm, which was his homestead. He claimed to have sold it, and reinvested \$3,000 of the purchase

money in the lots in suit. As a matter of fact, he invested the proceeds of the farm in business, in merchandising and trading, and later took the proceeds of that business and invested it in the lots on which the present home was built. A debtor may sell his homestead, and reinvest the money in another, and the latter will not be subject to general debts to which the former was not. But he cannot sell his homestead, and convert it into personalty, and use it in trading for an indefinite time, and then invest that in another homestead, and claim it as exempt from his antecedent debts. The circuit court properly denied the claim of homestead exemption in this case.

3. The debtor, Fitch, executed a general deed of assignment for the benefit of his creditors in 1894, before the enactment of the present statute on that subject. We are of opinion, from the proof, that his purpose was to hinder and delay his creditors, and that it gave grounds for the attachment of his property by creditors. The rights of the parties were fixed under the former statute. The act of March 16, 1894 (sections 74-96, Ky. St. 1903), was not intended to be retroactive, so as to disturb rights and liabilities incurred before its passage, although, so far as the practice was concerned, the new act applied in winding up assigned estates.

The judgment of the circuit court is reversed, and cause remanded, with directions to enter a judgment giving appellant E. Laura Fitch a lien on the attached property next in priority to the taxes and street improvement claims; then adjudge appellee a lien for his debt, interest, and costs, and sustaining his attachment, and denying appellant's claim to homestead in the lots; and for any other necessary proceedings not inconsistent herewith.

PARISH v. LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky. Jan. 20, 1904.)
RAILROADS—FAILURE TO BUILD FENCES—
STATUTE—INJURY TO LIVE
STOCK—LIABILITY.

1. Under Ky. St. 1903, § 1793, requiring railroads to erect and maintain cattle guards at all terminal points of fences constructed along their lines, a contention that such guards are not required to be erected except at public and private crossings is without merit.

2. Under Ky. St. 1903, § 1790, requiring railroads to construct and maintain fences on one-half of the distance of the division line between the right of way and adjoining land, and requiring the landowner to fence the other half, where the landowner erects the part required of him, the railroad is bound to erect the other half without notice from the landowner to do so.

3. Ky. St. 1903, § 1791, providing for notice to railroads to build fences as required by section 1790, is only for the purpose of setting the criminal law in motion and fining the party in default.

4. Where a railroad fails to erect a fence as required by Ky. St. 1903, § 1790, along its right of way, it is liable to the landowner for

injury to cattle resulting from such failure, though the statute does not in terms impose such liability.

Appeal from Circuit Court, Madison County.

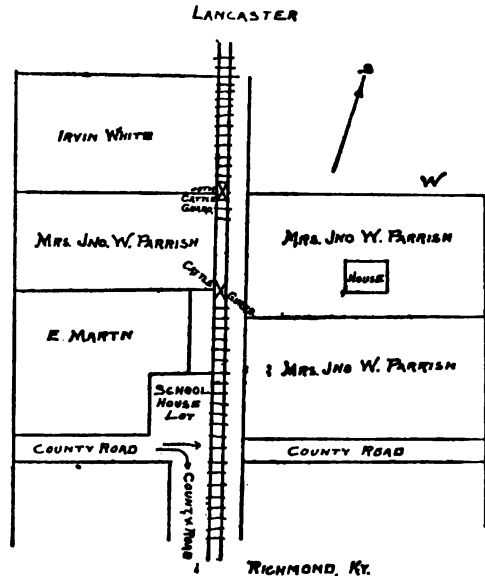
"To be officially reported."

Action by Bettie Parish against the Louisville & Nashville Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed.

J. Tevis Cobb, for appellant. J. A. Sullivan, for appellee.

NUNN, J. The appellant instituted an action against the appellee for damages for alleged injury to her cattle. In addition to the original petition, she filed several amendments, and the last is denominated as a "re-formed amended petition." The lower court sustained a demurrer to her pleading, dismissed her action, adjudged the costs against her, and of this she complains.

Appellant filed with her pleading a diagram, which is here inserted:



It appears from the pleadings that appellee's road passes through her farm a north and south course, leaving her home and most of her farm on the west side of the road, and the other part of her farm, about 65 acres, on the other or east side. It appears that she built a fence, with her own means, on the west side of the railroad, and parallel with it along the right of way from her south line to the public highway, and gave notice of this fact, but not in writing, to appellee, and requested it to erect a fence on the east side, on her land, parallel with and along the right of way of appellee; but that it failed and refused to erect the fence. She further alleged that her 65 acres of land on the east side of the railroad was surrounded by a good fence except along the

¶ 4. See Railroads, vol. 41, Cent. Dig. § 1411.

line of appellee's right of way, but that she connected her two strings of fence—the one between her lands and White, the other between her and Martin—with cattle guards made by appellee, one at her south line, marked "Tooth Cattle Guard," the other at her north line on east side of the railway, marked "Cattle Guard." She alleged that this "tooth cattle guard" was constructed in a deep cut, and dangerously constructed, "a veritable death trap," and that her cattle, 50 or 60 head, repeatedly passed out of her 65-acre field into this cut, and over this cattle guard, killing a few and injuring others, to her damage in the sum of \$300; that the other cattle guard had filled up about even with the roadbed, and for that reason was no obstruction to cattle, which passed out of her pasture over this cattle guard without injury to them, then passed out along appellee's right of way, and thence roamed over the country, whereby they lost so many pounds of flesh, which was named in the petition, to her damage in the sum of \$400.

Appellee contends that the lower court was right in sustaining the demurrer—First. For the reason that the petition stated that no written notice was given appellee requesting it to build its part of the division fence as required by section 1791, Ky. St. 1903; that by law it was not required to build its part of the division fence until the written notice as required by this section had been served upon it, and that after service of this notice it had four months in which to erect the fence. Second. That under its construction of section 1793, Ky. St. 1903, and the decision of this court on that section, it contends that it is not required to erect cattle guards at any point on its road except at public and private crossings, and, as the cattle guards complained of in the petition were not at a public or private crossing, it was not required by law to keep and maintain cattle guards at the points where situated, and consequently not responsible for any of the damage alleged to have been sustained by appellant's cattle. We are of the opinion that appellee misconstrues section 1793 and the opinions of this court thereon. Section 1793, Ky. St. 1903, reads as follows: "That all corporations and persons owning or controlling and operating railroads as aforesaid, shall erect and maintain cattle guards at all terminal points of fences constructed along their lines, except at points where such lines are not required to be fenced on both sides, and at public crossings. But where there is a private passway across said railroad, the land owner for whose benefit it is kept open shall bear one-half of the expense of cattle guards and gates, the former to erect the gates, the corporation or person operating the railroad to erect the cattle guards." The words "shall erect and maintain cattle guards at all terminal points of fences constructed along their lines, except at points where such lines are not required to be

fenced upon both sides and at public crossings," do not limit the erection and maintaining of cattle guards at public crossings and private passways. The section of the statute quoted does not require cattle guards at public crossings, except where lines of fence running parallel with said road terminate at the public crossing, or, if only a line of fence on one side of the railway extends to the crossing, a cattle guard would be useless. It is the purpose of the statute that cattle guards should be erected and maintained at all terminal points of fences, not at terminal points of one fence on one side only of the railway, nor when the railroad enters or leaves a person's inclosures or farm, unless this should be the terminal of the fencing on both or one side of the railroad. In such a state of case a cattle guard is required. To illustrate: Suppose a railway passed from one public highway to another a distance of five miles through inclosed farming lands, and fences erected on each side of the railway, parallel with it, for the whole distance, in such state of case a cattle guard at each public highway would meet the requirements of the statutes, unless the necessity for others arose at private crossings. But if the two fences beginning at one of the highways extended only halfway to the other public highway, at that point and at the public highway from which the fences started cattle guards would be required, and also at terminal points where the line was not required to be and was not fenced on both sides. From the diagram filed and the allegations of the petition it is not clear where the cattle guards should have been erected. It is clear, though, that the two fences do not extend north to the public highway. It is indicated by the diagram that there is uninclosed land along the right of way on the Martin tract. If so, the cattle guard should have been erected at the line of Martin and appellant, at the point indicated "Cattle Guard." If there is a fence parallel with the railroad along the Martin line to the schoolhouse lot, then at that point the cattle guard should have been erected.

The appellee is also in error as to its construction of section 1790, Ky. St. 1903, which reads as follows: "That every such corporation or person owning or controlling and operating a railroad in this commonwealth, and owning right of way, shall construct and maintain a good and lawful fence on one-half of the distance of the division line between such rights of way and the adjoining lands, except as is hereinafter provided; and that every owner of land or lands adjoining any rights of way of such corporation or person as aforesaid shall construct and maintain a good and lawful fence on one-half of the distance of the division line between such land or lands and such rights of way except as is hereinafter provided." This section required the appellee to construct and maintain this fence; that is, one-half of the division

fences between them. She alleged in her petition that she had performed her duty in this regard, and that appellee had failed to erect its part of the fence as required by statute. By the demurrer this is admitted. But appellee says that it is not compelled to erect this fence until it is served with written notice as required by section 1791, Ky. St. 1903. This written notice is only required for the purpose of setting the criminal law in motion and fining the party in default \$1 per day and every day after the expiration of the period of four months from date of service of the written notice during the time such fence shall not have been constructed. We have a statute (section 1790) that expressly required appellee to construct its half of the fence, and it admits that it failed to erect it. It should have complied with this statutory requirement without notice from the appellant of any kind, for none is required. See *McGhee, etc., v. Gaines*, 98 Ky. 183, 32 S. W. 602, 603. In that case the court said: "There can be no doubt of the proposition that, if the company is in default of the performance of a legal obligation—as by neglect to maintain a fence or cattle guard where stock may stray on the track—proof of such default and of the cattle coming on at such places and being killed will suffice to render it liable for damages. *Pierce on Railroads*, p. 428." The case of the *City of Henderson v. Clayton* (Ky.) 57 S. W. 1, 53 L. R. A. 145, was where the city was sued for a violation of its duty imposed by a statute. The court said: "From time immemorial, where a statutory duty for the protection of individuals had been violated, an action at common law might be maintained. The common-law rule referred to is thus stated in *Comyn's Digest*, 'Action upon Statutes': 'In every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law.' Another common-law authority thus states the rule: 'Whenever an act of Parliament doth prohibit anything, the party grieved shall have an action and the offender shall be punished at the king's suit. It is written in the hornbook of the law that the public and a party particularly aggrieved may each have a distinct but concurrent remedy for an act which happens to be both a public and a private wrong.' *Endlich on Statutes*, § 463. The same common-law rule is laid down in *Bishop on Noncontract Law*, § 133, and in *Cooley on Torts*, p. 658. It is also recognized in section 466, Ky. St. 1903: 'A person injured by the violation of any statute may recover from the offender such damage as he may sustain by reason of the violation, although a penalty or forfeiture for such violation be thereby imposed.' " The appellee was therefore liable to appellant for such damages as she sustained by reason of its violation of section 1790, Ky. St. 1903, above quoted, al-

though that statute did not in terms impose this liability on it.

We are not to be understood as deciding that the parties in interest cannot, if they desire, agree upon the erection, or agree to waive the erection and maintenance, of fences and cattle guards, if they can do so without injury to the rights of others; but without such agreement the principles herein stated must prevail.

It follows that the court below erred in sustaining the demurrer to the petition. The judgment is therefore reversed, and cause remanded for further proceedings not inconsistent with this opinion.

GILL et al. v. FUGATE et al.

(Court of Appeals of Kentucky. Jan. 12, 1904.)

FRAUD—INNOCENT PARTIES—ESTOPPEL—FORECLOSURE OF VENDOR'S LIEN—NEW TRIAL.

1. After delivery of a deed the grantee included therein land not sold, and then conveyed it without consideration, taking back purchase-money notes, which he assigned as collateral to a bank. *Held* that, the second grantee being only a volunteer, and the notes being nonnegotiable, and therefore, under Ky. St. 1903, §§ 474-483, subject to all defenses in the hands of an assignee that they would have been in the hands of the payee, there was no innocent party to prevent relief from the deed.

2. Where G. sold certain land to W., and W., after delivery of the deed, included other land therein, and then made a voluntary conveyance of all of it to S., taking back purchase-money notes, which he assigned to a bank, the bank not examining the records, but taking the word of W. as to the title, there is nothing to estop G. from having relief from the deed.

3. G. sold land to W., taking back purchase-money notes. After the deed was delivered, W. included therein other lands of G. The notes were sent by G., who lived 18 miles from the county seat, to his attorneys to collect, they being referred to the records for the description of the land. They foreclosed the lien on all the land included in the deed, there being no reason for consulting G., so that he did not learn till after the trial of the change in the deed. *Held*, that he was entitled to a new trial under Civ. Code, § 518, subsec. 7, for unavoidable casualty preventing his appearing.

4. The purchaser at decretal sale in a suit to foreclose the lien of a purchase-money note, having paid nothing, and having bought at a price entitling the owner to redeem, may not prevent a new trial on discovery that land was fraudulently included in the deed.

Appeal from Circuit Court, Logan County.

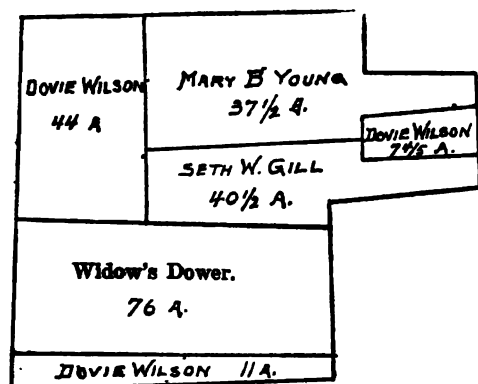
"To be officially reported."

Suit by Seth W. Gill and another against M. L. Fugate and others for a new trial. Judgment for defendants. Plaintiffs appeal. Reversed.

W. P. Sandidge, for appellants. Browder & Browder, for appellees.

O'REAR, J. S. H. Gill owned a farm of about 236½ acres of land in Logan county at his death. He died intestate. There survived his widow and three children, viz., Seth W. Gill, Mary B. Young, and Dovie Wilson, who were his only heirs at law. The

land was partitioned among them by mutual conveyances as follows: The widow was allotted 76 acres as dower. To the son, Seth W. Gill, was allotted 40½ acres; to Mary B. Young 57½, and to Dovie Wilson three tracts—one of 44 acres, another of 11 acres, and the other, 7½ acres. The subjoined plat shows the situation, and will enable the other facts of the case to be more easily understood:



Dovie had married H. S. Wilson, who had been an attorney at law. In 1888 Seth W. Gill conveyed to H. S. Wilson, by deed, his 40½ acres, and his undivided one-third in the dower tract, subject to the widow's life. Mrs. Young at the same time conveyed to H. S. Wilson her 57½ acres and her one-third of the dower tract. Part of the purchase money was unpaid, and liens were retained in each of the deeds. Thereafter the widow died, and in a short while after her death Mrs. Dovie Wilson died intestate, without having had a child born alive. In consequence Seth W. Gill and Mary B. Young, as heirs at law, inherited the three tracts allotted to Dovie Wilson (the 44 acres, 11 acres, and 7½ acres), as well as her one-third of the dower tract. At the instance of H. S. Wilson, Mrs. Young and her husband and Seth W. Gill went to his house some time after the death of his wife, where he proposed to buy from them their interest in the dower tract, as they now claim. The negotiation resulted in a sale of the interest mentioned for \$800, represented by two notes of \$400 each, executed to the vendors, respectively, by S. H. Wilson. The deed executed in pursuance to that sale is dated in 1898. This is the transaction principally involved in this suit. As stated, the vendors claim and testify that they intended to sell only the one-third of the dower inherited from their deceased sister; that no proposition was made to them to sell any other land; nor did they know that they had the title to the other lands formerly allotted to Mrs. Dovie Wilson. It may be here remarked that these two persons seem to have been simple people, and very ignorant of their legal rights, as well as without much knowledge or intelligence concerning such trans-

actions. H. S. Wilson prepared the deed, which they say Seth W. Gill read aloud in the presence of the others. The grantors some days later carried the deed to a deputy county court clerk living in the neighborhood, and, without re-reading it, signed and acknowledged it. The deputy clerk indorsed the acknowledgments on the deed, and it was delivered to H. S. Wilson. Seth W. Gill and Mrs. Young each testify that the deed only recited a sale of their one-third interest in the dower tract. The deputy clerk, who knew the land and the parties, testified that he remembered the transaction, and that the deed mentioned only the dower interest. The original deed is not produced, but the certified copy from the record of deeds in the county court clerk's office shows that a tract of land by metes and bounds was conveyed, including every foot of the 236½ acres except the 11 acres. It is charged in this suit by appellants, Seth W. Gill and Mary B. Young, that the deed as recorded was procured by the fraud of H. S. Wilson.

A year or so after the last-named deed was executed H. S. Wilson conveyed all the land mentioned to his father, S. A. Wilson, then and now a resident of the state of Tennessee. The recited consideration for the conveyance (which included all the personal property on the farm) was \$5,500, evidenced by four notes executed by S. A. Wilson to H. S. Wilson for \$1,375 each, payable in one, two, three, and four years, respectively. These notes H. S. Wilson assigned to certain of his creditors to secure antecedent debts, and borrowed also about \$900 additional on them, and procured the release of about \$1,500 of collateral from one of his creditors, the People's Bank of Adairville. He then became a bankrupt, and has left the state. Seth W. Gill sent his notes to an attorney at Russellville to bring suit enforcing a lien in his favor on the land he had sold to H. S. Wilson. Mrs. Young sent her notes to an attorney at the same place for like purpose. The attorneys, not knowing what lands had been conveyed, and being referred by their clients to the county court records for proper descriptions, and the clients being ignorant of the fact that the deeds contained any reference to any but the lands actually sold, having no reason to suspect otherwise, the suits were brought in their names by their attorneys to enforce their liens on all the lands referred to in their deeds. The People's Bank of Adairville, as holder of three of the \$1,375 notes executed by S. A. Wilson to H. S. Wilson and by him assigned to the bank, and C. E. Haddox, the assignee of the other \$1,375 note, were made parties to the proceedings, and set up their notes and liens. A judgment was rendered, by consent of all the lienholders, through their attorneys, enforcing the liens on all the land comprising the 236½ acres, including the 11 acres, which no one claimed had been conveyed at all since Mrs. Dovie Wilson's death. At the

sale made under this decree appellee M. L. Fugate, who was cashier of the People's Bank of Adairville, became the purchaser of the whole tract for \$2,750. It was appraised at \$5,328. This suit was brought by appellants, Seth W. Gill and Mary B. Young, to obtain a new trial of the action last mentioned. In addition to the facts above stated, it is alleged that the judgment was rendered decreeing a sale of their lands, viz., the 44 acres, 11 acres, and 7 $\frac{1}{4}$ acres inherited from their sister, to satisfy debts of S. A. Wilson and H. S. Wilson, and by casualty and misfortune they were prevented from appearing and showing that fact in the original suits. The learned judge who tried this case has advised us by an opinion filed in the court below of his conclusions of law as well as the finding of the facts upon which he based his judgment refusing the new trial.

It is contended for appellees here that the transaction between H. S. Wilson and appellants shown by the deed of 1898 was not fraudulent. No witness testified upon that branch of the case save appellants and the deputy clerk who took their acknowledgments. An ingenious argument is made by appellees' counsel in support of his theory. But the facts will not be reconciled with it. The trial judge was moved to remark: "I am convinced from the proof in this case that S. W. Gill and Mrs. Young were the innocent victims in the hands of an unscrupulous scoundrel, who would not have hesitated to rob them of their patrimony in their ancestor's estate, and did to a very great extent do so. * * * In his last deal with them he procures a conveyance from them investing him with the entire interest derived by his said wife from her father's estate practically for a nominal consideration. I do not think in my practice I am cognizant of a case which so strongly appealed for the intervention of a chancellor to redress the outrageous wrong as the case at bar, and I would take pleasure in granting the relief prayed for if it could be done without making the innocent suffer who is free from fault or neglect." The innocent referred to in the chancellor's opinion, and whose interest and attitude arrested his arm, is the People's Bank of Adairville. As stated, the bank was a creditor of H. S. Wilson for about \$1,500 secured by collateral notes. This collateral was surrendered, and \$900 additional loaned on the three \$1,375 purchase-money notes of S. A. Wilson, above alluded to. It was the view of the chancellor that the bank was an innocent holder for value of these notes, which had been executed for a conveyance of a title shown by the proper records to be apparently vested in the grantor; that, as between it and appellants, who had been defrauded of their lands by another, it should be protected. This brings us to consider what was the relation of these parties to the real subject-matter of the suit, to wit, the land. Under the findings of the chancellor

the land had not been bargained, nor had it been intended by appellants to convey them. They were included in the deed by mistake, or by the fraud of H. S. Wilson, according to all the proof in the record. Appellants could have sued immediately to have had that conveyance corrected. If H. S. Wilson conveyed the land to another with notice of his fraud or of the mistake, or if he conveyed it to such other without valuable consideration, the title would have been liable in the hands of such grantee to the same relief at the instance of appellants as if it remained in H. S. Wilson. Now, the allegation was—and we think the record sustains it—that H. S. Wilson executed this conveyance to defraud his creditors; that it was in reality a voluntary conveyance to his father to defeat his (H. S. Wilson's) creditors. Appellants were of his creditors. That being true, the conveyance was void, in so far as appellants were creditors. In no event was it an obstacle to their recovering their own as against the volunteer, S. A. Wilson. The latter merely assumed the place of his son, H. S. Wilson, as holder of his title, for whomsoever might have the right to reclaim it from said H. S. Wilson. The notes executed by S. A. Wilson to H. S. Wilson were not negotiable. By our statute (sections 474-483, Ky. St. 1903) they were subject to every defense in the hands of an assignee that they would have been in the hands of the original payee. Therefore, when the bank took these notes, whether for value or not, it merely took H. S. Wilson's title to them—took his place as payee. It could have no greater or other rights growing out of them, except as against H. S. Wilson, than he had. The bank, as holder of these notes, being in H. S. Wilson's place, could not have interposed them as a defense to the suit of appellants to recover of H. S. Wilson the land of which he had defrauded them. S. A. Wilson could not have been compelled by the bank to pay the notes. H. S. Wilson, by assigning the notes, the fruits of his fraud upon appellants, could not create a valid title in his assignee to the estate represented by them. What would have been the situation had H. S. Wilson, with an apparent title of record, sold and conveyed the land for value to an innocent purchaser, or had mortgaged it to an innocent creditor, we need not stop to consider. That is not this case. On buying the nonnegotiable notes the bank took them cum onere. It will not be relieved by suggesting that it might have got a good title from the same person in some other way. Nor is this a case of estoppel. It is not claimed nor shown that the bank was misled by the state of the record of deeds, nor that it examined or relied on the record. Appellants made no representations by which the bank was induced to alter its condition. It acted alone on H. S. Wilson's representations, and relied on its faith in his apparent title to the paper as an evidence of an en-

forceable debt owned by him against the land. Unfortunately, his title was not good. The paper did not give him an enforceable lien on the land. It was not enforceable for any purpose. It was worthless. His assignee must therefore lose.

It is very earnestly argued that under section 518, Civ. Code, subsec. 7, the new trial was not authorized, for it was under that section that it was sought. It reads: "The court in which a judgment has been rendered shall have power, after the expiration of the term, to vacate or modify it * * * (7) for unavoidable casualty or misfortune preventing the party from appearing or defending." It is claimed that there was no misfortune that prevented appellants from appearing. They are not defending. Appellants were not aware that their deed contained the description it did. Having no thought of that kind, and nothing to suggest it to them, it was not reasonable that they would or should make inquiry, or examine the records to discover the truth of it. They lived some 18 miles from their county seat, Russellville. They sent their notes by mail to their attorneys for collection. This was not an unusual or negligent method of transmitting them. It was not probable that they would have copies of the description of the land at hand. They were contained in the deeds of record. Supposing, naturally, that the record showed the truth, it was not improper to merely refer the attorneys to the records to get the necessary boundary descriptions to be set out in the petition to enforce their liens. The attorneys, not being told, and nothing appearing to excite inquiry, supposed, of course, that the deeds to which they had been referred by their clients were genuine, and brought the suits accordingly. The suits, being based upon writings filed therewith, were not required to be verified or signed by the plaintiffs. There was no issue of fact presented in the case, and consequently no reason for calling the clients for consultation before the trial. They took the usual and formal course. No negligence appears, for negligence implies a failure to do something which duty or prudence requires should have been done. The combination of probabilities, of every reasonable appearance that would mislead an ordinarily careful and prudent person pursuing that business, was such as to produce the mistake in the trial of the lien suits enforcing a lien on land not sold by the plaintiffs, for debts for which it was in no wise liable. This was the result of a "casualty"—an unforeseen incident—a misfortune.

The case of *Denny v. Wickliffe*, 1 Metc. 216, is relied on by appellees. There the plaintiffs sought a specific execution of a contract of sale. The defense was that he had not paid all the purchase money. After the judgment plaintiff sought a new trial on the ground that he had since discovered that the title was defective. The court held that

as a purchaser the law presumed him constructively notified of the state of his title shown by the record, and that the record was open to him for inspection; that it was natural and usual for purchasers to investigate the records concerning the title they are buying. That is what the records are for, principally. But here the vendor is not called upon by any sort of ordinary prudence to examine the records to see if his deed had been tampered with since it left his hands, nothing having occurred to arouse his suspicion about the matter. In *Elliott v. Harris*, 81 Ky. 470, Mrs. Elliott, the holder of purchase-money lien notes against land, in a suit to enforce them lost because of an apparent failure of title in the vendor. After the judgment she accidentally discovered the deed of record constituting the missing link. In her action for a new trial it was urged, as here, that she must take notice of the records. This court held that, as the deed, though recorded, was not indexed, it was not a lack of diligence not to find it. See, also, *Hall v. Com.* (Ky.) 30 S. W. 877. The facts stated were held to constitute casualty or misfortune entitling the losing party to a new trial. The purchaser at the decretal sale had paid nothing; had bought at a price entitling the owner to redeem—a price at which the sale might have been set aside for inadequacy, if any other casualty or error in the proceedings, even slight. The circuit court should have set aside the judgment and proceedings thereunder, and have awarded the new trial.

Judgment reversed, and cause remanded for proceedings consistent herewith.

B. F. BEARD & CO. v. GOODMAN.

(Court of Appeals of Kentucky. Jan. 29, 1904.)

SALE OF FERTILIZER—ATTACHING LABELS—COMPLIANCE WITH STATUTE.

1. The statute regulating the sale of fertilizer requires that every bag sold shall have attached to it a label containing the name and address of the manufacturer, the name of the fertilizer, etc. Defendant bought a fertilizer from plaintiffs, being informed that it would be shipped direct to him from a firm in Illinois. On its arrival, defendant removed it from the cars. He afterwards informed plaintiffs that it was not labeled, whereupon they telegraphed the Illinois firm, secured proper labels, and delivered them to defendant, who expressed his satisfaction, and retained and used the fertilizer. Held a sufficient compliance with the statute to enable plaintiffs to recover the purchase price.

Hobson, J., dissenting.

Appeal from Circuit Court, Breckinridge County.

"To be officially reported."

Action by B. F. Beard & Co. against Arthur Goodman. Judgment for defendant, and plaintiffs appeal. Reversed.

Bennett H. Young and N. McC. Mercer, for appellants. Weed S. Chelf, for appellee.

PAYNTER, J. The appellants are merchants, and they sold the appellee fertilizer of the agreed value of \$338.75. One defense to the action is that it was sold to him in violation of the statute, because none of the bags or packages containing the fertilizer had attached to them any label furnished by the Kentucky Agricultural Experiment Station, giving a chemical analysis of the fertilizer, and that for that reason the contract is not enforceable. The facts are these: The appellants did not keep the fertilizer in stock, and informed appellee that it would be shipped to him at his station by Swift & Co., of Illinois. It was shipped by Swift & Co., and reached appellee's station on the 26th of September, and two or three days thereafter, and without the knowledge of appellants, the appellee unloaded it. The bags containing the fertilizer did not have any labels attached to them, showing the chemical analysis; and appellants did not know of this fact until informed by appellee, whereupon they telegraphed Swift & Co. for the character of labels required by the statute. The labels were sent promptly, and were delivered by appellants to the appellee, who expressed himself satisfied therewith. The appellee kept and used the fertilizer.

The question is, was this such a compliance with the statute as will enable the plaintiffs to recover the agreed value of the fertilizer? The statute requires that every bag of commercial fertilizer sold or offered for sale in this state shall have attached to it, in a conspicuous place, a label, which shall contain the name and address of the manufacturer, the name of the fertilizer, number of net pounds in each package, etc. A penalty is provided against the manufacturer or vendor who shall sell, offer, or expose for sale, any fertilizer, without having the labels required by statute on the packages. This court, in *Vanmeter v. Spurrier*, etc., 94 Ky. 22, 21 S. W. 337, held that one who violated the statute, in not furnishing the labels as required by it, could not recover the value of the fertilizer sold. In that case the labels were never furnished. In the case at bar the labels were furnished, but were not on the packages when they arrived at the appellee's station, and in fact were never placed upon the packages by the appellants. The appellee received the bags of fertilizer and the labels. He received just what the law contemplated he should have—the fertilizer which he bought, and the labels giving the information required by the statute. Reduced to the last analysis, the appellee seeks to evade the payment of the contract price of the fertilizer, not because the labels were not furnished him, but because they were not on the bags when they arrived in the car. The labels received gave the appellee the information for his protection which the statute contemplated purchasers of fertilizers should have. If the fertilizer was not of the character represented, a cause of action

would exist, and the labels furnished would show the character of fertilizer which the vendor represented he was selling. The purpose of the statute was to prevent the manufacturers and vendors from perpetrating frauds on purchasers, not to enable such purchasers to escape liability for fertilizer sold and delivered to them. While the statute was not complied with to the letter, it was in the spirit. We are therefore of the opinion that the defense relied on to which we have referred is not available. The court erred in giving a peremptory instruction to find for the appellee.

The judgment is reversed for proceedings consistent with this opinion.

HOBSON, J., dissenting.

WALLACE et al. v. KNOXVILLE WOOLEN MILLS.

(Court of Appeals of Kentucky. Jan. 27, 1904.)

SALE—ACTION FOR PRICE—DEFECTS IN MATERIAL—MEASURE OF DAMAGES—COUNTERCLAIM—PLEADING—SUFFICIENCY.

1. Where defects in yarn sold to manufacturers of hosiery could not be ascertained until it was used in the regular course of business, the acceptance thereof does not preclude their right to counterclaim for the defects in an action for the price.

2. Where yarn sold to manufacturers of hosiery proves defective, the measure of damages is the difference in value of the yarn as it was contracted to be delivered and the yarn as it in fact was, and, in addition, such damage as was done to the machinery in giving it a fair trial, or such as occurred from loss of time in making the trial, provided ordinary care was exercised by the purchaser, but no loss which might have been avoided thereby should be allowed.

3. In an action for the price of yarn sold to defendants, manufacturers of hosiery, special damages on account of injury to the machinery from defects in the yarn, and loss of time in making a trial thereof, were properly specially pleaded as a defense.

Appeal from Circuit Court, McCracken County.

"To be officially reported."

Action by the Knoxville Woolen Mills against George C. Wallace and others. From a judgment for plaintiff, entered on sustaining a demurrer to the answer, defendants appeal. Reversed.

Quigley & McQuot, for appellants. Wheeler & Hughes and Simrall & Doolan, for appellee.

HOBSON, J. Appellee, the Knoxville Woolen Mills, instituted this action against appellants to recover \$2,712.39, the balance due on an account for a lot of cotton yarn sold and delivered by it to them; appellee being a manufacturer of yarn in Knoxville, Tenn., and appellants being manufacturers of hosiery at Paducah, Ky., and buying the yarn for use in their factory. After the suit was brought, appellants paid appellee \$2.

015.05 on the account, and filed an answer and counterclaim as to the remainder of the account, in which they alleged these facts: They have a large plant, employing regularly about 100 persons, and a great number of machines engaged in the manufacture of hosiery, their weekly expenses being about \$500. They are engaged in selling their products to retail dealers throughout the country, all of which was well known to the plaintiff when the contract was made. On or about October 1, 1902, they received from the plaintiff the first shipment of the yarn in contest; the contract being for the purchase of 50,000 pounds of yarn, to be delivered in weekly installments of 8 cases until all was shipped. After receiving the first shipment and running it into their machines in their plant, they ascertained that the yarns were not of the character, quality, and kind agreed to be furnished them by plaintiff under its contract, which fact could not be ascertained until each cone was run into the machine. They at once notified the plaintiff of the defective character and quality of the yarn, complaining to plaintiff of the quality of yarns that were being shipped. The plaintiff continued to make shipments, and the defendants repeatedly made complaint, and insisted that they should be reimbursed on account of the defective quality of the yarn. On November 3d, or about 30 days after plaintiff began to ship the yarn, in answer to complaints of defendants the plaintiff wrote them the following letter:

"Knoxville, Tenn., Nov. 3rd, 1902.

"The Alden Knitting Mills, Paducah, Ky.—Gentlemen: Yours of the 1st inst. received. I regret exceedingly that our yarns have not been giving satisfaction. This is the first complaint we have had for some time, but the samples of yarn you submitted is certainly not very good. In one place it looks like a #6 had been wound on to #11 or #12s. And in another place, especially that of the knit sample, it looks like it had been caused by a bad roller in the cotton mill.

"Our Mr. McKeldin wrote you last Saturday that he hopes to be over early this week. He expects to leave to-night or to-morrow night, and I hope you will have no trouble in getting our differences reconciled, and our business relations continue pleasant. We know we can make good yarn, and are doing it to-day.

"I have the pleasure of knowing your Mr. Toof, and am obliged to him for his interest in the matter. I assure you, when our Mr. McKeldin sees you, he will make everything satisfactory.

"Very truly yours,

"[Signed] R. P. Gettys, V. P."

The officer of the plaintiff came to Paducah in a few days, and admitted that the yarns were not of the character, quality, and kind contracted to be shipped, and represented to defendants that he would undertake to adjust the claim for damages made by

78 S.W.—13

the defendants. By reason of the representations of the plaintiff, the defendants were kept from making other contracts for the purchase of good yarn for their knitting, as they would have done but for this misrepresentation. There is no market in the city of Paducah for the purchase of yarns. The defendants made every effort to procure yarns for use in their plant when they ascertained that plaintiff would not comply with its contract. They would not have used the yarn shipped by plaintiff, but for the representations of the plaintiff that it would make good yarns to comply with its contract, and that the defendants would be compensated for damages by reason of the defective character of the yarns. It was further alleged that the plaintiff made these representations to the defendants with a fraudulent intent to mislead them, and to induce them to keep and use the portion of said yarns that were used, and to prevent them from exercising their rights under the contract, and that thereby the plaintiff practiced a fraud upon them, and lulled them into the belief that their claim for damages would be adjusted and paid. The damages were fixed at \$850, and it was alleged that by reason of the nonresidence of the plaintiff the defendants would be irreparably damaged unless allowed to make their counterclaim in this action. The court sustained the demurrer to this part of the answer, and entered judgment in favor of the plaintiff on the account for the yarn.

In support of the judgment, we are referred to *Jones v. McEwan*, 91 Ky. 373, 16 S. W. 81, 12 L. R. A. 399, and *Duckwall v. Brooke* (Ky.) 65 S. W. 357. In the first case the wheat was inspected and received, and thereafter a counterclaim was presented on the idea that the wheat was not as it was supposed to be. The court applied the rule that where the purchaser receives the goods in discharge of the contract after inspecting them, or after a fair opportunity to do so, he cannot sue the vendor to recover damages upon the ground that the goods did not come up to the contract. In the second case, five car loads of corn were shipped. Two were rejected, and three were risked out. Two other cars were sent in place of the two that were rejected, and it was held that the purchaser took the risk of the three which he sent out after inspecting them and knowing the condition of the corn. This case followed *Jones v. McEwan*, and is on all fours with it. On the other hand, in *National Oak Leather Company v. Armour-Cudahy Packing Company*, 99 Ky. 667, 37 S. W. 81, suit was brought to recover the price of certain hides, and a counterclaim was pleaded for damages on account of their defective condition. The defendant paid for the first car load of hides before they were received, and the defective condition of the hides was discovered while they were being fleshed. They were received in July,

and the defects were discovered in the beam-house early in August. They could not have been discovered before in the ordinary run of their business. Notice of the defects were at once forwarded to the seller, and damages demanded. It responded, admitting the inferior condition of the hides, and promising a better showing on the second car load. In a few days the second car arrived, and the hides were found in a worse condition than the first. The purchaser offered to surrender the hides, except 80, which it proposed to keep to pay the damages. This offer was refused, and, it becoming apparent that the hides were about to spoil, it sent to the seller the price of the hides as stipulated in the contract, less its claim for damages, and proceeded to use them in order to save them. It was held that the counterclaim was maintainable, and judgment was entered for the defendant. The case before us falls within the principle of this case, and is not governed by the rule laid down in *Jones v. McEwan*. The first shipment of the yarn sued for was made October 1st. The last shipment was made on November 12th. The yarn was rolled on cones, and its condition could not be ascertained until the cones would be unwound. In the ordinary course of business, this would be when the cones were placed in the machines, and the yarn was unwound for use. The rule relied on for appellee applies only to such things as may be inspected in the ordinary course of business before they are accepted. It does not apply to defects which could not be discovered by ordinary care in the usual course of business when the goods are received. When appellants received the yarn in contest, they had a right to presume that it was such as the contract required, and were not required to anticipate defects which could not be ascertained by ordinary care, in the usual course of business, before using the yarn. Complaint having been made promptly, and the seller promising to remedy the defects and to compensate the purchaser for the loss, the counterclaim is maintainable. The letter of the plaintiff shows that there had been previous correspondence. It recognizes the defectiveness of the yarn, and is a promise that Mr. McKeldin will make everything satisfactory.

In setting out their damages, the defendants alleged that by reason of the defective quality of the yarn their machinery was damaged in passing the yarn through it in the sum of \$200; that they were further damaged by reason of their inability to do full work with their machinery, on account of the yarn's being defective, in the sum of \$450; and that by reason of the failure of the plaintiff to deliver yarns of the quality, character, and kind contracted to be furnished, they were damaged in the sum of \$200. It is earnestly argued for appellee that the damages to the machinery, or by reason of appellee's failure to do full work with the

machinery are so remote, and that the other item of damage is vague and indefinite, that it should be disregarded. Ordinarily the measure of damages on the sale of a chattel is the difference in value between the article contracted for and that delivered. But where an article is sold for a particular purpose the purchaser may be entitled to recover such special damages as may be considered within the reasonable contemplation of the parties as the natural and probable result of the breach of the contract, it being the duty of the purchaser to make his damages as small as he can by the exercise of ordinary care. 24 Am. & Eng. Ency. of Law, pp. 1155, 1156. The yarn sued for was sold to the defendants to be manufactured in their plant into hosiery. The measure of damages is the difference in value of the yarn for the purposes for which it was bought as it was contracted to be delivered, and the yarn as it in fact was; and, in addition to this, the jury, may also allow such damage as was done to the machinery in giving the yarn a fair trial, or such damage as occurred from loss of time in making the trial, provided ordinary care was exercised by the defendant in making the trial, and no loss which might have been avoided by the exercise of ordinary care in the proper course of business should be allowed. The case is here on demurrer to the answer, and, taking its allegations to be true, as we must on demurrer, we conclude it sufficiently states a cause of action. The pleader might have made simply a general allegation of damage in the sum of \$850 by reason of the defectiveness of the yarn, as he did in the amended answer, and under this he could have recovered general damages, but the special damages on account of the injury to the machinery and loss of time were properly specially pleaded. Such damages are not too remote, and are often allowed in cases of this character. 2 Sedgwick on Damages, § 742; 2 Sutherland on Damages (2d Ed.) § 662.

Judgment reversed and cause remanded for further proceedings consistent herewith.

HEATHER v. THOMPSON.

(Court of Appeals of Kentucky. Jan. 28, 1904.)

REWARDS—DETECTIVE SEEKING OUT ALLEGED CRIMINAL—OFFICER MAKING ARREST UNDER CONTRACT—RIGHTS OF PARTIES.

1. Where a detective, on learning of an offer of a reward from the Governor for the arrest of a man charged with murder, sought out the alleged murderer, and procured another officer to make the arrest, under contract by which the officer was to be paid a certain sum and expenses therefor, the latter cannot repudiate the contract on the ground that the detective concealed from him the amount of the reward and the fact that it had been offered by the Governor, in the absence of evidence that he demanded to know the amount or the source from which the reward emanated.

Appeal from Circuit Court, Laurel County.
"Not to be officially reported."

Controversy between William Heather and George C. Thompson over a reward of \$250. From a judgment awarding \$210 thereof to Thompson, Heather appeals. Affirmed.

Hazelrigg & Chenault and L. A. West, for appellant. James Sparks and D. K. Rawlings, for appellee.

SETTLE, J. This is a controversy between appellant and appellee over a reward of \$250 offered by the Governor for the arrest of one Sol Griffin, who stood indicted for murder, and was a fugitive from justice. The reward is claimed by appellant, Wm. Heather, who actually arrested the alleged murderer, and also by the appellee, Geo. C. Thompson, by whose procurement the arrest was made. It appears that Judge Tinsley, United States District Attorney for the Eastern District of Kentucky, by letter to appellee acquainted him with the offer of the reward by the Governor, and appellee took immediate steps to ascertain the whereabouts of Griffin, who was known to him as he was to Griffin, by visiting different counties and making inquiries of divers persons. He finally ascertained from an acquaintance in Clay county, where he visited for that purpose, that Griffin was at work at a sawmill in Estill county. He then went to Irvine, the county seat of Estill county, and from the investigation made after getting there became satisfied that Griffin was in the county. As he was well known to Griffin, he thought it best not to attempt his arrest himself, as he would likely be recognized by the former before he could get near enough to seize his person. So he contracted with the appellant, who was marshal of the town of Irvine, to make the arrest for him, which appellant then undertook to do for \$20. Fearing that Griffin would hear of his (appellee's) presence in the county, and would suspect the object of his visit, and thereby be enabled to effect his escape, appellee left Irvine for Richmond, this state, but left his address with appellant, upon the latter's assurance and undertaking that he would arrest Griffin and inform appellee thereof immediately. Appellant thereupon went on the following day to the mill where Griffin was at work, and arrested him. After making the arrest, he failed to notify appellee that he had done so; but having, in the meantime, telegraphed the Governor, and learned of the reward, he started to London, the county seat of Laurel county, with the prisoner, intending to deliver him to the jailer and himself claim the reward, notwithstanding his agreement with appellee to arrest and deliver Griffin to him. When appellant got as far as Richmond with the prisoner on the way to London, appellee, learning of their being in the city, met them there, demanded of him the prisoner, offered to put his own handcuffs on the latter, and proposed to pay appellant the \$20 for which he had agreed to make the arrest, and to pay the expenses incurred by the appellant

and his assistant in making the arrest; but to each and all of these demands and offers the appellant returned a positive refusal, and, ignoring appellee, went on with the prisoner, though in appellee's company, to London, where he delivered the prisoner to the jailer of the county, who, over appellee's objection and protest, gave to appellant a receipt for him. It is manifest that the arrest of Griffin was made at the instigation of appellee. In fact, he would not, in our opinion, have been arrested but for the investigation, industry, and zeal of the appellee. It is, we think, equally clear that the appellant did not act in good faith with appellee. He attempts to justify his conduct by the claim that appellee concealed from him the amount of the reward to be paid for Griffin's arrest, and the fact that it had been offered by the Governor, but admits that he was informed by appellee that a reward had been offered, and that his object in making the arrest was to secure the reward. We fail to see how the concealment by appellee of the amount of the reward, or the fact that it was offered by the Governor, could excuse appellant's violation of his contract with appellee, as he seemed entirely willing to make the arrest for \$20. Besides, it does not appear that he demanded to know the amount of the reward, or the source from which it emanated. He admitted that he was to make the arrest for \$20, but claimed that it was agreed upon for the arrest of a Tom Griffin, instead of Sol Griffin, and that appellee made a mistake in the name of the criminal. Appellee denied that he gave to appellant Tom Griffin as the name of the criminal, and said that the mention of that name came first from appellant, and he (appellee) told him that Sol Griffin was the true name, but perhaps that person had changed his name to Tom Griffin to escape detection and arrest. We are of opinion from the evidence that there was no misunderstanding between the parties, and that appellant knew from what appellee told him that Sol Griffin was the person to be arrested, and, further, that he ascertained on the day of his employment, and before appellee left Irvine, where Griffin could be found, yet concealed the fact from appellee in order to get him away from Irvine before the arrest was made.

The lower court, upon all the evidence before him, adjudged that appellee was entitled to all of the reward except \$40, which sum was allowed appellant in payment of the amount agreed upon between him and appellee when he was employed by the latter to make the arrest and in satisfaction of the expense incurred by him in the matter of conveying the prisoner to London. We see no cause for disturbing this finding of the court, as it seems to be sustained by the evidence. In addition, it may be said that under section 26, Cr. Code, it was the official duty of appellant, as marshal of Irvine and a peace officer, after undertaking the arrest of Griffin, to do so without other reward than the fees

allowed by law. Besides, the section of the Code, supra, section 3687, Ky. St., declares what duties shall be performed by marshals, and confers upon them all the powers as peace officers that may be exercised by sheriffs. In *Marking v. Needy and Hatch*, 8 Bush, 22, it was held that a public officer whose sworn duty it was to make arrests will not be allowed to claim a reward offered therefor. And in the more recent case of *Riley v. Grace*, 33 S. W. 207, the rule was reaffirmed by this court. In the latter case the arresting officer was the marshal of the city of Springfield, and the arrest for which he claimed the reward was made some miles outside the corporate limits of the city of which he was marshal; yet, as stated, it was held that he was not entitled to the reward. While it seems to be the law that a marshal may arrest an offender against the laws of the commonwealth anywhere in the county in which is situated the municipality of which he is an officer, we incline to the opinion that he cannot be required to execute a warrant of arrest outside of the corporate limits of such municipality, except for an offense against the laws thereof; but we are further of opinion, however, that if he does agree to undertake to execute a warrant of arrest for a violation of the laws of the commonwealth outside of the corporate limits of the city of which he is the marshal, it will be deemed a waiver of his privilege to refuse it, and in that event he would be entitled to no other compensation for the services performed than the statutory fees.

Finding no error in the judgment of the lower court, the same is affirmed.

RIVERS v. MORRIS et al.

(Court of Appeals of Kentucky. Jan. 14, 1904.)
DOWER—CONSTRUCTION OF WILL—TRUST ESTATE—HOMESTEAD.

1. Ky. St. 1903, § 2134, endows a wife of those lands only of which her husband during coverture was beneficially seised, and of which he had the fee-simple title. Section 2148 gives the husband dower in the wife's land to the same extent. A will gave testator's estate to W. and his wife, H., and their children; those living being named in the will. It then recited: "I will that said W. and H. take charge of all of said property, and use the same for the purpose of supporting the family and raising and educating said children so far as the rents and profits * * * will go, and when all the children arrive at the age of twenty-one years then said W. and H. shall give to each one his or her portion under this will." All of the children were living at testator's death, but two died in infancy, and intestate, before their parents. W. died, and H. remarried, and died. *Held* that, as the will created a trust in W. and H. for the benefit of the children, the second husband of H. was not entitled to dower in the land.

2. A testator devised his property to a husband and wife, charged with a trust for the benefit of their children. The family occupied the realty as a homestead. On the husband's death the widow remarried, and afterwards died. *Held*, that the court could not allow her second husband a homestead interest in the property, as that would impose a burden and

create an estate different from that contemplated in the will.

Appeal from Circuit Court, Scott County.

"Not to be officially reported."

Suit by J. C. Rivers against John Morris and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Montgomery & Lee, for appellant. Jas. F. Asken, for appellees.

O'REAR, J. The will of Green Stucker thus disposed of his property: "After the payment of all my debts and burial expenses, I will and devise all of the balance of my estate of every kind, real and personal, to William Morris and his wife, Harriet Morris, and their children, the children they now have and such as they may hereafter have. The children they now have are named Rheta, Sallie, Benjamin, John and Ada Bell Morris. I will that said William and Harriet Morris take charge of all of said property and use the same for the purpose of supporting the family and raising and educating said children so far as the rents and profits from said property will go and when all the children arrive at the age of twenty-one years, then said William and Harriet Morris shall give to each one his or her portion under this will." The testator is not shown to have been in any wise related to the devisees. William Morris, named as one of the devisees, died intestate in 1900. Harriet Morris, his widow, also named in the will, was married to appellant, J. C. Rivers, in April, 1902. She died in the fall of that year. Harriet Morris had five children by William Morris, the same named in the will of the testator as living at the time the will was made. No other children were born to her. All of the devisees were living at the death of the testator. Two of them died infants, intestate, and without issue, before either their father or mother died. One of the children named as a devisee is yet an infant. After the death of Harriet Morris-Rivers, appellant, her last husband, brought this suit for a partition of the land devised by the will, it being something over 100 acres. He claims that Harriet Morris-Rivers took an undivided one-seventh as a devisee under the will, and that she inherited one-half of an undivided one-seventh from each of her infant children who had died intestate; that the parties had occupied this land as a homestead; and that appellant, as the surviving husband of Harriet Morris-Rivers, is entitled to either dower or homestead in her two-sevenths of the land. The circuit court denied his claim and dismissed his petition.

Under the will Harriet and William Morris did take an interest, but they took it subject to the charge made in the will that the use and income of the whole of the property devised should be for the purpose of supporting the family, and raising and educating

ing the children named, and that the property was not to be divided among any of the devisees until all of them arrived at the age of 21 years. William and Harriet were trustees for their infant children, who were given primary interest in the income of this estate. So long as they continued members of the family, they, too, were entitled to support from that income. Upon their death the whole of the income and profits from the property was set apart by the will for the education and support of the children until the youngest shall have arrived at the age of 21 years. This was a charge upon the estate of each child—those dying intestate—as well as it was upon the interest of Harriet and William Morris. The death of the trustees in no wise affected the trust. It continues until the time of distribution named in the will. Under section 2134, Ky. St. 1903, the wife is endowed of those lands only of her husband of which he during coverture was beneficially seised, and of which he had the fee-simple title. Under section 2148 the husband is now given dower in the wife's land in the same manner and to the same extent. Considering the law as embraced in section 2134, this court has held that, to entitle the surviving spouse to dower, the other must not only have been seised of the fee-simple title to the land during coverture, but it must have been the land of which the owner was entitled also to the beneficial use and possession. *Young v. Morehead*, 94 Ky. 608, 23 S. W. 511; *Butler v. Cheatham*, 8 Bush, 594. In this case the wife was not entitled to the possession of any of the land devised as against her children. It was not such a title as that her surviving husband was entitled to dower in the land. The court could not allow appellant a homestead in the land without imposing a burden and creating an estate different from that contemplated and provided for by the testator in his will.

The judgment is affirmed.

COOPER v. LANKFORD et al.

(Court of Appeals of Kentucky. Jan. 29, 1904.)

ASSIGNMENTS FOR BENEFIT OF CREDITORS—
CONTINUANCE OF BUSINESS—RIGHTS OF AS-
SIGNEE—LOSSES—ACCOUNTING—CHARGES.

1. Where an assignee for the benefit of creditors over their protest elected to continue the assignor's business, which was manifestly unprofitable, and in consequence lost to the creditors the cash, and manufactured assets equal to cash, which he received on taking charge of the estate, he was properly charged with the amount so lost.

2. Where an assignee for the benefit of creditors of a firm engaged in logging elected to continue the business, it was improper to charge him in his account for logs belonging to the assignor which came into his hands, which were so small and defective as to be valueless for manufacture.

Appeal from Circuit Court, Pulaski County.
"To be officially reported."

Judicial accounting by J. S. Cooper, as substituted assignee of the insolvent estate of

Houston & Adams. From an order charging the assignee with certain losses on objection of Erwin Lankford and others, the assignee appeals. Modified.

O. H. Waddle, for appellant. Virgil P. Smith and W. A. Morrow, for appellees.

BURNAM, C. J. On the 12th day of February, 1900, C. E. Houston and J. H. Adams, of Somerset, Ky., doing business as Houston & Adams, contracted to sell and deliver to the T. B. Stone Lumber Company, of Cincinnati, Ohio, about 250,000 feet of poplar, oak, and chestnut lumber, which was to be manufactured from trees upon a tract of about 50 acres of land which they had purchased from George Gastineau. The lumber company advanced \$300 on the contract, under an agreement that it was to be repaid to them out of the lumber as delivered. In compliance with this contract, Houston & Adams had a large number of trees cut down, sawed into logs, and hauled to the sawmill of G. R. Gilleland & Co., with whom they had contracted to manufacture them into lumber at the price of \$3 per thousand feet. A sufficient number of the logs were manufactured under this contract, and the lumber delivered to Stone & Co., to repay to them the \$300 advanced, and leave a balance of \$142.80 due from them to Houston & Adams. On the 21st day of June, 1900, Houston & Adams found that they could not successfully carry out their contract, and they made a general assignment of all their property to W. F. Rainey for the benefit of all their creditors equally. This deed of assignment authorized the assignee to carry out their contract with Stone & Co. Rainey, however, failed to qualify, and the appellant, J. S. Cooper, was appointed in his place. There came into his hands as assignee \$142.80 in money, which was collected by him from the Stone Lumber Company, and about 20,000 feet of manufactured lumber, which was ricked on the millyard, the value of which is not clearly disclosed by the testimony, but was probably worth \$200; also a number of logs, some of which were on the millyard, and some lying in the forest, and some trees still standing. After Cooper's qualification as assignee, Gilleland & Co. claimed that a balance was due to them by Houston & Adams, and that they had a lien on the lumber ricked in their yard to secure them. Cooper seems to have held several conferences with some of the local creditors as to what course he should pursue. Some of them insisted that he should at once sell all of the assigned property to the best advantage, and distribute the cash among the creditors. One of them testifies that he offered \$600 in cash for the assets of the firm. This statement, however, is denied by Cooper, who testifies that he found that he could not sell the logs; that he paid to Gilleland & Co. \$91.95 upon their bill, and entered into a new contract with them to saw the residue of the logs at \$2.75

per thousand feet, and then proceeded to manufacture the logs into lumber, and to deliver it to Stone & Co., under the contract. The trustee having failed to make any report of his proceedings under the deed of assignment, a rule issued against him from the Pulaski county court at its July term, 1901, requiring him to do so. In compliance with this rule, he made a settlement of his accounts on the 18th of October, 1901, in which he accounted for \$761.70, proceeds of the assigned estate, and was credited \$767.91, paid out in the manufacture of the logs. In other words, the cost of manufacturing the logs had not only taken all the money received from the lumber, but had also consumed the cash and the proceeds of the manufactured lumber which came into his hands. On the 25th of February, 1902, appellees instituted this suit against appellant for a settlement, and asked that the case be referred to the master commissioner to hear proof of claims, and for a distribution of the funds in the hands of the assignee. In his answer, appellant set out the facts detailed above; claimed that he had no assets for distribution; that he had acted for what seemed to him to be the best interest of the estate in the course which he had taken; and denied liability. It was adjudged by the trial court from the evidence in the case that the assigned estate was of the value of \$600 at the time appellant took charge of it, and he was credited with \$91.95 paid to Gilleland & Co., and was adjudged to pay over the residue, \$508, for distribution among the creditors.

The main question for decision upon the appeal is, can the assignee of an assigned estate, in his discretion, or pursuant to express authority conferred by the deed of assignment, continue the assignor's business? It will hardly be controverted that as a general rule, at common law, the effect of a general assignment by a debtor of his property for the benefit of his creditors is to put an end to his business as ordinarily conducted, as effectually as if the assignor were dead, and his property passed to his administrator by operation of law, or to his executor by force of his last will. It is the obvious duty of an assignee to proceed without unnecessary delay to convert the assigned estate into money, and to apply the proceeds to the payment of his debts. 4 Cyc. 236. Nor can there be any doubt that the assignor cannot, in a deed of assignment, authorize his assignee to continue and carry on the business, either for the benefit of the creditors or for his own benefit. If such provisions in deeds of assignment were tolerated and enforced by courts, it would put it in the power of an insolvent debtor to indefinitely postpone the collection of debts due by him, and at the same time subject his property to the risks of business, and place it in a position where it might be lost in attempting to carry on the business of his own motion. In the case of *Dunham v. Waterman*, 17 N. Y. 9, 72 Am.

Dec. 406, reversing 3 Duer, 166, Judge Selden makes use of the following language: "The true principle applicable to all such cases is that a debtor who makes a voluntary assignment for the benefit of his creditors may direct, in general terms, a sale of the property and collection of the dues assigned, and may also direct upon what debts and in what order the proceeds shall be applied, but, beyond this, can prescribe no conditions whatever as to the management or disposition of the assigned property. In all other respects the assignee must be left to act under the ordinary rules and principles which apply to trustees in analogous cases." While this is the general rule, there are exceptional cases in which the assignee, with the consent of the creditors, may work up the stock on hand, and prepare it for the market, if it is manifest that it will be for the benefit of the assigned estate. The case of *Hill v. Cornwall & Bro.'s Assignee*, 95 Ky. 536, 26 S. W. 540, belonged to this category. There the property assigned was a manufacturing establishment in full operation, with an established business in all parts of the country, and a considerable amount of material on hand to be manufactured. The creditors, with an advisory committee at their head, authorized the continued operation of the factory to work up the materials then on hand, because it was believed that the plant would sell better as a going concern. It was held that the assignee was justified in continuing the business for a short time, and that the creditors were estopped by their conduct from complaining of losses incurred in the operation of the business which was carried on at their suggestion. But the facts in this case do not bring it within the rule of that or similar cases. Nor can it be doubted that the assignee of an estate could apply, under section 96 of the Kentucky Statutes of 1903, to the county court, for authority to continue the business temporarily, or the power of the court to authorize such continuance when it was manifest that it would be for the benefit of the creditors.

In this case the assignee, on his own judgment, against the protest of creditors, elected to continue what was manifestly an unprofitable business, and in consequence lost to the creditors of the assigned estate the cash, and manufactured lumber, equal to cash; and we think he should be charged therewith. But the testimony shows that the logs which came into the hands of the assignee were so small and defective as to be practically of no value, for the reason that the cost of manufacturing them into lumber was greater than the value of the lumber after they had been so converted. We therefore think that the assignee should not be charged with anything on this account, but only with the cash on hand, and the value of the manufactured lumber which came into his hands. The suggestion of appellant that appellees have not pursued the remedy point-

ed out by the statute, and appealed from the settlement made in the county court, is untenable, as they filed no exceptions to that settlement, and did not make themselves parties to the proceeding in any way. They were therefore not estopped from the institution of this suit in the circuit court, as provided by section 96 of the Kentucky Statutes of 1903. *Pickrell v. Thompson* (Ky.) 59 S. W. 751.

But for reasons indicated, the judgment is reversed, and cause remanded, with instructions to charge the assignee with \$342.80, and credit him with such legal disbursements as he may show himself entitled to, including reasonable compensation, and for other proceedings consistent with this opinion.

CITY OF LUDLOW v. RICHIE.

(Court of Appeals of Kentucky. Jan. 29, 1904.)

MUNICIPAL CORPORATIONS — ATTORNEYS — SERVICES—SALARY—ADDITIONAL COMPENSATION.

1. Ky. St. 1899, § 3509, authorizes the council of cities of the fourth class to appoint a city attorney, authorizes the board to fix his compensation, and declares that it shall be his duty to advise the board as to all legal matters, and perform such other duties as the board may require. Defendant city passed an ordinance requiring the city attorney to attend to all suits then pending or thereafter to be brought to which the city was a party, and declared that, for services of an extraordinary character thus rendered the city, he should receive such additional fee as might be agreed on. A resolution was subsequently passed fixing plaintiff's salary as city attorney for his second term, with his consent, at \$300 per year, and providing that his services should include all business of the city coming under his jurisdiction. *Held*, that plaintiff was not entitled to recover for services rendered in defending litigation against the city, as extraordinary services; no claim having been made therefor during his term, and no additional compensation having been previously agreed on.

2. Where a city attorney attended to considerable litigation for the city in the Court of Appeals, and was compelled to travel to the place where the court was held to argue the cases, he was entitled to recover expenses incurred while performing such services, in addition to his salary.

Burnam, C. J., dissenting.

Appeal from Circuit Court, Kenton County.
"Not to be officially reported."

Action by W. T. Richie against the city of Ludlow. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Thurber & Jackson, for appellant. W. H. MacKoy, for appellee.

HOBSON, J. Appellee, W. T. Richie, was city attorney of Ludlow for four years beginning in January, 1894. The term was for two years. For the first term his salary was fixed at \$200 a year. For the second term, which began in January, 1896, his salary was fixed at \$300 a year. After the end of his period of service he filed this suit on April 10, 1899, to recover of the town \$1,338.16 for legal services on behalf of the city in actions

to which it was a party, which were rendered by him while he was city attorney. The only question we deem it necessary to determine is whether these services were in the line of his duty as city attorney, and were covered by the annual salary paid him. It is insisted that it was not incumbent on him, as city attorney, to represent the city in civil actions to which it was party.

Ludlow is a city of the fourth class. The act for the government of fourth-class cities was approved June 28, 1893. The council first elected under the act organized in January, 1894. The provision of the act as to the city attorney, so far as material, is in these words: "The board of council as soon as they are organized under this charter, or as soon thereafter as practicable, and biennially thereafter, may appoint a city attorney who shall prosecute all pleas of the commonwealth and all warrants or proceedings instituted for violations of the ordinances or municipal regulations of the city in the city court. * * *

The board of council shall fix by ordinance previous to his election or appointment, the compensation for his services. * * *

It shall be the duty of the city attorney further to attend the meetings of the board of council, advise it in all matters of litigation or legal proceedings, and perform such other duties in his department as the board of council may require." Ky. St. 1899, § 3509. The city council made the following ordinance: "That in addition to the duties prescribed in charter in section 27, section 48, section 71, it shall be the duty of the city attorney (a) to give legal advice to the mayor, and other officers, and the various city boards, if any, and the board of education, in all matters pertaining to their respective offices and duties affecting the interest of the city, and if so required or asked, which advice or opinion shall be in writing for future reference; (b) to prepare the contract, order and bonds and all legal documents of and by and with and for the city, when required to do so by the city council; (c) to attend to all suits now pending or hereafter to be brought, to which the city is a party, and for all services of an extraordinary character which he may be called upon to render for the city as its attorney, he shall receive such an additional fee as he and the city council may in each instance agree upon and not otherwise; (d) to advise the city council and the officers of the city, and the various boards of the same, of his own motion and without instruction, if, in his judgment, there is error about to be committed or the best interests of the city to him seem to require such advice and counsel." After the council organized under the new charter, it set about getting up the ordinances, and some time was spent before they were completed. The above is from section 4 of ordinance 316, and was passed on July 12, 1894. Appellee made no objection to the ordinance, but, on the contrary, advised the council

that it was all right. He took charge of the existing litigation against the city, and attended to the new suits as they were brought from time to time. He presented no bill or claims for the services sued for to the council during his entire term of service, although some of the suits were disposed of during that term, soon after they were brought. When he was re-elected the following order was made by the council, fixing his salary for the second term: "Mr. Dillon moved that the salary of the city attorney be fixed at three hundred dollars per year, and that his services should include all legal and other business of the city coming under his jurisdiction." This was carried. Appellee was present at the time, and made no objection. It is earnestly insisted for appellee that as by the statute it is made the duty of the city attorney to prosecute in proceedings in the city court for violations of the municipal ordinances, to attend the meetings of the board of council, and to advise it in all matters of litigation or legal proceedings, the concluding words of the section, making it his duty to "perform such other duties in his department as the board of council may require," refer to duties in the line of the things mentioned, and not to civil actions by or against the city. It is also urged by his counsel that in the act for the government of cities of the first, second, and third classes, it is expressly made the duty of the city attorney to attend to civil actions where the city is a party (Ky. St. 1899, §§ 2909, 3166, 3314), and it is argued that the absence of this language in the act governing cities of the fourth class shows that the Legislature had in mind making a different rule as to these smaller towns. There is force in the argument. But while the act for the government of fourth-class cities does not make it the duty of the city attorney to attend to civil cases on behalf of the city, it does provide that it shall be the duty of the city attorney to "advise it in all matters of litigation or legal proceedings, and perform such other duties in his department in addition to those named as the board of council may require." The word "advise" is used here in its broad sense. The meaning is, he shall be the legal adviser of the council in all matters of litigation and legal proceedings, and in defining the duties which are required of him in his department the council may properly include attention to litigation as to which it is his duty to advise it. In other words, it is left to the discretion of the board of council in the fourth-class cities to determine what duties in his department shall be required of the city attorney. The reason for this is obvious. The needs of the city, the character of the litigation, the experience of the attorney, and other considerations would determine the council in its action according as the public interests required, and his compensation would be fixed by the council according to the duties required of him. The

rule of strict construction is not to be applied to such a statutory provision, but, on the contrary, it is to be liberally construed, so as to promote its objects. Ky. St. 1899, § 460. As between a municipality and its officers, the charter defining the duties of the officers and regulating their compensation is to be construed, in case of doubt, to protect the treasury of the city, for claims against the treasury of the city cannot be sustained on doubtful implication. By the ordinance adopted by the council pursuant to the statute, and acquiesced in by the appellee, it is expressly provided that he is to attend to all suits "now pending or hereafter to be brought to which the city is a party"; and then it is provided that, "for all services of an extraordinary character which he may be called to render for the city as its attorney, he shall receive such an additional fee or compensation as he and the city council may in each instance agree upon and not otherwise." Some force must be given to the words "and not otherwise." They can only mean that he was not to have an additional fee or compensation except for services of an extraordinary character, and that as to this he and the city council were in each instance to agree. The plain meaning is that, if services were required of him which he regarded as extraordinary, he was to call the attention of the council to the matter, and ask an additional compensation. No claim that the services sued for were of an extraordinary character was presented to the city council. It was made his duty to attend all suits to which the city was a party, and, while it was recognized that services of an extraordinary character might be required, it was plainly stated that he was not otherwise to receive an additional fee or compensation. During his term he presented to the council claims which were allowed him, amounting to \$157.29. One hundred and ten dollars of this was for expenses and extraordinary services. The remainder was for services in proceedings to collect taxes, or matters not now shown to be extraordinary. This, perhaps, led to the Dillon resolution, when his salary was raised to \$300. The purpose of this resolution was to cut off claim for extraordinary services, and to make the salary exclusive of all other compensation. Appellee accepted his salary paid under this resolution. It was competent for the council, independently of section 3509, Ky. St. 1899, to agree with their attorney as to his compensation, and to pay him a lump sum in full for all services. This was the effect of the Dillon resolution, and there can be no allowance thereafter to appellee for extraordinary services rendered as city attorney. It is not alleged that he rendered any extraordinary services during his first term, nor is it shown by the proof that he performed any such services for which he should now receive compensation in addition to the salary which was paid him as city attorney. It appears from

the proof that he attended to considerable litigation for the city in this court; coming here for this purpose, and arguing the cases before the court. For his expenses in so doing he should be paid, if this has not been done; but, as he presented no claim to the council for extraordinary services at the time, it must be held that these services were performed by him as city attorney, and in the line of his duty, for the council was entitled, under the old ordinance, to know when he claimed a certain service was extraordinary, so that they could act for the best interests of the city in determining whether the services should be performed or not. The meaning of the ordinance is that services not contracted for as extraordinary were to be rendered by the city attorney as part of the duties of his office. Appellee has in his hands \$126.28, which he collected for the city, and retained on his fees, less \$1.60, which he paid out on an appeal, leaving a balance of \$124.68. This is pleaded as a set-off by the city, and judgment should be entered in its favor therefor.

Judgment reversed and cause remanded for a judgment as herein indicated.

BURNAM, C. J., dissents.

HUNZIKER v. SUPREME LODGE K. P.

(Court of Appeals of Kentucky. Jan. 22, 1904.)
INSURANCE — CERTIFICATES — BY-LAWS — ATTACHMENT — STATUTES — CONSTRUCTION
— SUICIDE — INSANITY.

1. Ky. St. 1903, § 679, provides that all policies issued to persons within the commonwealth by corporations transacting business therein, which contain any reference to the application of the insured or the by-laws, or to the rules of the corporation having any bearing on the contracts, shall contain or have attached a correct copy of the portions of the by-laws referred to, and, unless so attached, no such by-laws shall be received in evidence in any controversy between parties interested. *Held* that, where a certificate issued before the enactment of such act contained no reference to suicide, but the insurer, after the passage of the act, passed a by-law that in case a member died by his own hand the company should be liable only for a proportionate amount of the policy, but such by-law was not called to insured's attention nor attached to the policy, it was no defense to an action thereon.

2. Ky. St. 1903, § 679, providing that the by-laws of any insurance company shall not be received in evidence nor considered a part of an insurance contract unless contained in or attached to the certificate, affects the remedy only to the extent of establishing a rule of evidence, and is not invalid as interfering with contract rights.

3. Though suicide by insured while sane is a breach of an implied condition in a policy that insured will not intentionally terminate his life, suicide while insured is insane is no defense to a policy containing no provision against suicide.

Appeal from Circuit Court, Fulton County.
"To be officially reported."

Action by Louisa Hunziker against the Supreme Lodge Knights of Pythias. From a

judgment in favor of defendant, plaintiff appeals. Reversed.

Robbins & Thomas, for appellant. B. T. Davis, C. S. Hardy, and Walter P. Lincoln, for appellee.

SETTLE, J. Gustave Hunziker died in the city of Hickman, Fulton county, this state, November 30, 1902, of pistol-shot wounds inflicted by his own hand. He left, surviving him, a wife, Louisa Hunziker, and a daughter, Linda Hunziker, who is his only child. Many years before his death, Gustave Hunziker, then, as at the time of his death, a resident of Hickman, became a member of a lodge in that city of the secret fraternal order known as the "Knights of Pythias," the governing or chief body of which is styled "Supreme Lodge Knights of Pythias." This governing body is in control of all subordinate lodges of the order, and of what is known as the "Endowment Rank," which provides insurance for its members. On December 27, 1888, Gustave Hunziker became a member of this endowment rank, and by signing the necessary application, and paying to the Supreme Lodge Knights of Pythias the required membership fee, he received of it a certificate or policy of insurance, No. 21,021, whereby it agreed, in consideration of the statements contained in the written application attached to the policy, the payment of the prescribed admission fee, and the payment thereafter by the insured of all assessments as required, to pay to Louisa and Linda Hunziker, his wife and daughter, or to such other person or persons as he might thereafter direct, the sum of \$2,000 upon due notice and proof of the death of the insured. After the death of Gustave Hunziker, due notice and proof of which was furnished the Supreme Lodge Knights of Pythias, it refused to pay the beneficiaries in the policy the \$2,000 of insurance named therein, but did offer to pay them \$942.60, which they refused to accept. Thereupon this action was instituted in the lower court by the appellants, beneficiaries, to recover of the appellee, Supreme Lodge Knights of Pythias, the \$2,000 claimed by them under the policy.

The facts as herein stated are in substance set forth in the petition, to which the appellee's answer interposes the defense that the insured, Gustave Hunziker, in entering into the contract of insurance, evidenced by the policy or certificate sued on, agreed, as recited therein, to be controlled by all the rules and regulations of the order, governing the endowment rank, then in force, or that might thereafter be enacted, and that the appellee, at its biennial convention held in Cleveland, Ohio, August 25 to September 8, 1896, enacted in due form, for the government of the endowment rank, a by-law to the effect that if the death of any member of the endowment rank, theretofore or thereafter admitted into the first, second, third, or fourth class, should result from suicide, voluntary or involuntary,

¶ 1. See Insurance, vol. 28, Cent. Dig. §§ 1152, 1156, 1956.

whether such member be sane or insane at the time, the amount to be paid upon such member's certificate should be a sum only in proportion to the whole amount as the matured life expectancy might be to the entire expectancy at the date of the admission into the endowment rank, the expectation of life based upon the American Experience Table of Mortality in force at the time of the death to govern. It is also averred in the answer that the by-law enacted in 1896 was in force at the date of the death of the insured, that his death resulted from pistol-shot wounds inflicted by his own hand for the purpose of causing his death, and that he was in the fourth class of the endowment bank. It is further averred in the answer that, according to the American Experience Table of Mortality in force at the date of the death of Gustave Hunziker, his expectation of life at the date of his admission into the endowment bank was $29\frac{2}{100}$ years, that he lived $13\frac{96}{100}$ years thereafter, and therefore the amount due on the policy sued on was \$942.60, and for this amount appellee offered to confess judgment. A demurrer was filed to the answer, and overruled by the court, to which appellants excepted. They then filed a reply in which it is averred that the by-law of September 3, 1896, mentioned in the answer, was adopted by the appellee after the enactment of section 679, Ky. St. 1903, and was never attached to the policy or certificate sued on, nor was any copy thereof so attached or offered to be attached to the policy, or delivered or offered to be delivered to appellants or the insured, nor did they or the insured ever hear or receive notice of the alleged enactment of such a by-law. It is further averred in the reply that the insured, at the time of the infliction upon himself of the wounds of which he died, "was insane, and did not have sufficient reason to know what he was doing, or to distinguish right from wrong, and did not then have sufficient will power to govern his actions by reason of his mental unsoundness, and which insane impulse, governing him at the time, he could not then resist or control." A demurrer was filed by appellee to the reply, which was sustained by the court, to which appellants excepted. Judgment was thereupon entered in appellants' favor for only \$942.60 of the amount claimed by them, with interest from January 29, 1903, and costs up to the time of appellee's offer to confess judgment for the \$942.60. Of that judgment the appellants complain, and its reversal is asked at the hands of this court.

It is admitted by the appellants that the insured committed suicide; therefore it is insisted for appellee that, according to the terms of the certificate or policy accepted by the insured, his contract with it was governed not only by the laws of the association then in force, but also such as might thereafter be enacted by the appellee, supreme lodge, for which reason the by-law enacted by it in 1896 was also binding upon him, and, inasmuch as

it provides that if any member of the endowment rank commit suicide—whether the act be voluntary or involuntary, or such member at the time be sane or insane—it shall serve to reduce the amount due the beneficiaries named in the certificate or policy from \$2,000, to a sum only in proportion to that amount as the matured life expectancy might be to the entire expectancy at the date of admission into the endowment rank, according to the American Experience Table of Mortality in force at the time of death, it follows that appellants are only entitled to receive \$942.60, and it was upon this theory that the lower court acted in rendering the judgment appealed from.

It is, however, contended by the appellants that the by-law of September 3, 1896, cannot affect their rights under the certificate of insurance, because it was adopted by the appellee subsequent to the enactment of section 679 of the Kentucky Statutes, and never attached to the certificate as provided therein. The statute, *supra*, provides: "All policies or certificates hereafter issued to persons within the commonwealth by corporations transacting business therein under this law, which policies or certificates contain any reference to the application of the insured, or the constitution, by-laws, or other rules of the corporation, either as forming part of the policy or contract between the parties thereto, or having any bearing on said contract, shall contain or have attached to said policy or certificate a correct copy of the application as signed by the applicant, and the portions of the constitution, by-laws, and other rules referred to; and unless so attached and accompanying the policy, no such application, by-laws, or other rules, shall be received in evidence in any controversy between the parties to, or interested in, said policy or certificate, and shall not be considered a part of the policy or of the contract between such parties. * * * There is nothing in the certificate of insurance received by Gustave Hunziker from the appellant, or in the application attached thereto, in regard to suicide, or providing that the appellee's liability shall be limited to an amount less than the sum named in the certificate if the insured took his own life. This stipulation had no existence until the enactment in 1896 of the by-law set out in the appellee's answer, and which, though adopted after the enactment of the section of the statute *supra*, has never been attached to or made a part of the certificate. It appears from the averments of the reply, which upon the demurrer must be taken as confessed, that neither the insured nor the appellants ever received or saw a copy of the by-law in question, or heard of its existence. In the cases of the Supreme Commandery of the United Order of the Golden Cross v. Hughes (Ky.) 70 S. W. 405, and Mooney v. Ancient Order United Workmen (Ky.) 72 S. W. 288, it was held that section 679, Ky. St. 1903, is appli-

cable to societies such as that of appellee, and that "the application for the certificate, or the by-laws, or other rules of the corporation, unless attached to or accompanying the certificate, cannot be received in evidence, or considered a part of the contract, in any controversy between the parties interested in the certificate. * * *" The rule thus stated follows the language of the statute, the provisions of which are mandatory. The by-law claimed to have been adopted by the appellee, not having been attached to or made a part of the certificate or policy sued on, cannot be relied on to limit the appellee's liability, or reduce the recovery below the maximum amount named in the certificate. The fact that the by-law was enacted after the certificate was issued did not relieve the appellee of the duty of causing it to be attached to the certificate after its enactment, as required by the statute. In *Mooney v. Ancient Order United Workmen*, supra, the by-law relied on to defeat the action was also enacted after the issuance of the certificate, yet, as we have already indicated, it was held that it could not be set up as a defense, because it had never been attached to the certificate.

Counsel for appellee contends that the statute, supra, because of the words "all policies hereafter issued," etc., has no application to a policy (certificate) that, like the one on the life of Gustave Hunziker, was issued before its enactment. That question is not before us for adjudication. We have only decided that the statute does apply to the by-law relied on by appellee, as it was adopted after the enactment of the statute, and its purpose and effect was to materially alter the original contract of insurance, for which reason it was required by the provisions of the statute to be attached to the original contract or certificate. It may be remarked, however, that, as the statute in question is promotive of justice and a sound public policy, much might be said in favor of extending its provisions to policies and certificates issued before as well as after its enactment, notwithstanding its use of the words "hereafter issued." Indeed, authority is not wanting to sustain this view of its meaning. In *Park v. McReynolds*, 64 S. W. 517, this court, in discussing section 2358, Ky. St. 1899, which provides for the filing in the county clerk's office of a notice of liens acquired by attachment, judgment, or execution, etc., "hereafter issued," said: "It seems to us that the act in question applies to all executions and attachments and suits and judgments, whether issued or instituted before or after the enactment." The statute under consideration is one that affects the remedy to the extent, at least, that it establishes a rule of evidence. It does not interfere with the right of insurance companies to pass such a by-law as the one relied on by appellee, but it prevents them from making use of it as evidence, or relying upon it as a part of the contract, in a controversy or lawsuit with one of their pol-

icy holders, unless it has been attached to and made a part of the policy. In discussing the power of the Legislature to pass laws affecting the remedy, Sutherland, in section 478 of his work on Statutory Construction, says: "A law which changes the rules of evidence relates to the remedy, and is not within the constitutional inhibition."

Eliminating from the case the by-law upon which appellee relies—and without it there is nothing in the certificate in regard to suicide—there is but one other question to be considered, viz., was the insured sane or insane when he took his own life? If he was sane, in the absence of any stipulation in the contract providing otherwise, his act in taking his own life would release appellee altogether from liability upon the certificate, and that such is the law is conceded by counsel for appellants. But, on the other hand, it has been held in this state—and such seems to be the accepted view of the law in most of the states—that, in the absence of a stipulation in the contract against suicide while insane, such an act cannot be relied on as a defense by the insurance company. In *Moonney v. Ancient Order United Workmen*, supra, the law on this subject is stated with admirable clearness in a quotation taken from 19 A. & E. Ency. of Law, p. 78: "If the insured in a contract of life insurance, taken out for the benefit of his estate, or payable to a beneficiary the designation of whom may be changed at the option of the insured with the consent of the insurer, commits suicide, the policy is void if the insured was sane when he took his own life, and this for two reasons: In the first place, every contract of life insurance must be construed to contain an implied condition that the insured will not intentionally terminate his life, but that the insurer shall have the benefit of the chances of its continuance until terminated in the natural, ordinary course of events. It is upon these chances that the premium is calculated and the contract is founded; hence the suicide of the insured operates as a fraud upon the insurer, and especially is this so when the insurance is taken out in contemplation of the act. In the second place, the enforcement of the contract in case of death by suicide is opposed to public policy. If the contract should expressly include death from this cause, the provision, even if not prohibited by statute, would be contrary to public policy, in that it tempted or encouraged the insured to commit suicide; and it is obvious that the court will not imply a condition which, if expressed in the contract, would render it void. But when the policy is made payable to a nominated beneficiary, and contains no stipulation that it shall be void in case of death of the insured by suicide, it may be enforced notwithstanding the insured dies by his own hand, unless, perhaps, where the policy was taken out in contemplation of suicide." As the act of an insane person in taking his own life cannot be

a fraud upon the insurer, no reason exists why it should invalidate the policy. If the insurance company would protect itself against such a risk, it should so provide in its policy, otherwise it will be liable. It is in substance averred in the reply in this case that the insured was insane at the time of the shooting, and was then without sufficient reason to know what he was doing, or to distinguish right from wrong, and was by reason thereof without sufficient will power to resist the insane impulse to kill himself. If this be true, the appellee is liable for the amount sued for.

From the foregoing view of the law, it follows that the lower court erred in sustaining the demurrer to the reply. The question of whether the insured was sane or insane at the time of taking his life was one of fact that should have gone, under proper instructions, to the jury. The judgment is therefore reversed, and cause remanded with directions to the lower court to set aside the judgment, and also the order sustaining the demurrer to the reply, and for further proceedings consistent with this opinion.

METROPOLITAN LIFE INS. CO. v. AS-MUS.

(Court of Appeals of Kentucky. Jan. 28, 1904.)
LIFE INSURANCE—APPLICATION BY WIFE IN HUSBAND'S NAME—INNOCENCE OF FRAUD—RIGHT TO RECOVER PREMIUM.

1. Where a wife is induced, by an agent selling life insurance, to make application in her husband's name without his knowledge, and she is innocent of any intentional wrong, she may recover from the company the premiums paid, such insurance being void under the rules of the company.

Appeal from Circuit Court, Kenton County.
"Not to be officially reported."

Action by Henrietta Asmus against the Metropolitan Life Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

S. D. Rouse, for appellant. Cecil Pence, for appellee.

NUNN, J. This action was instituted by appellee to recover premiums paid by her from her own funds to appellant upon two alleged policies of insurance issued by appellant to appellee upon the life of her husband, without his knowledge or consent. The first policy bears date of August 19, 1889, for the sum of \$200. The second policy is for \$500, and bears date of May 26, 1890. Upon the first policy the premium was 40 cents per week, and upon the second the premium was \$1 per week. She paid the weekly premiums on these two policies from their date to some time during the year 1902, when she for the first time discovered that they were void and of no effect, for the reason that they had been procured without the knowledge and consent of her husband, and that he was kept in ignorance of same until the last-mention-

ed date. She alleged that the defendant company, through its authorized agents, fraudulently induced her to take out these policies upon the life of her husband; that she did not know that the issuance of these policies under such circumstances was a violation of the rules of the company and the law; that she was innocent of any intention to wrong the company or anybody; that the premiums she had paid on these policies amounted to more than \$800; that it was paid by her without any consideration; that the company knew all the time that the policies were void and that it was receiving her money without consideration. The company answered, admitting the issue of the policies and the reception of the premiums as alleged, denied that she was innocent of any wrongful intent, but alleged that she and their agent, one Metz, combined to perpetrate a fraud upon the company, and that she forged the name of her husband to the two applications of insurance, and for this reason she was not entitled to recover the premiums paid by her—that the same were forfeited to the company. It also pleaded the five and the ten years' statutes of limitations. The appellee traversed the affirmative matter in this answer, and in her pleadings alleged, in avoidance of the 10 years' statutes of limitations, that she could not by the exercise of ordinary diligence have discovered that the policies were void, for the reason that they were obtained without the consent of her husband, before the time she did discover it in the year 1902. A trial was had before a jury, which returned a verdict in favor of appellee for the sum of \$721.80, with interest.

There was no evidence introduced except appellee and one or two witnesses in her behalf, who sustained the allegations of her pleadings. The appellant did not introduce any witnesses. At the conclusion of the evidence the appellant offered an instruction, and requested the court to instruct the jury to find for appellee the amount of premiums paid by her within the five years next preceding the institution of her action. The court refused to give this instruction, but gave the following: "The jury is instructed to find a verdict for the plaintiff. If the jury believe from all the evidence that the plaintiff failed to exercise such diligence as is ordinarily exercised by ordinarily careful and prudent persons, under the same circumstances and conditions, in ascertaining that the policies mentioned in the proof were invalid, then the jury should find a verdict in the sum of \$360.80. But if the jury believe, from all the evidence, that the plaintiff did exercise such degree of diligence in so ascertaining, then the jury should find a verdict in the sum of \$721.80." The appellant contends in its brief that the court should have given a peremptory instruction, for the reason that she had signed the name of her husband to the application without his

knowledge, consent, or authority. It is evident from all the proof that appellee was innocent of any intentional wrong; that she did not commit a forgery in the meaning of that term. She was induced to do what she did by the agent of the appellant, and she had the right to rescind the contract, when she discovered the fraud, and recover the premiums paid. *Fisher v. Metropolitan Life Ins. Co.*, 160 Mass. 386, 35 N. E. 849, 39 Am. St. Rep. 495. It appears that about \$200 of the premiums paid by her were paid more than 10 years before the institution of her action, which she failed to recover by reason of the plea of the statutes of limitations. The contention of appellant is that the judgment is erroneous in allowing a recovery for any part of the premiums paid by her more than five years next before the bringing of her action, because she ought to have discovered that her policies were invalid in a short time after their issue. Section 2519 of the Kentucky Statutes of 1903 reads as follows: "In actions for relief for fraud or mistake, or damages for either, the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake, but no such action shall be brought ten years after the time of making the contract or the perpetration of the fraud." She alleged in her petition that she could not have discovered the fraud or mistake sooner than she did by the exercise of ordinary care and diligence. The court expressly submitted this question to the jury, and told it that it could not find for her any sum for premiums paid prior to the five years next before the institution of the action, unless it believed from the evidence that she could not have discovered the fraud or mistake before the time she did discover it.

It is perfectly clear from the evidence that appellee paid these weekly premiums for 12 or 13 years under an honest conviction that she held an enforceable contract against appellant, and the question of her diligence was submitted to the jury, and it found against appellant, and we do not feel authorized to disturb the verdict. *Metropolitan Life Ins. Co. v. Blesch, etc.* (Ky.) 58 S. W. 436, and the cases therein cited. Wherefore the judgment of the lower court is affirmed.

CINCINNATI, N. O. & T. P. RY. CO. v. HALCOMB.

(Court of Appeals of Kentucky. Jan. 15, 1904.)

CARRIERS—INJURY TO PASSENGER—BRUTALITY OF CONDUCTOR—SUFFICIENCY OF EVIDENCE—CONTRIBUTORY NEGLIGENCE—PROPRIETY OF INSTRUCTION—ABSENCE OF EVIDENCE.

1. Evidence in an action by a passenger for injuries occasioned by being pushed from a moving train by the conductor before its arrival at the station held insufficient to sustain a verdict for plaintiff.

2. Where plaintiff sued for injuries caused by being shoved from a train, and the defendant railroad company denied that she was so treated, or even fell when being assisted from the

train, an instruction on contributory negligence was properly refused as inapplicable to the evidence.

Appeal from Circuit Court, Pulaski County. "Not to be officially reported."

Action by Theola Halcomb against the Cincinnati, New Orleans & Texas Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

O. H. Waddle and John Graham, for appellant. Edwin P. Morrow, for appellee.

PAYNTER, J. The appellee boarded appellant's train at Somerset as a passenger for Tateville, and claimed that immediately after passing Burnside, the station north of Tateville, and about two miles therefrom, the conductor called out "Tateville," came back and took her telescope, carried it forward to the door of the car, and motioned her to follow, which she declined to do. Thereupon he returned to where she sat, took her by the hand, pulled her out of her seat, led her to the platform, and, while the train was in motion, shoved her arm, so as to cause her to fall from the train while in motion—the train not having reached the station of Tateville—which fall caused her to receive painful injuries and bruises about her stomach and hips. The foregoing statement is the substance of the averments of the petition and appellee's evidence. The jury awarded her \$500 in damages, and from a judgment on this verdict this appeal is prosecuted.

No one seems to have seen appellee fall from the train, if she did so, nor did she make any complaint to any one about being thrown from the train, or about having been injured, until she had walked $2\frac{1}{2}$ miles, to the house where she was boarding, and not then until some time after her arrival, although she had an escort from the depot, and met a party with whom she engaged in conversation on the way from the train. If she fell from the train, it occurred near the depot, and it is strange that no one saw her fall. Besides, it is most remarkable that she would pass by the depot, and walk $2\frac{1}{2}$ miles, without a murmur as to the alleged brutal treatment of the conductor. Without any motive, it is incomprehensible that a conductor of 22 years' experience should treat an inoffensive woman so brutally, and imperil her life, without the slightest provocation. The statements of the appellee as to how the alleged injury was inflicted are improbable, and her long delay in telling about it makes the impression on the court that she certainly, at least, is mistaken in her claim that she was pushed by the conductor from a moving train. When the court considers the improbable evidence of appellee, and that no possible motive for the alleged outrageous conduct of the conductor was shown, together with his reasonable and consistent statement as to how he aided appellee in alighting from the train, it is, at

"first blush," impressed with the belief that the verdict of the jury is palpably against the weight of the evidence.

Appellee claims she was shoved from the train. Appellant denies that she was shoved from the train, or even fell when she was being assisted from it. The theory upon which the trial was conducted by the defendant was that its servant did not shove appellee from the train, and that she did not fall in alighting therefrom. So there is no evidence by either party from which it might be inferred that appellee was guilty of a negligent act; hence there was no evidence upon which to base an instruction on contributory negligence. It would have been error to have given such an instruction. *Thurman v. Louisville & Nashville R. Co. (Ky.)* 34 S. W. 893.

The judgment is reversed for proceedings consistent with this opinion.

THIEL v. SOUTH COVINGTON & C. ST. RY. CO.

(Court of Appeals of Kentucky. Jan. 29, 1904.)

STREET RAILROADS—COLLISION WITH WAGON—NEGLIGENCE—JURY QUESTION.

1. The horse drawing the wagon in which plaintiff was driving ran away across a bridge, and as it was about 300 feet from the end of the structure a street car turned onto the bridge. The horse continued to run along the track on which the car was advancing until it got just in front of the car, when it swung to one side, and the car collided with the wagon, and threw plaintiff out. The car made no effort to stop until after the collision. When about 100 feet from the car, plaintiff waved his hands, as if to notify the motorman. The car could have been stopped within 6 or 8 feet. *Held*, that a peremptory instruction for the defendant street car company was error.

Appeal from Circuit Court, Kenton County. "Not to be officially reported."

Action by Louis Thiel against the South Covington & Cincinnati Street Railway Company. Judgment for defendant, and plaintiff appeals. Reversed.

B. F. Graziani, for appellant. Ernst, Cassatt & McDougall, for appellee.

PAYNTER, J. The appellant instituted this action to recover damages for injuries which he received by reason of the alleged negligence of the servants of appellee in causing one of its street cars to collide with a wagon which appellant was driving. It is, in substance, averred in the petition, that while a party riding in the wagon with appellant was paying the toll at the Cincinnati end of the suspension bridge which crosses the Ohio river between Cincinnati, Ohio, and Covington, Ky., a street car, by reason of the negligence of those in charge of it, struck the wagon, causing the horse to take fright and run away over the bridge toward the Covington end of it; that as the horse approached that end of the bridge those in charge of the car which was going

to the Cincinnati side from Covington, by reason of their negligence, caused it to strike the wagon, and threw appellant from it, to his serious injury and damage. The evidence introduced by the plaintiff failed to show that the car which first struck the wagon on the Cincinnati end of the bridge belonged to the appellee. The evidence of the plaintiff himself is very unintelligible and unsatisfactory, evidently resulting from his lack of intelligence and the faculty of describing an occurrence like the one in question. A witness by the name of Besten, introduced by the appellant, gives a very intelligent account of the collision. Preliminary to the statement of this witness' testimony it is well to state that the bridge is higher in the middle than elsewhere; that there are two car tracks over the bridge; that the west track is used by cars running from Cincinnati to Covington, and the east track is used for cars going from Covington to Cincinnati. Besten testified, in substance, that the horse which appellant was driving was running away, and that the driver was endeavoring to control him; that as the horse approached the Covington side a street car came upon the bridge from Covington; that the horse was running on the east track; that the car was running on the same track; that the space between the horse and the street car was about 300 feet; that the horse continued to run on the east track until it got just in front of the street car, when the horse swung from the track, and before the wagon could leave it the car ran into the wagon, and threw therefrom the occupants. The plaintiff survived his injuries, but his companion was killed. The street car did not stop until after the collision, and apparently made no effort to do so until that time. Besten testified that within about 100 feet of the street car the appellant waved his hands, as if to notify the motorman to stop the car. The evidence is that the car could have stopped, at the rate at which it was going, within the distance of six or eight feet. Under this state of facts the court gave peremptory instructions to find for the defendant.

A jury would have been authorized to conclude that when the horse turned from the track to avoid the street car the wagon would not have struck it if the car had been stopped. The question arises, should the car have been stopped, under the circumstances, before the horse reached it. There would have been no trouble in stopping the car before the horse reached it, even after the driver gave the signal to have it stop. Even if there had been no obligation on those in charge of the street car to have discovered the appellant upon the track and avoided injuring him, still, if the discovery was made that he was upon the track in a perilous position, and might be saved by stopping the car, it was the duty of those in charge of it to do so, and thus have avoided injuring him.

From the circumstances proven in this case, a jury might have felt authorized to infer that those in charge of the street car discovered the appellant's perilous position on the track and used no care to avoid injuring him. Street cars are almost as dangerous agencies in the destruction of human life as railroad trains. They are operated upon streets upon which people are constantly traveling. People may be expected to cross the track at any point on the line. Street cars have not the exclusive right to the use of the streets. In view of the fact that persons may be expected to be upon the street car track at any time or place, the law imposes a duty upon motormen to use ordinary care to discover persons upon the track and avoid injuring them. In *Passamanek's Adm'r v. The Louisville Railway Co.*, 98 Ky. 205, 32 S. W. 623, the court said: "Persons operating street cars along the public streets of a city must know, and in law are bound to know, that men, women, and children have an equal right to the use of the highway, and will be upon it. It was the duty of appellee's servant or agent to be on the lookout, and to take all reasonable measures to avoid injuries to persons who might be upon the street. To be on the watch is no more than ordinary care under such circumstances." The court erred in giving a peremptory instruction to find for defendant.

The judgment is reversed for proceedings consistent with this opinion.

GRAY TIE & LUMBER CO. v. FARMERS' BANK OF SMITH'S GROVE.

(Court of Appeals of Kentucky. Jan. 29, 1904.)

DRAFTS—AGENT EXCEEDING AUTHORITY.

1. Where an agent has authority to draw on his principal only for timber that he has bought and received, the principal is not liable to a transferee of a draft drawn on it by its agent for timber which he had not received, and which had no existence.

"Not to be officially reported."

On rehearing. Petition overruled.

For former report, see 74 S. W. 174.

HOBSON, J. We have carefully re-examined the record, and reconsidered the question suggested in the petition for rehearing. Neel was not a general agent for the transaction of the business of his principal, authorized to make drafts on his principal as might be necessary. He was not empowered to exercise a discretion as to drawing drafts. He was authorized to receive, count, and mark the ties which he bought, and then to give a draft for the ties which were thus delivered to him. He gave a great many such drafts, which were paid, and his authority to make drafts, under these circumstances, is undoubted. But it cannot be inferred from this that he had authority to make drafts for ties which he had not received, and which were in fact not in existence. Be-

fore he went to Evansville his only authority was to receive the ties on the river, and then give a draft for the price after they were thus counted and marked. In the case in question his authority was enlarged, and he was allowed to go into the woods and receive and mark the ties, and give a draft therefor, before the ties were hauled to the river, but this was the only change that was made in his authority. This is shown not only by the positive and uncontradicted testimony of Neel and Gray, but also by the form of draft which was given to him to fill out, on which the paper sued on was drawn. He had no authority to give a draft before he received the ties. While one who lends his credit to another by putting in his hands a note or bill to be used for raising money is bound thereon to an innocent party who purchases the paper, although there may have been no consideration for it between the parties, still this principle can have no application to a bill put out by an agent, unless the agent had authority thus to lend the credit of his principal to another. Power so extraordinary cannot be presumed in the absence of proof; and the proof conclusively showing that no power was conferred on the agent to lend the credit of his principal, and that his only power was to draw drafts for the ties after he had gone in the woods and counted and marked them, the draft in question is void to the extent that the ties were not in existence, although it is valid to the extent of the 6,081 ties which were in existence, and were received and marked by the agent.

The petition for rehearing is therefore overruled.

NEW YORK LIFE INS. CO. v. HORD.

(Court of Appeals of Kentucky. Jan. 26, 1904.)

LIFE INSURANCE—FRAUD—INDUCING ISSUANCE OF POLICY—ELECTION OF REMEDIES.

1. Where a life insurance company was induced by fraud to issue a policy, the doctrine of election of remedies does not apply so as to entitle it to either rescind the contract on discovering the fraud, or to affirm the transaction by payment to the beneficiary, and then sue its agent, who participated in the fraud, to recover its damages.

"Not to be officially reported."

On petition for rehearing. Petition overruled.

For former opinion, see 77 S. W. 380.

O'REAR, J. It is very earnestly urged that appellant was entitled to its election of remedies when defrauded by Dr. Hord and Mrs. Weaver; that it had the right either to rescind the contract on discovering the fraud, or to affirm the transaction and sue to recover its damages. The only defendant now being considered is Dr. Hord. He was not a party to the contract. There could never have been maintained against him a suit for rescission. It might have been that he, by his fraud,

had induced appellant to enter into such a binding contract with Mrs. Weaver as that neither she nor the company could have compelled its rescission. That would not have altered Hord's liability to appellant for his fraudulent practices (if they were fraudulent) by which appellant was induced to enter into the contract. The liability of the faithless servant to his master for having fraudulently induced the latter to enter into a contract may be wholly distinct from the liability of the other contracting party.

The doctrine of election has no place in this case. As contended for, it would amount to this: Appellant's agent fraudulently misrepresented to it the health of an applicant for life insurance, but appellant learned of the fraud before it had sustained damage. Appellant claims it may elect to let the injury happen, though it might have averted it, and then recover the damages from the wrongdoing servant. But that cannot be the law. If a tortfeasor sets in motion an event calculated to injure another, if the latter sees the danger in time to avoid it, he cannot let the damage happen to him, and then recover his loss from the wrongdoer. So all the authorities hold.

Applying those familiar and just principles to this case, we have it that appellant, after discovering the alleged fraud that had been practiced upon it, and with every opportunity and right to plead that fact in bar of any recovery upon the policy of insurance, nevertheless voluntarily paid the policy. Until then it had not suffered loss—the damage had not occurred. Issuing the policy of insurance did not damage appellant. It was the payment of it that caused the loss. If appellant had learned of the false representation before it issued the policy, but had nevertheless elected to issue it, it could scarcely be said that it was induced to do so by the false representations, for in fact it would have issued it in spite of, and not in reliance upon, them. It may be true that such false representations inducing a policy of life insurance to issue would be regarded as continuing representations to induce the payment of the money in case of death of the injured, when their falsity was not learned till after the money was paid. But if, before the money was paid, and while its payment might have been successfully resisted, the insurer learns of the falsity of the representations, then it cannot say it paid the money relying on their truthfulness, because it did not. It was not and could not have been misled by a statement which it knew to be false. The demurrer was sustained to the petition because it showed that appellant's loss was not because it was misled by appellee's statements into paying the money. To attempt to deceive is wrong; but, if it is not successful to the point of causing the loss, it is *damnum absque injuria*.

Petition overruled.

E. S. BONNIE & CO. v. PERRY'S TRUSTEE.

(Court of Appeals of Kentucky. Jan. 28, 1904.)

BANKRUPTCY—PREFERENCES—SUITS TO SET ASIDE—EVIDENCE—DEPOSITIONS—CANCELLATION OF MORTGAGES—LIQUOR LICENSES—TRANSFER BY INSOLVENT—EFFECT.

1. Under Bankr. Act July 1, 1898, c. 541, 30 Stat. 564, § 67e (U. S. Comp. Stat. 1901, p. 3449), avoiding transfers made by a bankrupt within four months prior to the filing of the petition, except as to purchasers in good faith, and giving the trustee the right to recover the same, a transfer by a saloonkeeper of his stock and fixtures to a wholesaler, who knew of his insolvency, and applied a portion of the purchase money to the discharge of an unrecorded chattel mortgage held by another on the fixtures, and turned over the balance to the saloonkeeper, was void, and the stock and fixtures, or their value, could be recovered of the wholesaler by the trustee, irrespective of the adequacy of consideration paid by such wholesaler, or of whether he himself secured any benefit by the transaction.

2. Nor was the wholesaler entitled to any credit for the amount turned over by him to the saloonkeeper.

3. In an action by a trustee in bankruptcy to set aside a sale of the bankrupt's property, the proceeds of which sale were applied to the discharge of an unrecorded chattel mortgage of the bankrupt's, it was error to adjudge that the mortgage be canceled, the mortgagee not being a party to the suit, and the mortgage not being void to the extent that it evidenced a debt, though it was not a lien against subsequent creditors, and its validity being a subject for decision by the bankrupt court.

4. Under Ky. St. 1903, § 4203 et seq., relative to liquor licenses, which contemplate that a license be given to a definite person to sell at a definite place, although section 4198 allows (but does not compel) the authorities to renew a license in case of the death or transfer of business by the licensee to his personal representative or the purchaser, a license is a mere personal privilege, and is not transferable, and an attempt by an insolvent licensee to transfer his license to a creditor does not render the creditor who accepts it liable to pay anything for the license to the licensee's trustee in bankruptcy.

5. In a suit by a trustee in bankruptcy to set aside a transfer made by the bankrupt, it was error to admit in evidence as part of a deposition of the bankrupt a copy of his testimony previously given before the referee, which he admitted to be true, and said that he adopted it as part of his deposition.

Appeal from Circuit Court, Logan County.
"To be officially reported."

Action by H. R. Perry's trustee in bankruptcy against E. S. Bonnie & Co. From a judgment for plaintiff, defendant appeals. Reversed.

E. B. Drake and Gibson, Marshall & Gibson, for appellant. J. W. Linton and Wilbur F. Browder, for appellee.

O'REAR, J. This action was brought to set aside a sale of property on the ground that it was fraudulent, made in contemplation of insolvency, and to prefer the purchaser over other creditors of the seller. The property was the stock and fixtures of a saloon in Russellville, Ky., and unexpired licenses to sell liquor. Perry owned the stock

and fixtures, and held licenses expiring the 1st of October, 1903. The sale was made about the 1st of February, 1903. Appellant was an unsecured creditor of Perry's to the amount of about \$942. Perry had conducted the business since October, 1901, with the result that at the end of January, 1903, he was practically without any stock of goods, insolvent, and in fear of being closed up by attachment. The stock of goods and fixtures were found by the circuit court to be of not exceeding \$1,200 in value. Appellant is a corporation, a wholesale liquor dealer at Louisville, Ky. The purchase of the stock of goods was made after midnight on Sunday night of February 1, 1903, at Russellville. The persons present were the vice president of appellant company, who had learned of Perry's failing circumstances and impending bankrupt condition; the owner, Perry; T. S. Rhea, the latter of whom claims to have held an unrecorded chattel mortgage against the fixtures for about \$1,000; and one Dunaven, who had been a traveling salesman for appellant, and who had apprised it of the necessity to take some action to save itself from Perry's collapse. Shortly after the sale to appellant by Perry, the latter, on his own application, was adjudged a bankrupt by the United States District Court for the Western District of Kentucky. This suit was brought by the trustee in bankruptcy against appellant to recover the value of the fixtures and goods bought by it, and to recover the value of Perry's licenses from the state and city of Russellville to vend liquors at retail. The value of the licenses was claimed to be \$800. The value of all the property sold and transferred, including licenses, was claimed to be about \$2,300.

Appellant admits that when it bought the property it knew that Perry was "hopelessly and notoriously insolvent"; that it had an unsecured debt of about \$942 against him; that its representative went to Russellville in haste on hearing of Perry's pressing financial embarrassment, to look after its interests as his creditor; that it bought the bar fixtures and liquors and cigars without taking an invoice; that the trade was made at an unusual hour for business transactions; that the trade was made after an all-night conference and negotiation between the debtor creditor and a favored lienholder and friend; that \$1,000 of the purchase money was paid to the lienholder, whose unrecorded mortgage gave him no legal priority over other creditors; that the remaining \$200 was turned over in cash to the failing debtor. The trustee claims that the licenses were included in the sale, and that in consideration of their transfer, and the sale of all the other property owned by Perry, appellant's debt was to be satisfied; thus constituting an unlawful preference of appellant as a creditor. On the other hand, appellant asserts that its debt was not, and was not to be, canceled by the trade; that it bought the saloon and

liquors to set up Dunaven in that business, in order to collect from him an old account which he was owing appellant, and to continue a customer for their wares. The saloon was in fact conducted in Dunaven's name, but only for a short time by him, when he returned to appellant's service as a traveling salesman, leaving in charge other employes furnished by appellant. The circumstances indicate that it was the purpose of the failing debtor to secure at least two of his creditors to the exclusion of all others, viz., appellant and Rhea. The means adopted was to sell the saloon and contents to appellant at a low figure, including the licenses, and out of the proceeds to settle Rhea's unsecured debt. The scheme was in direct contravention of the United States bankruptcy statute (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]). Nor does it matter whether the purpose of it was to gain an advantage by appellant as creditor, or to give an advantage to Rhea without profit to appellant, but with its knowledge of the debtor's purpose. The effect of the federal statute is somewhat broader than the state statute against preferences. It renders the preference of one creditor to the exclusion of others by an insolvent debtor a fraudulent act. Whoever, with knowledge, or notice equivalent in law to knowledge, of the debtor's insolvent condition and purpose, buys his property, even for a fair consideration, takes it subject to the right of the trustee in bankruptcy to sue for and recover it if within four months of the act of preference the debtor is declared a bankrupt. See section 67e of the act of Congress of 1898 (30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]). Only innocent purchasers for fair value are protected by the act. The sale and transfer are void if the act is violated, whether by a creditor or purchaser. It might matter little to other creditors if a failing creditor could sell his property, even for fair value, to one with knowledge of his purpose to abscond with the proceeds, or to otherwise unlawfully apply them, if they could not get at the tangible property in the hands of the purchaser. It being clear to us that the act of bankruptcy committed by Perry on the night of February 1st was in fraud of his creditors, whether appellant was or was not a beneficiary of it, we have not stopped to consider the question so much discussed whether appellant really paid a fair consideration for the bar fixtures and liquors and cigars. The transaction was such that, under the circumstances, appellant ought to have kept out of it. But it took chances of its not being attacked by creditors. The trustee ought to recover the property thus placed beyond the reach of the creditors, or, if the property cannot be had, then he ought to recover of the guilty purchaser its value. The circuit court adjudged the transaction fraudulent, and that appellant either return the property to the trustee within a named time, or to

pay him \$1,000 for it. We are of opinion that the court was right in holding the transaction to be fraudulent as to creditors, and in holding that appellant was not such a purchaser as was to be protected; but we think the judgment should have been for the return of property, or its proven value, \$1,200. Appellant was no more entitled to credit for the \$200 he paid to Perry than for the \$1,000 he paid to Rhea.

The circuit court furthermore decided that the mortgage to Rhea was void, because not recorded, and that it did not constitute a lien on the property. It was adjudged to be canceled. Rhea was not a party to the suit. Although the unrecorded mortgage may not have been, and was not, a lien as against at least subsequent creditors, it evidenced a debt, and to that extent, so far as the record before us shows, was not void. At any rate, it should not have been canceled. Its validity is more properly the subject now for decision by the bankrupt court.

The court further decided that appellant pay to the trustee \$800, the value of the liquor licenses attempted to be transferred to it by Perry. A license to retail liquors in this state is a personal privilege only. It is confined by statute to the place and person named in the order granting it. Section 4203, Ky. St. 1903. Although by section 4198, when the owner of a license dies, or sells his stock or place of business, the authorities may renew the license to the personal representative, widow, or purchaser, they are not required to. Indeed, the fitness of the person proposing to exercise the license is always one of the main things considered in granting it. It cannot be sold for debt under execution or attachment. It is an intangible privilege, without vendible value or quality. It might be abandoned by its owner, or be revoked at any time for certain causes by the public authority granting it. It is not transferable. The fact that the city council and county court are allowed to transfer it without additional charges upon the application of the owner does not give him the right to transfer it. That he has donated it—or attempted to give it—to one of his creditors, although insolvent, cannot make such creditor liable to the trustee in bankruptcy for the value of the license. The object of the statute is to hold only that liable to debts which could be subjected by law to their payment. The licenses in this case do not appear to have been really transferred by the city or county authorities. It was done only by the licensee. We are of opinion that the court erred in adjudging appellant to pay anything for the licenses.

Before this suit was begun, Perry was called before the referee in bankruptcy for examination pending his application to be adjudged a bankrupt, and was questioned at considerable length by counsel representing certain creditors, by the referee, and by his own counsel. Appellant does not appear to

have been present or represented. A stenographic report of his testimony was preserved. Much of it tends to show his motive and condition at the time of the sale attacked in this suit. In the preparation of the case he was introduced as a witness by the trustee (appellee). He was shown what purported to be a copy of his testimony given before the referee, and asked whether it was true, and whether he would adopt it as a part of the deposition then being given. He said it was true, and he would and did adopt it. It was thereupon filed as a part of his deposition. Appellant's exceptions to it were overruled, and it was considered by the court. Although we find enough evidence in the record to sustain the conclusion at which we have arrived without regarding the interpolated copy from the referee's office, we must condemn the practice of presenting evidence in that form. Whether the stenographer who took the notes of the testimony was duly sworn, or whether the copy is authenticated as it should have been to have entitled its reception, we do not consider; for, if so, its injection in that form as the testimony of the witness in this case was still an improper practice. It was incompetent as evidence in this case. It is nothing here, at best, but hearsay. The fact that the witness said that he said it on another occasion and in another action makes it none the less hearsay. The right to confront the witness, to see and hear him testify, to cross-examine him upon the points in issue in the instant suit, to have his own language reported, are matters of right given to a party, and of inestimable value to the court in its endeavor to arrive at the truth. The exceptions to that part of the deposition should have been sustained.

The judgment is reversed on both the original and the cross-appeal. The cause will be remanded for proceedings governed by this opinion.

BOARD OF COUNCILMEN OF CITY OF HARRODSBURG v. MITCHELL.

(Court of Appeals of Kentucky. Jan. 28, 1904.)

MUNICIPAL CORPORATIONS—STREETS—CHANGE OF GRADE—INJURIES—DAMAGES—EVIDENCE—INSTRUCTIONS—REQUESTS—REVIEW.

1. Where, in an action against a city, the appeal record failed to show that taxpayers were excluded from the jury, or that others who were not taxpayers were permitted to serve thereon, an objection on that ground could not be reviewed.

2. Where, in an action against a city for injuries to abutting property by the raising of a street, the evidence as to plaintiff's damages was conflicting, and there was some evidence justifying the verdict, it could not be reversed on appeal as unsustained by sufficient evidence.

3. A motion for a new trial on the ground of newly discovered evidence cannot be reviewed on appeal where the evidence alleged to have been newly discovered is not contained in the appeal record.

4. An objection that an instruction given was not sufficiently specific is not available on appeal where an appellant failed to ask or offer other instructions.

Appeal from Circuit Court, Mercer County.
"Not to be officially reported."

Action by J. P. Mitchell against the board of councilmen of the city of Harrodsburg. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

E. M. Hardin, for appellant. E. H. Gaither, for appellee.

SETTLE, J. The appellee recovered in the lower court a verdict and judgment of \$200 in damages against the appellant. The alleged injury upon which the claim for damages was based grew out of the raising by appellant of a street in front of appellee's lot, the making of a culvert thereunder, and so ditching it upon both sides as to divert the surface water from its natural course and cause it to flow in unusual and increased quantity upon appellee's lot, thereby inundating and injuring his yard and garden, and washing the metal from a driveway through the premises. Appellant's motion for a new trial was overruled; and it has appealed.

There being no brief for the appellant in the record, we are not apprised of the particular errors upon which it relies for a reversal. But we have examined the grounds urged in the court below for a new trial, and find that they were seven in number: (1) Irregularity in the proceedings of the court in excluding certain taxpayers of the appellant city from sitting on the jury, and allowing others to do so, to the prejudice of appellant, to which it then objected and excepted. Besides, it would not have been error for the court to have excluded taxpayers of the city from the jury, if it did so. (2) Excessive damages, appearing to have been given under the influence of passion or prejudice on the part of the jury. (3) Error by the jury in its assessment of damages. (4) That the verdict was not sustained by sufficient evidence, and was contrary to law. (5) That the appellant has discovered new evidence, which it could not with reasonable diligence have discovered and produced at the trial. (6) Errors of law occurring at the trial and excepted to by appellant at the time. (7) The court improperly instructed the jury.

As to the first of these grounds, it may be remarked that the record fails to show that taxpayers of the appellant city were excluded from the jury, or that others who were not such taxpayers were permitted to serve thereon. In other words, there is nothing appearing in the record that conduces to show any error or irregularity upon the part of the court in selecting or impaneling the jury.

As to the second and third grounds, it is only necessary to say that we have been unable to find anything in the record that may be said to sustain either of them. The amount of the verdict is certainly not unreasonable, and could not have been influenced by either passion or prejudice, yet in our opinion it was as much as the jury were war-

ranted by the evidence in finding. If by the third ground it is meant that the jury adopted some improper mode of assessing the amount of appellee's damages, that fact is not disclosed by the record.

The fourth ground, that the verdict is not sustained by sufficient evidence, is in our opinion equally untenable, as the evidence introduced by appellee conduces to show that there was some injury caused to his lot by the overflows of which he complained, and that such overflows were caused by the manner in which the appellant's servants and agents repaired the street in front of his property. That is to say, it appears from the evidence that this street had been in existence a great number of years; that the appellee's land was slightly lower than that on the north side of the street; that the land on the north side constituted a kind of natural watershed from which the water ran down on the street, but which, before the street was raised, flowed in large measure to the low places therein, somewhat beyond appellee's lot, and some of it stood on the north side of the street in pools or ditches, by all of which it was prevented from running upon the appellee's premises, to his injury. Even when the rainfall was great, the overflow was gradual, and extended over so large a surface that it could do his lot little or no injury. But when the appellant raised the street in front of appellee's lot, ditched it on both sides, and put in a culvert almost opposite the center of his gate, it caused all the water from the higher ground on the opposite side of the street to flow through the culvert, where it joined the water from the ditches on the side of the street next to appellee's lot, thereby producing a greater accumulation of water than had been accustomed to gather on that side of the street, which was all thrown upon the lot of Mrs. Riley adjoining that of appellee, from which it was thrown upon appellee's lot, which was the lower ground, with much greater force and volume than had ever been known before the repairing of the street. By this means his garden was in part washed away, his driveway in part demolished, and his lot otherwise injured. Upon the other hand, the witnesses introduced by the appellant furnished testimony that tended to contradict and disprove the evidence introduced in behalf of the appellee. The evidence was therefore conflicting, but it was all proper to go to the jury, and it was for them to determine whether the appellee was damaged by the acts of appellant complained of, and, if so, to what extent, and we cannot disturb the verdict, as we are unable to say that there was no evidence to sustain it.

It is unnecessary to consider the fifth ground that was urged in the lower court for a new trial, for we have no means of knowing what new evidence was discovered by appellant after the trial, the record being altogether silent upon the subject.

We are also at a loss to know what error of law occurring at the trial is referred to by appellant in the sixth ground, as the record furnishes no light to aid us in its discovery.

The complaint presented by the seventh ground, that the court improperly instructed the jury, is not, in our opinion, well founded. It cannot be said that the one instruction given by the trial court did not correctly present to the jury the law of the case. Though it might have been more specific in defining the measure of damages, it could not have been misleading, or otherwise prejudicial to the appellant. Besides, appellant is not in a position to complain that it was not more specific on that point, in view of the fact that it neither asked nor offered any other instruction.

Finding in the record no cause for disturbing the judgment, the same is hereby affirmed.

OWENS et al. v. JENKINS et al.

(Court of Appeals of Kentucky. Jan. 28, 1904.)

PROBATE OF WILL—COMPETENCY OF TESTATOR—CREDIBILITY OF WITNESS—IMPEACHING TESTIMONY—SUFFICIENCY OF ADMONITION—IMPROPER ARGUMENT—FAILURE TO OBJECT.

1. On the probate of a will the physician who attended the testator in his last sickness testified that he was mentally competent. On a cross-examination he was asked whether he had made statements to a third person that testator was incompetent, and answered, "No." It was then shown that he had presented to the executor and been paid a bill \$200 in excess of his book charges against testator, which were themselves excessive. He explained this by saying that he had rendered testator professional services of which he had not kept account. The third person was called, and testified that the physician had told her that testator was mentally incompetent, and also that he had collected his bill under a threat to break the will. The court admonished the jury that they were to consider this testimony only so far as it contradicted the physician. *Held* insufficient, as the jury should have been charged to consider it only so far as it affected his credibility.

2. Improper argument of counsel cannot be taken advantage of by an appellant who failed to object thereto below.

Appeal from Circuit Court, Henry County.
"Not to be officially reported."

Proceedings by M. A. Jenkins and others for the probate of the will of George W. Henderson, deceased. From a judgment for the propounders, Harry Owens and others appeal. Affirmed.

W. O. Jackson and W. M. Cravens, for appellants. W. B. Moody and Turner & Turner, for appellees.

O'REAR, J. On the trial of the motion to probate the will of George W. Henderson, Dr. Nuttall, the physician who attended upon the testator during his last illness when the will was executed, testified the testator was mentally competent to make a will. Dr. Nuttall was also one of the attesting witnesses to the will. Appellants introduced evi-

dence to prove that Dr. Nuttall had made statements out of court that the testator was not competent, and, furthermore, that his attitude as a witness had been influenced by the payment by the executor of a rather large bill rendered by the doctor for his professional services to the testator during his last illness. The trial court allowed all this to be shown. Counsel for appellants seem to be under misapprehension as to the admonition of the court to the jury regarding the effect of this evidence. Their argument is based upon the theory that the court admonished the jury at this point that the evidence just named was to be received only as affecting the credibility of Dr. Nuttall as a witness. The occurrence at the trial as set out in the bill of exceptions shows this state of case: Dr. Nuttall, on cross-examination, was asked by appellants whether he had not made the statements to Mrs. Cravens that the testator, when he made the will, was not mentally capable of understanding what he was doing. He answered that he did not. It was then shown that the doctor had produced a bill of \$500 against the executor for professional services rendered the testator during his last illness. Upon cross-examination he was required to produce his books containing the charges against the testator. His accounts show that he had charged the testator for a number of visits at \$10 each, whereas the other accounts in the same book show generally similar charges to other patients at about the same time from \$1.50 to \$5 each. But even with the charges as contained in this account it only amounted to about \$310. He was paid \$500. In explanation of this he testified that the testator was almost daily at his office for treatment, and was continuously under his care, for which he paid nothing. The witness added: "After his death I didn't have the exact amount on my books. I charged him just enough to make the entire service \$500." Mrs. Cravens was introduced by appellants as a witness, who testified that Dr. Nuttall had stated to her directly after the death of the testator, in substance, that at the time of making the will the testator was practically a dead man, and was not mentally competent to understand what he was doing. She also testified that the doctor admitted to her that he had got the \$500 for having the will made, and that the executor did not want to pay him that amount, and that he told him "to give him the check right there, or he would break the will."

The bill of exceptions at this point shows the following: "The court here on its own motion said to the jury they were not to consider the testimony only so far as it contradicted Dr. Nuttall." We are of the opinion that the court should have told the jury that the testimony of Mrs. Cravens concerning the statement alleged to have been made to her by Dr. Nuttall as to the testamentary capacity of the testator was to be considered

only as affecting the credibility of Dr. Nuttall as a witness. Of the other evidence of Mrs. Cravens just alluded to, the theory of appellants is that the propounders of the will, the executor, and the principal devisee were fabricating evidence in its support, and that they had taken this course to insure the favorable testimony of a witness whose relation to the testator, and whose connection with the execution of the will, made him a very important witness in the case. The suppression or fabrication of evidence is of itself a relevant fact, to be proved against the party committing it, although it is a collateral fact, and not connected with the main fact in issue. It is in the nature of an admission by such party against his interest, and raises a presumption against the validity of his claim or defense. It may therefore be proven, and is regarded as substantive evidence tending to establish the main fact. 1 Greenleaf on Evidence, § 37; Commonwealth v. Webster, 5 Cush. 295, 52 Am. Dec. 711; Benjamin v. Ellinger, 80 Ky. 472.

We are of the opinion, however, that the admonition given the jury by the court did not have the effect claimed by appellants. Indeed, in the form in which it appears in the bill, we cannot conceive that it had any appreciable effect, and leaves the testimony of these two witnesses as if the admonition had not been given; for it is to be observed that the court told the jury that they were to consider Mrs. Cravens' testimony only in so far as it contradicted Dr. Nuttall, while as a matter of fact her testimony upon these two points did contradict Dr. Nuttall in every particular, and therefore the jury were told in effect to consider Mrs. Cravens' testimony as evidence. This really left the jury without any admonition as to the proper effect to be given to her testimony that was admissible only for the purpose of affecting the credibility of the witness Nuttall, above discussed. At the same time it left the jury to consider her testimony tending to show a fabrication of evidence by the propounders as affecting the main facts at issue.

We do not mean to hold that the proof of an attempted fabrication of evidence can be made by testimony that a witness had said out of court that he had been induced by the party calling him to give false testimony in his behalf, and, upon the witness' denying that he had made that statement out of court, to prove that he had. This would be to establish a relevant fact by incompetent hearsay evidence only. There must be other evidence tending of itself to establish that fact. In this case the extraordinary charge of the attesting witness for his professional services, as compared with similar charges for like services to others; the failure of his account to show by \$200 the amount received in satisfaction of his bill, although the account appears to have been kept by daily entries, as far as it was kept; and the witness' explanation—were facts from which the in-

ference might have been not unreasonably drawn; if the jury saw fit to look at it in that light, that the witness had been improperly biased by the party calling him. The jury might or might not take that view of it, according to the reputation of the witness, their acquaintance with him, his bearing while testifying, and a number of other familiar circumstances which go to affect ordinarily the credibility of witnesses in jury trials. The witness' explanation of the unusual appearance of his account and charges, in itself and standing alone, was probably sufficient to reconcile the charges with the entire innocence of the propounders and the witness. The testimony of Mrs. Cravens that this witness had made contrary statements to her had the legal effect only to tend to impeach Nuttall's testimony, and it therefore should have been guarded by the court with the admonition also that her evidence on this point should be received only as affecting the credibility of the witness Nuttall. This is probably what the court intended to do, and did do, but in the preparation of the bill of exceptions, which is not a stenographic report of the trial, the matter has been so awkwardly expressed as to fail to describe what actually occurred. The verdict of the jury finding for the propounders of the will is their acquittal of Dr. Nuttall and the propounders of improper conduct in the matter.

The complaint here of the closing argument to the jury by counsel for appellees cannot avail appellants. It was not then objected to. The circuit court was not asked to and did not rule on it. A party cannot submit to improper argument, without objection to the trial court, and then, if the verdict is adverse to him, take advantage on appeal of the supposed evil effect of the objectionable matter. 1 O. R. R. Co. v. Radford (Ky.) 64 S. W. 511; Alexander v. Menefee (Ky.) 64 S. W. 855; Bland v. Gaither (Ky.) 11 S. W. 423; C., St. L. & N. O. R. R. Co. v. Coffee, 7 Ky. Law Rep. 451; L. & N. R. R. Co. v. Webb, 11 Ky. Law Rep. 369.

Perceiving no error prejudicial to appellants, the judgment is affirmed.

CITY OF LEBANON v. BIGGERS.

(Court of Appeals of Kentucky. Jan. 26, 1904.)

TAXATION—LIABILITY—RESIDENCE.

1. In an action by a city for personal taxes defendant testified that he had left his home in the country, and moved, with his family, to the city where he bought a residence, with no fixed intention of returning to his farm, which he rented on shares, reserving three rooms in the house for his own use. *Held*, that he had become a resident of the city, and therefore liable to be taxed as such.

Appeal from Circuit Court, Marion County.
"To be officially reported."

Action by the city of Lebanon against J. M. Biggers for taxes. From a judgment for defendant, plaintiff appeals. Reversed.

H. S. McElroy, for appellant. Lafe T. Pence, for appellee.

BURNAM, C. J. The appellee, J. M. Biggers, was assessed for taxation for the year 1901 by the city of Lebanon on property valued at \$6,925, which included his residence at \$2,000. The great bulk of the balance of the property consisted of cash notes, which were valued at \$4,835. The rate of assessment for that year, as fixed by the board of council of the city, was 70 cents on each \$100 worth of property, and a poll tax of \$1. Appellee having refused to pay the tax assessed against him, the city brought this suit for a personal judgment for the amount of the taxes, \$48.47, the poll tax, and the penalty provided by law for failure to pay. The defendant resisted payment of the taxes upon the ground that he was not a resident of the city, but that his permanent home was located upon his farm, some $3\frac{1}{4}$ miles from the city of Lebanon, and he was only liable for the tax assessed against the real estate owned by him, which he offered to pay. To support his contention as to his residence, the defendant testified that he had a wife and two children; that for many years he had owned a farm of 300 acres about $3\frac{1}{4}$ miles from Lebanon, on which was located a dwelling house which contained seven rooms, which he had occupied for many years; that on the 20th of October, 1890, he purchased the residence then occupied by him in Lebanon, furnished it comfortably, and shortly thereafter took possession of it with his family, and had continued to reside in it; that after his removal from his farm it was operated by him on shares; that the tenant occupied a portion of the dwelling, but that he reserved three rooms for his own use; that he still got his vegetables, chickens, milk, and household supplies largely from the farm, and that he frequently stayed out at the farm at night during the summer; that he depended upon his farm and stock trading for a living. But upon his cross-examination he was asked this question: "Mr. Biggers, where, in future, do you expect to make your residence for your family? A. In the country, on some farm. I do not know whether I will make it my farm or not, but I am going away from town." He admitted that his family had not occupied his country residence during the year 1901, and that he had paid taxes upon his personal property for that year in Lebanon, but had refused to pay for the year 1901 in consequence of the decision by this court in *Montgomery v. City of Lebanon*, 64 S. W. 509, 54 L. R. A. 914; that he had moved to town because both his own and his wife's health were better than on the farm, and because they wanted the advantages afforded by the city of attending church, etc.; that when he moved into the city there was no fixed definite time in his mind of abandoning his town residence. Under this state of fact the trial

court dismissed plaintiff's petition, and it has appealed.

It is a maxim of the law that every person must have a domicile, and also that he can have but one, and that, when once established, it continues until he renounces it and takes up another in its stead. Nor can there be any question that a domicile is not lost by temporary absence. The question is one of fact, and it is often difficult to determine. The rule is laid down by Mr. Justice Cooley in volume 1 of his work on *Taxation* (3d Ed.) p. 641, quoting Shaw, C. J., as follows: "No exact definition can be given of 'domicile.' It depends upon no one fact or combination of circumstances, but from the whole, taken together, it must be determined in each particular case. It is a maxim that every man must have a domicile somewhere, and also that he can have but one. Of course, it follows that his existing domicile continues until he acquires another; and, vice versa, by acquiring a new domicile he relinquishes his former one. From this view it is manifest that very slight circumstances must often decide the question. It depends upon the preponderance of evidence in favor of two or more places; and it may often occur that the evidence of facts tending to establish the domicile in one place would be entirely conclusive were it not for the existence of facts and circumstances of a still more conclusive and decisive character, which fix it beyond question in another. So, on the contrary, very slight circumstances may fix one's domicile, if not controlled by more conclusive facts fixing it in another place. If a seaman without family or property sails from the place of his nativity, which may be considered his domicile of origin, although he may return only at long intervals, or even be absent many years, yet if he does not, by some actual residence or other means, acquire a domicile elsewhere, he retains his domicile of origin. So going abroad with one's family and actually taking up one's residence in a foreign city, but with the intention at some time of returning, does not deprive one of his domicile of birth, or the authorities of the place of domicile of the right to tax him." Jacobs, in his *Law of Domicile*, 378, says: "A removal which does not contemplate an absence from the former domicile for an indefinite and uncertain time is not a change of it. But when there is a removal, unless it can be shown or inferred from circumstances that it was for some particular purpose, expected to be only of a temporary nature, or in the exercise of some particular profession, office, or calling, it does change the domicile. The result is that the place of residence is *prima facie* the domicile, unless there be some motive for that residence not inconsistent with a clearly established intention to retain a permanent residence in another place." In 10 A. & E. En. of Law (2d Ed.) 15, it is said: "Domicile is composed of two elements—res-

idence and intention; and both of these must concur. Residence in a place without the requisite intention of remaining will not suffice to give one a domicile in such place. Nor will an intention to change one's domicile, unaccompanied by actual removal, result in a change of domicile. * * * The intention which is necessary to said domicile is the intention to reside in a particular place permanently or for an indefinite period of time. It is not necessary that the person should intend never to move away. * * * When a person has actually removed to a place with the intention of remaining there for an indefinite time, it becomes his place of domicile, notwithstanding he may have a floating intention to return at some future period to his previous domicile." The same author says on page 20: "Every independent person may change his domicile at will, and to constitute a change there must be an actual removal of residence, coupled with an intention of remaining at the place of removal permanently or for an indefinite time. The domicile must be determined in each particular case from the whole taken together." Lord Thurlow, in *Bruce v. Bruce*, 2 B. P. 229, says: "A person being at a particular place is prima facie evidence that he is domiciled at that place, and it lies on those who say otherwise to rebut that evidence." When we apply the law as stated in these authorities to the facts of this case, we find that when appellee left his home in the country and moved to the city of Lebanon he bought a new residence, furnished it comfortably, and took up his abode there, with no fixed or definite intention of returning to his farm. Indeed, he testifies that he does not know that he will return to his home in the country, even if, in the future, he should abandon his residence in the city. He says the hope of improving his health was one of the main inducements in moving to the city, and that his anticipations have been realized; that the opportunity afforded by the city of attending church regularly was an element in determining his choice. All of these circumstances are likely to make his residence in the city permanent, although he testifies that it is at present indefinite. The facts in this case clearly distinguish it from *Montgomery v. City of Lebanon*. In that case it appeared that Montgomery moved to Lebanon for a definite purpose and for a definite time—the education of his two children, the youngest of which was then 16 years of age; that he continued to act as surveyor of a public highway in the country in the neighborhood of his farm; that he intended to return to his farm as soon as his children had finished their education. It would be better if the questions of fact involved in cases of this character were left to the determination of a jury. But as the parties elected to submit their controversy to the chancellor, and he has decided the question upon its merits without objection, we think it not improper

that upon this appeal the matter should be finally disposed of. We have reached the conclusion that under the facts of this case the appellee, J. M. Biggers, was liable for the taxes sued for, and that the trial court erred in not so adjudging.

Judgment reversed, and cause remanded for proceedings consistent herewith.

WILLIS et al. v. THORNTON.

(Court of Appeals of Kentucky. Jan. 12, 1904.)

APPEAL—AMOUNT INVOLVED—QUESTIONS OF TAXATION.

1. Though, in an action for cattle levied on, and damages for their detention, the value of the cattle and such damages are not enough to give the Court of Appeals jurisdiction, the appeal will be entertained, questions of right to tax being involved.

Appeal from Circuit Court, Marion County.

"Not to be officially reported."

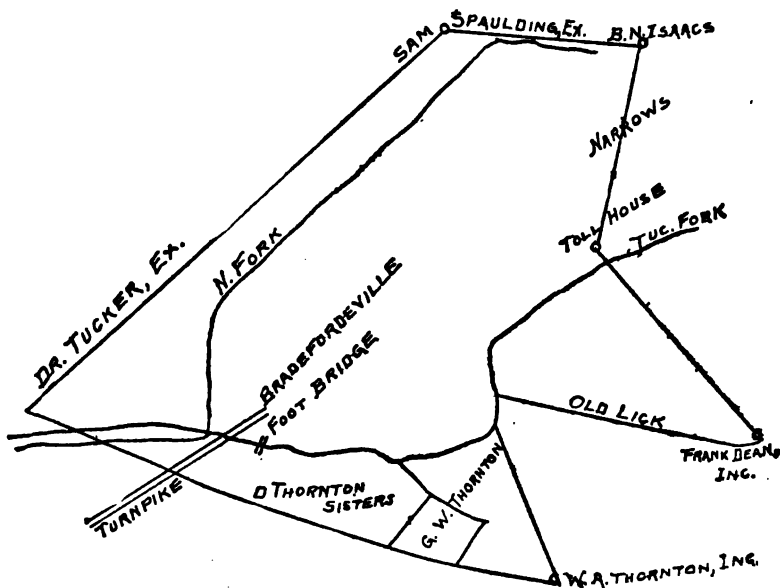
Action by Eliza Thornton against J. E. Willis and another. Judgment for plaintiff. Defendants appeal. Affirmed.

H. S. McElroy and C. S. Hill, for appellants. J. P. Maryson and Samuel Averitt, for appellee.

SETTLE, J. This action was instituted and an order of delivery obtained by the appellee, Eliza Thornton, to recover of the appellants, Willis and Classcock, a cow and calf which they levied on to satisfy a tax assessed against her by the trustees of Graded School District No. 37, in Marion county. It is averred in the petition that the levy upon the cow and calf was made by the appellee Willis as deputy for his co-appellant, J. H. Classcock, who was and is collector of the school tax for District No. 37; that the levy was and is illegal, as she did not owe the tax assessed against her, and is not liable therefor, because she is not now, and never has been, a resident of Graded School District No. 37. It is further averred in the petition that the cow and calf were worth \$50, and that appellee had been damaged in the amount of \$25 by reason of the wrongful seizure and detention of the cattle by the appellants. The answer of the appellants, after admitting the seizure and detention of the cattle, and denying the illegality thereof, or that appellee was damaged thereby \$25, or any other sum, avers that the tax for which the cow and calf were seized was legally assessed by the trustees of the district; that it was due and unpaid, and is still owing by the appellee; and further that she was, at the time it was assessed, and is now, a resident of Graded School District No. 37. The cause was tried by the circuit judge without the intervention of a jury, and the judgment rendered declared the appellee not liable for the tax, restored to her the cow and calf, awarded her \$15 damages for their detention, and also allowed her her costs. By this appeal a reversal of that judgment is sought by the appellants.

We are of opinion that the lower court decided correctly in holding that the appellee is not a resident of Graded School District No. 37, and consequently not liable for the tax sought to be collected of her by the sale of her cattle. A number of witnesses introduced by the appellee testified that the land owned by her, and upon which she resides, does not lie within the boundary of the school district. Others, introduced by the appellants, testified that it is included therein. We are not, however, forced to depend in this case upon mere expressions of opinion from witnesses. There is other evidence, by which we can better afford to be guided, as it is the highest known to the law, and is furnished by the record fixing the boundary of the district, which was in the office of the clerk of the Marion county court, and introduced in evidence upon the trial, together with the accompanying map:

passing it, the line strikes the Rolling Fork; then runs up that stream to where South Fork joins it; thence up South Fork to where the land of Wm. Thornton touches that stream, at which point, by consent of the trustees given after the line was originally fixed, it was made to diverge so as to include his (Wm. Thornton's) residence, after which it again returns to the South Fork, which stream it follows until the mouth of Old Lick creek is reached. Here the line again diverges so as to include the residence of Frank Dean, after which it runs to the tollhouse on the Lebanon & Hustonville Pike, and from that point through and including the "Narrows" until it reaches B. N. Isaac, who is not included; and from his residence the line soon reaches the North Rolling Fork, with or contiguous to which stream it continues until the beginning point is reached, at Spaulding's. It appears from the



The boundary referred to is as follows: "Beginning at Sam Spaulding's, excluded; thence across the knob to Dr. Tucker's farm, excluded; thence up the Rolling Fork (river) and South Fork (a tributary of Rolling Fork) to the mouth of Old Lick creek; thence to Frank Dean's, included; thence to the tollhouse on the Lebanon and Hustonville pike, included; thence through the narrow, including all the narrows; thence to B. N. Isaac's farm, excluded; thence down the North Rolling Fork to the beginning. This boundary changed by the consent of trustees to include farm now occupied by Wm. Thornton, no point of the aforesaid boundary being more than two and one half miles from the site of the school buildings hereinafter named." It will be observed that from the beginning point, at Spaulding's, the line runs to the farm of Dr. Tucker, who is excluded. After reaching his place, or upon

map that appellee's land lies wholly on the west side of the Rolling Fork, and, as the school district boundary line calls to run with the South Fork after leaving the Rolling Fork, it must continue with the South Fork until it passes the land of appellee, in order to reach the land of Wm. Thornton. Upon reaching his land the boundary, as already stated, leaves South Fork so as to include his farm, and then returns to the same stream, to continue as farther indicated by the map.

S. G. McElroy, superintendent of common schools, testified that the original boundary was changed by consent of the school trustees so as to include Travis Thornton and Wm. Thornton. We are unable to understand what connection Travis Thornton had with the appellee, unless, as we suspect, she is his daughter, and her land was derived through him, but that fact does not appear

from the record. The school superintendent does not seem to be borne out by the record as to Travis Thornton's having been included in the boundary of the school district by consent of the trustees, for the order of the county court copied into the record shows that only Wm. Thornton was so included.

It is insisted for the appellee that the amount in controversy in this case is not sufficient to give this court jurisdiction of the appeal. If the value of the cattle in controversy and the damages claimed for their detention were all that is involved, the appeal could not be entertained. But that is not all. An attempt has been made to subject the property of the appellee to taxation, which is resisted by her, and in cases involving questions of taxation this court has repeatedly exercised its jurisdiction, no matter how small the amount involved. If the trustees of Graded School District No. 37 have the legal right to enforce the payment of the tax demanded by the appellee, her entire estate—real as well as personal—is liable therefor, or may in the end become so.

Believing the judgment of the lower court to be free from error, the same is hereby affirmed.

DEARING et al. v. MORAN.

(Court of Appeals of Kentucky. Jan. 27, 1904.)

ACTION FOR SERVICES—PLEADING—HUSBAND AS WIFE'S DEVISEE—HOMESTEAD—CLAIMS AGAINST WIFE.

1. Failure of the petition, in an action for personal services, to allege a promise of compensation, is cured by an answer and reply which make a direct issue on the question whether the services were gratuitous.

2. A husband cannot claim a homestead, in land devised to him by his wife, as against a debt of the testatrix.

3. A separate contract by a wife for nursing and care in her last illness is valid.

4. A devisee's voluntary conveyance of land devised to him is no bar to the prosecution of an action to subject the land to a claim against the testator.

Appeal from Circuit Court, Barren County. "Not to be officially reported."

Action by J. T. Moran against E. B. and Pernie Dearing. From a judgment for plaintiff, defendants appeal. Affirmed.

Baird & Richardson, for appellants. Luther James and C. H. Hatchett, for appellee.

HOBSON, J. Rebekah J. Dearing, while sick, was taken to the house of appellee, J. T. Moran, and was nursed and taken care of by him until her death, about two weeks later. She left a will by which she devised all her property to appellant E. B. Dearing, who about a month afterwards married his co-appellant, Pernie Dearing. The property devised consisted of a tract of land which E. B. Dearing has since conveyed to his second wife. Moran brought this suit to recover for the nursing of and attention to the first wife during her last sickness, and to subject the land to his claim. The court allowed him

forty dollars (\$40) for his services, and ordered the land sold for its payment. From this judgment Dearing and wife appeal.

While the evidence is conflicting, the weight of it sustains the chancellor's judgment. It shows that the services were reasonably worth the amount allowed, and that they were rendered upon promise of compensation. While the petition was defective in not alleging such promise, or facts from which a promise would be inferred, this defect was cured by the answer and reply, which made a direct issue on the question whether the services were gratuitous.

E. B. Dearing cannot claim a homestead in the land as against the debt of the testatrix from whom he acquired it. He takes the land under the will of his wife. It is true that as surviving husband he would be entitled to a life estate in the land, but he cannot claim under the will and against it. He conveyed the land to his wife Pernie, as the owner of it, and thereby evinced a purpose to take under the will. When he takes under the will he must take with concomitant burdens. The land was assets of the estate.

The facts warranted the chancellor in concluding that the testatrix agreed to pay Moran for his services. While it was his duty to take care of his wife, she could also contract for nursing, and thus secure herself such comforts as she needed. The devisee takes the property devised to him subject to the debts of the testator, and the voluntary conveyance by E. B. Dearing to his present wife, Pernie, is no bar to the prosecution of the claim. *Carpenter v. Hazelrigg* (Ky.) 45 S. W. 686; *Harrison v. Taylor's Adm'r* (Ky.) 51 S. W. 193; *Schnabel v. Schnabel's Ex'x* (Ky.) 56 S. W. 983.

Judgment affirmed.

LOUISVILLE RY. CO. v. MEGLEMERY.

(Court of Appeals of Kentucky. Jan. 29, 1904.)

CARRIER—INJURY TO PASSENGER—NEGLIGENCE—INSTRUCTIONS—EXCESSIVE DAMAGES.

1. A verdict for \$1,500 for injuries to the leg and head of a man 61 years old was not excessive, where he had not recovered eight months after the injury, and the injuries were such that it then took him twice as long to go to and from his office as before the injury.

2. An instruction that if a street car company failed to use the utmost care to allow a passenger to alight in safety, and to move far enough from the car to prevent his being struck by the trailer, and if such failure caused his injury, the company is liable, was not erroneous, in failing to state that the injured person could not recover if he had not used ordinary care, where it was followed immediately by an instruction that did so state.

3. An instruction that a passenger injured in alighting from a street car could not recover from the company if he would not have been injured but for his failure to use ordinary care is not objectionable as requiring a verdict against the company unless his negligence was the sole cause of the injury.

4. After a passenger had alighted from a street car, so as to be free from injury from

its forward movement, the company owed no further duty, except to use ordinary care to avoid injuring him; and if he was injured by his movement toward the car, and the company's employes, exercising ordinary care, could not prevent the injury after discovering his danger, the company is not liable.

Paynter, J., dissenting.

Appeal from Circuit Court, Jefferson County, Chancery Division.

"Not to be officially reported."

Action by Ed Meglemery against the Louisville Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Fanleigh, Straus & Fanleigh and Kohn, Bond & Spendle, for appellant. M. A., D. A. & J. G. Sachs, for appellee.

HOBSON, J. Appellee filed this action against appellant to recover for injuries which he received while in the act of alighting from one of its cars. The jury, to whom the case was submitted, found for the plaintiff, and fixed the damages at \$1,500. The verdict is not excessive, under the evidence. The proof for the plaintiff shows that he is 61 years old, and has been one of the magistrates of the city for a number of years. On Sunday, August 25, 1902, during the Knight Templars' Conclave at Louisville, he got on one of the motor cars of the defendant at Fourth and Broadway. The motor car had a trailer behind it. When he reached Third and Main he rang the bell to get off. The car stopped. The proof for the plaintiff shows that as he was in the act of getting off, having his right foot on the ground, and his left foot on the step, or between the step and the ground, the cars made a sudden lurch forward, and he was struck by the trailer car, which was about nine inches wider than the motor car, and knocked him down, inflicting painful injuries on his leg and head, from which he had not recovered at the time of the trial, in April, 1903. He was then still unable to use that leg as before. He was laid up at home for a month, was on crutches about two months, and at the trial could walk all right where it was perfectly level; but, in going up and down steps or hills, he had to give his left leg a push to get along. At the time of the trial he still suffered from the injury, and it took him twice as long to walk from home to his office as before he was hurt. The proof for the defendant tends to show that the trailer was no wider than the motor car, and that the plaintiff alighted in safety from the car, and started across the street, when a surrey came by, and in backing from the surrey he backed against the trailer car, and was thus struck. Five or six witnesses were introduced on the trial who were present at the time and saw the occurrence. Two or three testified that the accident occurred as stated by the plaintiff; and about an equal number, that it occurred as claimed by the

defendant. On this testimony, the court instructed the jury as follows:

"(1) The court instructs the jury that it was the duty of the defendant, the Louisville Railway Company, to use the utmost care and skill that prudent men, engaged in the same or like business, are accustomed to use under the same or similar circumstances to enable the plaintiff, Ed Meglemery, to alight from the car in safety, and to move far enough from said car, if such moving away was necessary after so alighting, to prevent his being struck or injured by the trailer with said car; and if you believe from the evidence that the defendant failed to use such care, and that by reason of such failure the plaintiff was prevented from getting out of the way of defendant's car after he alighted therefrom, and was injured thereby, then the law is for the plaintiff, and you will so find.

"(2) It was the duty of the plaintiff, Ed Meglemery, to exercise ordinary care for his own safety in alighting from said car and moving away from the same, if such moving away was necessary; and if you believe from the evidence that the said Meglemery negligently failed to exercise such care, or negligently remained so close to said car as that he was struck by the trailer and injured, and, but for such negligent failure on the part of the plaintiff to move away from said car when he alighted therefrom, said injury would not have been received by him, then the law is for the defendant, and you will so find."

Appellant complains that the first instruction was not modified so as to show that the plaintiff could not recover if he failed to exercise ordinary care; and it is insisted that this error is carried into the second instruction, and that by it the jury was charged not to find against appellee on account of his contributory negligence unless such negligence was the sole cause of his injury. Appellant also complains that the real issue in the case was not presented to the jury by the instructions; insisting that the following instruction, which it asked, should have been given:

"(4) The court instructs the jury that after the plaintiff alighted in the street from the defendant's car, so as to be free from injury by its forward movement, the defendant ceased to owe the plaintiff any further duty, except to use ordinary care to avoid injuring him; and if the jury believe from the evidence that the plaintiff was injured by a backward movement, or movement towards the car, on his part, caused by an approaching vehicle in the street, or from any other cause over which the defendant had no control, and that by ordinary care on the part of the defendant's employes in charge of said car the injury to the plaintiff could not have been avoided after they discovered, or could by ordinary care on their part have discovered, plaintiff's peril, and by the exercise of

ordinary care could then have avoided injuring him by stopping the car, the law is for the defendant, and the jury so find."

We are unable to see that there was any error in instructions 1 and 2 given by the court. They are to be read together, and, when so read, state plainly that the plaintiff cannot recover if he failed to exercise ordinary care, and but for this would not have been injured. In order to find for the defendant under instruction 2, it was not necessary for the jury to believe from the evidence that the plaintiff's negligence was the sole cause of his injury. If it was due in part to the plaintiff's negligence and in part to the defendant's negligence, then he could not recover, if, but for his own negligence, the injury would not have happened. Instruction 4, which was refused by the court, states the law correctly, and, with this instruction before them, the mind of the jury would have been brought more directly to the issue they were to try. It defines the duty owing by the defendant to the plaintiff, and shows when and under what circumstances the duty would cease. It presented to the jury the theory of the case on which alone all the testimony introduced by the defendant was given, and, on the whole case, we conclude that the refusal to give the instruction was prejudicial to the substantial rights of the defendant.

For this error alone, the judgment appealed from is reversed, and the cause remanded for a new trial.

PAYNTER, J., dissents.

CITY OF RICHMOND v. MARTIN.

(Court of Appeals of Kentucky. Jan. 26, 1904.)
PERSONAL INJURY—DEFECTIVE SIDEWALK—
DAMAGES—NEW TRIAL—INSTRUCTIONS.

1. In an action for personal injuries it appeared from the record on appeal that plaintiff's bones were not fractured, that her body was greatly injured, and that she was confined from three to five weeks to her bed, but was now able to walk without crutches. She contended that the injured leg was shorter than the other, and that her general health was permanently impaired, but how far this claim would be sustained by an examination did not appear. The record failed to show any evidence of passion or prejudice on the part of the jury. *Held*, that a verdict for \$1,500 would not be set aside as excessive.

2. In an affidavit on which a new trial was sought in an action for personal injuries caused by falling into a hole in a sidewalk, the affiant, who had testified for plaintiff, stated that he had been mistaken as to the place where she received her injuries, for which reason he would testify, if the case were again tried, that the defect in fact was not so great as the one as to which he had formerly testified. *Held*, that the affidavit was properly disregarded, as at most his testimony would only be cumulative, and the evidence fixed beyond doubt the point of the injury and the dangerous character of the hole, and several witnesses testified as to the circumstances of the accident.

3. Instructions embraced in those given by the court in language wholly free from error or ambiguity were properly refused.

Appeal from Circuit Court, Madison County.

"Not to be officially reported."

Action by Nannie Martin against the city of Richmond. From a judgment for plaintiff, defendant appeals. Affirmed.

J. T. Jackson and J. Tevis Cobb, for appellant. Smith & Bush, for appellee.

SETTLE, J. The appellant seeks the reversal of a judgment of \$1,500 in damages recovered against it by the appellee in the Madison circuit court for injuries to her person, caused, as averred in her petition, by the negligence of the appellant in knowingly permitting a hole to be and remain in its sidewalk on Collins street, within its corporate limits, into which she, without knowing of its existence, fell in going to the house of a neighbor. The answer denied the negligence charged, or that the appellee was injured, and alleged contributory negligence on her part. By consent all affirmative matter in the answer was controverted of record. A trial by jury resulted in a verdict and judgment as indicated, followed by the filing of grounds and a motion by appellant for a new trial, which was refused by the lower court. The evidence showed that the pavement on Collins street at a point near appellee's residence in the appellant city was in a defective and dangerous condition, in that it contained a hole several inches in depth. In passing along the sidewalk in question after nightfall, with no light save what was furnished by a moon entering upon the fifth day of its quarter, the appellee fell into this hole, thereby receiving the injuries complained of. There was no evidence tending to show that she knew of the existence of the hole, or that she had passed over the pavement at that point from the time the hole made its appearance down to the time of her falling into the same. Upon the other hand, the evidence strongly conducted to prove that the officers of appellant charged with the duty of keeping the streets and pavements of the city in repair knew, or by the exercise of ordinary diligence could have known, of the presence in the pavement of the hole, and of its dangerous character, for it had existed for a week or more before appellee received her injuries.

In view of the evidence, the weight of which preponderated in appellee's favor, we are of opinion that the jury were authorized to find for the appellee; but we are further of opinion that in fixing the amount of appellee's damages at \$1,500 they went to the utmost limit. While it appears from the evidence that none of appellee's bones were fractured by the fall into the hole, it does appear that one of her legs and her side and body were greatly wrenched or sprained and otherwise injured thereby; that she suffered greatly physically and mentally, and was confined from three to five weeks to her

bed, from which she finally arose to go about with the aid of crutches, and, though now able to walk without their use, she contends that the injured leg is shorter than the other, and that her general health and strength have been permanently impaired by the injuries complained of. How far this claim would be sustained by the examination of a skilled surgeon, we are unable to say, as such an examination has never been made. She was visited from three to five times, immediately after her injuries were sustained, by a reputable surgeon, but he failed to make a critical or satisfactory examination of her person, though he testified that he did, without removing her clothing, satisfy himself that none of her bones were fractured. While loath to approve the amount of the verdict returned by the jury in appellee's behalf, we are equally loath to disturb it on the ground that it is excessive. Moreover, the record fails to show any evidence of passion or prejudice upon the part of the jury. For these reasons we are of opinion that grounds 1, 2, and 3 in support of a new trial, which relate to objections to the verdict, were all and severally insufficient to authorize the lower court to set aside the verdict.

With reference to alleged errors upon the part of the trial court in the matter of admitting and rejecting evidence set forth in grounds 4 and 5 filed in support of the motion for a new trial, we find it proper to say that no such errors are shown by the record, nor have any such been suggested in the brief of appellant's counsel.

It is contended that the lower court erred in not granting a new trial upon the alleged new evidence disclosed by the affidavit of S. P. Deatherage. Deatherage was introduced by appellee, and proved a fairly good witness in her behalf; but after giving his testimony he discovered, as stated in his affidavit, that he had been mistaken as to the place where appellee received her injuries, for which reason he would testify, if the case were again tried, that the defect in the pavement where appellee was injured was not so great as the one about which he had formerly testified. We do not think it was error for the lower court to disregard the affidavit of Deatherage. At most, his testimony would only be cumulative. The evidence fixed beyond doubt the point where appellee was injured. The dangerous character of the hole which caused her injuries was equally well established, and several witnesses testified without contradiction to the manner in which her leg was injured in the hole, and also as to the manner in which she was extricated. We are therefore unable to see that the testimony of Deatherage would throw any new light on the occurrence.

The only remaining complaint of appellant's counsel is as to the instructions given and refused by the lower court. As to those refused it may be said that several of them,

with the addition of a few words of modification, would contain the law. But there could have been no error in refusing them, for those given by the court embraced all the law, expressed in language wholly free from error or ambiguity. The law applicable to the state of case here presented has been repeatedly declared by this court in the following recent cases: *City of Midway v. Lloyd*, 74 S. W. 195; *City of Covington v. Asmon*, 68 S. W. 646; *City of Wickliffe v. Moring*, 68 S. W. 641; *City of Covington v. Johnson*, 69 S. W. 703; *City of Louisville v. Johnson*, 69 S. W. 803. Tested by the rule announced in the foregoing authorities, the appellant was properly held liable under the facts disclosed by the record.

Wherefore the judgment is affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. NEAL.*
(Supreme Court of Arkansas. March 14, 1903.)

RAILROAD BRAKEMAN—NEGLIGENT KILLING—RULES OF INTERSTATE COMMERCE COMMISSION—UNIFORM DRAW BARS—NEGLIGENCE—EVIDENCE—SUFFICIENCY—DIRECTION OF VERDICT.

1. A verdict for defendant should not be directed unless it can be said as a matter of law that no recovery can be had on any reasonable view of the facts.

2. Pursuant to Act Cong. March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3175], the Interstate Commerce Commission promulgated a rule that the maximum variation from the standard height of drawbars to be allowed between the drawbars of empty and loaded cars engaged in interstate commerce should be three inches. In an action against a railroad for the death of a brakeman, who was crushed between two cars, the conductor of the train testified that as the cars which deceased was endeavoring to couple came together he noticed that the drawhead of the car having an ordinary drawbar was from two to three inches higher than the drawbar of the other car, which had the automatic coupling, and that the face of a common drawbar is only five or six inches wide, while an automatic drawbar is eight inches wide. *Held*, that it was a question for the jury whether the railroad had failed to comply with the rule.

3. Failure of the plaintiff to show that the center of the draft line of the drawheads of the two cars was not even was immaterial, the rule not requiring that the draft lines should be even, but that the centers of the drawbars should be of a certain standard height.

4. It was not necessary for plaintiff to show knowledge on the part of defendant that it had not complied with the rule.

5. Failure of the railroad to comply with the rule does not authorize a recovery for the death of a servant unless such failure was the proximate cause of the death.

6. The fact that the negligence of a third person contributes to that of the master in causing injury to a servant is no defense to an action against the master.

Appeal from Circuit Court, Crawford County; Jephtha H. Evans, Judge.

Action by Jonathan Neal against the St. Louis, Iron Mountain & Southern Railway

*Rehearing denied January 1, 1904.

¶ 6. See Master and Servant, vol. 24, Cent. Dig. § 515.

Company. From a judgment for defendant, plaintiff appeals. Reversed.

George W. Taylor was employed by the St. Louis, Iron Mountain & Southern Railway Company as a brakeman on one of its freight trains. On the 18th of January, 1899, the train upon which he worked left Van Buren, Ark., for Coffeyville, Kan. The train reached Salisaw, Ind. T., about 4 o'clock in the afternoon, and had two cars to be left at that point. For the purpose of putting these cars on the side track, the train was uncoupled, and the engine with 14 or 15 cars attached was run about half a mile farther west, leaving the caboose and six cars standing on the main line. After the 2 cars that were to be left at Salisaw were put on the side track, the 12 or 13 cars which were attached to the engine were pulled out on the main track, and then pushed or kicked back towards the caboose and cars that had been left on the main track. The conductor of the train mounted the front or last car that was being pushed back, in order, by the use of the brakes, to govern the speed of the train. This car upon which the conductor stood was equipped with the old-fashioned link and pin drawbar. It had a capacity of 40,000 pounds, and was loaded with shingles which weighed some 23,000 or 24,000 pounds. The car farthest to the west of those cars attached to the caboose, and to which the car on which the conductor rode was to be coupled, had a capacity of 60,000 pounds, and was loaded with lumber, the weight of which was about equal to the capacity of the car. This car was equipped with an automatic coupler, but the drawhead was fixed so that the link and pin coupler could be used when it was necessary to couple to a car having that coupling. Before these cars came together, Taylor went between them, and inserted the link in the drawhead of the car having the automatic coupler. When the cars were nearly together, he endeavored to get from between the cars, and was caught between the grab-irons and the car and was killed. Jonathan Neal was appointed administrator of the estate, and brought this action against the railway company to recover damages alleging that the company was guilty of negligence in that the drawheads on the cars were not of the standard and uniform height required by an act of Congress, and that the injury was caused by this breach of duty on the part of the company. The defendant answered, and denied the charge of negligence, and denied that it had in any respect failed to comply with the act of Congress mentioned. After hearing the evidence on the part of the plaintiff, the circuit court held that plaintiff had failed to make out a case, and directed a verdict and judgment for the defendant. Plaintiff appealed.

Chew & Fitzhugh and W. H. Neal, for appellant. Dodge & Johnson and Oscar L. Miles, for appellee.

RIDDICK, J. (after stating the facts). This is an action against a railway company to recover damages caused by the death of George Taylor, one of its employes. The plaintiff is the administrator of the estate of Taylor, and he alleges that Taylor's death was occasioned by the failure of the company, while engaged in interstate commerce, to provide its cars with drawbars of uniform and standard heights, as required by an act of Congress. The circuit court, after hearing the evidence on the trial, held that plaintiff had failed to make out a case, and directed a verdict for the defendant. The question before us is whether the evidence was sufficient to require that the case be submitted to the jury for its decision.

The practice of directing a verdict for the defendant when it is clear that the evidence is not sufficient to make out a case for plaintiff is a wise one, for it saves time and costs, and expedites the business of the court; but a case should not be withdrawn from the jury in that way unless it can be said as a matter of law that no recovery can be had upon any reasonable view of the facts which the evidence tends to establish. *Catlett v. St. L., I. M. & So. Ry. Co.*, 57 Ark. 461, 21 S. W. 1062, 38 Am. St. Rep. 254; *Texas Ry. Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 38 L. Ed. 829; 6 Ency. Plead. & Prac. 679, 680.

In order to determine whether it was proper to direct a verdict in this case, we must notice the facts which the evidence tends to establish, and also the law bearing on the same. The act of Congress upon which plaintiff bases his right of action was passed for the protection of employes of railroad companies engaged in interstate commerce, and for other purposes. It authorized the Interstate Commerce Commission to promulgate an order that "the standard height of drawbars for freight cars measured perpendicular from the level of the tops of the rails to the center of the drawbars for standard-gauge railroads in the United States, shall be 34½ inches, and the maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars shall be three inches." Act Cong. March 2, 1898, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 8175]. Now, the conductor of the train upon which Taylor was employed testified that, as the two cars which Taylor was endeavoring to couple came together, the witness, who was standing on one of the cars, noticed that the drawhead of the car having the common drawbar was from two to three inches higher than the drawbar of the other car having the automatic coupling. He further stated that the face of a common drawbar is only five or six inches in width, while that of the automatic drawbar is eight inches in width; and it follows that, if the centers of these drawbars had been even, the top of the common drawbar would have been an inch or inch and a half lower than the top of the automatic. As this testimony

tended to show that, instead of being lower, the top of the common drawbar was from two or three inches higher, than the top of the automatic, it also follows that the evidence tends to show that at the time of this accident there was a difference between the centers of the drawbars of the two cars which Taylor was trying to couple of from three to four inches. The automatic drawbar was the lower of the two, and the witness stated that Taylor put the link in the automatic drawbar, and endeavored to raise it high enough to enter the drawhead of the other car which was approaching; that it seemed that he could not get it high enough, and that for this reason he dropped it, and undertook to get from between the cars. The common drawbar struck on top of the link in the automatic drawbar, slid along it, and, striking the knuckle on the automatic drawhead, broke it off, and then passed along the top of the automatic drawbar so that the two cars came together, catching Taylor between the grab-irons, and causing his death. It seems to us that under this state of the evidence it was a question for the jury to say whether there was a failure on the part of the company to comply with the act of Congress requiring companies engaged in interstate commerce to use cars with drawbars of standard and uniform heights, and whether this failure to comply with the statute was the cause of Taylor's death. The evidence may not be very satisfactory, for it is doubtful whether the conductor, while on top of the car, could tell accurately the slight difference between the drawbars as they came suddenly together; but the weight of such evidence is a matter for the jury to determine, and not the court.

Counsel for appellant contend that there is no evidence to show that the centers of the draft line of the drawheads of these two cars were not even, and therefore no evidence to show that the variation in the draft line of the two cars was more than that permitted by the act of Congress. But the act of Congress does not require that the draft line of cars used in interstate commerce should be even, but requires that the centers of the drawbars should be of the standard and uniform height mentioned in the act. The act says nothing about draft line, but requires that the centers of the drawbars should be of uniform height, with the exception that a variation is permitted between loaded and unloaded cars. For this reason the failure to show what the variation was between the centers of the draft line of the drawbars on these two cars was not material.

Again, counsel for appellant contend that if it be admitted that the drawbars were defective, still there is no evidence that the defendant had notice of the defect, and that on that ground plaintiff failed to make out his case. It is true that, as a general rule, the master is only bound to use ordinary care to provide suitable and safe machinery for the servant,

and is liable for damages caused by defective machinery only when the defect is the result of negligence on his part; as where he neglected to repair the defect after having notice of the same, or when, by the use of ordinary care, he would have known that the machinery or appliances were defective. In such cases the plaintiff must show knowledge of the defect on the part of the master, or that his lack of knowledge was due to negligence, for the mere fact of an injury caused by a defect does not of itself make out a case of negligence. But it is different where the injury is caused by a violation of a statutory duty on the part of the master. The statute upon which this case is based does not say that the company shall use ordinary care to provide its cars with drawbars of a certain height, but it imposes as a positive duty upon railway companies that they shall do so. Where it is shown that the company has violated this statutory duty, that fact of itself makes out, if not a case of negligence per se, a prima facie case of negligence sufficient to go to the jury, if it be also shown that the injury was caused by this failure of the company. 3 Elliott on Railroads, § 1155; Dresser. Employers' Liability, § 51. It must, of course, be shown that the failure of the company to comply with the statutory requirement was the proximate cause of the injury, or that it contributed to the injury. If, in this case, the proximate cause of the injury was the great and unusual force with which the cars were pushed or kicked back against the other cars, then, if that was caused by the act of a fellow servant, plaintiff could not recover. But this carelessness of a fellow servant would not prevent a recovery if the failure of the master to provide the kind of drawbars required by the statute also contributed to the injury. The contributory negligence of the plaintiff or the party injured is usually a good defense, but the fact that the negligence of a third person contributed with that of the master to cause the injury is no defense, for in such a case each of the wrongdoers is responsible for the entire injury. The plaintiff can have but one recovery, but in such a case he has the option to sue either or both of the parties that caused his injury. Chicago, etc., Ry. Co. v. Chambers, 15 C. C. A. 327, 68 Fed. 148.

The act of Congress requiring railroad companies to equip their cars with drawbars of standard and uniform heights specifically provides that an employé injured by the failure of a company to comply with the act shall not be deemed to have assumed the risk by reason of his knowledge that the company had not complied with the statute, and there is no question of assumed risk presented.

After consideration of the law and the evidence in this case, we are of the opinion that the circuit court erred in directing a verdict for defendant. The judgment is therefore reversed, and a new trial ordered.

MCCORD et al. v. NABOURS et al.

(Supreme Court of Texas. Jan. 28, 1904.)

WRIT OF ERROR—PENDENCY OF CERTIFICATE OF DISSENT.

1. Rev. St. 1895, art. 1040, provides that in case of dissent by a judge of the Court of Civil Appeals it shall, on motion of a party, or on its own motion, certify the point of dissent to the Supreme Court. Article 1042 provides that after the question is decided the Supreme Court shall notify the Court of Civil Appeals of the decision, and it shall be entered as the judgment of the Court of Civil Appeals. *Held*, that a certificate of dissent having been made by the Court of Civil Appeals, on motion of a party to certify it and other questions, its judgment is not final, so as to allow of writ of error under article 941; and that while the certificate of dissent is pending before the Supreme Court it will not grant a writ of error, though the parties ask it to disregard the certificate in case it grants the writ.

Application for Writ of Error to Court of Civil Appeals of Third Supreme Judicial District.

Action by W. A. Nabours and others against A. P. McCord and others. Judgment for defendants was reversed by the Court of Civil Appeals (75 S. W. 827), and defendants apply for a writ of error. Denied.

Ford, Chambers & Sharp, J. K. Freeman, M. J. Moore, M. M. Crane, and N. H. Tracy, for applicants.

GAINES, C. J. This is an application for a writ of error, and we are of opinion that it should be dismissed. The applicants were defendants in the trial court, and the trial resulted in a verdict and judgment in their favor. The cause having been appealed, the Court of Civil Appeals adjudged that the judgment should be reversed, and the cause remanded for a new trial. In this result all the judges concurred; but the opinion of the majority announced a proposition of law, applicable and perhaps necessary to a proper decision of the case upon a new trial, to which one of the judges filed a written dissent. The judgment of the court reversing the judgment of the trial court and remanding the cause was entered on the 3d day of June, 1903. On the 15th day of the same month the appellees filed a motion for a rehearing, and on the 18th they also filed a request for additional findings of fact, and also a motion that the Court of Civil Appeals should certify the question of dissent and also other questions to the Supreme Court. On the day last named the court overruled the motion for a rehearing, and also the motion for additional findings of fact, but granted the motion in so far as to certify the point of dissent. That question was accordingly certified to this court, and was here set down for a hearing on the 18th day of January, 1904. However, on December 12, 1903, the appellees filed in this court a petition for a writ of error, and at the same time filed a motion asking that the hearing of the certified question be postponed until the ap-

plication for the writ of error should be determined. On the 20th day of January, 1904, an agreement was filed in this court, signed by counsel for all parties, consenting that this court should first pass upon the application for a writ of error, and, in case it was granted, the certificate of dissent should be disregarded; but that, in case it should be refused, the question of dissent should be heard and determined.

This is a proceeding without precedent in this court, and it seems to us a very anomalous one. Articles 1040, 1041, and 1042 of the Revised Statutes of 1895 contain the only provisions of our law which authorize the Courts of Civil Appeals to certify questions of dissent. They are as follows:

"Art. 1040. When any one of said Courts of Civil Appeals shall in any cause or proceeding render a decision in which any one of the judges therein sitting shall dissent as to any conclusions of law material to the decision of the case said judge shall enter the grounds of his dissent of record, and the said Court of Civil Appeals shall, upon motion of the party to the cause, or on its own motion, certify the point or points of dissent to the Supreme Court.

"Art. 1041. When a certificate of dissent is sent up by any Court of Civil Appeals it shall be the duty of the clerk to send up a certified copy of the conclusions of fact and law as found by the court, and the questions of law upon which there is a division, and the original transcript, if so ordered by the Supreme Court, and thereupon, if the Supreme Court so direct, the clerk shall set down the same for argument and notify the attorneys of record.

"Art. 1042. After the question is decided the Supreme Court shall immediately notify the Court of Civil Appeals of their decision, and the same shall be entered as the judgment of said Court of Civil Appeals."

It is clear that the purpose of allowing a question pending before the Court of Civil Appeals to be certified for the decision of this court is to guide that court in the ultimate determination of the case. Therefore the Court of Civil Appeals must retain jurisdiction of the case until they are officially notified of the answer of the Supreme Court to the question certified, and until it has acted in accordance with that answer. That such was the course of procedure contemplated by our statute is shown by the language of article 1042, already quoted. The words "and the same shall be entered as the judgment of said Court of Civil Appeals" must necessarily mean, as we apprehend, that that court shall proceed to make a final judgment in accordance with the decision of the Supreme Court—that is to say, if the Supreme Court shall concur with the majority of the Court of Civil Appeals, the latter court shall affirm its previous rulings; if not, it shall reverse that ruling and enter judgment accordingly. Until the Supreme

Court has decided a question of dissent, which has been certified and the Court of Civil Appeals has acted upon its decision, the decision of the Court of Civil Appeals is suspended, and the judgment it has previously rendered has not that quality of finality which is necessary to give this court jurisdiction to grant a writ of error.

It may be that, where a certificate of dissent has been sent to this court upon motion of one of the parties to the cause, such party has the right to waive the certificate and to apply for a writ of error. It would seem, however, that in such a contingency the proper practice would be to apply to the Court of Civil Appeals for the withdrawal of the certificate, when that court might either grant the motion or let the certificate stand as a certificate upon its motion. Here we are asked to disregard the certificate only in the event we grant the writ of error. Besides, in this case the appellees did not simply move the Court of Civil Appeals to certify the question upon which the judges of that court disagreed, but requested that other questions be certified. The Court of Civil Appeals certified the question of dissent only. It may be that they would have certified the question without motion or request therefor.

We conclude that so far the judgment of the Court of Civil Appeals is not final, and that therefore no writ of error lies thereto. Rev. St. 1895, art. 941. The application for the writ of error is therefore dismissed.

GULF, C. & S. F. RY. CO. v. JOHNSON.

(Supreme Court of Texas. Jan. 28, 1904.)

WITNESS—IMPEACHING QUESTION—FINALITY OF ANSWER.

1. Where a witness is asked, for the purpose of impeaching him, if he had ever been in the penitentiary, his answer must be accepted as final, and evidence to contradict the same is inadmissible.

2. The Supreme Court has no authority to answer an abstract question certified by the Court of Civil Appeals.

Certified Questions from Court of Civil Appeals of First Supreme Judicial District.

Action by Oceana Johnson against the Gulf, Colorado & Santa Fé Railway Company. Statement and questions certified from the Court of Civil Appeals. Questions answered in part.

J. W. Terry and A. H. Culwell, for appellant. Geo. B. Griggs and Burke & Tarver, for appellee.

BROWN, J. This is a certified question from the Court of Civil Appeals for the First Supreme Judicial District. The statement and question are as follows:

"Appellee, who is a minor, brought this suit against the appellant by her next friend to recover damages for personal injuries alleged to have been inflicted upon her through appellant's negligence. The petition alleges,

in substance, that on or about July 1, 1894, while plaintiff, who was then an infant about three months old, was lying in her cradle in her home near the railroad track of defendant in the city of Houston, said cradle and the covering thereon was set on fire by sparks emitted from a passing engine operated by defendant over its said railroad, and said fire was communicated to the clothing and person of plaintiff, and she was thereby painfully and severely burned and injured. It is further alleged that said engine was equipped with defective appliances to prevent the escape of sparks, and was operated in an improper and careless manner, and that the injury to plaintiff was due to the negligence of defendant in failing to properly equip said engine and in operating same in a careless manner. The defendant answered by a general demurrer and general denial. The cause was tried by a jury in the court below, and resulted in a verdict and judgment for the plaintiff in the sum of \$3,500.

"One of the material issues raised by the evidence was whether the fire by which plaintiff was burned originated from sparks emitted by defendant's engine or from a burning cigar which plaintiff's father, W. T. Johnson, was smoking in the room in which plaintiff was lying when her clothing became ignited. Upon this issue the evidence was sharply conflicting; W. T. Johnson and other witnesses for plaintiff testifying that he was not smoking in plaintiff's room at or near the time the fire was discovered. Several witnesses for the defendant contradicted this testimony.

"George Downs was one of defendant's witnesses who testified to the effect that just before the fire was discovered in plaintiff's clothing he saw W. T. Johnson sitting in the window near plaintiff's cradle, smoking a cigar. On cross-examination this witness was asked where he was on certain days in the months of January, March, and April, 1894, and in reply stated he was in or near the city of Houston on the several dates named. He was then asked if he had ever been in the penitentiary, and replied that he had not. For the purpose of impeaching this witness plaintiff introduced, over the objection of the defendant, the testimony of J. S. Rice, who stated that he was the superintendent of the State Penitentiary at Huntsville, and had charge of the records of that institution, and attached to his deposition a certificate purporting to contain a copy of said prison records as the same related to a convict named George Downs. This certificate shows that an inmate of the penitentiary named George Downs was convicted in the district court of Hardin county at the March term, 1893, of theft of property over the value of \$20, and was sentenced by said court on 3d day of March, 1893, to two years' confinement in the penitentiary; that he was received in the penitentiary on the 12th of April, 1893, and served there for one year and

fourteen days, having been pardoned in April, 1894. Plaintiff then proved by Julia Downs, mother of the witness George Downs, that said witness was the George Downs mentioned in the certificate attached to the testimony of the witness Rice. To the introduction of this testimony the defendant, as shown by the bill of exceptions appearing in the record, made the following objections: "To all of which questions the defendant objected, it appearing that the purpose of said testimony was simply to impeach said witness George Downs, who had testified in this case on behalf of the defendant, and who had said, in response to a question propounded to him by plaintiff herein, that he had not been in the penitentiary. The defendant therefore objected to the testimony on behalf of the plaintiff by J. S. Rice, for the reason that such was not the proper way to prove that a man had been convicted of a crime; that the same was secondary evidence, and was not the best evidence of such conviction, and, further, that the law required penitentiary officials to keep a record of the men confined in said penitentiary, and therefore that a certified copy of such record should be produced, and not a statement from a witness as to what such record contained; that same was secondary evidence, and, further, because it was not shown that the witness was the keeper of the prison records; and for the further reason that this was an attempt to impeach the witness George Downs upon an immaterial issue, and that he could not be impeached in the trial of a civil case by showing that he had been confined in prison.' It was not shown by any other evidence in the case that George Downs had ever been in the penitentiary.

"Upon the foregoing statement we respectfully certify for your decision the following questions:

"Did the trial court err in refusing to sustain defendant's objection to the testimony of the witness Rice?

"In event the court should hold that the testimony was inadmissible upon the ground that it was not the best evidence of the fact sought to be proven, we ask, in view of another trial, that the question of whether the fact that the witness had been in the penitentiary was admissible for the purpose of impeaching his character be also answered."

We answer that the trial court erred in not sustaining the defendant's objections to the evidence of the witness Rice. The plaintiff's counsel had no right to ask the witness Downs if he had been in the penitentiary, and, after receiving a negative answer, to contradict the witness by proving that he had been confined in the penitentiary. If such question be asked, the answer must be accepted as final. *People v. McKeller*, 53 Cal. 65; *Lawrence v. Barker*, 5 Wend. 305; *Hart v. State*, 15 Tex. App. 233, 49 Am. Rep. 188; *Hill v. State*, 18 Tex. App. 673; 1 Green. Ev. § 449.

"Whether the fact that the witness had been in the penitentiary was admissible for the purpose of impeaching his character" has not arisen in this case. It is an abstract question which may never arise, and we have no authority to answer it.

KINNEY v. STATE.

(Court of Criminal Appeals of Texas. Jan. 13, 1904.)

CRIMINAL LAW—HABITUAL CRIMINALS—PREVIOUS OFFENSES—INDICTMENT—OBJECTIONS—SENTENCE.

1. Where an indictment charged defendant with unlawfully exhibiting a gaming table for the purpose of gaming, and then alleged that defendant had previously been convicted in the same court of the same offense charged in the indictment, as authorized by Pen. Code 1895, art. 1014, providing for an increase in punishment where defendant had previously been convicted "of the same offense," the indictment was not objectionable as alleging an offense of which accused had been previously put in jeopardy, since the words "the same offense," as used therein, should be construed as meaning an offense of the same character only.

2. Where the punishment assessed in a prosecution for exhibiting a gaming table for the purpose of gaming did not exceed that authorized by Pen. Code 1895, art. 382, for the first offense, defendant could not object that the indictment alleged previous convictions, which, under Pen. Code 1895, art. 1014, would have authorized the court to have increased the punishment.

Appeal from Tarrant County Court; R. F. Millam, Judge.

Kid Kinney was convicted of exhibiting a gaming table, and he appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of exhibiting a gaming table, and his punishment assessed at a fine of \$100 and 40 days' confinement in the county jail; hence this appeal.

There is no statement of facts in the record, and only one bill of exceptions. This questions the action of the court taking into consideration in assessing the punishment the former convictions of appellant in other cases for similar offenses. The indictment charges appellant with the offense of unlawfully exhibiting a gaming table for the purpose of gaming, and then alleges that appellant had previously been legally convicted in the same court in causes Nos. 24,405, 24,259, and 24,260, being three in number, of the same offense charged in the indictment against appellant. This indictment seems to have been brought under article 1014, Pen. Code 1895, which authorizes an increase in punishment where appellant had previously been convicted of the same offense. This statute appears to have been upheld in *Long v. State*, 36 Tex. 6. However, that case was reversed because proof was admitted of other previous convictions when

there was no allegation of such convictions in the indictment. And to the same effect see 1 Bishop's Cr. Law, 961; Bishop, Stat. Crimes, § 178. The authorities all appear to hold that the matter of punishment pertains to the remedy, and is no part of the definition of the offense. However, in order to enhance the punishment on account of previous convictions, this must be alleged and proven. We do not understand appellant in his bill of exceptions to set up the question of former jeopardy, or claim the indictment should have been quashed because it alleges convictions for the same offense. If it be conceded that appellant intended to raise this question on the indictment, still we do not believe it would have been well taken. The indictment alleges that he had been previously convicted in said causes of the same offense, and this follows the language of the statute. According to our interpretation of "the same offense" here means an offense of the same character, and not the same identical transaction. In the absence of a statement of facts or any bill showing that the other offenses were the identical offenses charged in this indictment against appellant and involving the same transaction, we presume they were different offenses of the same character. But, so far as the punishment here adjudged against appellant, it was only a fine of \$100 and 40 days' confinement in the county jail, which did not exceed the punishment prescribed under article 382, Pen. Code 1895, for the first offense. It occurs to us this eliminates altogether the question of former convictions. If the court had assessed a punishment of \$300, and imprisonment in the county jail for 270 days, as for the third offense, then appellant might have had some plausible ground for his contention. But, as shown above, even in that case his contention could not be sustained.

There being no error in the record, the judgment is affirmed.

KINNEY v. STATE.

(Court of Criminal Appeals of Texas. Jan. 13, 1904.)

CRIMINAL LAW—STATUTES—MISDEMEANOR—HABITUAL CRIMINALS—SUBSEQUENT CONVICTIONS—INCREASED PUNISHMENTS—JEOPARDY.

1. Pen. Code 1895, art. 1014, providing for an increase of punishment in subsequent convictions for the same offense, is constitutional.

2. Pen. Code 1895, art. 1014, providing for increased punishment in cases of subsequent conviction for the same offense in cases of misdemeanor does not place the defendant twice in jeopardy for the same offense.

Appeal from Tarrant County Court; R. F. Milam, Judge.

Kid Kinney was convicted of exhibiting a gaming table, and he appeals. Affirmed.

¶ 1. See Criminal Law, vol. 15, Cent. Dig. § 3254.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of exhibiting a gaming table, and his punishment assessed at a fine of \$100 and 40 days' confinement in the county jail. The indictment charges appellant had been legally convicted in three cases charging the same offense charged against him in this indictment. The record contains no statement of facts nor bill of exceptions. However, appellant insists in his motion for new trial that the judgment of the court is contrary to the law. The judgment shows the following: "It appearing to the court that defendant has before been convicted in causes No. 24,405, 24,229, 24,250, as alleged in the indictment, the court now here assesses his punishment at a fine of \$100 and imprisonment in the county jail for 40 days; said punishment being increased by reason of each of said former convictions." Article 1014, Pen. Code 1895, provides: "If it be shown on the trial of a misdemeanor that defendant has been once before convicted of the same offense, he shall on a second conviction receive double the punishment prescribed for such offense in ordinary cases, and upon a third or any subsequent conviction for the same offense the punishment shall be increased so as not to exceed four times the penalty in ordinary cases." See, also, article 64, Pen. Code 1895. This statute is constitutional. The insistence that it places defendant twice in jeopardy for the same offense is without merit.

The judgment is affirmed.

JONES v. STATE.

(Court of Criminal Appeals of Texas. Jan. 13, 1904.)

CRIMINAL LAW—DISMISSAL OF APPEAL—DEFECTIVE RECORD.

1. In the absence of a certificate that appellant is confined in jail pending the appeal, and a recognizance in the record, as provided by Code Cr. Proc. art. 887, the appeal will be dismissed.

Appeal from Tarrant County Court; R. F. Milam, Judge.

Fred Jones was convicted of exhibiting a game, and he appeals. Appeal dismissed.

Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of exhibiting a game, and fined \$75 and given 30 days in jail. The Assistant Attorney General has filed a motion to dismiss the appeal on the ground that there is no certificate that appellant is confined in jail pending the appeal, nor does the record contain a recognizance as provided in article 887, Code Cr. Proc. An examination of the record shows the motion is well taken, and it is therefore sustained. The appeal is accordingly dismissed.

JONES v. STATE.

(Court of Criminal Appeals of Texas. Jan. 13, 1904.)

CRIMINAL LAW—DISMISSAL OF APPEAL—DEFECTIVE RECORD.

1. If the transcript does not contain a certificate of the clerk that appellant is confined in jail, and there is no recognizance in the record as required by law, the appeal will be dismissed.

Appeal from Tarrant County Court; R. F. Milam, Judge.

Fred Jones was convicted of an offense, and he appeals. Appeal dismissed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. The Assistant Attorney General moves to dismiss the appeal on the ground that the transcript does not contain a certificate of the clerk that appellant is confined in jail, nor is there a recognizance in the record, as required by law. The motion is well taken. The appeal is accordingly dismissed.

FULTON v. STATE.

(Court of Criminal Appeals of Texas. Jan. 13, 1904.)

CRIMINAL PROCEDURE—RECOGNIZANCE.

1. A recognizance which bound an appellant in a criminal case to appear before the trial court "from time to time of the same" is not a substantial compliance with Code Cr. Proc. art. 887, under which it should bind him to appear "from term to term."

Appeal from Grayson County Court; G. P. Wehb, Judge.

From a conviction for crime, Sam Fulton appeals. Dismissed.

Howard Martin, Asst. Atty. Gen., for the State

DAVIDSON, P. J. The recognizance bound appellant to appear before the trial court "from day to day and from time to time of the same, and not depart," whereas it should have bound appellant to appear before that court "from day to day and from term to term, and not depart," etc. "From time to time" is not a substantial compliance with the form of recognizance provided in article 887, Code Cr. Proc., which requires the appearance "from term to term."

The motion to dismiss is sustained. The appeal is accordingly dismissed.

NIX v. STATE.

(Court of Criminal Appeals of Texas. Jan. 20, 1904.)

HOMICIDE—SELF-DEFENSE—CARRYING ARMS.

1. An instruction that if, just prior to the killing, deceased stepped back, and as he did so put his right hand to his pocket and said to defendant, "You will not move another bale of hay," and if from the acts of deceased, or from

his words coupled with his acts, there was created in the mind of defendant a reasonable apprehension that he was in danger, he should be acquitted, was erroneous for requiring the jury to find that such words were spoken, as defendant might have been justified in acting in self-defense without such words being coupled with the act.

2. Where there was substantial evidence in support of defendant's theory of self-defense, an instruction that "the law of self-defense applies to a defensive and not to an offensive act, and is limited to necessity or apparent necessity," and that if defendant, at the time he fired the shot, did not have reasonable ground for believing, and it did not reasonably appear to him, viewing the circumstances from his standpoint, etc., was erroneous for the limitation with which it was prefaced, as it had a tendency to impress the jury that the court did not believe the defensive theory.

3. Where defendant had testified that he had carried his pistol for the purpose of defending himself, he was entitled to an instruction that he had a right to carry it with him if he had reason to believe that he might have trouble or that deceased would do him serious bodily harm or take his life, without a qualification requiring the jury to find that he carried it without hostile intent.

Appeal from District Court, Hunt County; H. C. Connor, Judge.

Barto Nix was convicted of manslaughter, and appeals. Reversed.

Bennett & Jones, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of manslaughter, and given the minimum penalty.

To the following portion of the charge an exception was reserved: "If you believe from the evidence that just prior to the killing deceased stepped back, and, as he did so, put his right hand to his pocket and said to the defendant, 'You will not move another bale of hay,' or said, 'You damned son of a bitch, you will not move another bale of hay,' and if you believe from the acts, if any, of the deceased, or from his words, if any, coupled with his acts, there was created in the mind of the defendant a reasonable apprehension that he (the defendant) was in danger of death or serious bodily injury at the hands of the deceased," etc.—you will acquit. We believe this charge, under the facts of the case, was error, because it required the jury to believe, before they could acquit, from the facts, that deceased used the expression set out in the charge, and that they were required further to couple these words with the acts of the defendant before he could justify. The testimony was contradictory upon this point. The state's only eyewitness was a boy named Hill. Bearing upon this immediate portion of the difficulty, or the facts adduced, this witness stated he went with defendant to the scene of the homicide—which was a house or barn in which hay belonging to both deceased and appellant was stored—deceased being a renter of appellant; that appellant was using some scales for the purpose of weighing

may he was selling from this house, and had placed the scales on the inside of the barn or house; that deceased picked them up and moved them on the outside, and appellant said to him, "Just leave them alone." Deceased went on and set them out as if he did not hear. This witness further stated that appellant remarked to deceased, "Do you want any of it?" and deceased said, "Do you want any?" Appellant said, "You get out of here." Deceased replied, "I don't have to; this is my barn." Appellant shot deceased with a pistol. When appellant made the remark, "Do you want any of it?" he pulled his pistol and held it out in front of him. This witness further says that he was not looking at deceased at the time of the shooting, but was closely observing appellant, and did not see any move on the part of deceased to draw his pistol. The evidence for the defense along this line was that appellant told deceased not to set the scales out of the house; that he had seen a lawyer in regard to their troubles, and deceased said that the lawyer could not settle his part of it. Appellant made a remark which was not heard by witness Jim Nix, but at this juncture deceased threw his hand to his right front pocket, and said, "You damned son of a bitch, I am here to see that you never move another bale of hay." Appellant immediately drew his pistol and shot. This witness was watching both parties. Appellant testified in his own behalf that deceased went into the barn, picked up the scales, and set them out just north of the chimney. Up to this time nothing had been said between the parties, except "Good morning." As deceased set the scales out, appellant told him not to do that, that it was his (appellant's) hay, and he was going to get it. Deceased said, "Show your papers." Appellant replied, "The wagons will be my papers when they come." Deceased stepped back, threw his hand to his pocket, and said, "I am here to see that you never move another bale of hay." As he made this remark, appellant fired. There was only one shot. It is made further to appear that, when the body of deceased was examined, the pistol was partly out of the pocket to which appellant and his witness show he threw his hand. Appellant was entitled to a clear charge affirmatively setting forth his theory of this transaction, without coupling these matters together, or limiting his right of self-defense by making a conjunction of the two necessary for the jury to acquit. Evidence of the state excludes the statements proved by defendant and his witnesses. Therefore the jury may not have believed this theory of the defendant's case, and the court had made it necessary, by the charge, for them to believe these remarks were made by deceased, in order to return a favorable verdict.

The court charged the jury in these words: "But the law of self-defense applies to a defensive and not an offensive act, and is lim-

ited to necessity or apparent necessity, as above explained. Therefore, if you believe from the evidence that at the time the defendant fired the shot he did not have reasonable ground for believing, and that it did not reasonably appear to defendant, viewing the circumstances from his standpoint," etc., you will acquit. Upon another trial we believe that this limitation on self-defense should not be given. It has a tendency to impress the jury with the fact that the court did not believe the defensive theory, that is, that defendant brought about the difficulty or produced the occasion. The evidence pro and con, as already stated, places the immediate facts of the killing on rather close lines; and if the testimony for the state was true, or believed by the jury, this charge was calculated to impress the jury that the court did not believe the defensive theory of it, and may have turned the scales in the minds of the jury adversely to appellant.

Appellant requested the following instruction: "That the defendant had a right to carry the pistol with him to get and remove his hay from the deceased's barn if defendant believed or had reason to believe that he might have trouble, or if he believed or had reason to believe that deceased would do him serious bodily harm or take his life." This charge was given with the following qualification, "and if you believe, in addition to the foregoing, that defendant carried the pistol without any hostile intentions, but for the purpose of defending himself." We do not believe this qualification should have been inserted. The court had already charged the jury that appellant had the right to carry the pistol to the barn, and appellant had testified that he carried it with him to defend himself, in case deceased attacked him. This he had the lawful right to do, and clearly the jury understood, from the defendant's testimony, that he carried the pistol for the purpose of defending himself against an attack of deceased; and they may have further believed, and doubtless did, that this manifested hostile intentions, and in one sense of the word perhaps it did; but still he had the right to carry it to protect himself, and even to shoot, if necessary to defend his life or his body from serious injury. The carrying of the pistol for the purpose of defending himself from an anticipated attack, for which he seemed to have decided reasons to draw the inference, would in one sense carry with it the idea of hostile intention; but as understood by appellant, if his testimony is believed, it was not offensive, but defensive. A man may carry a pistol for the purpose of defending himself against an anticipated attack, and with the further intention, if the attack came upon him in such shape that it was necessary to use the pistol in a deadly manner, to so use it, without being guilty of a criminal hostile intention.

There are other questions of more or less

importance growing out of the speeches and argument of the prosecution, and the conduct of the jury upon their retirement. These will be avoided upon another trial, and are therefore not discussed.

For the errors mentioned, the judgment is reversed, and the cause remanded.

DINA v. STATE.

(Court of Criminal Appeals of Texas. Jan. 13, 1904.)

RAPE—ASSAULT—EVIDENCE—SUFFICIENCY—INSTRUCTIONS—WITNESSES—IMPEACHMENT—TRIAL—REMARKS IN CLOSING—APPEAL—PRESERVATION OF EXCEPTIONS.

1. In a prosecution for assault with intent to rape, where defendant proved that prosecutrix had brought suit for damages against the railroad on account of the alleged assault—the same having been committed on the cars of the railroad—it was proper for the state to show, for impeachment, that certain of defendant's witnesses were connected with the railroad; that they had not testified at a former trial prior to the institution of the civil suit, and only became witnesses for defendant after its institution.

2. In a prosecution for assault with intent to rape, there was no reversible error in the prosecuting attorney's referring, in closing, to defendant's former trial as a "conviction," where the use of the word "conviction" was accidental, and the prosecuting attorney, on his attention being called thereto, immediately corrected it, and the court instructed the jury to disregard the remark.

3. Unless language used by a prosecuting attorney in closing is of such a character as to obviously require a reversal, the court will not reverse on account thereof in the absence of a requested charge on the subject, and a refusal to give the same, all saved by a bill of exceptions.

4. In a prosecution for assault with intent to rape, it was error for the court, in referring in its charge to testimony of defendant's witnesses, to assume such witnesses contradicted each other, and also assume a contradiction between two witnesses where none existed.

5. There can be no conviction of assault with intent to rape unless there is evidence sufficient to authorize the jury in believing that it was defendant's intention to have intercourse with prosecutrix at all hazards; that is, that he intended to use force sufficient to accomplish his purpose notwithstanding any resistance which prosecutrix might make.

6. In a prosecution for assault with intent to rape, evidence examined, and held insufficient to sustain a conviction.

Appeal from District Court, Morris County; P. A. Turner, Judge.

Jim Dina was convicted of assault with intent to rape, and he appeals. Reversed.

J. F. Jones and Bolin & Terrell, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of an assault with intent to commit rape, and his punishment assessed at a term of eight years in the penitentiary.

During the trial appellant objected to testimony showing that certain witnesses who

testified at this trial had not testified at a former trial of the case. It appears from the explanation of the court in this connection that the defendant proved that prosecutrix, Mrs. Segal, had brought a suit in the district court for damages, since the former trial, against the railroad company, on account of the alleged assault, the same having been committed on the cars of the railroad company; and in response thereto the state was permitted to show that said witnesses were connected with the railroad company, and that they only became witnesses for defendant after the institution of the civil suit. This was admissible as going to the credit of said witnesses. We further hold that the argument of the district attorney along this line was permissible. Appellant objected to that part of the argument of the district attorney in which he used the following language: "These witnesses did not testify at the former conviction of defendant;" the contention being that the allusion to the former conviction of defendant was reversible error. The court explains this bill by showing that the use of the word "conviction" in that connection by the district attorney was entirely accidental; that the district attorney, on his attention being called thereto, immediately corrected it; and that the court verbally instructed the jury to disregard said remarks. In *Baines v. State*, 66 S. W. 847, we held that the allusion to a former conviction by the district attorney, where the same was entirely accidental, was no ground for reversal. And see *Gaines v. State* (Tex. Cr. App.) 77 S. W. 10, 8 Tex. Ct. Rep. 616.

With reference to other objections urged to the argument of the district attorney we would observe that no written charge was asked on the subject by appellant, and refused by the court, and bill of exceptions saved thereto. Unless the language used is of such a character as obviously to require a reversal, it is held that the court will not reverse in the absence of a requested charge on the subject, and the refusal to give the same, all saved by bill of exceptions. *Smith v. State* (Tex. Cr. App.) 68 S. W. 995, 5 Tex. Ct. Rep. 372.

Appellant reserved a bill of exceptions "to the charge of the court wherein it told the jury they could not use the contradictory testimony of Joe Davis and Charley Gallagher and Bob Conley of witnesses Mrs. Ann Floyd and J. G. Floyd, because Bob Conley's testimony did not corroborate the testimony of Joe Davis and Charley Gallagher, and did not contradict the testimony of Mrs. Ann Floyd and J. G. Floyd, as shown in paragraph ten of said charge." We have examined the record in this connection, and believe the point is well taken. If it be conceded that the court could charge in the manner done here, calling direct attention to the contradictory testimony by reiterating it in the charge, certainly he was not authorized to assume there was any contradiction be-

tween the witnesses. That was a matter solely for the jury. And unquestionably the court had no right to tell the jury that there was a contradiction between the testimony of defendant's witnesses and Bob Conley's testimony, inasmuch as an examination of the testimony of Bob Conley fails to disclose that he contradicted the testimony of Mrs. Floyd in any material respect. Indeed, as we view his testimony, it corroborates her. We doubt the propriety of the court in any case charging on impeaching testimony, and instructing how the jury are to weigh it, unless there be some occasion to limit the purpose of the testimony, or there is danger the jury might appropriate the testimony as original evidence against appellant, or for some other purpose than purely impeaching purposes. See *Dodson v. State* (Tex. Cr. App.) 70 S. W. 969, 6 Tex. Ct. Rep. 311. There was no occasion here to charge on impeaching testimony at all. The charge as given was not only not called for, but was not a correct charge on the subject. It not only assumed that the witnesses contradicted each other, but assumed the contradiction as between Conley and Mrs. Floyd, where none existed, and this was hurtful to appellant.

Appellant strenuously contends that the evidence is insufficient to support the verdict. This is a remarkable case. The prosecutrix, Mrs. Segal, was a passenger on the chair car running on the Cotton Belt Railroad, and during a short stoppage of the train at the town of Naples, about daylight, she claims that while she was asleep in a reclining chair, and her little daughter, four years of age, being also asleep by her side, she was suddenly aroused by some one raising her skirt, and then choking her into insensibility; that about that time the train started, and the party, whom she identified as appellant, rushed out of the train. She described her assailant to the conductor and others, and appellant, who was a porter at a hotel in Naples, was arrested on her description. On his arrest, according to the officers, which was some hours afterwards on the same day, he asked them if it was about that trouble on the train in the morning. Besides her description of her assailant to the officers, this is the only corroborating circumstance that we recall identifying appellant with the transaction. However, appellant explains this by stating that he had heard, before the officers came, of the occurrence at the train that morning. In addition, appellant proved a complete alibi by Mrs. Floyd, proprietress of the hotel, and her husband. It was also in evidence that the train stopped at Naples only about two minutes that morning, which was about daylight, or a little before, and that the car where the alleged assault occurred was about eight cars back from the engine, which would have placed it a good dis-

tance from the hotel; the hotel being about opposite the baggage car, and some 30 steps therefrom. If it be conceded that the identity of appellant is sufficiently established by the testimony of the prosecutrix, and in such measure as to break down his alibi, authorizing the jury to believe him the guilty party beyond any reasonable doubt, still, according to our view, it is exceedingly questionable whether the evidence of the prosecutrix established that appellant entertained the specific intent to accomplish his purpose of having carnal intercourse with prosecutrix at all hazards. We understand this to be the doctrine laid down by the authorities. *Dockery v. State*, 34 S. W. 281, 35 Tex. Cr. R. 487; *Price v. State*, 36 Tex. Cr. R. 143, 35 S. W. 988; *O'Brien v. State* (Tex. Cr. App.) 40 S. W. 969; *Wood v. State* (Tex. Cr. App.) 61 S. W. 308; *Caddell v. State* (Tex. Cr. App.) 70 S. W. 91; *Coffee v. State* (Tex. Cr. App.) 76 S. W. 761, 8 Tex. Ct. Rep. 557. All these cases established the principle that there must be sufficient evidence to authorize the jury to believe that it was the intention of appellant to have intercourse with prosecutrix at all hazards; that is, he intended to use sufficient force to accomplish his purpose, notwithstanding any resistance prosecutrix might put forth. If the assault is less than this, the party may be guilty of an aggravated assault, but not of an assault with intent to rape. In this case, according to the testimony of prosecutrix, what attracted her attention was that her dress was being raised, though she is contradicted by a number of witnesses as to this. She then says he immediately began choking her. The little girl, asleep by her side, does not appear to have been aroused by the struggle. She says she attempted to scream, but could not, because he was choking her. She had a purse on her belt, but says no attempt was made to take this; but he choked her until the train started to move off, and then immediately left her and ran out of the train. She does not appear to have overcome him by her resistance, nor did any one interfere to prevent him from accomplishing his purpose, if his purpose was as she suggests. What was done occurred on the car during the temporary stoppage of the train at the depot. The doors of the car were open, affording ingress and egress to all persons who might come into the car, though it seems at the time none were present except herself and her little daughter. It does not occur to us that, under the circumstances, giving full effect to all prosecutrix testifies as being true; and disregarding altogether the alibi proven by appellant, there was manifest from her evidence the determined purpose on the part of appellant to copulate with prosecutrix at all hazards.

For the errors discussed, the judgment is reversed and the cause remanded.

HOLCOMB v. STATE.

(Court of Criminal Appeals of Texas. Jan. 13, 1904.)

CRIMINAL LAW—APPEAL—SUFFICIENCY OF RECOGNIZANCE.

1. The form prescribed by Code Cr. Proc. 1895, art. 887, for a recognizance on a criminal appeal, reads, " * * * conditioned that the said A. B., who has been convicted in this cause of a misdemeanor, and his punishment assessed," etc. Held, that a recognizance reading " * * * conditioned that the said —, who stands charged in this court of the offense of aggravated assault, and who has been convicted in this court, and his punishment assessed," etc., would necessitate a dismissal of the appeal.

Appeal from Grayson County Court; G. P. Webb, Judge.

Tom Holcomb was convicted of aggravated assault, and appeals. Dismissed.

Don A. Bliss, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The Assistant Attorney General has filed a motion to dismiss the appeal on the ground that the recognizance is defective and does not substantially comply with article 887, Code Cr. Proc. 1895, in that it does not state appellant was convicted of a misdemeanor in this cause. It reads, " * * * conditioned that the said Tom Holcomb, who stands charged in this court of the offense of aggravated assault, and who has been convicted in this court, and his punishment assessed at a fine of five hundred dollars and confinement in the county jail for the period of thirty days, shall appear," etc. In this particular the form prescribed by article 887 reads, " * * * conditioned that the said A. B., who has been convicted in this cause of a misdemeanor, and his punishment assessed at — as more fully appears by the judgment of conviction duly entered in this cause, shall appear," etc. The motion is well taken. *Meeks v. State*, 74 S. W. 910, 7 Tex. Ct. Rep. 824.

The appeal is dismissed.

WALLIS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 13, 1904.)

INTOXICATING LIQUORS—VIOLATION OF SUNDAY LAW.

1. It is a violation of the Sunday liquor law for a saloon keeper to sell beer on Saturday, with an agreement to keep it on ice for the purchaser till Sunday, and then on Sunday to hand it out to him through a broken glass in the door.

Appeal from Tarrant County Court; R. F. Milam, Judge.

Marion Wallis appeals from a conviction. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of violating the Sunday law, and his punishment assessed at a fine of \$25; hence this appeal.

The only question is as to the sufficiency of the evidence to support the verdict. The evidence on the part of the state shows that appellant kept a saloon, and that on a certain Sunday in May, 1903, John Teems and W. C. Holly, who were policemen in the city of Ft. Worth, were in the alleyway just back of the saloon, which was in the same building with the Avenue Hotel, and they saw a negro come to the back door of the saloon. When he saw the policemen, he went back. They watched him, and directly he returned to the back door of the saloon, and knocked, and said something to some one inside. Directly some one inside handed the negro two bottles of beer out from the saloon through an opening in the glass in the door. It seems that a portion of the glass door was broken out. The negro took the beer, and went into the kitchen of the Avenue Hotel. One of the officers went into the kitchen of the hotel, and saw two negroes drinking. One was the negro cook, whom they saw coming from the door of the saloon, and the other was a big black negro. The black negro had a half pint bottle of whisky. Immediately afterwards one of the officers went to the back door and knocked, and directly they saw appellant go out of the front door of his saloon and leave. Appellant proved by himself and another witness that he had sold the beer in question to the negro cook at the hotel on the Saturday evening before, and he agreed to keep the beer on ice for him until Sunday; and appellant proved by himself alone that when the negro knocked on the back door of the saloon Sunday morning he handed him out the beer he had purchased the night before. He further testified that he did not keep his saloon open on Sunday. So, under the proof, the case resolves itself into the proposition whether a saloon keeper can make sales of his goods on Saturday, put them in the refrigerator, keeping them cool until Sunday, and then deliver said goods to his customers. If he can do it in one instance, he can do the same thing in another or other instances. And if he should make a sufficient number of sales for delivery on the next day, his house might be thus kept open the entire day to consummate deliveries. An essential part of the business of a saloon keeper is the keeping of his drinks cool, or the cooling of them with ice in the summer; and if he can make sales on Saturday, and keep the goods of the purchaser in his refrigerator for delivery on Sunday, he would be compelled to keep open for that purpose. Although he makes no sale on Sunday, and receives no money on Sunday for goods previously sold, still he has brought about the necessity of keeping open for the delivery of his wares. It is true the proof here shows only a specific instance of delivery, and that

was through the broken glass of his back door; still he kept open for this purpose, and in pursuance of an agreement to deliver the goods on Sunday.

Under our view of the case and our construction of the law, the proof was sufficient to sustain the conviction, and the judgment is affirmed.

WILSON v. STATE.

(Court of Criminal Appeals of Texas. Jan. 18, 1904.)

AGGRAVATED ASSAULT—HEARSAY EVIDENCE—FORMER CONVICTION OF WITNESS—IMPEACHING EVIDENCE—FAILURE TO PRODUCE RECORD—HARMLESS ERROR—BILL OF EXCEPTIONS—CERTIFICATE OF JUDGE—EFFECT—EXCLUSION OF IMMATERIAL EVIDENCE.

1. In a prosecution for aggravated assault, a bill of exceptions was reserved to the admission of the testimony of a witness for the state that C., a former witness, told him that defendant had told C. of an agreement between defendant and others to work up a fight. The defendant objected to this as hearsay, and the court explained the bill by saying that the testimony was admitted to impeach C., a proper predicate having been laid over defendant's objection that the impeachment was on a collateral issue. *Held* that, in view of the court's explanation, it would be presumed that the testimony was admissible as impeaching testimony on a material issue.

2. Where a witness on cross-examination denies that he has been previously convicted of a larceny, he may be impeached by the record showing his conviction.

3. In impeaching a witness by showing, after his denial thereof, his former conviction of a larceny, it is not necessary to produce the jailbook, as that is not a record.

4. The impeachment of a witness by showing by parol evidence his former conviction of a larceny, after his denial thereof, is harmless, where the record of conviction is afterwards introduced.

5. The certificate of the trial judge to a bill of exceptions is not a certificate that the grounds of objection to testimony, as stated in the bill, are true in fact.

6. On appeal from a conviction of aggravated assault the bill of exceptions showed that a witness testified to having picked up some knucks in the room where the fight occurred between him and defendant. On cross-examination he was asked who was present, and replied that defendant and two others were. He was then asked what he said, and, after answering this, was asked if defendant was in the room when he made the statement, and said, "No." His statement was then objected to as hearsay, and because not shown to have been made in defendant's presence. *Held* that, as the bill failed to show that the remark was not made immediately after the fight, or so near thereto as to become a part of the *res gestae*, it did not disclose error.

7. In a prosecution for aggravated assault, evidence that on the night before the prosecuting witness and another arrested defendant and others for gambling is admissible.

8. In a prosecution for aggravated assault a witness testified that he saw what he took to be knucks on defendant's hands; that he (witness) was in a scuffle with a third person from the time he entered the room until he shot such third person, and that he thought he saw the knucks just as he entered the room. Defendant offered to prove that the witness had his

pistol out, and struck the third person, and afterwards shot him, and that during the scuffle the witness got down on the floor. *Held* that, as the only evidence really excluded was that during the scuffle with the third person the witness got down on the floor, no error was committed in rejecting the offer.

Appeal from Collin County Court; F. E. Wilcox, Judge.

Pearl Wilson was convicted of an aggravated assault, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. The appellant was convicted of an aggravated assault, and his punishment assessed at a fine of \$50; hence this appeal. There is no statement of facts in the record. The bill of exceptions must be considered as standing alone.

Bill No. 1 questions the action of the court permitting the state to prove by Alec Robertson that Geo. Culwell told him (Robertson) that defendant had told him (Culwell) that it was agreed between defendant and Fred Wilson and Gene Chitman that Gene Chitman should work up the fight and one was to whip Will Webster and one was to whip Tom Bounds and one was to whip Alec Robertson. Appellant objected to this because immaterial and hearsay. The court explains the bill as follows: "That said testimony was admitted to impeach the witness George Culwell, a proper predicate having been laid for the same over the defendant's objections made thereto at the time, to wit, that the state was seeking to impeach the witness on a collateral issue." While the bill does not disclose how this impeaching testimony came up, still, in view of the court's explanation, we must presume that the testimony somehow was admissible as impeaching testimony on a material issue in the case. Culwell may have testified to some facts that may have rendered it competent to impeach him as was done.

By bill No. 2 appellant objects to the action of the court permitting the witness Andy Atkinson to testify that he was jailer of Collin county in 1901, and knew George Culwell; that he had a jail sentence of one day; that, according to his recollection, he was confined in jail one day. This was for the theft of harness or bicycle. This testimony was introduced in impeachment of the witness Culwell, who had testified to material facts in favor of defendant. Appellant objected to the testimony because the jailbook was the best evidence, and because said testimony was immaterial and hearsay. Under *Brittain's Case*, 36 Tex. Cr. R. 406, 37 S. W. 758, and other cases which follow it, this character of testimony was not admissible; the rule there laid down being to the effect that a witness could be impeached on cross-examination by proving that he had been previously convicted of some felony or misdemeanor imputing moral turpitude, but that, if he denied the same, the issue being

¶ 4. See Criminal Law, vol. 15, Cent. Dig. § 3133.

collateral, he could not be contradicted. But we understand this doctrine was overruled in *Tony Lee v. State*, 73 S. W. 407, 7 Tex. Ct. Rep. 384 (the writer hereof dissenting), it being there held that, if a witness denied that he had been formerly convicted, he could be impeached by the record showing his conviction. In this case it is true the record was not resorted to, but no objection was made on that ground. The jailbook is not a record. If the objection had been made that the judgment of conviction was not produced, then a different question would be presented.

In this connection, in a subsequent bill, appellant also questions the action of the court permitting this same witness Culwell to be contradicted in regard to a former conviction in a theft case by the information and judgment showing his conviction of the offense of theft. It appears from the bill of exceptions that said George Culwell, on being interrogated about said former conviction, denied the same. The state then introduced the information and judgment showing that George Culwell had been prosecuted for the theft of a bicycle, and had pleaded guilty thereto, and been fined \$15, and confined one day in jail. We do not understand that appellant objected to the introduction of the record here, as it comes exactly under the rule laid down in *Tony Lee v. State*, supra; but the specific objection urged is that the conviction showed that George Culwell was convicted of said theft, and the witness' name was G. W. Culwell, and that there was a want of identity. It further appears in this connection that said witness Culwell was recalled and re-examined on the question, and asked if he had ever been charged with the theft of a bicycle, and he replied that his father attended to the matter for him, and he did not know whether he had pleaded guilty or not. Thereupon the state's counsel read said information and judgment in evidence, showing the conviction as above mentioned. It is then shown by the bill that appellant objected because said judgment was hearsay, and void as to defendant; and for the further reason that the state was concluded by the answer of the witness. As stated above, this question has been determined in *Lee v. State*, supra. We would further remark in this connection, if there was any error in the action of the court in regard to the admission of parol evidence, as stated above, that the subsequent admission of the record evidence as shown in this bill renders the parol evidence, if error, harmless error.

By bill No. 3 appellant challenges the action of the court permitting the state to prove that at the time of the fight between defendant and Will Webster said Robertson was an acting deputy sheriff. This was objected to on the ground that it was the conclusion of the witness; that, if he was a deputy sheriff, it was not disclosed to de-

fendant at the time; and the same is immaterial and irrelevant, etc. The ground of objection stated is not a certificate by the judge that they are facts, and, for aught that appears, it was shown in connection with the testimony of Alec Robertson that defendant knew said Robertson was a deputy sheriff, and that fact may have been material; at least the bill does not show it was immaterial. The same observations apply to bill No. 4. The fact that Robertson may not have given bond at the time as deputy sheriff is immaterial, for, if he was acting de jure, and with the knowledge of appellant, it would be sufficient.

It appears that during the progress of the trial, while the witness Will Webster was on the stand, he testified that he picked up some knucks in the room where the fight occurred between him and defendant. "On cross-examination by defendant he was asked who was in the room at the time he picked up the knucks, and he replied that defendant, Alec Robertson, and Gene Chitman were in the room. And then defendant's counsel asked witness what he said when he picked up the knucks, and he replied that he said 'This is what he done it with' (referring to the injury to his head). Defendant's counsel then asked if Pearl Wilson, defendant, was in the room at the time he made this statement, and he said, 'No,' defendant was in the courtroom. And thereupon defendant moved the court to withdraw from the jury the statement by witness, 'This is what he done it with,' on the ground that it was hearsay as to defendant, and was not shown to have been made in his presence or hearing." The court refused to strike out the testimony, and this is assigned as error. The bill of exceptions should have negated any view of the case in which said evidence might be held admissible. For aught that appears, this remark may have been made immediately after the fight, or so near it in point of time as to become part of the *res gestæ*.

We believe it was competent, as was done by the court, to admit the testimony of the witness Will Webster to the effect that, on the night before, he and Tom Bounds arrested defendant and others named for gambling. The explanation of the court shows that said evidence was admitted for the purpose of showing or tending to show the motive on the part of defendant at the time of the assault. The bill does not put us in possession of the facts attending the introduction of this evidence. Unquestionably, if the difficulty arose out of the previous arrest, testimony concerning that arrest was admissible.

During the trial, the witness Robertson testified that he saw what he took to be knucks on Pearl Wilson's hands, but he could not say whether he saw this before or after Fred Wilson caught him (witness); that he was in a scuffle with Fred Wilson

from the time he entered the door until he shot Fred Wilson; that he thought he saw the knucks just as he entered the room. Thereupon defendant offered to prove by the witness Robertson that he had his pistol out and struck Fred Wilson with the same, and that afterwards he shot Fred Wilson; that during a scuffle with Fred Wilson he (witness Robertson) got down on the floor. This testimony was objected to by the state on the ground that it was an attempt to go into the details of another and different case. The court excluded the testimony. We are inclined to believe this testimony was admissible. However, it was in evidence that witness Robertson engaged in a scuffle or fight with Fred Wilson, and that he shot him, and the only evidence that was really excluded was that during the scuffle with Fred he (witness Robertson) got down on the floor. We cannot see how the rejection of this testimony could have materially affected the result of the case, especially in the absence of a statement of facts.

We have treated all these bills with reference to the admission or rejection of testimony on their merits, just as if there was a statement of facts in the record. However, the statement of facts, if before us, might show that the testimony was of such an overwhelming character as that the jury could not have done otherwise than they did, regardless of the admitted and rejected testimony.

There being no error in the record, the judgment is affirmed.

LOCKETT v. STATE.

(Court of Criminal Appeals of Texas. Jan. 13, 1904.)

CRIMINAL LAW—APPEAL—RECOGNIZANCE.

1. Where the final phrase, "in this case," in the form of recognizance on appeal in a criminal case, prescribed by Code Cr. Proc. 1895, art. 887, is omitted, the appeal will be dismissed.

Appeal from Johnson County Court; J. D. Goldsmith, Judge.

Goaph Lockett was convicted of gaming, and appeals. Dismissed.

Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of gaming, and fined \$10. The Assistant Attorney General has filed a motion to dismiss the appeal because the recognizance is defective in omitting the final phrase, "in this case," in the form of recognizance prescribed by article 887, Code Cr. Proc. 1895. An examination of the record shows that the motion is well taken, and it is therefore sustained. Brock v. State, 72 S. W. 599, 7 Tex. Ot. Rep. 72.

The appeal is accordingly dismissed.

SHANKLES v. STATE.

(Court of Criminal Appeals of Texas. Jan. 13, 1904.)

CRIMINAL LAW—APPEAL—EXCEPTIONS.

1. An exception on appeal from conviction of crime, reciting "that the court erred in its charge" and "in failing to instruct all the law applicable to the case," is too general to be available.

Appeal from Tarrant County Court; R. F. Milam, Judge.

T. J. Shankles was convicted of crime, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The grounds of the motion for new trial pertain to the statement of facts, two of which alleged the insufficiency of the evidence and the excessiveness of the verdict, and the other two recite "that the court erred in its charge," and "in failing to instruct all the law applicable to the case." The charge was an aggravated assault, the ground of aggravation being that the assault was committed upon a woman. The punishment was a fine of \$100. The evidence is not in the record. The exceptions to the charge are entirely too general, even if the statement of facts was before us. We are unable to say that the verdict was not supported by the evidence without the facts.

The judgment is affirmed.

GAITHER v. STATE.

(Court of Criminal Appeals of Texas. Jan. 13, 1904.)

CRIMINAL LAW—APPEAL—RECOGNIZANCE.

1. A recognizance on appeal which omits the concluding phrase, "in this case," as contained in the form prescribed in Code Cr. Proc. 1895, art. 887, is defective, and the appeal will be dismissed.

Appeal from Johnson County Court; J. D. Goldsmith, Judge.

E. C. Gaither was convicted of selling liquor to a minor, and appeals. Dismissed.

Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of selling liquor to a minor, and his punishment assessed at a fine of \$25. The Assistant Attorney General has filed a motion to dismiss the appeal on the ground that the recognizance is defective, in that it omits the concluding phrase, "in this case," as prescribed in the form laid down in article 887, Code Cr. Proc. 1895, for recognizances. An examination of the recognizance shows that the motion is well taken. Brock v. State, 72 S. W. 599, 7 Tex. Ot. Rep. 72.

The appeal is accordingly dismissed.

WILSON v. STATE.

(Court of Criminal Appeals of Texas. Jan. 13, 1904.)

CRIMINAL LAW—JURISDICTION ON APPEAL—MISDEMEANOR—APPEAL FROM JUSTICE COURT—AMOUNT OF FINE.

1. Where, on appeal from a justice's court in a prosecution for a misdemeanor, the defendant's punishment is assessed at a fine of less than \$100, the Court of Criminal Appeals has no jurisdiction to review the case.

Appeal from Collin County Court; F. E. Willcox, Judge.

Pearl Wilson was convicted of a crime, and appeals. Dismissed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This case seems to have originated in the justice court, and appealed to the county court. The punishment assessed in the county court was a fine of \$25. The motion of the Assistant Attorney General to dismiss the appeal must be sustained, as the case became final in the county court, the punishment being less than a fine of \$100. The appeal is accordingly dismissed.

TEXAS & P. RY. CO. et al. v. DAWSON.

(Court of Civil Appeals of Texas. Jan. 9, 1904.)

CARRIERS—CARRIAGE OF STOCK—NEGLIGENCE—INSTRUCTIONS.

1. In an action against a railroad for damages sustained by a shipper of cattle, owing to alleged unreasonable delays and rough treatment of the cattle, though the court charged that, if the jury should find that the damage to the cattle was due to unreasonable delays, they should find for plaintiff, defendant had a right to have the issue presented affirmatively, on its request that, if the injury was caused by the condition of the cattle, plaintiff could not recover.

2. It was proper to refuse to charge that, if the condition of the cattle contributed to their death or injury, the damages so occasioned should be excluded, since, whatever the condition of the cattle, the carrier was bound to transport them with reasonable diligence and care.

Appeal from District Court, Ector County; James L. Sheppard, Judge.

Action by E. F. Dawson against the Texas & Pacific Railway Company and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Ed J. Hamner, H. D. McDonald, and L. F. Parker, for appellant St. Louis & San Francisco R. Co. J. M. Wagstaff, for appellant Texas & P. Ry. Co. A. S. Hawkins, for appellee.

CONNER, C. J. The judgment from which this appeal has been prosecuted is one in appellee's favor for the sum of \$881.18, equally apportioned against the Texas & Pacific

Railway Company and the St. Louis & San Francisco Railroad Company, as damages on a shipment of cattle from Odessa, Tex., via the Texas & Pacific Railway, to Sherman, Tex., and thence via the St. Louis & San Francisco Railroad to Latham, Kan., their final destination. The actionable negligence, as alleged, consisted of unreasonable delays and rough treatment in transportation that were denied by the appellant companies, which also specially pleaded to the effect that the proximate cause of the loss and injury to appellee's cattle was due to their weak and impoverished condition. The principal error assigned is to the action of the court in refusing to give, as requested by appellants, special charge No. 5, presenting the special defense mentioned. We have concluded that said special charge is substantially correct, and should, under the circumstances, have been given.

Appellee's evidence was to the effect that the cattle were in fair condition for shipment, but there was also evidence tending to a contrary conclusion. To illustrate: Appellee testified, among other things, that there had been but little, if any, rain on the cattle range during the winter of 1901 and spring of 1902, up to the date of the shipment; that generally the grass was poor; that he gathered the cattle in question, and was four days driving the 50 miles to the railway station; and that the "shipment consisted of old, thin, weak cows, and were the cullings of the herd, which I wanted to fatten and sell." The station agent at Odessa testified: "I remember the shipment of stock in question. I was present when they were loaded. They were mostly cows, and they were very poor and weak. They were so weak they could hardly go up into the cars, and some of them fell down when they brought them up to the chute. I don't think I ever saw any other cattle shipped from Odessa which were as poor and thin as these." The court's charge submitted the issue thus raised by the special answer, and the evidence in negative form only. That is, the jury were instructed, in substance, that, if they should find the damage shown was due to unreasonable and negligent delays, they should find for appellee. In general terms, this, by implication, excluded a finding in appellants' favor in event the damage proximately resulted from the condition of the cattle, and not from the delays, but we think it was a right appellants had to have the issue affirmatively presented when so requested. See *Railway Co. v. Stribling* (Tex. Civ. App.) 34 S. W. 1003; *Harris v. Harwell* (Tex. Civ. App.) 71 S. W. 791; *Ry. Co. v. Carter* (Tex. Sup.) 68 S. W. 159; *Ry. Co. v. Washington*, 94 Tex. 510, 63 S. W. 534.

Appellants also apparently sought, in their special charge No. 4, which was rejected, to have the jury instructed to the effect that in the assessment of damages they should

¶ 2. See *Carriers*, vol. 9, Cent. Dig. §§ 920, 923.

exclude all or any part thereof that would have resulted from the condition of the cattle in case the shipment had been with reasonable dispatch. But this charge, we think, was properly rejected. It was to the effect that, if the condition of the cattle "contributed to their death or injury," such damages so occasioned should be excluded. Whatever the condition of the cattle, appellants, having received them therefor, were in duty bound to exercise ordinary care, and to transport them with reasonable dispatch, and, if guilty of negligence or of unreasonable delay which proximately resulted in injury, they are liable, although the results may have been more disastrous than would have been had the cattle been in good condition. Such is the rule applied in the transportation of passengers, and we know of no reason why it should be otherwise in cases of shipment of live stock. See *Ry. Co. v. Ferguson* (Tex. Civ. App.) 64 S. W. 797, and *Railway Co. v. Lula Williams* (not yet officially reported) 78 S. W. 5, and authorities cited.

The question presented in the first assignment is not likely to arise on another trial, and the court seems to have properly excluded the testimony of George Sherrer, as shown in the bill of exceptions relied upon in the second assignment. While this witness undoubtedly qualified himself to give an opinion as to the actual effect of an ordinary shipment upon cattle in the condition of those in question, we are not prepared to hold that his individual experience was admissible as original evidence.

We find no error in other respects, but for that discussed the judgment will be reversed and the cause remanded.

WOOD et al. v. FULLER.

(Court of Civil Appeals of Texas. Jan. 2, 1904.)

SEQUESTRATION—DAMAGES—LIABILITY ON BOND.

1. Under Rev. St. 1895, arts. 4874, 4876, providing that in suits to recover personal property by sequestration defendant may retain possession by giving a bond conditioned to have the property forthcoming, or to pay the "value thereof," and that, in case suit goes against him, judgment shall be entered on the bond for the "value of the property," the measure of damages is the market value of the property at the time of the trial, and not at the time and place defendant took possession of it.

Appeal from Dallas County Court; Ed. S. Lauderdale, Judge.

Action by H. Fuller against Fred T. Wood and others. From a judgment for plaintiff, defendants appeal. Reversed.

Cockrell & Gray, for appellants. Wynne & Blanks, for appellee.

TALBOT, J. This is an action brought by appellee, Fuller, against appellant Wood

in the nature of a sequestration suit to recover of him a horse alleged to be of the value of \$1,000. Petition, affidavit, and bond were filed on the 15th day of September, 1898, in due form, and the writ of sequestration duly issued. On the same day, by virtue of said writ, the sheriff of Dallas county, Tex., seized and took possession of said horse, whereupon the appellant, Wood, presented to said sheriff a replevy bond for the horse in the sum of \$2,000, with Fred J. Steer and W. McLemore as sureties, and the horse was delivered to Wood. Appellant Wood pleaded a general denial, ownership of the horse, and other special pleas not necessary to state. There was a trial by jury, and a verdict rendered in favor of appellee and against appellant Wood for \$1,000, as the value of said horse at the time taken from the possession of appellee, with interest thereon at the rate of 6 per cent. per annum. Judgment on the bond, as provided for by article 4876, Rev. St. 1895, was rendered on this verdict against appellant Wood and against appellants Steer and McLemore for the sum of \$1,270.

Appellants' first assignment of error complains of the charge of the court upon the measure of damages. The court charged the jury that, in the event they found for the appellee, they should "return a verdict for the plaintiff for the amount you find from the evidence was the reasonable market value of said horse at the time and place the defendant took possession of him, with six per cent. interest thereon per annum from that date." It is insisted that the true measure of damages in such case is the market value of the horse at the date of the trial, and not its market value at the time and place defendant took possession of it. An examination of the authorities convinces us that appellants' contention must be sustained. Whatever conflict of authority and uncertainty may have existed, we believe the question has been definitely settled in this state by our Supreme Court in the case of *Luedde v. Hooper*, 95 Tex. 172, 66 S. W. 55. There it is distinctly held that the true measure of damages in a suit to recover personal property, when by sequestration the property has been placed in the hands of the sheriff or other officer, and replevy bond given by the defendant in the writ under the statute to retain possession of the same during the pendency of the suit, is the market value of such property at the time of the trial, when the question arises, as in this case, in the original proceeding. The rule announced is based upon articles 4874 and 4876 of the Revised Statutes of 1895, supported by the case of *Watts v. Overstreet*, 78 Tex. 571, 14 S. W. 704, and authorities therein cited. The facts of the *Luedde Case*, supra, and of the case under consideration are practically the same, and the holding in that case is decisive of the question here.

Other assignments of error have not been

considered, for the reason, as suggested by counsel for appellants, that error therein presented, if any, is not likely to occur upon another trial.

For the error in the charge of the court upon the measure of damages the judgment of the court below is reversed, and the cause remanded.

WHITE v. WATSON et al.*

(Court of Civil Appeals of Texas. Jan. 2, 1904.)

PUBLIC LANDS—SALE—SCHOOL LANDS—ADDITIONAL SECTIONS—PURCHASE BY MINOR—HOME SECTION—RESIDENCE—COMMISSIONER'S CERTIFICATE—EVIDENCE.

1. Under Const. 1876, art. 7, § 24, and article 14, § 6, regulating sales of public lands, and Sayles' Ann. Civ. St. art. 1482f, authorizing the sale of additional school lands to actual settlers, a minor who is an actual settler is not deprived of his right to purchase additional lands by reason of his minority.

2. Where, in an action to recover land sold to defendant as additional school lands, one of the material issues was whether defendant was an actual settler on his home section when the land in controversy was awarded to him, and plaintiff's application to purchase the land was made prior to defendant's proof of three years' occupancy on his home section, necessary to the issuance of the land commissioner's certificate to such effect, such certificate was not binding on plaintiff, and was therefore inadmissible to prove defendant's residence on his home section.

Appeal from District Court, Palo Pinto County; W. J. Oxford, Judge.

Action by T. C. White against Walter Watson and others. From a judgment in favor of defendant Walter Watson, plaintiff and intervening defendants appeal. Reversed.

Crudginton & Penix, Theodore Mack, and Stevenson & Ritchie, for appellant White. Wayne H. Lasater, for appellants Lasater. H. E. Bradford, G. A. McCall, and Jno. H. Eaton, for appellee.

CONNER, C. J. For the second time this case appears before us on appeal. Appellee, at the dates involved, was a minor claiming the section of land in controversy as additional to his home section, both of which had been awarded to him prior to appellant's application to purchase the land in controversy as an actual settler thereon. The former judgment was reversed because of a peremptory charge in appellant's favor based upon the proposition that the sale to appellee was void because of his minority. See *Watson v. White* (Tex. Civ. App.) 64 S. W. 826. The proposition is again asserted that because of his minority appellee's title is void, the cases of the State v. Rogan (Tex. Sup.) 54 S. W. 1018, *Wurzbach v. Burkett* (Tex. Civ. App.) 60 S. W. 590, *Adams v. King* (Tex. Civ. App.) 66 S. W. 484, and *Dupree v. Duke*

(Tex. Civ. App.) 70 S. W. 561, being cited as sustaining the proposition. In the case of *Adams v. King* we followed the decision in the case of the State v. Rogan, the purchases involved being under the same law; but this case was distinguished from both State v. Rogan and *Wurzbach v. Burkett* in the opinion by us on the former appeal. We deem it unnecessary to reiterate our views as expressed in the opinion in *Watson v. White*, nor will we attempt to add to what we there said, save to call attention to the emphasis since given by our Supreme Court in the cases of *Tolleson v. Rogan*, 73 S. W. 520, and *Martin v. Terrell*, 76 S. W. 745, to the view of this court expressed in *O'Keefe v. McPherson*, 61 S. W. 534, and *Watson v. White*, supra, as to the weight that we think should be given to the well-known aforetime rule of the General Land Office to disregard the question of minority in sales of public lands requiring actual settlement in all cases where the minor had capacity to become an actual settler. Having, therefore, on the former appeal herein, determined adversely to the main contention and proposition as above stated on this appeal, and not now seeing our way clear to determine otherwise, notwithstanding the subsequent conflicting opinion in *Dupree v. Duke*, supra, we conceive it to be our duty to adhere to the decision before announced. *Burns v. Ledbetter*, 56 Tex. 282; *Kempner v. Huddleston*, 90 Tex. 192, 37 S. W. 1066, and authorities therein cited. We hence at once pass to the consideration of the only other material question, as we conceive, presented on this appeal. One of the material issues on the trial was whether appellee was an actual settler on his home section at the time of the award to him of the section in controversy. Irrespective of title to the home section, and in addition thereto, it was essential to appellee's recovery that this fact be established, and as relevant to this issue he offered the certificate of the Commissioner of the General Land Office to the effect that the required proof of three years' occupancy on the home section had been filed in the General Land Office on February 21, 1900, and that the same was deemed "sufficient"; in consequence of which the certificate was issued. Appellant's application to purchase had been made prior to such proof and the issuance of the certificate. The certificate therefore did not conclude him on the issue of appellee's actual settlement. *Lamkin v. Matsler* (Tex. Civ. App.) 73 S. W. 970. It follows, we think, that the certificate was inadmissible, and that appellant's objections thereto on the ground that it was irrelevant should have been sustained. The evidence on the issue mentioned is of conflicting tendency, and we have no means of determining what effect the commissioner's formally expressed conclusion that the proof filed with him was "sufficient" may have had on the jury. At all events, the court's ruling was erroneous,

*Rehearing denied January 23, 1904.

and the certificate probably prejudicial, from which it follows that the judgment must be reversed.

Reversed and remanded.

McLEAN et al. v. CONNERTON et al.
(Court of Civil Appeals of Texas. Jan. 13, 1904.)

VENDOR AND PURCHASER—ACTION ON PURCHASE-MONEY NOTES—DEFECT IN TITLE—STAY OF EXECUTION—TIME OF MATURITY—RECOVERY OF ATTORNEY'S FEES.

1. Where, in a suit on purchase-money notes and to foreclose a vendor's lien, it appears that after they became due the purchaser discovered an outstanding deed of trust, 14 years old, constituting a cloud on title, judgment on the notes, with a stay of execution and order of sale until the deed is released, sufficiently protects the purchaser's rights, and gives him no room to complain.

2. Where each of two purchase-money notes, maturing a year apart, provides that, on default in payment of principal or interest on the one first falling due, both of them shall become immediately due, at the election of the holder, such a default entitles the holder to recover the whole sum due by both, together with attorney's fees, though, after the default, and before the maturity of the second note, the purchaser discovers an outstanding deed of trust constituting a cloud on the title, since such defect in the title would not prevent an election to mature the second note.

Appeal from District Court, El Paso County; W. S. Fly, Judge.

Action by Michael Connerton and others against H. A. McLean and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Patterson & Buckler, for appellants. F. E. Hunter, for appellees.

FLY, J. This is a suit instituted by appellees on two promissory notes, each for \$1,250, given for purchase money, and to foreclose a vendor's lien on certain lots in the city of El Paso. Judgment was rendered in favor of appellees for their debt and foreclosure of their lien, but execution and order of sale were stayed until a release of a certain deed of trust was obtained and placed on record.

In July, 1901, Michael Connerton and Della Land sold lots 14, 15, and 16 in Block 81 in Magoffin's Addition to city of El Paso to appellants for \$500 in cash, and two notes, each for \$1,250, and due, respectively, in July, 1902 and 1903; it being provided in each that default in payment of principal or interest on the one falling due should, at the election of the owner, mature both of them. When the note became due in July, 1902, it was not paid. Three weeks before the land was sold to appellants, McLean procured an abstract of title of the lots, which was paid for by appellees. The abstract showed that a former owner of the lots had given a deed of trust in January, 1888, on the land, and there was no evidence of a release of the same. McLean swore that he did not ex-

amine the abstract, and did not know of the defect in the title until September 20, 1902, when he obtained the opinion of an attorney as to the title to the lots. At that time Connerton promised to obtain a release of the deed of trust.

We see no just ground of complaint on the part of appellants at the judgment of the court. They did not desire to pay the notes unless the release of the deed of trust was obtained, and the judgment provides that they shall not pay until the release is obtained and recorded. The court did exactly in this case what the Supreme Court said should have been done in *Brown v. Montgomery*, 89 Tex. 250, 34 S. W. 443, and reversed the judgment because such action was not taken. In the case last cited it is held that in cases of this character a deed reserving a vendor's lien must be considered an executed contract, and the rule as to the circumstances under which a vendee in such contracts can defend in a suit for the purchase money, laid down in *Cooper v. Singleton*, 19 Tex. 267, 70 Am. Dec. 333, is copied. That rule is as follows: "The vendee should establish beyond doubt that the title was a failure in whole or in part, that there was danger of eviction, and also such circumstances as would prima facie repel the presumption that at the time of the purchase he knew and intended to run the risk of the defect." The rule is approved, with the exception of the extent to which the proof shall go in establishing failure of title, and the court says: "It is sufficient if he establish same to the satisfaction of the court and jury, as in other cases." Let it be conceded, as held in the *Brown-Montgomery Case*, and in *May v. Taylor*, 27 Tex. 125, that the existence of the deed of trust constituted a partial failure of the title to the land, within the meaning of the rule, and that appellees agreed, after the first note had, by its terms, matured, to clear the title, and there is no evidence that there was any danger of eviction under the deed of trust, which was 14 years old. The note it was given to secure was due in January, 1889, and it appears more like a case of neglect to cancel a defunct instrument than a case of a live, active mortgage, from which an eviction for a subsequent purchaser might flow. But if appellants had brought themselves fully within the demands of the rule, the provision in the judgment staying execution and order of sale until a release of the deed of trust is secured and recorded meets all of the equities of the case, and there is no just cause of complaint, unless, as insisted by appellants, the second note had not matured at the time the suit was instituted, on account of the existence of the deed of trust. If that position could be maintained, nothing would be involved except the attorney's fees on the second note, because it is apparent that no increased cost was entailed upon appellants by including the second note in the suit. ex-

cept the attorney's fees. If the note due in July, 1902, was matured on that date, and could be sued on at the time this suit was instituted, the second note became due if the holders of the notes elected that it should become due. They so elected, and the whole of the purchase money was due when this suit was instituted, and the court properly rendered judgment for attorney's fees on the entire sum.

The judgment is affirmed.

MILLER v. HALLFORD.

(Court of Civil Appeals of Texas. Jan. 9, 1904.)

SCHOOL LANDS—ADDITIONAL PURCHASE—RE-SALE.

1. A purchase of school lands as an additional purchase by the owner of land other than school lands, under Batts' Civ. St. 1895, art. 4218fff, is not forfeited, but his rights therein passed to his vendee by his sale thereof before occupation to another not an actual settler; he continuing to own and occupy the land made the basis of such purchase.

Appeal from District Court, Callahan County; J. H. Calhoun, Judge.

Action by E. H. Miller against W. J. Hallford. Judgment for defendant. Plaintiff appeals. Reversed.

Legett & Kirby, for appellant. Russell & Russell and Otis Bowyer, for appellee.

STEPHENS, J. Appellant brought suit against appellee to recover 80 acres of school land in Callahan county, claiming to be entitled to the land as vendee of L. M. Tyler, to whom it had been duly sold as the owner of land other than school land, under article 4218fff, Batts' Civ. St. 1895. The award was made to Tyler in November, 1897, and he was recognized in the General Land Office as the purchaser till March 6, 1903, when the Commissioner indorsed on his obligation, "Land forfeited for abandonment," which was followed by a reclassification and appraisal, and an application in due form by appellee to purchase as an actual settler. The next year after the award was made to Tyler, he sold the land in controversy to G. M. Stokes and wife, who conveyed it the year following to appellant's wife; the deed reciting a consideration of \$175. In addition to this, May 21, 1903, Tyler made a conveyance to appellant himself. Tyler never ceased to own and occupy as his place of residence the land made the basis of his application to purchase the school land, and the annual interest payments were all made in his name by the successive vendees, but neither Tyler nor any of his vendees ever occupied the land in controversy. Appellee went into possession thereof as the tenant of appellant, and while so in possession became an actual settler, and made application to purchase it as such.

The facts above stated, which are undis-

puted, bring the case within the ruling made by the Supreme Court in Nesting v. Terrell, 75 S. W. 485, decided since the trial below.

The judgment is therefore reversed, and here rendered for appellant.

LOPEZ v. VOGIS et al.

(Court of Civil Appeals of Texas. Jan. 13, 1904.)

APPEAL—RECORD—DISMISSAL.

1. Where an appeal was perfected July 25th, and the transcript of the record was applied for by appellant on September 23d, and delivered to him on October 2d, and filed in the Court of Civil Appeals on the 15th of October, and the cause submitted for decision on the 6th of the next January, but neither party had filed any briefs, the appeal will be dismissed.

Appeal from Willson County Court; H. B. Gouger, Judge.

Suit between Narciso Lopez against R. Vogis and others. From the judgment, Narciso Lopez appeals. Dismissed.

NEILL, J. The appeal in this case was perfected on the 25th of July, 1903. The transcript of the record was applied for by appellant's counsel on the 23d of September and delivered to him on the 2d day of October, 1903. It was filed in this court on the 15th day of October, 1903, and this cause submitted for its decision on the 6th of January, 1904. No brief for either party has been filed in this court. It therefore becomes our duty to dismiss the appeal (Hunt v. Glasscock [Tex. Civ. App.] 65 S. W. 209; Harris v. Bryson [Tex. Civ. App.] 73 S. W. 548; Railway v. Hall [Tex. Civ. App.] 74 S. W. 778; Railway v. Brock [Tex. Civ. App.] 77 S. W. 953), which is accordingly done. Appeal dismissed.

W. T. RICKARDS & CO. v. J. H. BEMIS & CO.*

(Court of Civil Appeals of Texas. Dec. 12, 1903.)

EXECUTION—SALE—RIGHT TO PROCEEDS—ASSIGNMENT—PROCEEDINGS AGAINST SHERIFF—STATUTORY PENALTY—ADVERSE CLAIMS—VALUE OF LAND—EVIDENCE—JUDGMENTS—SATISFACTION BY SURETY—SUBROGATION—TRANSFER OF INTEREST—VALIDITY OF CONTRACT—CONSTRUCTION—TRIAL—DIRECTION OF VERDICT.

1. Where a claimant of an execution fund exhibited what on its face appeared to be a valid written contract whereby plaintiffs agreed that such claimant should have a certain amount of the proceeds of the execution, the sheriff was not called on to determine whether such proceeds should be paid to plaintiffs or the claimant, but had a right to retain the money and have the title thereto determined by the court, and in so doing could not be subjected to the statutory penalty of 5 per cent. per month for failure to pay over the same.

2. The makers of a bond indemnifying a sheriff from the consequences of paying out an execution fund to them were entitled to contest the right of plaintiffs, who claimed the fund, to re-

* Writ of error denied by Supreme Court.

cover the statutory penalty from the sheriff for failure to pay over the fund to them.

3. The amount for which land sold at execution is not evidence of its value where it was shown that the bid was made by a young employé of the purchaser, and that, if its attorney had been present, the property would not have been bid to the amount that it was.

4. Where a judgment against a principal and surety was paid by the surety without satisfying the same of record, the surety was subrogated to the lien of the judgment, and he or his assignee could foreclose the same.

5. In proceedings to compel a sheriff to pay over the proceeds of an execution sale, where persons claiming adversely to plaintiffs by virtue of a purported assignment from them were made parties, and where plaintiffs claimed the assignment was voidable because of false representations of the assignee as to the solvency of the judgment debtor, the value of his interest in the land, and the superiority of the assignee's lien thereon, the burden was on plaintiffs to show that such representations were false.

6. Where the evidence in support of issues by the one having the burden of proof thereon is so slight that reasonable minds could not arrive at different conclusions in reference thereto, there is no error in directing a verdict for the other party.

7. Where plaintiffs and defendants entered into a contract on a valuable consideration received by plaintiffs, by which a certain interest of plaintiffs in a judgment was transferred to defendants, and, before plaintiffs made any objection to the assignment, execution was issued on the judgment, levy made, sale held, and the consideration paid to the sheriff, the defendants' right to the proceeds of the sale became absolute, no fraud being established in the transaction.

8. Where plaintiffs and defendants entered into a contract by which plaintiffs transferred to defendants their interest in a judgment in order that defendants might clear up their title to the property subject thereto, and in which it was agreed that plaintiffs were to be at no expense in connection with the matter, and the land was sold on execution at defendants' instance, their payment to the sheriff of a sum sufficient to cover the costs of the sale was a compliance with their agreement to save plaintiffs from expense.

Appeal from District Court, Marion County; J. M. Talbot, Judge.

Action by W. T. Rickards & Co. against J. H. Bemis & Co., in which plaintiffs recovered judgment against defendants, and filed a motion against I. H. Lanier, as sheriff, to require him to pay over moneys collected under an execution issued thereon. The Clark & Boice Lumber Company and Fred J. Clark and J. M. Dickson, at the instance of the sheriff, were made parties. There was judgment for the sheriff, and the parties brought in by him, and plaintiffs appeal. Affirmed.

On the 8th day of December, 1901, W. T. Rickards & Co. filed a motion against I. H. Lanier, sheriff of Cass county, Tex., to require him to pay over to them \$1,069.30, collected by him on a sale of land under an execution issued on a judgment rendered in the district court of Marion county on June 23, 1902, in favor of W. T. Rickards & Co., as plaintiffs, and against J. H. Bemis & Co., as defendants, for \$4,317.45, and asks for the statutory penalty of 5 per cent. per month. I. H. Lanier, sheriff of Cass county,

answered, admitting the sale of the land and the collection of \$2,550 under the execution issued upon said judgment, and, further, that Joseph M. Dickson had demanded of him \$1,000 of said money, said Dickson claiming an assignment of said amount to him by plaintiffs; that he paid to the plaintiffs, Rickards & Co., the sum of \$1,490.70, being all of said money collected by him, excepting the \$1,000 which has been paid the Clark & Boice Lumber Company, upon their executing him an indemnity bond for \$2,000, and except \$69.30, which he retained as his costs in making the levy and sale. He alleged that before he collected said moneys he was notified that the plaintiffs, Rickards & Co., had transferred to J. M. Dickson a \$1,000 interest in said judgment, and by the terms of said transfer authorized the payment of \$1,000 to said Dickson before the plaintiffs in judgment were paid any sum whatever; that the Clark & Boice Lumber Company asserted the right to be subrogated to all the rights of J. M. Dickson in said judgment, and entitled to receive the sum of \$1,000 of the proceeds of the sale. He set out the indemnity bond, and asked that the Clark & Boice Lumber Company, the principals in said bond, and Fred J. Clark and Joseph M. Dickson be made parties to the cause. Thereafter the makers of said bond answered in the cause. On May 5, 1902, the plaintiffs, Rickards & Co., filed their first supplemental petition, in which they say that it is true that they executed and delivered to J. M. Dickson, attorney, on May 29, 1901, an assignment of \$1,000 interest in their said judgment in the district court of Marion county against J. H. Bemis & Co. in consideration of the payment to them of the sum of \$50 by said Dickson. They charge that the assignment was procured from them by means of false and fraudulent representations made to them by Dickson in two letters written by him to plaintiffs. It is alleged, in substance, that the representations contained in said letters that J. H. Bemis & Co. were insolvent, and that plaintiffs' judgment was worthless, were not true; and that it was not true that the purpose for which Dickson, as attorney for the Clark & Boice Lumber Company, desired to obtain an interest in said judgment, was to avoid the necessity of foreclosing a lien on the land; that they did not discover the fraud until after the sale of the land by the sheriff; that they thereupon notified the sheriff not to pay the \$1,000 to Dickson, but that the same be paid to plaintiffs' attorneys. They also tendered back the \$50 consideration paid for the assignment with 6 per cent. interest from May 29, 1901. On June 12, 1902, the defendants Clark & Boice Lumber Company, F. H. Clark, and J. M. Dickson filed their first amended original answer, in which they, among other grounds, demur to the plaintiffs' right to recover any penalty, "because it appeared from plaintiffs' plead-

ings that they had transferred to defendants an interest of \$1,000 in their judgment for a valuable consideration, which the plaintiffs had not offered to return until long after the \$1,000 had been turned over by I. H. Lanier, sheriff, and long after this suit was instituted, and because this suit was in effect an independent suit, and sought relief which could not have been granted, and made parties which could not have been made parties on a motion against the sheriff." In addition to a general denial, they further answered in substance: "That the plaintiffs had been represented at the sale made under the execution by their attorney and agent; that they had full knowledge of all the facts which they now claim had been misrepresented; that they had bid at said sale against the Clark & Boice Lumber Company, knowing the facts, and knowing that the Clark & Boice Lumber Company claimed to own the \$1,000 interest in the judgment, and knowing that the Clark & Boice Lumber Company would not have bid if it had not owned the interest of \$1,000 in the judgment; that all representations made to the plaintiffs by any of the defendants were true, and were believed to be true when made, and were made in good faith; that the Clark & Boice Lumber Company would never have bid at the sale unless it had owned the \$1,000 interest in the judgment; that, if any material misrepresentations were made—which the defendants denied—then the defendants were willing and offered in court to have the transfer of the \$1,000 interest in the judgment, and the sheriff's deed to it, canceled and set aside, provided they were paid their \$50 and their \$1,750 with 6 per cent. interest, allowing a credit on said amounts of \$1,000 as of the day of the sale; that plaintiffs had never paid nor tendered said \$50 back, except in so far as their pleadings filed May 5, 1902, contained a tender; that at the time of the sale under the execution the Clark & Boice Lumber Company was the owner of the lands sold, but that J. H. Bemis had probably a nominal outstanding legal interest therein, and that the Clark & Boice Lumber Company purchased the interest of \$1,000 in said judgment so as to perfect its technical legal title; that J. H. Bemis had long before conveyed his interest in said lands to those through whom the Clark & Boice Lumber Company claims; that, if J. H. Bemis had not conveyed his interest in said land, he and the plaintiffs were estopped from denying that he had so conveyed, because on July 3, 1891, J. H. Bemis, as president of the Jefferson Lumber Company, a private corporation, of which he was then president, had executed a deed to the Henry Warnell land to W. B. Ward, and in said deed stated that said land had been conveyed to the Jefferson Lumber Company by J. H. Bemis, and because on July 1, 1891, the said J. H. Bemis, as president of the Jefferson Lumber Company, did execute to

Erastus Jones a deed conveying said Cas-tonon land; that said lands were accepted for value by the said grantees therein, who believed they were getting a good title, and that the Clark & Boice Lumber Company had succeeded to their rights; that for many years prior to 1892, and while J. H. Bemis was president of said Jefferson Lumber Company, said land was always treated by him as the property of the Jefferson Lumber Company, and assessed for taxation as its property, and that plaintiffs knew all the facts." On the 3d day of January, 1903, the day of trial, the plaintiffs filed an amended petition, in which they denied that the contract made with Dickson on May 29, 1901, was an assignment of an interest in the judgment, and withdrew the admission made in their former pleadings that such was the effect of the contract. A trial was had, and the exceptions by plaintiffs, calling in question the right of the defendants the Clark & Boice Lumber Company, Fred Clark, and J. M. Dickson to contest and object to the recovery of the 5 per cent. penalty by plaintiffs from I. H. Lanier, sheriff, were overruled, and the special exceptions of defendants to plaintiffs' pleading seeking to recover such penalty were sustained. At the close of the plaintiffs' evidence the court instructed a verdict for defendants, and judgment followed accordingly, and plaintiffs appeal.

Figures & Pruitt and Todd & Armistead, for appellants. L. S. Schluter and Joseph Dickson, for appellees.

BOOKHOUT, J. (after stating the facts). 1. There was no error in sustaining the defendants' exceptions to the recovery of the statutory penalty of 5 per cent., sought to be recovered from the sheriff for failing to pay plaintiffs the \$1,000. There was exhibited to the sheriff what upon its face appeared to be a valid written contract, made for a valuable consideration, whereby plaintiffs agreed "that said Dickson shall have the right to receive the proceeds of said sale up to the amount of \$1,000." Under the circumstances shown to exist, the sheriff was not called upon to determine to whom the \$1,000 should be paid. He was not required to constitute himself a judge to decide the question of conflicting interests between the claimants. *Daugherty v. Moon*, 59 Tex. 399. He had the right to retain the money and have the question as to who was entitled to it determined by the court, and in so doing he could not be subjected to the statutory penalty of 5 per cent. per month for failing to pay over the same. *McMahan v. Hall*, 36 Tex. 59; *Platt v. Philips*, 37 Tex. 9. He held the money for this purpose, and only paid it out upon the execution to him of a bond in double the amount thereof. The makers of the bond were entitled to contest plaintiffs' right to recover the penalty. They were

made parties to the suit by the sheriff, and would have been liable for the penalty had the sheriff been liable therefor. They were authorized to defend against such recovery by interposing a demurrer to the plaintiffs' pleadings seeking such recovery.

2. Was there error in instructing a verdict for defendants? As stated, the misrepresentations charged in the pleadings are: (1) In effect, that J. H. Bemis & Co. were insolvent, and plaintiffs' judgment was worthless; (2) that the purpose for which defendant desired to obtain an interest in plaintiffs' judgment was to avoid the necessity of foreclosing a lien. With reference to the insolvency of J. H. Bemis & Co., it was shown that long before April 10, 1901, plaintiffs were informed that J. H. Bemis & Co. were insolvent, and plaintiffs' debt was charged off as bad; that plaintiffs' judgment was rendered June 23, 1892; that an execution was issued on August 4, 1892, but that nothing was collected; a large balance appears to be still unsatisfied. There was no evidence that J. H. Bemis & Co. were solvent. Bemis was a witness in the case, but was not asked as to his solvency. The evidence fails to disclose the value of the interest which J. H. Bemis & Co. had in the land sold. The execution describes the property levied upon as one undivided one-half interest in and to the following described land, to wit: (1) Henry Warnell tract of land of 919 acres; (2) Louis Castenon survey for 960 acres. The first tract was bid in at the sheriff's sale by the defendants, and the second by the plaintiffs. There was no testimony offered as to the interest actually owned by J. H. Bemis or the firm of Bemis & Co. in the land, except as shown by the levy. Bemis testified that he had not acquired any interest in the land since 1890. It is stated in the letter of Dickson to plaintiffs, dated July 16, 1901, introduced in evidence by plaintiffs, "that the Clark & Boice Lumber Company actually owned these lands, but that, if J. H. Bemis had any apparent interest of record, it was not a real interest of any particular value, because (1) as to the Henry Warnell land he had, for the Jefferson Lumber Company, a corporation of which he was president, executed to W. B. Ward, in July, 1891, a deed of the entire property, reciting that this land had been conveyed to the Jefferson Lumber Company by J. H. Bemis; and (2) as to the Louis Castenon land he had, for the same company, in 1891, as its president, executed a deed to Erastus Jones of the entire property," and that "the Clark & Boice Lumber Company owned the title of Ward and Jones." These matters were also specifically plead by defendants. If these facts are true, then it seems that the Clark & Boice Lumber Company acquired title to the land by estoppel. *Carothers v. Alexander*, 74 Tex. 328, 12 S. W. 4; 11 Am. & Eng. Enc. of Law (2d Ed.) p. 429. We do not think that the amount for which the land

sold at execution sale should, under the circumstances surrounding the sale, be considered as evidence of the value of Bemis' interest in the land. The letter of Dickson, last referred to, states, in effect, that, "if their attorney had been present, the property would certainly have not been bid to over the \$1,000; that the attorney for the defendants was not present at the sale, nor was any officer of the Clark & Boice Lumber Company, it being simply represented by a young employé." At the time of the sale plaintiffs' judgment against Bemis & Co. was over nine years old, and nothing had ever been paid upon it. Execution was issued thereon in 1892, and placed in the hands of the sheriff of Marion county, and was by him returned nulla bona August 15, 1892. It seems that at the time of trial there was still a balance due upon the judgment. In the letter to the plaintiffs of May 10th the plaintiffs were informed that defendants' plan was to have an execution issued on plaintiffs' judgment, and levied on the Bemis interest in the lands, which it was expected would be purchased by the defendants. Plaintiffs knew that it was defendants' purpose to clear the title to the land. The letter of July 16th by Dickson to plaintiffs states that: "A great many judgments had been obtained against J. H. Bemis, and the first one to be recorded in Cass county against him was one in favor of the Atlanta Bank, which was against him and G. M. D. Grigsby and others. This judgment was recorded and abstracted in such a way as to make it a lien upon any property which J. H. Bemis might really own in Cass county. This judgment was primarily against J. H. Bemis, G. M. D. Grigsby being only a surety. The judgment has not been satisfied upon the record, but as a matter of fact it has been satisfied to the Atlanta Bank by Grigsby. The effect of this was to subrogate Grigsby to the lien of the bank so far as this bank was concerned, and Grigsby now has a claim against Bemis secured by a lien on any land which Bemis might really own in Cass county. This judgment is now practically controlled by my client. In order to foreclose this lien it will be necessary to bring suit against Bemis setting up the facts and asserting the lien and get a decree of foreclosure. This would take some time, and would involve some trouble and expense. I thought it would be simpler therefore to have the property sold out under some judgment which was inferior as a lien to that of the Atlanta Bank, and on investigation found that your judgment was in this position. It was my idea to sell the property out under your judgment, when the purchaser would get whatever title Bemis had, subject only to the Atlanta Bank judgment, and if an arrangement was made with the owners of that, whatever apparent title Bemis had in the property would become vested in the purchaser. The amount of the Atlanta Bank

judgment is much in excess, I am informed, of what is the value of the property. I therefore thought that if we bought an interest of \$1,000 in your judgment it would be ample to protect us against any possible loss in the matter, and the title would be straightened in an easy and inexpensive way." It was admitted that the judgment against Bemis and Grigsby, referred to in the letter, in favor of the Atlanta Bank, was a mistake, and it was intended and should have stated that it was in favor of the American Exchange Bank. No proof was offered showing that defendants did not have a lien upon the land superior to plaintiffs. It was not shown that plaintiffs' judgment had ever been abstracted and the abstract filed in Cass county, or that they had any lien on the land prior to the levy of the execution. If it be true that the American Exchange Bank had a judgment against Bemis as principal and Grigsby as surety, and such judgment was a lien on the land, and the same was paid by the surety, and the judgment was not satisfied of record, Grigsby would be subrogated to such lien, and he or his assigns could, by proper proceedings, have the same foreclosed. *Darrow v. Summerhill*, 93 Tex. 92, 53 S. W. 680, 77 Am. St. Rep. 833; *Mitchell v. Dewitt*, 25 Tex. Supp. 181; 3 Pom. Eq. Jur. p. 469, § 1419. The burden was upon plaintiffs to show the solvency of Bemis & Co., the value of their interest in the land levied upon, and that defendants did not have a lien on the land superior to plaintiffs, and that the statement of the defendants made in the letters of the attorney were false. The evidence tending to support these issues was so slight that reasonable minds could not have arrived at different conclusions in reference thereto. It, in effect, amounted to no evidence; hence there was no error in instructing a verdict for defendants. *Joske v. Irvine*, 91 Tex. 575, 44 S. W. 1059. Plaintiffs did not tender back the consideration stipulated in the contract (\$50) until May 5, 1902—10 months after they discovered the alleged fraud. The defendants offered to cancel the sale, and have the sheriff's deed set aside, provided they were restored their \$50 and their \$1,750 and interest, the same to be credited with the \$1,000 paid them by the sheriff.

3. It is here insisted that the contract between plaintiffs and Dickson was not an assignment of any part of the judgment. The entire correspondence shows that both parties understood that the contract was an actual transfer of the interest of the judgment. Plaintiffs made on May 14, 1902, to Dickson, this statement: "We will transfer to you the amount of the judgment if you desire." In the testimony of Mr. Johnson, one of the plaintiffs, he states, "Upon behalf of W. T. Rickards I executed an assignment of interest in the judgment to Joseph Dickson." In plaintiffs' supplemental petition, filed May 5, 1902, it is distinctly alleged that plaintiffs had made an assignment of interest in the judg-

ment to Joseph M. Dickson. In the amendment filed by plaintiffs on the 3d day of January, 1903, they for the first time stated that the contract was not an assignment of an interest in the judgment, and not intended to be. Whether the contract constituted an assignment of an interest in the judgment, we think, under the facts, is immaterial. The facts show that the contract was made by the parties for a valuable consideration to and received by plaintiffs, and before they made any objection thereto the execution was issued on the judgment, and levy had been made, and the sale had taken place, and the consideration had been paid to the sheriff. Such being the case, defendants' right to the \$1,000 became absolute, unless plaintiffs were in a position to show that they had been defrauded into making the contract. As stated, the evidence failed to establish any fraud in the transaction.

4. Under the fourth assignment of error plaintiffs claim that, in any event, they should have had a judgment for \$69.30, the amount of costs retained by I. H. Lanier, as sheriff, and to which he was entitled, as shown by his return upon the execution. By the letters between the plaintiffs and Dickson it is stated that plaintiffs "shall be at no expense in connection with said matter." A fair interpretation of the contract is that plaintiffs were to get their \$50 for the transfer, and no costs were to be taken out of this amount. The defendants were to get the net proceeds of the sale up to \$1,000, and beyond that amount they had no interest in the matter. The amount of these costs was practically paid to the sheriff by the defendants when they paid him the \$1,750 in cash, and, in our opinion, in making such payment defendants complied with the terms of their contract, even if the contract is to be interpreted as plaintiffs claim.

The assignments not discussed have been carefully considered by us, and are without merit.

Finding no error in the record, the judgment is affirmed.

On Rehearing.

(Jan. 23, 1904.)

Appellants complain on their motion for rehearing that we were in error in stating in the opinion that it is stated in the letter from Dickson to plaintiffs, dated July 16, 1901, introduced in evidence by plaintiffs, "that the Clark & Bolce Lumber Company actually owned these lands, but that, if J. H. Bemis had any apparent interest of record, it was not a real interest of any particular value, because (1) as to the Henry Warnell land he had, for the Jefferson Lumber Company, a corporation of which he was president, executed to W. B. Ward, in July, 1891, a deed to the entire property, reciting that this land had been conveyed to the Jefferson Lumber Company by J. H. Bemis; and (2)

as to the Louis Castenon land he had, for the same company, in 1891, as its president, executed a deed to Erastus Jones to the entire property," and that "the Clark & Boice Lumber Company owned the title of Ward and Jones." This complaint is just. The statement is not contained in the letter, and, in so far as the opinion so stated, it is corrected. This does not change the conclusion reached in the case, and the motion for rehearing is overruled.

CRAWFORD v. ARNOLD et al.

(Court of Civil Appeals of Texas. Jan. 13, 1904.)

ADVERSE POSSESSION—EVIDENCE—DEEDS TO ADVERSE CLAIMANTS—ADMISSIBILITY.

1. On the issue whether there was an outstanding title in a third party to a tract which a deed purported to convey, deeds to him and those under whom he claimed, showing a claim of title for more than 10 years, adverse to the grantee in the deed in suit, are material in connection with evidence of actual possession for the statutory period by such claimants.

Appeal from District Court, Frio County; E. A. Stevens, Judge.

Action by R. F. Arnold and others against V. F. Crawford. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

I. N. Spann and C. A. Davies, for appellant. Magus Smith, for appellees.

NEILL, J. On the 16th day of February, 1898, appellees, who are plaintiffs below, by their warranty deed of that date, conveyed to appellant, defendant below, 961 acres of land in Frio county, which was specifically described by metes and bounds. In the same deed plaintiffs reserved 100 acres of the tract to be set apart to them by defendant in a square on any side or corner that he might designate. The defendant having failed and refused to set aside to plaintiffs the 100 acres reserved by them in the deed, the plaintiffs, on the 21st day of November, 1900, filed this suit in the nature of trespass to try title to recover the 100 acres and to have it partitioned to them by a decree of the court. Pending the suit a survey of the tract embraced within the field notes of the deed was made under the order of the court, and upon actual survey the tract was found to contain only 937 acres. This survey was acquiesced in by all the parties to the suit as determining the quantity of land conveyed. After it was made, the plaintiffs amended their pleadings, claiming only 76 acres of the tract, and asked judgment therefor, and that that quantity of the land be partitioned to them. The defendant answered that he was entitled under plaintiffs' deed to 861 acres of the tract; that there is a field containing 15½ acres of the land, which has been fenced, cultivated, and held in peaceable and adverse possession by other parties for more

than a period of 10 years, and is owned by Dr. R. Redditt; that plaintiffs never placed defendant in possession thereof, and he is advised and believes that said outstanding title to said 15½ acres is good, and cannot be recovered in law from the present owner and holder thereof, by reason of which he holds only 61½ acres of land over and above the 861 acres which was conveyed and warranted to him by plaintiffs' deed, and that plaintiffs should not recover of him more than 61½ acres. He further answered that at the time he purchased the land from plaintiffs they represented and warranted to him that a certain line of fence pointed out was on and belonged to said premises; that such representations were untrue; that such fence was not on and did not belong to said lands, and that, therefore, there was a breach of said warranty, which entitled him to recover from plaintiffs the reasonable value of such fence, which he alleged to be \$337.50, and prayed judgment therefor. There was a trial of the case before a jury, and the defensive matters pleaded were submitted to them, and the issue determined by a verdict in favor of plaintiffs, upon which judgment was entered in their favor for 76 acres, and all costs were taxed against the defendant.

No error is assigned questioning the judgment so far as it affects the issue of the alleged breach of warranty regarding the fence. The assignments of error relate only to the issue as to the outstanding title to the 15½ acres averred by defendant to be in Dr. R. Redditt, and of the action of the court in assessing all costs against defendant. Before considering the assignments, we will say that the issue as to outstanding title was only raised by the special plea hereinbefore stated, the defendant not having interposed a general denial or plea of not guilty. It was agreed in writing between the parties "that the records of all deeds or muniments of title either party might desire to offer in evidence might be offered in lieu of the original, subject to such objections only as might be offered to the original documents." The defendant having introduced testimony showing that Dr. Redditt owns and claims the 15½ acres in controversy, and that he and those under whom he claims have had actual possession thereof for 12 or 15 years prior to February, 1898, and from that time up to the date of trial, offered in evidence the record of a deed dated July 22, 1901, from J. C. B. Harkness to Dr. R. Redditt, together with the record of other deeds, which would show that Redditt and his grantor, Harkness, and those under whom they claim, had been claiming said 15½ acres of land, situated in the south corner of the tract described by the field notes in the deed from plaintiffs to defendant, adverse to plaintiffs for a period longer than 10 years prior to February, 1898. The introduction of the record of said deeds was objected to upon the ground they were immaterial and irrelevant.

This objection was sustained, and defendant not permitted to introduce in evidence the record of said instruments. We think the testimony offered was clearly relevant to the issue made by the pleadings, and would, in connection with the other evidence introduced, strongly tend to show an outstanding title to the 15½ acres at the time plaintiffs conveyed the lands to the defendant.

For the error of the court in excluding said testimony, the judgment is reversed, and the cause remanded.

O'MAHONEY et ux. v. FLANAGAN et al.
(Court of Civil Appeals of Texas. Jan. 9, 1904.)

DEEDS—RECITAL—NOTICE TO PURCHASER—VERDICT.

1. Recital of a deed that the grantors give, transfer, and convey the land to their daughter in consideration of \$300 paid them "at various times her marriage," is sufficient to put a purchaser from her husband after her death on inquiry as to whether the land was her separate property, as the deed, on its face, would have made it, had it recited that the payments were made "before" her marriage.

2. Where the verdict in trespass to try title is merely for plaintiff for the land, and there is evidence that the value of the rents and damages is the same amount as the value of the improvements, it will be inferred that the jury set off one against the other.

Appeal from District Court, Harrison County; Richard B. Levy, Judge.

Action by Cecil Flanagan and others, by J. W. Flanagan, their next friend, against H. O'Mahoney and wife. Judgment for plaintiffs. Defendants appeal. Affirmed.

This was an action of trespass to try title, which was brought by appellees Cecil Flanagan, Hunter Flanagan, and Annie May Flanagan, minors, by their next friend, J. W. Flanagan, against appellants, and in which the judgment was rendered for plaintiffs. Both parties to the suit claim title under John T. Hunter and wife. On February 28, 1888, John T. Hunter and wife conveyed the property to Sallie Flanagan, the mother of appellees. The deed is as follows: "State of Texas, County of Harrison. Know all men by these presents that we John T. Hunter and Ann M. Hunter of Marshall, Harrison County, Texas, have this day and date sold bargained and conveyed to our daughter, Sallie Flanagan of Marshall, Harrison County, Texas, she being the wife of J. W. Flanagan Jr. of Marshall, Harrison County, Texas, all of our right and title to a certain tract or parcel of land described as follows (160) one hundred and sixty acres of land more or less known as a part of the Henry Teel headright survey we John T. Hunter and Ann M. Hunter bought said land from R. G. Hamil and wife and now be it known that we John T. Hunter and wife Ann M. Hunter of State and County above mentioned do give, transfer and convey to

our daughter Sallie Flanagan for the consideration (\$300) three hundred dollars paid us in hand at various times her marriage to J. W. Flanagan, Jr. the land is known as the John T. Hunter farm situated about 3½ miles north E. of Marshall, Texas, we convey all of and title to said Sallie Flanagan our daughter of said land which is now rented to Wm. Albright for the year of 1888 Sallie Flanagan is to have all benefits derived from said land from this date on as we John T. Hunter and Ann M. Hunter relinquish all claim after date of this deed now be it known that said land has on it at present three negro cabins and two houses in the yard where our resident lately burned the land and all these on from this date on belongs to our daughter Sallie Flanagan to hold and control and dispose of as she see proper. Now we John T. Hunter and Ann M. Hunter of Marshall Harrison County, Texas, do bind ourselves to warrant and defend Sallie Flanagan in all claims that may arise legally in regard to the title to the above land we give this warrantee deed to our Daughter Sallie Flanagan of said County and State now we sign our names and acknowledge our signature in presence of witness this the 28th. Feby. 1888. Signed by John T. Hunter and Ann M. Hunter." The court on the issue of title instructed a verdict for plaintiff. The issues as to rental value of land and damages, and of improvements made by defendants in good faith, were submitted to the jury. The jury returned a verdict for plaintiff for the land, but found nothing for rents and damages or for improvements. Defendants appeal.

T. P. Young, for appellants. F. H. Prendergast, for appellees.

BOOKHOUT, J. (after stating the facts). Complaint is made of the action of the court in instructing a verdict for plaintiffs on the issue of title. The evidence showed that at the time of the execution of the deed Sallie Flanagan was the wife of J. W. Flanagan, and that plaintiffs are their children. Sallie Flanagan died, and J. W. Flanagan subsequently married Mattie Flanagan. J. W. Flanagan and Mattie Flanagan sold the land to D. T. Noble and J. F. Bryant on the 18th day of December, 1895, by warranty deed, which was duly acknowledged and recorded; the consideration being part cash, and their three notes, each for \$121.75, each payable to J. W. Flanagan or bearer, secured by a vendor's lien, and payable in one, two, and three years, respectively, after date. D. T. Noble and J. F. Bryant conveyed the land to defendant Mrs. B. O'Mahoney for \$387.50, the amount of these notes, in January 1897; the consideration being the cancellation of these notes. Flanagan in the spring of 1896 borrowed from Mrs. B. O'Mahoney \$125, and deposited the three notes executed by D. T. Noble and J. F. Bryant as security therefor.

When the first of the three notes matured, Noble and Bryant refused to pay it, and stated they would not pay the notes. Thereupon the defendant H. O'Mahoney procured J. W. Flanagan to write to Noble and Bryant, requesting them to convey the land to Mrs. B. O'Mahoney in satisfaction of the notes, which they accordingly did. There was undisputed evidence that the consideration, \$300, recited in the deed from John T. Hunter and Ann M. Hunter to Sallie Flanagan, was paid out of the separate estate of Sallie Flanagan, and that it was the intention of the parties to make the land her separate property. Neither H. O'Mahoney nor Mrs. B. O'Mahoney had any actual notice when the land was conveyed to her of the title of plaintiffs. They did know that J. W. Flanagan had been twice married, and that he had children by his first wife at the time Mrs. O'Mahoney loaned Flanagan the money, and at the time the land was conveyed to her.

The question presented is, was the recitation in the deed to Sallie Flanagan sufficient to put a reasonably prudent person upon inquiry as to whether the land was community or her separate property? The recitation referred to reads: "Now be it known that we John T. Hunter and wife Ann M. Hunter of State and County above mentioned do give, transfer and convey to our daughter Sallie Flanagan for the consideration (\$300) three hundred dollars paid us in hand at various times her marriage to J. W. Flanagan, Jr. the land," etc. It will be noted that the conveyance is by John T. Hunter and wife to their daughter Sallie Flanagan. It used the words "give, transfer and convey." It further specifies the consideration of three hundred dollars "paid us in hand at various times her marriage." There seems to be a word omitted between the words "times" and "her" in this recitation. Either the word "before" or "since" would supply the omission. If the word "before" was omitted, and the recitation should read "paid us in hand at various times before her marriage," the deed, upon its face, would make the land her separate property. If the word "since" should be supplied, then it would show that the consideration was paid since marriage, and the land would appear to be community property. The facts recited in the deed were sufficient to put a purchaser upon inquiry as to whether the land was the separate property of Mrs. Sallie Flanagan, or the community property of herself and husband. Whatever is sufficient to put a purchaser upon inquiry, which, if prosecuted with ordinary diligence, will disclose the true condition of the title, is held, in law, to be notice. *Wethered's Adm'r v. Boon*, 17 Tex. 150; *Bacon v. O'Connor*, 25 Tex. 226, 227; *Sickles v. White*, 66 Tex. 179, 17 S. W. 543. There is no contention that inquiry would not have disclosed the true condition of the title. The fact that neither appellee nor her husband had read the deed from Hunter and wife to

Mrs. Sallie Flanagan does not affect the question. This deed was in her chain of title and recorded, and she is conclusively presumed to have notice of its recitals. *Bryan v. Crump*, 55 Tex. 1; *Renick v. Dawson*, 55 Tex. 102; *Caruth v. Grigsby*, 57 Tex. 259. We conclude that the defendant, under the facts, was not a good-faith purchaser of the land, and that, so far as the title is concerned, there was no error in instructing a verdict for plaintiffs.

The fourth assignment complains of the charge of the court in defining a purchaser in good faith as "one who not only supposes himself to be the true owner, but who is ignorant that his title is contested by a person claiming a better title. A possessor in good faith will be entitled to compensation for the permanent and valuable improvements he has made upon the land while so in possession, though it should turn out his title is defective, or that another has a superior title." This charge announced a general rule, and is correct. Other parts of the charge correctly applied the law to the facts.

It was shown, in addition to the facts recited, that appellant had made improvements upon the land of the value of \$125. It was also shown that the rental value of the land and damages was \$125. The jury did not find anything for improvements, or for the rental value and damages to the land. The value of the rents and damages being the same as the value of the improvements, it may be inferred the jury set off one against the other. There is no evidence that appellee made any investigation as to the validity of the title under which Mrs. O'Mahoney claimed, or that she had consulted an attorney in reference to the same, prior to her purchase.

The charge, as a whole, fairly submitted the issue of improvements in good faith, and there was no error in refusing the special charge, the refusal of which is made the ground of the fifth assignment of error.

Finding no error in the record, the judgment is affirmed.

LITHGOW v. SWEEDBERG.

(Court of Civil Appeals of Texas. Jan. 6, 1904.)

LIEN FOR REPAIRS—DEATH OF OWNER—PRESENTMENT AND ALLOWANCE OF CLAIM—EFFECT.

1. The fact that the owner of a steam boiler placed in possession of a mechanic for purposes of repair dies before its redelivery and payment for the repairs, and the claim therefor is presented to and allowed against his estate, being approved and classified by the county judge, does not take away the mechanic's lien given by Rev. St. 1895, art. 3320, providing that, when any article shall be repaired by any mechanic or other workman, he is authorized to retain possession until the amount due is fully paid off; nor does it impair the power of sale given to such lienor by article 3322.

Appeal from District Court, Webb County; A. L. McLane, Judge.

Action by F. H. Lithgow, as administrator of the estate of C. A. Charleston, deceased, against C. A. Sweedberg. Judgment for defendant, and plaintiff appeals. Affirmed.

A. Winslow, for appellant.

NEILL, J. This suit was brought by the appellant, as administrator of the estate of C. A. Charleston, deceased, against the appellee, to recover possession of a 20 horse power boiler, as the property of the estate of decedent. This appeal is from a judgment in favor of defendant.

The undisputed facts are that plaintiff's intestate was at the time of his death the owner of the property sued for; that, prior to his death, deceased placed the boiler in defendant's possession for the purpose of having him repair it; that defendant made the repairs, in which he furnished the material. The repairs not being paid for, and the boiler being in possession of the defendant at the time of Charleston's death, letters of administration having been granted to plaintiff, defendant presented to him his claim against the estate for \$15, of which \$11.15 was for the repairs made on the boiler. The claim was allowed on May 10, 1902, filed with the clerk of the county court, and approved and classified by the county judge. Afterwards plaintiff, as administrator, demanded of defendant possession of the boiler, which was refused; defendant claiming that he was entitled to retain possession until his charges for labor and material furnished in making the repairs were fully paid.

Under these undisputed facts, the only question to be determined is, who was entitled to possession of the boiler? We think this question is answered in defendant's favor by article 3320, Rev. St. 1895, which is as follows: "Whenever any article, implement, utensil or vehicle shall be repaired with labor and material, or with labor and without furnishing material, by any carpenter, mechanic, artisan or other workman in this state, such carpenter, mechanic, artisan or other workman is authorized to retain possession of said article, implement, utensil or vehicle until the amount due on same for repairing by contract shall be fully paid off and discharged." This is but a declaration of the common-law principle that a bailee for hire, who performs services upon the goods of another, has a lien on such goods to secure his reasonable charges (*Wilson v. Martin*, 40 N. H. 88; *Harris v. Woodruff*, 124 Mass. 205, 28 Am. Rep. 658; *Morgan v. Congdon*, 4 N. Y. 552; 2 Kent, Comm. [5th Ed.] 635), and has the right to retain possession until his demand is satisfied, though he has no power of sale, unless given by statute or contract (*Holderman v. Manler*, 104 Ind. 118, 3 N. E. 811; *In re Merrick*, 91 Mich. 342, 51 N. W. 890). But in this state article 3322 gives such bailee, as is defendant, the power to sell, and prescribes the mode of sale. There is nothing in the statutes regarding estates

of decedents that takes from an artisan the right of possession given by article 3320, nor the power of sale conferred by article 3322. We can see no reason why an administrator, in the absence of a statute conferring it, should have any greater right than deceased would have had if he had lived. Defendant's lien and right to possession until his debt is satisfied were vested rights under the statute, which courts have no authority under the law to construe away. If, before Charleston died, defendant had sued him and obtained judgment for the value of his labor and material furnished in repairing the boiler, such suit would not have been a waiver of his right to retain possession until his debt was satisfied. The presentation of his claim to the administrator for allowance, and its approval and classification, could not affect the administrator more favorably than such suit and judgment would his intestate. It seems to be a rule in administration of estates that a creditor cannot be compelled to surrender his collateral security unless he is tendered the whole amount of his debt. *Woerner on Administration*, 859.

The judgment of the district court is affirmed.

GALVESTON, H. & S. A. RY. CO. v. CASSINELLI & CO.

(Court of Civil Appeals of Texas. Jan. 6, 1904.)

RAILROADS — ANIMALS ON TRACKS — NEGLIGENCE — BURDEN OF PROOF — EVIDENCE — SUFFICIENCY.

1. In an action against a railroad for the value of mules killed at a siding, the burden was on plaintiff to prove negligence of defendant's employes.

2. The mere fact that a passenger train was running at a high rate of speed does not show negligence, in an action to recover for mules which had been turned loose by their driver, who was preparing to load freight cars standing on a siding, and thereupon went around the end of the cars onto the main track, where they were struck by the train, the employes on which had no warning that the mules were likely to go onto the track.

Appeal from Kinney County Court; M. P. Malone, Judge.

Action by G. B. Cassinelli & Co. against the Galveston, Harrisburg & San Antonio Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Baker, Botts, Baker & Lovett and Ellis & Love, for appellant. Earnest Jones and Joseph Jones, for appellee.

JAMES, C. J. The action was to recover the value of two mules killed by appellant's train at a switch or siding known as "Kinney." At that place the right of way was fenced, but there were gates on either side. Defendant at that place deposited freight cars on the switch, and wagons came into the gate to load freight and carry it to Brackett.

¶ 1. See *Railroads*, vol. 41, Cent. Dig. § 1576.

On this occasion there were five cars there loaded with hay. The switch track was north of the main track, and faced a gate. Plaintiff's employé had come with a wagon with five mules, and had stopped at the second car from the east end of this string of cars. He proceeded to unhitch, and had unhitched the two lead mules, and was unhitching the others, preparatory to turning them all out of the right of way. He turned the two lead mules loose, and they, having gone, were about 60 or 70 yards to that end of the cars, and around the end of the west car, while the teamster was unhitching the others, when they were struck by a passenger train and killed. The teamster, Alverado, testified that he thinks they went around the west end of the cars, and crossed over the main track, and presumed that they became frightened, and ran back on the track, when they were struck. He further testified that he did not see the mules when they went off or when they were killed, because he was busy switching the others. His testimony, therefore, as to their having crossed the main track and gone over to the Smith side, and were frightened back, is merely a conclusion; he, in effect, admitting that he knew nothing about it. There was testimony that the track (the main track) was straight, and a mule on the track could have been seen a mile or more. But there was no testimony that these mules were on that track until struck, or south of the track, and they must have been south of the string of cars to be seen from an engine coming from the east; or, to say the least, while they were north of the cars, if they could be seen at all there, or behind the west car, there was nothing to notify persons on the engine that these animals were likely to go upon the track ahead of the train. The burden of proof was upon plaintiff to prove negligence of defendant's employés. The animals were killed in a very short time after they were turned loose under the above circumstances. There is nothing in the evidence tending to establish defendant's negligence, unless it be the high rate of speed at which the passenger was moving. This alone—particularly under the conditions existing here—was not negligence. *I. & G. N. Ry. Co. v. Wear*, 1 Gammel, Law J. 541.

Reversed, and rendered for appellant.

TINKLE v. SWEENEY et al.

(Court of Civil Appeals of Texas. Jan. 2, 1904.)

INTOXICATING LIQUORS—SELLING TO MINORS—CIVIL LIABILITY—BELIEF OF AGE—CONDITIONS OF BOND—BREACH.

1. There is no civil liability for selling liquor to a minor where the liquor dealer believed, and had good reason to believe, that the minor was over 21 years of age.

2. That a minor entered a liquor dealer's place of business on three occasions, and re-

mained therein only long enough to purchase, drink, and pay for beer, does not show a breach of the clause of the liquor dealer's bond relating to permitting a minor to enter and remain in the place of business.

Appeal from District Court, Grayson County; Rice Maxey, Judge.

Action by Emily Tinkle against M. J. Sweeney and others. From a judgment for defendants, plaintiff appeals. Affirmed.

J. H. Randell, for appellant.

RAINEY, C. J. This suit was instituted to recover on a liquor dealer's bond for selling intoxicating liquors to a minor and allowing said minor to enter and remain in the appellees' place of business. Defendants pleaded the general denial, and specially that Sweeney and his employés believed, and had good reasons to believe, that the minor was more than 21 years of age. The case was tried before a jury, and verdict and judgment rendered for defendants, and plaintiff prosecutes this appeal.

Various assignments of error are presented complaining of the charge of the court, and that the judgment of the court is contrary to the evidence, in that the evidence shows that Sweeney permitted the minor to enter and remain on the premises, contrary to the terms of the bond. Conceding that the court erred in its charge, as complained of, in view of the testimony the case must be affirmed. The evidence is sufficient to support the verdict of the jury that Sweeney had good reasons to believe, and did believe, that the minor was 21 years of age. This finding settled the question of liability for selling to the minor.

On the issue as to the minor's remaining in Sweeney's place of business, the evidence shows without conflict that said minor entered said place of business on three occasions, and remained therein only long enough to purchase some beer, drink it, and pay for it. This evidence does not show a breach of that clause of the bond relating to permitting a minor to enter and remain in the place of business. This issue is definitely settled by the opinion of the Supreme Court in answer to certified questions from this court. See *Tinkle v. Sweeney* (Tex. Sup.) 47 S. W. 609, 8 Tex. Ct. Rep. 674.

The judgment is affirmed.

BURTON-LINGO CO. v. BEYER.

(Court of Civil Appeals of Texas. Jan. 16, 1904.)

LIMITATIONS—AMENDMENT OF PLEADING—CHANGE OF CAUSE OF ACTION.

1. Plaintiff sued on an account, an exhibit of which was attached, alleging that on March 30th, and divers dates thereafter, as shown in the exhibit, he, at defendant's request, sold the goods described in the account, "for which defendant agreed and undertook to pay plaintiff the sums of money as shown by said account." In an amended petition, to which the same exhibit was attached, it was averred that "the

¶ 1. See *Intoxicating Liquors*, vol. 29, Cent. Dig. § 172.

said articles, * * * as shown in said account, were sold and delivered to plaintiff under contract between plaintiff and defendant that the same should be paid for on the 1st day of January, * * * and the sum of said account should be due and payable on said last day, and defendant undertook and promised to pay plaintiff the amount of said indebtedness on the 1st day of January." Held, that the amended petition did not state a new cause of action, so as to be barred by limitation.

Appeal from Mitchell County Court; W. B. Crockett, Judge.

Action by the Burton-Lingo Company against M. T. Beyer. Judgment for defendant, and plaintiff appeals. Reversed.

W. K. Homan, for appellant. Ed J. Hamner, for appellee.

STEPHENS, J. Appellant sued appellee to recover a balance due on account of lumber sold from March 30, 1900, to July 28, 1900. In the original petition, filed September 9, 1902, to which was attached as an exhibit the itemized account declared on, the following allegations were made: "On the 30th day of March, 1900, and on divers dates thereafter, as set out in the itemized account hereto attached, marked 'Exhibit A,' and made part of this petition, plaintiff, at the special instance and request of defendant, sold and delivered to defendant the articles of lumber, goods, wares, and merchandise described in said itemized account, at the prices as stated therein, which are the reasonable values of said articles, for which defendant agreed and undertook to pay plaintiff the sums of money as shown by said account; but, though long since due and payable, defendant has failed and refused, and still fails and refuses, to pay the same, or any part thereof, except the sum of \$217.71, which is credited on said account, leaving a balance of \$265.86 due plaintiff on said account." In the amended petition, filed January 24, 1903, to which the same account was attached as an exhibit, in lieu of the allegation in the original petition, "for which defendant undertook and agreed to pay plaintiff the sums of money as shown by said account," the following allegations were made: "The said articles of lumber, goods, wares, and merchandise as shown in said account were sold and delivered by plaintiff to defendant under contract between plaintiff and defendant that the same should be paid for on the 1st day of January, 1901, and the sum of said account should be due and payable on said last day, and defendant undertook and promised to pay plaintiff the amount of said indebtedness on said 1st day of January, 1901." The court, holding that the amended petition stated a new cause of action, sustained a special demurrer pleading the statute of limitations, and dismissed the suit, and to this error is assigned.

The cases cited by appellee to sustain the ruling complained of were cases in which a new promise was declared on in the amend-

ed petition, and are therefore inapplicable to a case like this, in which the amended petition pleads the original promise made when the lumber was sold, and not a new promise subsequently made. Both the original petition and the amended petition evidently declared on the same transaction, and differed only as to the terms and effect of the contract. If the original petition did not accurately or fully state the contract, it was the office of an amendment to make the correction. It has several times been held that the filing of an original petition which is even bad on general demurrer will stop the running of limitation. The cases sustaining appellant's contention are numerous, many of which are cited in its brief, and need not be quoted.

The judgment is therefore reversed, and the cause remanded for a new trial.

MISSOURI, K. & T. RY. CO. OF TEXAS v. HUFF.

(Court of Civil Appeals of Texas. Dec. 19, 1903.)

CARRIERS—PASSENGERS ON FREIGHT TRAINS—RULES OF CARRIER—PRESUMPTIVE ABROGATION—AUTHORITY OF BRAKEMAN—NEGLIGENCE—EVIDENCE—SUFFICIENCY—SPECIAL JUDGES—ELECTION.

1. The legislative provision for the election of special judges is applicable to both regular and special terms.

2. In an action for injuries to a passenger alighting from a freight train, evidence held sufficient to justify a finding that defendant's brakeman was negligent in causing plaintiff to alight at the time and place that he did.

3. Though rules are made and promulgated by a carrier prohibiting the carriage of passengers on freight trains, when such rules are openly and habitually violated by the employees, and such violation is known to the company's officers, or continued for such a length of time that such officers, by the use of ordinary care, might have known of it, and no attempt is made to enforce the rules, such rules will be presumed to have been abrogated.

4. Where plaintiff knew nothing of a rule of defendant prohibiting the carrying of passengers on freight trains, and defendant's freight trains had for years openly, publicly, and without protest from defendant carried passengers, as was known to plaintiff and the public generally, and plaintiff, in response to the invitation of the conductor, boarded a freight train and paid his fare, he was authorized to presume that the carrying of passengers was permitted, and that he would be protected as one.

5. In an action for injuries to a passenger on a freight train, evidence held sufficient to warrant the presumption that a rule prohibiting the carriage of passengers on such trains had been abrogated.

6. Although the rules of a carrier prohibit a brakeman on freight trains from inviting passengers to board the same or collect fares, yet, if he exercises such authority with the knowledge of the company's officers, or has openly and habitually exercised it for such a length of time that the officers, by the exercise of ordinary care, might have known it, knowledge will be imputed to the company, and it will be responsible for such brakeman's acts.

7. A new trial on the ground of newly discovered evidence is properly denied where the

¶ 4. See Carriers, vol. 9, Cent. Dig. § 982.

motion fails to show diligence in discovering the evidence, and it is not probable that the evidence would change the verdict on another trial.

Appeal from District Court, Hunt County; T. D. Montrose, Special Judge.

Action by J. C. Huff against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Affirmed.

T. S. Miller and Perkins, Craddock & Wall, for appellant. Evans & Elder, for appellee.

RAINEY, O. J. Appellee was injured while alighting from a freight train upon which he had been riding, claiming to be a passenger thereon. The appellant company denied his right on the train, and that he was not a passenger, and owed him no duty as such: Judgment was rendered in favor of appellee, from which the company appeals.

Conclusions of Fact.

We adopt the following, taken, with slight changes, from the appellee's brief, which are correct deductions from the evidence, to wit:

"On the evening of March 16, 1902, the appellee and Horace Arnold were in Celeste, a town on appellant's road, about twelve miles north of Greenville, and desired to go to Greenville, their home, that night. A freight train, consisting of engine, tender, fifteen cars, and caboose, in charge of five employes, to wit, engineer, fireman, conductor, a head and rear brakeman, en route from Denison to Greenville, had stopped at the station at Celeste; the engine standing at the south end of the platform near the depot, while the caboose was standing about 100 yards north of the depot. J. W. Scruggs was conductor and J. F. Haddock head brakeman, but the entire crew at that time were strangers to both Huff and Arnold. The train crew wore no uniform, and a stranger had no means by which he could distinguish the conductor from the brakeman. Besides, the conductor and brakeman had, with the knowledge of the company, been in the habit of performing the duties of each other for a long time prior to this date. The train in question was an extra freight train, but there was no difference in appearance, and there was no means of distinguishing an extra from a way or through freight train. It is stated on a card in all the cabooses that 'only such freight trains as are specifically permitted to do so are allowed to carry passengers, and persons going aboard any freight train must ascertain from the time table, which the ticket agent will show on demand, what trains are permitted to carry passengers.' Rule 319 of the time card provided, except when otherwise specified, that freight trains will not carry passengers. The time card was not intended for the information of the public, but for the employes, and this

was so specified on the time card. A way freight train carried passengers on a regular schedule published in the time card until a short time prior to this date. That all of the defendant's freight trains, including way, through, and extra trains, had openly and publicly, and without protest from, and without any effort on the part of the defendant to prevent the same, 'except the issuance of the rule as above stated,' carried passengers for hire for many years immediately prior and up to the 16th day of March, 1902. And this was generally and publicly known and understood. In carrying passengers on its several freight trains they were permitted to ride in and on box cars and flat cars, as well as the caboose; and this custom was publicly and generally known, and had been permitted by the defendant for many years immediately prior to this date. When the train was approaching Celeste, it blew for the station. The appellee and Arnold had started to church. And when they heard the sound of the whistle they turned, and went hurriedly to the station, in order to catch the train home. When they reached the station, there was a light in the ticket window. They approached the window, and asked a young man, whom they took to be the ticket agent, for tickets for Greenville, and were informed by him that the agent was out, but would return soon. They waited in the waiting room for the return of the agent, and while there a man came along with a lantern on his arm, looked into the station, and then went towards the engine. After he passed up towards the engine, they noticed some one giving the proceed signal, and they then went hurriedly out of the station towards the engine, where they encountered two of the train crew near a well—Scruggs and Haddock. Each had a lantern, and dressed like ordinary trainmen. At this time they did not know either of the men. Appellee went up to the man who was giving directions to the engineer to move his train, and asked him if he was the conductor, and he replied, 'Yes, where do you boys want to go?' They said, 'To Greenville.' He replied, 'Get on.' And they said, 'We have no tickets.' The conductor replied, 'If you have money, get on.' They then started in a run to catch the caboose, as the train was then moving; and the other man, who had heard the whole conversation, said: 'Get on that flat car there. You won't have time to catch the caboose.' They climbed onto the train and took a seat upon a plank on a flat car half loaded with slack coal, and rode to Greenville in plain view of the engineer and fireman, it being a moonlight night, with nothing to obstruct the view. The conductor, Scruggs, and head brakeman, Haddock, were the only two members of the crew that were at the well on the platform where this conversation occurred; and the man that said he was conductor, after telling them to get on the train, went to

wards the engine, and the brakeman boarded the train at the same place where appellee did. When the train reached Kingston, three miles from Celeste, it stopped for a few minutes. The two men with lanterns that told them to get on the train at Celeste passed by and saw them sitting on the flat car. A short time after the train left Celeste, one of these men—either the conductor or brakeman, and whom appellee testified was the conductor—came to them, and collected the regular fare of 35 cents each to Greenville. A short time before the train reached Greenville, the brakeman approached appellee and Arnold, and told them that they would have to get off in the north yards, the place where passengers on freight trains usually got off. In the north yards of Greenville the railroad crosses three streets—Henry, Bourland, and Polk. The first two are grade crossings, and the third an undergrade crossing. From the south edge of Polk to Henry street the roadbed was covered with black cinders, was smooth and free from obstructions, and afforded a safe place for passengers to alight from freight trains; and this entire space was then being used, and had been so used for a great number of years, openly and publicly, as a place to discharge its passengers on its way, extra, and through freight trains; and this was so because there was a coal chute just north of the station at Greenville, and when a freight train came in from the north it either stopped its engine at the coal chute, or turned off of the main line into the yards, which would throw the caboose and the other parts of the train anywhere along this space. And this was publicly known and understood. The flat car on which appellee and Arnold were riding had a ladder and stirrup at the rear end and east side of the car. There was likewise a ladder and stirrup on the rear end and east side of the car in front of them. As the train approached these crossings, the brakeman or conductor came to them, told them to climb down those ladders preparatory to leaving the train, and that he would hold his lantern, and notify them when the train reached the proper place for them to get off. Appellee climbed down the ladder on the car that he was riding on, and Arnold went forward and climbed down the ladder on the forward car, each with their faces to the west. The moon was in the west, about as high as the sun would be at 4 p. m., which threw them to get off in the shadow of the car, and the shadow, together with the cinders, made it dark under their feet. And when the car on which appellee was riding, and when appellee reached a point over the undergrade crossing immediately over the abutment at the south end of the trestle, where the cinders came right up to the abutment, the brakeman told him to step off, which he did, falling a considerable distance, striking his back against the abutment, and falling to the ground, where he

was afterwards found in an unconscious condition. At the time he stepped from the train, it had almost stopped, running about one and a half miles per hour.

If there was ever any rule or regulation prohibiting the carrying of passengers on any of appellant's freight trains, the same was unknown to appellee. Besides, the same had never been enforced, but, on the contrary, the defendant, through its conductors and brakemen, had carried passengers on all of its freight trains openly and publicly, and for a great number of years, and with such frequency and regularity that the appellee had a right to presume that no such rule had ever existed. And when appellee boarded such train he did so believing that he had a right to pay his fare and ride on the train to Greenville, and this belief was based on the knowledge that the defendant was then carrying passengers on such freight trains, as he had often ridden and had seen and known of other persons riding on such trains, especially between Celeste and Greenville. That it was the duty of the brakeman on all freight trains to direct passengers when and where to alight from such trains, and to assist them in so doing; and appellee knew this fact from experience, and from having seen them assist other persons and often perform this duty. That at the time appellee alighted from the freight train he did not know of the existence of the undergrade crossing."

Conclusions of Law.

This cause was tried at a special term and before a special judge selected by the practicing attorneys. The appellant duly objected to trying the cause before a special judge on the ground that, in the absence of the regular judge, who was holding a term of court in another part of the district, no authority existed for electing a special judge by the practicing attorneys, and that such a proceeding is void. On November 15, 1902, Hon. H. C. Connor, district judge for the Eighth Judicial District, then holding a regular term of court in Hunt county, duly ordered a special term of court to be held in said county, beginning January 12, 1903, and to continue for five consecutive weeks. At the time appointed, and during the continuation of said special term, the said Connor was absent in another part of the district, holding regular session of court, and the bar proceeded to elect Hon. T. D. Montrose special judge, who held said special term, and presided during the trial of this cause. Our statutes provide for the holding of special terms, as well as for the election of special judges, when the district judge is absent, or unable or unwilling to hold the court. This statute was construed by our Supreme Court in the case of *Munzeshelmer v. Fairbanks*, 82 Tex. 351, 18 S. W. 697, and it was there held that: "When a special term is called in the manner provided for by the statutes

on the subject, and a judge qualified to hold it can be procured by observing such statutes as are applicable when the judge of the court is absent, we think it may and should be done, without regard to the cause of the absence of the judge; and the court so called and organized should be held, notwithstanding another court may be lawfully in session in the same district." It is true in that case the judge holding the special term was a regular judge of another district, but this, in our opinion, is not distinguishable in principle from the case under consideration, as the election of a special judge is specially provided for in the absence of the regular district judge. This is in accord with article 5, § 7, Const., which authorizes the Legislature to provide for holding special terms of the district court. The legislative provision for the election of special judges is within the power granted by the Constitution, and is applicable to both regular and special terms. If it were not so, the provision for special terms would be practically ineffectual, as the time of the regular judges is so occupied by the regular terms that they could seldom find time to hold special sessions.

Under the evidence the jury were warranted in finding that appellee was a passenger on appellant's train, and that its employes were negligent in causing the appellee to alight under the circumstances. It is the settled law of this state that, even though rules are made and promulgated by the carrier prohibiting the carrying of passengers, if such rules are openly and habitually violated by the employes, and such violation is known to the officers of the company, and continued for such a length of time that such officers, by the use of ordinary care, might have known of such violation, and no attempt made to enforce them, such rules will be presumed to have been abrogated and be of no force or effect. *Railway Co. v. Rutherford* (Tex. Sup.) 62 S. W. 1056; *Id.* (Tex. Civ. App.) 1069, and authorities cited. Appellee knew nothing of the rule prohibiting the carrying of passengers on freight trains, and under the facts he was authorized to presume that it was permitted, and that he would be protected as a passenger. *Railway Co. v. Black*, 87 Tex. 160, 27 S. W. 118. The evidence is amply sufficient to warrant the presumption that rules prohibiting the carrying of passengers on freight trains had been abrogated.

The same principle applies to the authority of the employes. Although, by the rules of the company, the brakeman may have been prohibited from inviting passengers to board said train or from collecting fares, etc., yet if he had been exercising such authority with the knowledge of the officer of the company, or, if the said officers did not actually know it, yet if he had openly and habitually exercised such authority for such a length of time that such officers, by the exercise of ordinary care, might have known

it, knowledge will be imputed to the company, and it will be responsible for such acts. *Thompson on Neg.* vol. 3, § 3305; *Krueger v. Ry. Co.* (Mo. App.) 68 S. W. 220. The evidence is conflicting whether the conductor or brakeman invited appellee to board the train, or which collected the fare; but it is immaterial which it was, as there is sufficient evidence to show that the brakeman had habitually performed such functions, with knowledge of which the company was charged, and no effort made to discontinue it. Appellee was justified in believing that the brakeman was acting within the scope of his authority.

The court did not err in refusing a new trial on the ground of newly discovered evidence. The motion fails to show proper diligence in discovering said evidence, and it is not probable that the evidence would change the verdict on another trial.

Many assignments of error relating to the charge of the court, the refusal to give special charges requested, and other matters are presented by the able counsel for appellant. All have been carefully considered, and we deem it unnecessary to discuss them.

We are of the opinion that no reversible error is shown, that the evidence supports the verdict, and the judgment is affirmed.

On Rehearing.

(Jan. 23, 1904.)

At the request of appellant we make the following addenda to our conclusions of facts:

The rule or regulation printed on a card and posted in cabooses is not correctly quoted in our original findings, but is as follows: "Notice to Passengers Desiring to Ride on Freight Trains:—The public are notified that only such freight trains as are specially permitted to do so by order of the time tables are allowed to carry passengers, and persons who go aboard of any freight train must ascertain from the time table, which the ticket agent will show on demand, what trains are permitted to carry passengers. No conductor or other agent has any authority to vary this rule, and if the same is violated it is without the knowledge or consent of this Company." This card was known as "Form No. 708," and was issued in April, 1890, by the vice president and general manager. It was also conspicuously posted in each caboose, and also in waiting rooms of all depots along the line of said railway. On the time card or table was printed: "This time table is for the government and information of the employes of this railway only, and the management reserves the right to vary from it at pleasure." We state, in effect, in the original findings, that the rules as to freight trains carrying passengers had been openly and publicly violated, and without protest, from and without any effort on the part of the defendant to prevent it. This, under the

evidence, is probably stated too broadly. While the evidence shows some slight effort to enforce the rules, it was not sufficient to show that reasonable effort had been made to do so, and the evidence on the other hand is amply sufficient to support the verdict of the jury to the effect that such rules had been abrogated by the open and habitual violation thereof.

MISSOURI, K. & T. RY. CO. OF TEXAS v. BEARD.

(Court of Civil Appeals of Texas. Jan. 6, 1904.)

CARRIERS OF GOODS—LOSS—EVIDENCE—SUFFICIENCY—QUESTION FOR JURY.

1. In an action against a railway company for the value of cotton which had been placed near its tracks for shipment and destroyed by fire, testimony of a witness that he saw sparks coming from defendant's engine and blowing in the direction of the cotton, either on the night in which the fire occurred or the night before, and about 2½ hours earlier than the hour at which the fire occurred, authorized the jury to conclude that the cotton was set on fire by the sparks seen by the witness.

2. In an action for cotton alleged to have been delivered to the defendant as a common carrier and destroyed by fire, evidence tending to show that the course of dealing and custom was to place goods to be shipped on the platform where the cotton was destroyed, and that it was the expectation and intention of the owner and also of the railway company that they were placed there for shipment, and would ultimately be shipped when instructions were given or when the party was ready for shipment, but not showing that such goods were, by virtue of the custom or course of dealing, to be thereafter regarded as in the actual possession of the railway, was insufficient to authorize submission to the jury of the question of delivery by reason of such custom.

3. If goods are delivered to a carrier and received by it for shipment, they may be transmitted without the issuance of a bill of lading, and may be regarded as in the possession of the carrier from the time received, though there was no instruction nor intention that the carrier should immediately make the shipment.

4. In an action against a railway company for goods which had been placed near its tracks for shipment and destroyed by fire, in which one theory for recovery was that the fire was caused by the negligence of the railway, and another theory was that it was burned after it had been delivered into the possession of the railway as a common carrier, it was error to instruct that, if the fire was caused by the defendant's locomotive, defendant was liable, as defendant, on the theory first stated, was entitled to have submitted the issue of plaintiff's contributory negligence in exposing the cotton to danger by fire.

5. In an action against a railway company for the value of goods placed near its tracks for shipment and destroyed by fire, an instruction on the theory that the evidence of the custom and course of dealing in permitting goods to accumulate on the platform for shipment might be sufficient to constitute possession by defendant as a carrier, was irreconcilably conflicting with an instruction that the defendant would not be liable as a common carrier unless the cotton was received by it for immediate shipment and it had received shipping instructions from the plaintiff.

Appeal from McLennan County Court; G. B. Gerald, Judge.

Action by E. B. Beard against the Missouri, Kansas & Texas Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

T. S. Miller and Clark & Bolinger, for appellant. Boynton & Boynton, for appellee.

FISHER, C. J. This is a suit by appellee against appellant for the value of 10 bales of cotton, which the appellee in his petition alleged were burned and destroyed after the same had been delivered into the possession of the appellant as a common carrier, the cotton then being in its possession for shipment; also that the fire which burned the cotton was caused and set out by the negligence of appellant. The court in its charge submitted to the jury both of the grounds alleged by the plaintiff. The verdict of the jury in favor of the appellee, the plaintiff below, for the full amount of the cotton, is general; therefore it is impossible to determine whether it was predicated upon the liability of appellant as common carrier, or whether it is based upon the alleged negligence in setting out the fire which destroyed the cotton.

It is seriously contended by appellant that the evidence is not sufficient to authorize the verdict and the judgment of the trial court against the appellant on either of the grounds alleged in the plaintiff's petition. The evidence is somewhat meager upon both of the grounds relied upon, and is less satisfactory in tending to establish the liability of the appellant as a common carrier than on the issue of negligently causing the fire that destroyed the cotton. As to the latter ground of recovery, there is evidence to the effect that either upon the night that the cotton was destroyed, or the night before, sparks were discovered coming from one of the appellant's locomotives near the cotton, and that the sparks were blowing in the direction of the cotton. The fire was not discovered until about 2 or 2½ hours after the sparks were noticed coming from the engine and blowing in the direction of the cotton. The appellant made no effort to establish the fact that its engines were properly operated and that they were equipped with the proper appliances to prevent the escape of sparks, but rested, it seems, its defense upon the proposition that the evidence of plaintiff upon this subject was insufficient to show that the fire which destroyed the cotton was set out by one of its engines. While the testimony is not of the most satisfactory character, we are still of the opinion that it was of a nature that authorized the jury to conclude that the fire was set out by the engine that was discovered emitting the sparks. While it is true that about 2 or 2½ hours elapsed from the time that sparks were discovered coming from the engine to the

1. See Carriers, vol. 9, Cent. Dig. §§ 110, 111, 202.

time of the discovery of the fire, still the conclusion is not unreasonable that the fire might have originated from the sparks that were discovered coming from the engine, and may have ignited or been burning the cotton, or some combustible material near it, some time before the fire was actually discovered. The witness who testified to seeing the sparks coming from the engine and blowing in the direction of the cotton is not certain whether he discovered the sparks on the night of the fire or the night before; but the evidence upon this subject, in our opinion, was of a character that authorized the jury to conclude that the cotton was set on fire by the sparks seen by this witness coming from one of the appellant's engines.

But, as said before, the evidence that the cotton was in the possession of the appellant as a common carrier at the time of its destruction by the fire in question is less satisfactory than the evidence upon the issue just discussed. The appellee, it seems, in the main relies more upon the custom or course of dealing upon the part of the railway company and those handling cotton at Eddy (the place where it was destroyed), in order to establish delivery to the company as a common carrier, than upon any evidence tending to show a contract of delivery. At the request of appellee the court submitted to the jury, by a special charge, the question of appellant's liability arising from such custom or course of dealing. The evidence upon this subject, in our opinion, is not sufficient to show that the appellant, by reason of such course of dealing and custom, had received possession of the cotton for shipment as a common carrier at the time that the same was destroyed. And if upon another trial the evidence upon this subject is not stronger than that stated in the record before us, then we are of the opinion that the issue ought not to be submitted to the jury. The evidence relating to this subject merely tends to show that the course of dealing and custom was to place on the platform, where the cotton was destroyed, cotton to be shipped, and that it was the expectation and intention of such parties so placing the cotton there, and also of the railway company, that the same was placed there for shipment, and would ultimately be shipped when instructions were given to that effect, or when the parties were ready for the shipment to be made; but the evidence does not show that such storage and delivery of the cotton upon the platform was, by virtue of a custom or course of dealing, to be thereafter regarded as then in the actual possession of the railway company as a common carrier for shipment.

On the question as to whether the cotton had been received by the appellant as a common carrier, independent of the custom and course of dealing referred to, the evidence is slight; but there is the testimony of the witness Fencemaker, the station

agent of the appellant, as follows: "To the best of my knowledge and belief, I had no arrangement with T. L. Warriner, or any other party, further than that the cotton was to be billed out as soon as placed on the platform." The T. L. Warriner referred to by this witness is the party who placed the cotton destroyed upon the platform. No bill of lading was ever issued, nor was one demanded; nor was it intended that this cotton should be shipped until the plaintiff had collected upon the platform a sufficient number of bales to load a car. Other than as stated, the evidence does not show that the railway company was informed that the cotton was there for shipment, nor was any car demanded, nor had the owner determined definitely the place to which he intended to ship the cotton, nor the time of shipment. The testimony referred to of this witness, Fencemaker, has a tendency to show that the cotton was to be billed out as soon as placed on the platform; and, if this is true, such arrangement might be held as some evidence, although slight, tending to show delivery to the appellant of the cotton in question as a common carrier. We do not mean to say that the evidence of this witness, considered alone, establishes the fact that the cotton in question was delivered to appellant as a common carrier, and that it received it as such; but we merely intimate the opinion that it may be considered as a slight circumstance, in connection with other evidence, if any should be developed, tending to show a delivery to the carrier of the cotton in question. The force of this evidence is much weakened by the testimony of the witness Warriner, who placed the cotton upon the platform, and who was a witness in behalf of the plaintiff, to the effect that it was not expected to ship the cotton immediately, but that the same would be shipped as soon as the witness Warriner, who bought the cotton in question, had purchased a car load. He states that he did not know when he would ship out the 10 bales in question. He had not decided where to ship it to, or to what person to ship it to, and had not applied for a bill of lading, because he says that it was then not ready to be shipped out. He further states: "I do not know that the agent, Mr. Fencemaker, knew that this cotton was on the platform at the time of the fire, but I supposed that he knew it, although I did not have any agreement or understanding with him at all about it." The plaintiff, Beard, in his testimony, states that he had no knowledge as to how or when this cotton was placed on the platform, and that Mr. Warriner, the witness above referred to, attended to this business, and that the plaintiff had nothing to do with it. The writer expresses the opinion that neither the evidence of custom, or that tending to show actual delivery of the cotton in question, is sufficient to establish the fact that at the time of its destruction it had been received

and was in the possession of the appellant as a common carrier. The court has agreed that the evidence to establish delivery by custom and course of dealing is not sufficient, and the writer is also of the opinion that the same ruling should be made as to the insufficiency of the evidence on the subject of actual delivery. The most that can be said of the testimony upon this subject is that the cotton in question was placed upon the platform preparatory to delivery, and with a view that it should be delivered to and received by the carrier when it was ready to be billed out. The evidence of the witness Warriner, upon whose testimony the plaintiff in the main relies as establishing the fact of delivery, clearly shows that this cotton was not ready for shipment, and that it was not intended to be billed out until he had purchased and collected enough cotton to load a car.

Appellant's second proposition under first assignment of error contends that as the evidence fails to show that the appellant received the cotton for immediate shipment, and as no bill of lading was issued, it could not be held liable as a common carrier. We are not prepared to agree with this contention. If, as a fact, the cotton was received by the carrier for shipment, its liability would attach although no bill of lading had been issued, and it was not immediately shipped out; nor intended to be immediately shipped. If a commodity is delivered to the carrier, and is received by the carrier for shipment, it may be transported to its destination without the necessity of the issuance of a bill of lading; and it may be regarded as in the possession of the carrier from the time received, although there was no instruction nor intention that the carrier should immediately start the shipment on its route. *Railway Co. v. Hall*, 64 Tex. 619; *Railway Co. v. Trawick*, 80 Tex. 274, 15 S. W. 568, 18 S. W. 948.

We are of the opinion that appellant's second assignment of error is well taken. At the request of the appellant, the court instructed the jury upon the issue of contributory negligence. The only way in which the defense of contributory negligence could be urged by the appellant would be in opposition to that theory of the plaintiff's case in which he relies upon the negligence of the appellant in setting out the fire. If the appellant at the time of the fire had received the cotton, and it was in its possession as a common carrier, the previous negligence of the plaintiff in putting it upon the platform, close to the track, would not be a defense. If by the act of placing the cotton upon the platform it went into the possession of the appellant as a common carrier, the issue of contributory negligence, as insisted upon as shown by the record in this case, would not be a defense to the plaintiff's cause of action. But if the appellant had not received the cotton, and it was not in its possession as a

common carrier, then the jury could consider the question of contributory negligence as a defense to that branch of the plaintiff's case where he seeks to recover from the appellant on the ground that the fire was negligently set out. Charge No. 2, complained of in this assignment, is as follows: "If you find from the preponderance of the evidence that the fire which burned the cotton in question originated from the locomotive of the defendant company, then your verdict will be for the plaintiff." The objection to this charge is that it authorizes a recovery against the appellant, although the plaintiff might be held guilty of contributory negligence in placing his cotton near the railway track, where it might be burned by fire set out by passing locomotives, under circumstances that showed that such cotton, when so placed upon the platform, was not in the possession of the appellant as a common carrier. The error in this respect was not cured by the special instruction of the appellant on the subject of contributory negligence, which was given by the trial court.

We are of the opinion that appellant's third assignment of error is also well taken. Our views expressed as to the facts upon the subject of custom, in effect, dispose of the questions raised in this assignment, but the charge here complained of is in direct conflict with charge No. 3 asked by the appellant. We do not mean by this to say that we approve the special charge No. 3 asked by the appellant, which was given by the trial court. The charge No. 1, complained of in the assignment, is to the effect that if, by virtue of the custom and course of dealing between the defendant and the shipper, the jury should believe that the cotton in question was received by the company on its platform for shipment prior to the issuance of the bill of lading, and that cotton was allowed to accumulate until shipment should be made upon a sufficient accumulation, and that by virtue of such custom the cotton was in possession of the defendant company, then they should find for the plaintiff. The charge No. 3, given at the request of appellant, is as follows: "Plaintiff cannot recover of the defendant in this cause on the ground that the defendant received plaintiff's cotton and is liable as a carrier for said cotton, regardless of how it was destroyed, unless you find from the testimony that the defendant received plaintiff's cotton for immediate shipment, and that the defendant had been given shipping instructions for said cotton." There is an irreconcilable conflict between the two supposed rules of law submitted by these two charges. One is upon the theory that the evidence of custom and course of dealing in permitting cotton to accumulate upon the platform by the railway company, with the view and purpose of ultimately shipping the same, might be sufficient to constitute possession in the appellant as a common carrier. The second is predicated

upon the proposition that the appellant would not be liable as a common carrier unless the cotton was received by it for immediate shipment, and that it had received from the plaintiff shipping instructions. No argument or demonstration is necessary in order to show the conflicting views presented by these two charges.

What we have stated in effect disposes of the questions raised in appellant's fourth assignment of error. We have in effect ruled that the evidence as stated in the record is not sufficient to show a delivery by custom and usage.

We have already intimated the opinion that we do not agree with the contention of appellant that it is necessary to be shown that the cotton was intended for immediate shipment, in order to hold the appellant liable as a common carrier, provided the evidence is sufficient to show that it had received the cotton, and that it went into its possession as a common carrier.

For the reasons stated, the judgment is reversed and the cause remanded. Reversed and remanded.

SAN ANTONIO & A. P. RY. CO. v. TURNEY.*

(Court of Civil Appeals of Texas. Dec. 2, 1903.)

CARRIERS OF PASSENGERS—PERSONAL INJURIES—DEPOTS AND GROUNDS—SAFE CONDITION—DEGREE OF CARE—INSTRUCTIONS—EVIDENCE—EXCESSIVE DAMAGES.

1. The rule of high care, which a carrier of passengers must use in maintaining its depot in a safe condition for passengers, applies to any part of its premises where by the acts of the carrier it is made necessary or proper for the passenger to go to board a train.

2. A carrier owes the same degree of care to a passenger while he is boarding a train at any point on its premises where its act has made it necessary or proper for him to go as it owes after he has boarded the train.

3. Where plaintiff, on a very dark night, while walking rapidly with a conductor who was carrying a lantern and showing him to a train which he desired to board, and which had stopped some distance from the station, fell into a gully, which he claimed he did not see, and of the existence of which he was not aware, the question of whether he saw or should have seen the gully was for the jury.

4. Whether defendant was guilty of negligence in not having the ditch lighted or guarded, and in failing to warn plaintiff, was for the jury.

5. Where plaintiff testified that defendant's conductor waited at the station until plaintiff got his transportation, and then said: "Hurry up. Let's go"—and that he started to accompany the conductor, who pointed out his train, but fell in a ditch and was injured, the testimony warranted a charge as to plaintiff's acting under the direction of defendant's conductor.

6. Where the evidence fixed the date plaintiff was injured while starting to board defendant's train as occurring on December 14th, an instruction as to the event occurring "on or about" December 14th did not injure defendant.

7. Where plaintiff, while a passenger on defendant's railway, received an injury rendering the two middle fingers of his right hand stiff,

and permanently impairing his capacity for work, but he continued to work for his brother, by whom he was employed as manager of a ranch, and received the same salary, he was nevertheless entitled to compensation for the impaired capacity to work.

8. Where plaintiff's evidence tended to show that he was injured by falling into a ditch while being led or directed by defendant's servant to a train which he desired to board, which had stopped some distance from the depot, it was not error to refuse to instruct that, if the place where plaintiff was injured was a portion of defendant's depot grounds where the public did not or would not ordinarily resort, defendant would not be required to keep said ditch or ravine covered, and its failure so to do would not constitute negligence.

On Rehearing.

9. Where plaintiff, while a passenger on defendant's railway, received an injury rendering the two middle fingers of his right hand stiff, permanently impairing his capacity for labor in his avocation of working on and managing a ranch, a verdict for \$5,000 was excessive, and should be reduced to \$4,000.

Appeal from District Court, Kerr County; I. L. Martin, Judge.

Action by A. M. Turney against the San Antonio & Aransas Pass Railway Company for personal injuries to plaintiff while a passenger on defendant's road. From a judgment in plaintiff's favor, defendant appeals. Affirmed conditionally.

Houston Bros. and R. J. Boyle, for appellant. Burney & Garrett and Ball & Ingram, for appellee.

JAMES, C. J. The petition of A. M. Turney contained allegations as follows: That he accompanied a shipment of cattle billed and routed from Alpine, Tex., to Kansas City, Mo.; that at Flatonia, Tex., the cars containing the cattle were transferred to defendant's line, and it became necessary that a new contract be made with defendant for transportation over appellant's line, which was executed at the depot by the station agent in the presence of the conductor who had charge of the train which was to transport the cattle over defendant's line from Flatonia to Waco, which contract entitled plaintiff to accompany the shipment, whereupon the conductor told plaintiff that the train had moved down the track some distance from the depot (which plaintiff alleges was the fact), and that he must hurry and get on the train, as they had already been delayed; that it was very dark, and plaintiff was ignorant of the surroundings; that he went with the conductor towards the train, the conductor, with his lantern, walking between the rails of one track, and plaintiff between two tracks—the main track and siding—and, while so proceeding very rapidly, plaintiff doing so to keep up with the conductor, he suddenly came upon and fell into a deep gully, trench, or ditch, of which he did not know and could not see, though he was exercising ordinary care at the time, by which fall he was injured; that such injuries were the result of defendant's negli-

* 1. See Carriers, vol. 9, Cent. Dig. § 1151.

* Writ of error denied by Supreme Court.

gence in having said gully, trench, or ditch upon its property and between its tracks, along the route over which plaintiff was required to go to get to his train, and over which he went by defendant's invitation, and under the direction of defendant's conductor. The petition also alleged negligence of defendant in failing to have the place protected or lighted, and in failing to warn plaintiff, through the conductor or otherwise, of its existence, and also in moving the train to a place which rendered it necessary for plaintiff to expose himself to such ditch in order to get to the train, instead of having it at the depot. The answer, in addition to a general denial, pleaded demurrer, assumed risk, and contributory negligence. Judgment was for plaintiff for \$4,000.

The first, third, and fourth assignments relate to overruled demurrers, and, as briefed by appellant, present the following propositions:

(1) Defendant was not required to have the gully covered, guarded, or lighted, and could not be charged with negligence for its failure to do so, it being only required to keep in a reasonably safe condition such portions of its depot grounds as are reasonably near the platforms and station where persons entitled to passage would naturally or ordinarily go; and the petition shows that the gully or ditch into which he fell was remote from the depot, and at a place where the public did not or would not naturally resort.

(2) The rule that carriers of passengers are held to the highest degree of care in respect to their safety does not apply to cases where the carrier is not a bailee of the person of the passenger, and in such cases only ordinary care is exacted; and the petition, disclosing that appellant's conductor, provided with a lantern, undertook to accompany plaintiff to the train, shows that defendant had performed its duty in the premises.

In reference to the first of these propositions, we hold that the duty of high care referred to applies not only at the station and proximate approaches, but to its premises generally, where it is made to appear that defendant, by its acts, made it necessary or proper for its passenger to take the course he did for the purpose of getting on its train.

In reference to the second proposition, we hold that a carrier of passengers owes the latter the same degree of care in providing for their safety when they are engaged in proper acts in the effort to board trains as when they are upon trains. The allegations here are to the effect that the train was not brought to the station, but to a point some distance off, and plaintiff was required to go there to get on, and was bidden by the conductor of the train to go to it, who indicated the course to be taken by plaintiff, and went with plaintiff. While so proceeding to the train, plaintiff was entitled to the same degree of care and precaution for his safety.

The second assignment relates also to a

demurrer. The point made is that the petition shows that the conductor, with a lantern, undertook to accompany plaintiff to the train, and, if the latter was unable to see the gully or trench, he must have gone beyond the range of the light, and so was guilty of contributory negligence. Plaintiff alleges that the conductor had a lantern, but does not allege its range or degree of light. The petition does allege, in substance, that plaintiff was walking very rapidly, keeping up with the conductor—the latter walking upon a track, and he between that and another—and, while so doing, suddenly came upon, and fell into, the gully, which he had not seen, and of the existence of which he did not know; that the night was very dark. The question of whether or not plaintiff saw the gully, or, in the exercise of such care as an ordinarily prudent person should have exercised in his circumstances, should have seen the gully, was properly left for the jury.

It being a question of fact as to the negligence of defendant, and also as to plaintiff's contributory negligence, there was no error in allowing proof of the conditions existing at the place of the accident. Therefore we do not sustain the fifth, sixth, and seventh assignments. Plaintiff was, in this respect, allowed to testify to the unlighted, uncovered, and unguarded condition of this ditch. From appellant's argument, we understand it to base these assignments upon the theory, already disposed of in this opinion, that defendant owed no duty to use such precautions or any precautions to protect passengers in a portion of its grounds remote from its depot.

The eighth assignment is that there was error in overruling the motion to direct a verdict for defendant. The propositions are, in substance, that it does not appear from the evidence that defendant was guilty of negligence in failing to have the ditch lighted, covered, or guarded, or in failing to warn plaintiff. Also that it appears affirmatively from plaintiff's evidence that his injury occurred through his own negligence. The testimony would not have warranted the court in assuming either as a matter of law. The matters mentioned in the argument submitted under this assignment are really argumentative upon the subject of plaintiff's knowledge and want of care, and were for the jury, but not for the court, to act upon.

At this place it will be proper to refer to the testimony. Plaintiff testified: That, after he had signed the contract at the depot, which had been delayed by the station agent not being on hand, the conductor said to him: "Hurry up. Let's go. We have been late." "We got out, and went as fast as we could, without running, towards the train. The conductor was with me. We were walking side by side, going towards the caboose. As we walked, we were talking. The conductor was just about nearly as close to me as we could walk. He was walking on the track,

and I was walking right by the side of the track. The character of the ground there about the tracks and between the depot and down to the gully was level. It was about 100 yards [another witness estimated the distance as 60 or 70 steps] from the ditch to the depot. The caboose was about 50 yards above the trestle—about 150 yards from the depot. The caboose was right up on the track on the north side of the trestle, between the caboose and the depot. The trestle was over a ditch or gully about 10 or 12 feet deep in the center, and I guess it was 30 or 40 feet wide. There are two tracks or trestles over the ditch at that place. When we started towards the train from the depot, the conductor and myself in a fast walk, he said: 'Hurry up. Let's go.' I asked him which was our caboose, and he said the one with a red light on it, and we went toward it. We could see the red light on the train, and we went towards it, both walking right towards it. He was on the track, and I was right by his side; and, when we got up there as far as the trestle, the first thing I knew I was falling into it. I had never been near the trestle. I did not know of its existence. The conductor didn't say anything with reference to its being there. There was no light about it. They had lights at the depot, but didn't have any outside at all. It [the trestle] was in a V shape. The track branched off just before we got to the trestle. * * * The depot was only a short distance from the track, and we were going right down the track when we got here [referring to a sketch]. I was on this side of him, and right there is where I fell—right at this V-shaped place right at the top of the trestle. * * * Fell right in the ditch that comes under the two trestles. The two trestles are separated. They were about six or eight feet apart. Of course, they widen out on the other side. The ditch was about 30 to 40 feet wide. The banks were steep. Where I fell off, it was blocked up with wood, and was perpendicular—straight up. There was no other way, so far as I knew, of getting on the train, than the way the conductor and myself proceeded. I knew of no way to go, only right on up toward the train. The reason I went that way, the conductor started on that way, and said to go with him. The conductor didn't tell me of the existence of the ditch: didn't say anything about the ditch at all. I have seen the ditch since I fell into it. I saw it last Friday, in the daytime. The width is about what I have stated it, I think. I think it would be about 10 or 12 feet deep in the center of the ditch. There were two trestles across it. It was not in the same condition it was when I fell into it. There was nothing there [referring to a plat]. Just the track came right up to the ditch, and right straight on. At the time I fell into the ditch I was walking right by the conductor's side—right close to him. He was walking right on one track. I was just out-

side the rail, right by his side. As to the color of the ground leading up to the ditch: Down next to the depot it was sand—light-colored sand, something like this in this country—and up toward the ditch it had cladders in it. There was no mark, or anything that I could see that night, the difference where the ground stopped and the ditch started. I was not walking ahead of the conductor—right by his side. As we walked down there, we were talking. He knew I was there."

Appellant contends, because plaintiff, at the trial, evinced familiarity with the details of the place and surroundings where he was hurt, and there being sufficient light for him to acquire this knowledge before he was hurt, the conductor was not negligent in not warning him, nor, under these circumstances, was defendant responsible for negligence in not having the place lighted or guarded, but plaintiff was guilty of contributory negligence. If it plainly appeared that plaintiff, before he walked into it, knew of the presence and condition of the ditch, these conclusions would follow. But the testimony was not distinctly this way, and was such that the jury might properly have found that the knowledge plaintiff showed at the trial was not obtained under such circumstances as would have made his conduct inconsistent with reasonable care on that occasion. He was put to cross-examination on the very matter, and he reiterated that it was a very dark night, and he could not see the ground. As to how he knew the depth of the ditch, he stated he climbed out, and had a pretty good idea of how deep it was; and, besides, he went there the other day. As to its width, he learned that when he tried to get out; that he did not know its width exactly, and does not know it yet. He knew there were two trestle bridges over the ditch that night, as he could skylight the trestlework. Looking up, he could see there were trestles there—two trestles. The conductor also told him to go under the trestle. He knew the two tracks (the main track and a transfer switch) divided, because he stepped over one. "Coming along the switch there, you could tell there was a track there. * * * I didn't know the exact situation of the tracks until I looked at it again." He stated that he was not certain that the conductor was carrying a lantern, but this fact he had alleged. The fact that plaintiff testified to the character of the soil near the depot was not remarkable, the depot being lighted, and a man may know that he is walking on cinders without being able to see them.

There was the testimony of a witness (Meade) that, if he remembered right, there was a walk on the edge of the trestle, which he guessed was four or five feet (perhaps more, perhaps less) from the track. Plaintiff testified that the present condition of the trestle with reference to railroads and floorings was not the same then as now, and that there

was no railway or flooring there when he fell between the two tracks. Meade's testimony indicates that there was no walk on the side of the trestle between the tracks. This matter is doubtless referred to as indicating that plaintiff was not walking near the track, as he testified. Plaintiff testified that the conductor was on the track, and he by the side of the track, right at the former's side, and, when they got to the trestle, the first thing he knew he was falling into it.

How, upon the whole evidence, the court could have decided the negligence of either party as a matter of law, we cannot understand. The defendant, through this conductor, who was accompanying and directing plaintiff to the train, knowing where and how he was walking, owed him the duty to use reasonable care in protecting him against dangers that existed in his route. The night was dark. Plaintiff was unacquainted with the place. The route taken by plaintiff, according to the testimony, was the direct one to the train, and the one plaintiff was requested and permitted to take by the conductor, who waited for him and went with him. The evidence indicates that the place where plaintiff fell was upon the premises of defendant. They were walking "as fast as they could, not to be running." The conductor was hurrying plaintiff along. The ground appeared to be level. Even if the conductor had a lantern, the court could not safely have assumed that the circumstances were not such as would have induced a reasonably careful person to reach the gully without having detected it. The evidence presented a question for the jury as to plaintiff's want of ordinary care, and also a question as to the carrier's negligence toward a person in plaintiff's situation, in having this danger which was connected with the way.

There was no error in the charge referred to in the ninth assignment. What has been said disposes of the question.

The tenth assignment of error complains of the fifth paragraph of the charge. This paragraph submits the case upon two phases in separate clauses—one as to negligence of the conductor in not warning plaintiff; the other, negligence of defendant in having the gully open and unprotected, without reference to warning. The assignment is that the court erred in the fifth paragraph of its charge. It is probably open to objection as not being in strict accordance with the rules. *Cammack v. Rogers* (Tex. Sup.) 73 S. W. 795. But inasmuch as it relates to one subject, viz., the question of defendant's negligence, we have concluded to consider it.

There are advanced six propositions under the assignment:

The first is disposed of by what has been already said.

The second and fifth are that the court should not have submitted the question as to plaintiff acting in accordance with defendant's conductor's directions, or that he, at the instance and direction of defendant's conduct-

or, followed in the way so directed by the conductor; there being no evidence to that effect. The evidence showed that the conductor waited at the station for plaintiff to sign the contract and get his transportation, and then said to him to "Hurry up. Let's go." The conductor pointed out the train by its light. He went with the conductor, walking by his side; hurrying along—almost running—to keep up with him. The conductor had directed plaintiff to go with him, and he followed in accordance with this direction or invitation, and as directed by the movements of the conductor. From the actions of the person who plaintiff says walked with him to the train, after waiting for him at the depot, the jury could have found that he was the conductor, as plaintiff testified he was. There was, therefore, testimony to warrant the expressions in the charge.

The third proposition is not well founded. The charge did not assume the fact that appellant's conductor walked with plaintiff along its premises at the time of the injury. That fact was left to the jury as one of the facts to be found by them from the evidence. *Ry. v. Lehmborg*, 75 Tex. 61, 12 S. W. 838.

The fourth proposition complains of the charge in stating that if the jury further find from the evidence that plaintiff was a passenger on defendant's train, and find that on or about the 14th day of December, 1900, etc. It was alleged that the occurrence happened on or about December 14, 1900. The evidence fixed the date as December 14, 1900. Appellant insists that the court erred in submitting the injury as to the accident occurring "on or about" such date. We can see no reason for holding, in view of the undisputed evidence as to when the particular train left Flatonia (the night of the 14th), that this in any way operated to appellant's injury.

The sixth proposition is that there was no evidence showing that the gully or ravine was situated in a portion of appellant's depot grounds where the public naturally or ordinarily go, and no evidence showing that appellee went upon that portion of its premises at the invitation of appellant unaccompanied by any of its servants. The charge complained of did not definitely say anything about plaintiff undertaking to go to the train unattended by the conductor. Appellee himself seems to construe this fifth paragraph of the charge as submitting the negligence of defendant in case the conductor did not accompany plaintiff to the train. In the first clause of the fifth paragraph the jury were instructed to find for plaintiff if, among other things, they found that plaintiff, at the instance and by the direction of the conductor of defendant, walked with said conductor towards the train; and, in the second clause, to find for plaintiff if, among other things, they found that plaintiff, at the instance and direction of defendant's conductor, followed in the way so directed by said conductor. If he, at the instance and direction of the conductor, followed the conductor in going to the train, he was

not unaccompanied by him. However, as will be explained further on, defendant, under the circumstances of this case, owed plaintiff the duty imposed on it in favor of passengers at the place of this accident, even if he went there unaccompanied by the conductor, if he was not guilty of contributory negligence.

We do not sustain the eleventh assignment. The proposition is that when a person seeks to recover for impaired capacity to labor and earn money in a particular avocation, and the evidence shows that his earnings in such business have not been decreased by reason of such injury, and are the same two years after the accident as they were before the injury, he is not entitled to recover for impaired capacity to labor and earn money in the future. The evidence showed that plaintiff had been working for his brother before and since the injury, without any decrease of wages; that he was employed by his brother before and since the accident to manage his ranch; that the two middle fingers of his right hand were rendered stiff by the injury; that he could not close the fingers against his hand; that the fingers pain him a great deal, particularly when he undertakes to do any work about the ranch, or when the weather changes; and that, after he has worked with them awhile, they seem to be paralyzed, and he has to quit. Also the two fingers will probably remain stiff permanently, and will to some extent disable his hand, and the use of the fingers will be attended with pain. He testified that he was not able to give his duties the same attention and perform the same labor now as before the accident. He could not do the work he did before, because he could not take the lead with the men like he did before. We conclude that, the fact that his condition as to wages having remained the same, this might be attributed to peculiar circumstances then existing, and that had existed with him since the accident, but which might at any time change. His capacity to do his former work had, according to the evidence, decreased; and the jury, looking to the permanent condition of his injured hand, and looking to the probable duration of plaintiff's life, and not merely to the present and past, could have found that his earning capacity had become diminished. We here overrule the sixteenth assignment, charging that the verdict was excessive in amount.

The twelfth assignment complains of the refusal of the following instruction: "It is the duty of railway companies to keep in safe condition all portions of its station grounds to which the public do or would naturally resort; and if you believe from the evidence in this case that the place where plaintiff sustained his injury was a portion of defendant's depot grounds, where the public do or would naturally resort, then the defendant would be required to keep its said ditch or ravine covered or guarded. On the other hand, if you do not believe that the

place where plaintiff was injured was a portion of defendant's depot grounds where the public did or would ordinarily resort, then you are charged that the defendant would not be required to keep said ditch or ravine covered, and its failure so to do would not constitute negligence." From the presentation of the question sought to be made, as we find it in appellant's argument under this assignment, the point seems to be that if plaintiff, unaccompanied and voluntarily, went upon that part of the premises so remote from the depot as where he was hurt, the issue of whether or not appellant failed to use ordinary care in having the gully open and unprotected should not have been submitted. The charge, as framed, ignored entirely the issue of his being accompanied and directed by the conductor in going over to the train. The refused charge amounted to this: That if the gully was at a point upon defendant's premises where the public ordinarily did or would not resort, and defendant for that reason owed no duty to the public to cover or guard it, it owed no duty to plaintiff under the peculiar circumstances of this case. The refused charge was practically one directing the jury to find for defendant, as there was no testimony that the place where plaintiff received his injury was where the public did or would generally resort.

What has been said in the above discussion renders it unnecessary to do more with the thirteenth, fourteenth, and fifteenth assignments than to overrule them.

We will add, in conclusion, that there was sufficient testimony to authorize the jury to find that plaintiff met his injury on appellant's premises. There is some doubt in our minds whether or not the brief of appellant raises this question directly. We doubt very much, if the facts were true, which the jury must have found in order to reach the verdict they did under the charge, that this question would be of any importance. The train was not brought to the depot, but was held on the main track, just across the gully from the depot, to start from that place. This was a stock train, which plaintiff had to take. He was a passenger thereon. According to the testimony of the witness Foster, it was usual for such trains to stop and start at this place. At any rate, such was the arrangement of appellant in this instance. Plaintiff was expected to, and it was necessary for him to, go from the depot to the place where the train stood, to get on board of it; and that, too, on a dark and misty night. Defendant had made it necessary for plaintiff, a stranger on the premises, to go from its depot to that train in the dark. It seems to us that if he had undertaken to do this alone, and, in so doing, had taken a direct route (and this was the regular route), and had exercised ordinary care under the circumstances, and on the way had fallen into this gully, defendant would have been liable, although the gully may not actually have been within appellant's premises. For the purposes of

such a case, under such circumstances, the intervening space would be regarded as defendant's premises. It would have been practically its invitation to plaintiff to walk across that ground for the purpose of reaching the train, and an assurance that the way was safe. But the case submitted was one in which the conductor of appellant's train directed or accompanied plaintiff from the depot to the train over this way upon which the danger existed. It seems to us that the fact as to this place being strictly upon appellant's depot premises was immaterial, as the case was presented. But the evidence indicates that such was the fact. Appellant was allowed to testify that he thought where the train was standing was within the yards of appellant. This was beyond the ravine. The evidence shows that, up to the place where plaintiff fell, the ground was all leveled off. Near the depot it was covered with sand, and down toward the trestle with coal cinders. Appellant maintained a switch which crossed the main track close to the place where they formed a V. Besides, the fact that these trains usually stopped across the trestle, and started from that point, indicates that the intervening space was in use by appellant in business of this character. No effort was made by appellant on the trial to show by evidence that the place of injury was not in its yards.

Affirmed.

On Appellant's Motion for Rehearing.

(Jan. 13, 1904.)

In the opinion delivered in this case, there are some expressions to the effect that the conductor accompanying plaintiff should have used reasonable care in guarding him against this accident. By this we did not mean that his duty was anything short of the high degree of care which the carrier and its servants owe a passenger. The entire opinion negatives such view.

In some way the court came to misconceive the amount of the verdict, which was for \$5,000, instead of \$4,000. It was with some difficulty that we approved the verdict for the latter amount, and now we shall require appellee to remit \$1,000 within 10 days, in which event the motion will be overruled, and the judgment affirmed for \$4,000; otherwise the motion will be granted, and the judgment reversed.

CITY OF CORSICANA et al. v. ANDERSON.*

(Court of Civil Appeals of Texas. Nov. 23, 1903.)

HIGHWAY—DEDICATION—ACCEPTANCE—EVIDENCE.

1. Where there is a plat of one's land on which it is laid off in lots, blocks, and streets,

whether at his instance or not, or a city map on which it is so laid out, he adopts such plat or map by reference thereto in the sale of the land, and his acts amount to a dedication of the streets, binding himself and those claiming under him.

2. Where land was platted by another person than the true owners, who afterwards recovered possession thereof, the question whether streets thereon have been dedicated depends on their acts, and not on his.

3. Evidence held to show that the owners of land, on recovering possession thereof from one who had held it without right, did not disavow a plat or city map showing streets on it, but sold the land with reference to them.

4. Where a city adopted a map of a tract showing streets thereon while the true owners of it were not in possession, in accordance with a plat filed by the person in possession, and, when they recovered possession and adopted the map, it did nothing to renounce its former act, but worked some of the streets, and proceeded promptly to prevent threatened obstructions, there was an acceptance by it of the streets dedicated by the owners.

Appeal from District Court, Navarro County; L. B. Cobb, Judge.

Suit by Neill P. Anderson against the city of Corsicana and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Richard Mays and B. R. Webb, for appellants. Frost & Neblett, for appellee.

TALBOT, J. The land involved in this litigation is designated as a part of Eleventh street and East Tenth avenue in the Houston & Texas Central Railway Addition to the city of Corsicana, and is claimed by appellee as private property under a lease from said railway company. He was engaged in the erection of a wooden platform upon East Tenth avenue, to be used in connection with a cotton compress operated by him. The city of Corsicana claimed that Tenth avenue had been dedicated as a public street of said city, and threatened to interfere and prevent the building of said platform. Thereupon the appellee brought this suit to enjoin said city and its officers from such interference, and the city answered, and by cross-action alleged that said Eleventh street had been dedicated also as a public street of said city; that appellee had obstructed said street by the erection of platforms and buildings thereon; and prayed that he be ousted therefrom, and that said city be quieted in its title to said Eleventh street, and recover possession of the same. The case was tried by the court without a jury, and judgment rendered for appellee, Anderson, perpetuating the injunction as to Tenth avenue, and a recovery denied appellants on their cross-action as to Eleventh street.

The evidence shows that on July 25, 1871, A. Groesbeck, W. J. Hutchins, F. A. Rice, and W. R. Baker, who will hereafter be referred to as Groesbeck and others, claiming to hold the legal title to 687½ acres of land adjoining the then town of Corsicana, made a map and plat of the same, showing blocks, lots, streets, alleys, and railroad right of

*Rehearing denied January 23, 1904.

¶1. See Dedication, vol. 15, Cent. Dig. §§ 45, 47.

way, and placed the same upon the deed records of Navarro county. At the same time Groesbeck and others executed and delivered to the Houston & Texas Central Railway Company a deed conveying to it, in consideration of its making its depot and station thereon, a strip 300 feet wide through said tract of land. This deed was placed upon record in said county on the day the map was recorded, and referred to said strip of land therein conveyed as having been designated and shown on said map as "Railroad Reservation." There was nothing on the map or the pages, when it was recorded, referring to this deed, or indicating that any deed had been given calling for said map and explaining in any manner the delineations thereon. Said deed further recited that "other blanks and spaces appearing on said map may be mapped, platted, or replatted over as grantors saw fit," and "to be held, occupied, and enjoyed by said company in such manner and for such purposes" as it saw fit; that "said strip or parcel of land shall be a continuous strip, not intersected by any street or way"; that streets running at right angles therewith should not cross it, but should abut thereon. This deed grants and dedicates to public use such portions of streets and alleys, "other than the Railroad Reservation, as may be contiguous to lots or blocks sold to any other person." All other streets and alleys designated on map, or portions of them not contiguous to lots conveyed, to remain the private property of grantors or their assigns, and may be relotted or closed up as may seem best to them. In 1874, Groesbeck and others, or the Houston & Texas Central Railway Company, placed on record a revised map of the addition, and in both the original and revised map there were shown thereon block three (3) and several other blocks as being within what was known as "Reservation." These blocks were lotted and in dotted red lines, and block three (3) abuts on Eleventh street on the west and on East Tenth avenue on the north. By deed dated May 13, 1874, and filed for record July 28, 1875, Groesbeck and others conveyed to the Houston & Texas Central Railway Company all the unsold parts of the addition, and in September, 1875, said railway company placed on record a re-revised map of said addition, which eliminated said block three (3) and said other blocks situated in "Reservation" as shown by said former maps, and left the space theretofore occupied by them open and blank. Prior to their conveyance of the unsold parts of said entire addition in 1874, Groesbeck and others sold a number of lots and blocks in said addition, referring to and calling for the maps in the description thereof placed on record by them. None of these lots, however, were in the "Reservation." The railway company, after receiving their said deed dated May 13, 1874, continued to sell lots and blocks in said addition to various purchasers, giving description thereof, as shown and designated on said second

map which had been placed of record. W. M. Elliott made a map of said Railway Addition, which is a duplicate of the first and second maps recorded in 1871 and 1874 respectively, and shows block three (3) and blocks (1), two (2), six (6), and twelve (12), and parts of Eleventh street and East Tenth avenue, situated in "Reservation," the same as they did; the only difference being, the reservation was indicated in these maps by red dotted lines, and Elliott's map represented it, as other portions of the addition, by the usual black line. This map made by Elliott was adopted by the city council of Corsicana as the official map of said city on the 4th day of July, 1893. The railway company maintained stock pens on Tenth avenue for about 18 years prior to 1900. The east line of these pens did not extend over the east line of the right of way strip, but was wholly on the right of way, extending north and south thereon. The size of the stock pens was cut down in 1896, and were entirely removed in 1900. After being reduced in size in 1896, they did not extend south into Tenth avenue, where it would cross the right of way. The Houston & Texas Central Railway Company, prior to January, 1889, was placed in the hands of a receiver, under whose authority one Dillingham, as commissioner, sold and conveyed on January 1, 1889, all the properties of said company to one Olcott, who later conveyed the same to the Houston & Texas Central Railroad Company, the reorganized corporation, except the lots and blocks in said addition. The heirs of John Cartwright, who were the owners of this tract of land, brought suit in the United States Circuit Court at Dallas in 1895 against Olcott for said block three (3) and other blocks in said addition, describing said blocks and lots as designated on said maps, and recovered judgment for said blocks by the same designation. Said Cartwrights brought suit in the district court of Navarro county, in 1897, against one F. M. Martin, the city of Corsicana, and other persons for numerous lots and blocks of land lying in said addition. The case was compromised with a number of the defendants, and the Cartwrights have made deeds to them for lots and blocks in said addition, calling for Elliott's map, and describing said lots and blocks as shown and designated on said map. The Cartwrights sued the Railroad Company for the right of way, and it was described in their petition as being "a strip 300 feet wide running through said addition, according to the revised map of said addition filed by the railway." The heirs of Cartwright conveyed to the Corsicana Cotton Factory, by deed of July 2, 1900, block one (1) and two (2), of the Railway Addition, which blocks are situated in Houston & Texas Central Railroad Addition to city of Corsicana, and in what is designated as "Reservation," said deed referring to map of said city and addition made by Elliott; and also conveyed to James Garrity, June 25, 1902, for mill and

elevator company, block thirty-four (34), and lots from one (1) to ten (10) in block nine (9), calling for the map of the Railway Addition, and also for Colline street and Hunt street of said addition. Hunt street is designated on Elliott's map as Sixth avenue.

The heirs of Cartwright conveyed to a number of different purchasers lots and blocks in said addition, describing same according to Elliott's map of the city, and calling for and referring to said map. They also conveyed to appellee, Anderson, August 6, 1902, land in said Railway Addition embracing block 3 and a part of East Tenth avenue. This land sold to appellee is described as beginning at the southeast corner of block No. 3, according to the map of said city made by W. M. Elliott. Appellee then conveyed the same land to the Houston & Texas Central Railroad Company, giving in deed same description, and on the 18th day of August, 1902, the railroad company executed a lease for said property to appellee, and he went upon the land, began the erection of his compress, and extended the platform into and over Tenth avenue. The railroad company, April 24, 1900, made deed to Corsicana Cotton Factory for lots 1 to 10 in blocks one (1) and two (2) in the "Reservation," and on May 31, 1901, made deed to Caldwell for blocks 6 and 12 in the "Reservation," both deeds referring to city map, and in negotiating the sales its representative exhibited Elliott's map. Streets running east and west through the Railway Addition are represented on all maps as crossing the right of way and Eleventh street running north and south, and the western boundary of said addition is also shown on said map to cross the right of way. The city for about 20 years has worked the streets shown by the maps of the Railway Addition, including Eleventh street and Tenth avenue, excepting that portion of Tenth avenue which was occupied by stock pens, and Eleventh street where it crosses the railroad track. Block 3 abuts on Eleventh street, and Eleventh street at this point runs north and south between said block 3 and Groom's Addition.

There is no point made on the pleadings. Numerous assignments of error, however, have been filed and urged, challenging the correctness of the findings and judgment of the lower court, but we believe it will be found, upon an analysis of said assignments, that the questions embracing all the points raised and presented for our decision are: (1) Had the property involved in this controversy been dedicated to public use by the acts and declarations of the parties owning and dealing with the same at the time of its lease by appellee? (2) Had the city of Corsicana at said time accepted such dedication?

It seems to be the well-settled doctrine that where the owner of land which has been laid off, mapped, and platted into blocks, lots, and streets as an addition to a city, by a map placed on the public records, sells and conveys the lots or blocks by deeds referring

to the map, in the description thereof, it constitutes a dedication to the public of such streets, and the rights in such streets become thereby vested in such purchasers and in the public. Judge Moore, in treating of this subject, in the case of Lamar County v. Clements, 49 Tex. 354, said: "It has been repeatedly held by this court, as well as by many others, that where the owner of land lays out and establishes a town, and makes and exhibits a map or plan of the town, with streets and public squares, and sells the lots with reference to such plan, the purchasers acquire, as appurtenant to their lots, all such rights, privileges, easements, and servitudes represented by such map or plan to belong to them or to their owners; that the sale and conveyance of lots according to such map implies a grant or covenant for the benefit of the owners of the lots; that the streets and other public places represented by the map shall never be appropriated by the owner to a use inconsistent with that represented by the map on faith of which the lots are sold, and especially so where the use to which the owner proposes converting them tends to lessen the value of the lots thus sold." *Oswald v. Grenet*, 22 Tex. 94; *Preston v. City of Navasota*, 34 Tex. 684; *Huber v. Gazley*, 18 Ohio, 18; *City of Logansport v. Dunn*, 8 Ind. 378; *Beatty v. Kurtz*, 2 Pet. 506, 7 L. Ed. 521; *Rowan v. Portland*, 8 B. Mon. 232; See, also, *Corsicana v. White*, 57 Tex. 382; *Bond v. T. & P. Ry. Co.*, 15 Tex. Civ. App. 281, 39 S. W. 978. It is also held in said case of Lamar County v. Clements, 49 Tex. 347, that, "where the dedication is manifested by unequivocal acts or declarations upon which the public or those interested in such dedications have acted, the fact the owner may have entertained a different intention from that manifested by his acts or declarations is of no consequence." In the case of *Oswald v. Grenet*, supra, it is said: "A setting apart or dedication to a public use, to be effectual, need not be by deed, nor need it be evidenced by the use of it having been continued for any particular time; it is enough that there has been some clear, unequivocal act or declaration of the proprietor evidencing an intention to set it apart for a public use, and that others have acted in reference thereto and upon the faith of such manifestation of intention." It is further said that "if one owning land exhibit a map of it on which a street is defined though not yet opened, and building lots be sold by him with reference to a front or rear on that street, this operates as an immediate dedication of the street, and the purchasers of lots have the right to have the street thrown open forever"—citing *Wyman v. Mayor*, etc., 11 Wend. 486. The principle upon which the irrevocable nature of a dedication is founded is one of estoppel in pais. When land has once been laid out and map thereof made, with lots, blocks, streets, and alleys delineated and shown thereon, and such lots, or a part of them, have been purchased with reference

to such map, it would be an act of bad faith and a fraud upon those who had so purchased with a view to and upon the faith of such streets being left open. It is also said that "this principle is not limited in its application to the single street on which the lots of the purchaser are situated."

It is contended by appellant that, where the owner sells his land with reference to a plat in which the same is laid off into lots, blocks, and streets, whether the map was made at his instance or not, or where, there being a city map on which the same is so laid off, and he sells with reference to such map, he adopts such map by a reference thereto, his acts will amount to a dedication of the streets. We believe this proposition sound, and announces a principle well established by the American decisions. *Angellon, Highways*, § 149; *Elliott on R. & S.* § 117; note to *Meier v. Railroad Co.*, 1 L. R. A. 856; *Oburch v. Mayor*, 33 N. J. Law, 25, 97 Am. Dec. 696, and cases in first note on page 706; 11 Am. & Eng. Ency. of Law, 402; In re Opening of Twenty-Ninth St., 1 Hill, 189; *Wyman v. Mayor*, etc., 11 Wend. 487.

The facts in this case show that, while A. Groesbeck, W. J. Hutchins, F. A. Rice, and W. R. Baker claimed, and doubtless thought they held, the legal title to the land involved in this suit at the time they placed the original map of the same on record and conveyed to the Houston & Texas Central Railway Company, as a matter of fact the superior title was in the heirs of Cartwright. They sued and recovered the same, and thereafter the railroad company and others recognized their claim and dealt with them as the owners thereof. The Cartwright heirs having been the owners of the land in litigation all the time, the rights of the parties do not depend upon the acts of Groesbeck and others and of the railway company, and will not be determined with reference thereto. Whatever effect such acts may have in throwing light upon and explaining the conduct of appellee in dealing with this property, and in affecting the Cartwrights with notice of the condition and status of the same, yet the decision of the question of dedication will be predicated upon the acts of the Cartwrights, manifesting a dedication, occurring before the property was leased by appellee. That the Cartwrights knew of the official map of the city made by Elliott there can be no doubt. That they also knew of the laying out of said lots, blocks, streets, and alleys, as shown by said map, and that many persons had purchased lots and blocks of ground in the Railway Addition, taking deeds therefor, referring to said city map in the description thereof, and upon the faith that such streets would be left open or opened up whenever the growth of the city and public interest required, is also satisfactorily shown by the evidence and circumstances of the case. When these facts came to the knowledge of the Cartwrights, they had the right to adopt or repudiate the city map made by Elliott, and all the acts of the

city officers in relation to said property; but there is nothing in the record before us indicating a disavowal of said map or acts. On the contrary, it clearly appears that by various transfers of lots and blocks situated in said Railway Addition, some of them being within the "Reservation," by reference to said city map in the description thereof, they have fully recognized and adopted said map. It will be noted that among the transfers thus made is found the deed from the Cartwrights to appellee himself, conveying the property in dispute, and describing it as beginning at the southeast corner of block No. 3, according to the map of said city made by W. M. Elliott, and that by the same description appellee conveyed the property to the Houston & Texas Central Railroad Company. By adopting the official map of the city of Corsicana made by W. M. Elliott, and making sales of lots and blocks situated in said addition as above stated, the Cartwrights thereby as clearly indicated an intention on their part to give up and surrender the use of the streets shown on said map to the public, and such acts were as effectual for that purpose as they would have been had they made or caused to be made said map in the first instance. We are of the opinion that the undisputed evidence in this case establishes the acts referred to, and that said acts were unequivocal, and fill the full measure required by law to constitute a dedication of property to a public use; that the Cartwrights and appellee, who holds under them, and who acquired no better right than they possessed, are estopped to deny the right of the appellants to the control and use of the streets involved in this litigation, and that the lower court erred in not so holding. There is no evidence, in our opinion, rebutting the presumption that the Cartwrights intended what their acts indicated, and, the public and interested purchasers having acted upon those acts, it is immaterial that they may have entertained a different intention from that manifested by such acts. *Lamar County v. Clements*, supra; *Elliott on Roads & Streets*, §§ 125, 126.

That the city of Corsicana had accepted the dedication at the time appellee leased the property was proven beyond controversy. Its officers had recognized the streets involved in this suit, as well as others, as shown by Elliott's map of the Railway Addition, and did some work upon them. The testimony of the witness Henry is positive upon this point, and the only testimony to the contrary, so far as we have been able to discover from the voluminous record before us, is of an entirely negative character. One or two witnesses say that if these particular streets were ever worked they were not aware of it. Conceding they were not worked at the points where the stock pens were located on Tenth avenue and where Eleventh street crossed the railway track, nevertheless, inasmuch as they were worked at other places, we regard the failure to work them at the points named not inconsistent with the idea of acceptance. Be-

sides, we have in the record undisputed evidence of one of those acts of acceptance of a dedication strongly emphasized by the courts as satisfactory, if not conclusive, to wit, the making and adoption of a map of the property dedicated, in accordance with the intention and plan of the dedicator. Gelder v. Brenham, 67 Tex. 345. It is true that the city of Corsicana adopted the Elliott map before the Cartwrights did any act manifesting an intention to dedicate the property, but there is no evidence that its officers ever renounced the acceptance theretofore made, or desired to so do. It is in evidence that after the acts of the Cartwrights in respect to a dedication of the property, and when the officers of said city learned that Tenth avenue and Eleventh street were about to be obstructed by appellee, they promptly asserted the city's right to keep them open for public use, and threatened to, and doubtless would have taken steps to, prevent such obstruction, had it not been for the intervention of this suit. The matter of obstructing the streets was referred to a special committee on investigation by the city council of appellant; August 19, 1902, they reported the result of their investigation; and August 28, 1902, by resolution passed, instructed the marshal of the city to remove obstructions placed in said streets, and to keep them opened.

In the view we take of the case, the fact that the railway company placed upon record in 1875 a re-revised map of the Railway Addition, whereon all the blocks and streets in the "Reservation" were eliminated and shown to be blank spaces, is of no consequence. The rights of appellant are not made to depend on the acts of the railway companies or either of them. So far as the Cartwrights are concerned, the record does not show that they ever sold any of the property by reference to said re-revised map. They ignored that map, and referred to the city map made by Elliott in all their conveyances. Our conclusion is that the lower court erred in perpetuating the temporary injunction herein, and in not entering judgment for appellant on the cross-action. The judgment of the district court will therefore be reversed, and judgment here rendered for appellant that the temporary injunction granted in this case be dissolved, that Eleventh street as shown on the city's map of said Railway Addition be declared a public street of said city, and that the right of possession thereof for the use of the public be vested in the appellant the city of Corsicana.

**FERGUSON-McKINNEY DRY GOODS CO.
v. CITY NAT. BANK OF
COLORADO.**

(Court of Civil Appeals of Texas. Jan. 16, 1904.)

**GARNISHMENT—ANSWER OF GARNISHEE—CON-
TROVERTING AFFIDAVIT—VERIFICA-
TION BY ATTORNEY.**

1. Sayles' Civ. St. art. 245, authorizing a plaintiff to controvert the answer of a garnishee,

§ 1. See Garnishment, vol. 24, Cent. Dig. § 239.

provides that plaintiff may file an affidavit, "signed by him," stating that he believes the answer incorrect, etc. Article 5 provides that, whenever it may be necessary for a party to make an affidavit, it may be made either by him or his agent or attorney. Held, that the controverting affidavit might properly be verified by an attorney.

Appeal from Mitchell County Court; W. B. Crockett, Judge.

Garnishment proceedings by the Ferguson-McKinney Dry Goods Company, as a judgment creditor of E. E. See, against the City National Bank of Colorado, Tex. From a judgment in favor of the garnishee, plaintiff appeals. Reversed.

Ed J. Hamner, for appellant. F. G. Thurmond, for appellee.

SPEER, J. The nature of this suit is fully stated in the opinion rendered by us upon a former appeal. Ferguson-McKinney Dry Goods Co. v. First National Bank of Colorado (Tex. Civ. App.) 71 S. W. 604. The pleadings were in all respects as they were upon the first trial, save that, after the appellant moved for judgment upon the written admission of the appellee, the appellee filed what it denominated its first supplemental answer, in which it excepted to the controverting affidavit of appellant for the reason that said affidavit was not made by the appellant, but by its attorney, and pleaded that the fund sought to be reached in the hands of appellee was exempt under the law. This exception should not only not have been sustained, but it should have been stricken out upon appellant's suggestion, because, as we expressly stated upon the former decision, the instrument filed by the bank admitted appellant's judgment against See, and the validity of the garnishment proceedings. But aside from this, there is no merit in the exception. Article 245, Sayles' Civ. St., authorizing a plaintiff to controvert the answer of a garnishee, provides: "If the plaintiff should not be satisfied with the answer of any garnishee, he may controvert the same by an affidavit in writing, signed by him, stating that he has good reason to believe, and does believe, that the answer of the garnishee is incorrect, stating in what particular he believes the same is incorrect." Article 5 of the statutes provides that "when-ever, at the commencement or during the progress of any civil suit or judicial proceeding, it may be necessary or proper for any party thereto to make an affidavit, such affidavit may be made by either the party or his agent or attorney." The language of the article first quoted would seem to contemplate that the plaintiff himself is the only person authorized to make the affidavit, and such was held to be the case in *Givens v. Taylor*, 6 Tex. 319. But article 5 has been enacted since that decision, and should, as we think, be held to apply to the affidavit of a plaintiff controverting the answer of a garnishee. Article 219, Sayles' Civ. St., authorizing the issuance of the writ of garnish-

ment in the first place, provides that "the plaintiff shall make application therefor in writing, under oath, signed by him, stating the facts authorizing the issuance of the writ, and that the plaintiff has reason to believe and does believe," etc. An affidavit under this article made by plaintiff's attorney has been upheld. *Wilson Hardware Co. v. Anderson K. & B. Co.* (Tex. Civ. App.) 54 S. W. 928. The language is no more suggestive or emphatic in the one article than in the other. Practically the same words are employed in each in respect to the individuality of the contemplated affiant. The statutes also require the answer of a garnishee to "be under oath in writing, and signed by him"; yet it is held that where the garnishee is a corporation, its vice president has authority to make the answer. *Gerhard Hardware Co. v. Texas Cotton Press Co.* (Tex. Civ. App.) 26 S. W. 168. Any other rule would tend to put all corporations outside the pale of the garnishment provisions of the statutes. Corporations can only act through agents.

The court therefore erred in sustaining appellee's exception. In view, however, of appellee's plea of exemption of the proceeds in its hands, the sufficiency of which plea we are not called upon to decide, we will not render, but reverse and remand, the cause for another trial. Reversed and remanded.

BORCHES & CO. v. ARBUCKLE BROS.

(Supreme Court of Tennessee. Oct. 31, 1903.)

SALES—ACTION FOR PRICE—JUDGMENTS—FEDERAL COURTS—CONSTRUCTION—RES JUDICATA—ISSUES—ESTOPPEL.

1. Where, in an action in the federal court to recover for coffee alleged to have been sold, the sellers averred a sale of 500 cases, of which 420 had been delivered, and judgment was rendered in such suit in favor of the buyers on a plea of payment, such judgment was res judicata of a claim subsequently set up by the sellers in a subsequent action by the buyers to recover the price of the 80 cases not delivered, by which the sellers sought to recover the value of the entire lot on the ground that the buyers had purchased the coffee from the sellers' agent individually, and got possession without payment by fraudulently corrupting such agent, and by misleading the sellers by statements, the falsity of which they did not know until they heard the testimony in the federal suit.

2. Where, in an action in the federal court for the price of coffee alleged to have been sold, the buyers denied the sale, but the court directed a verdict in favor of the sellers on such issue, and submitted the case to the jury on the issue of the buyers' plea of payment, which the jury determined in their favor, the direction of such verdict on the issue of sale could be considered in a subsequent action by the buyers to recover the price paid for a part of the coffee which was not delivered, for the purpose of determining the conclusiveness of the federal judgment on the issue of the making of the sale.

3. Where, in an action in the federal court for the price of goods sold, the trial judge directed a verdict in favor of the sellers on the issue as to whether a sale had in fact been made, the judgment in such action was res judicata as to such issue in a subsequent action

between the same parties, though the buyers, in their pleading and proof in the federal court, denied the making of the sale.

4. Where, in an action in the federal court to recover the price of 500 cases of coffee alleged to have been sold, the sellers pleaded the delivery of 420 cases, and tendered in their complaint a delivery of the balance, the fact that the buyers took no steps in such action to have the remaining cases delivered did not estop them, after having recovered judgment in the federal court on a plea of payment for the entire lot, from recovering the price of the coffee undelivered.

Appeal from Chancery Court, Knox County; Joseph W. Sneed, Chancellor.

Action by Borches & Co. against Arbuckle Bros. From a judgment in favor of plaintiffs, reversed by the Court of Chancery Appeals, both parties appeal. Reversed.

Shields, Cates & Mountcastle, for complainants. Sansom & Welcker, for defendants.

NEIL, J. On the 6th day of August, 1900, Arbuckle Bros. brought a suit in the United States Circuit Court at Knoxville against Borches & Co. to recover from them \$5,750, alleged to be due for 500 cases of coffee which it was averred Borches & Co. had bought, and had failed to pay for.

The declaration in that case alleged, in substance, that Arbuckle Bros. had sold to Borches & Co. the 500 cases of coffee referred to, at the price stated, had delivered 420 cases, and were ready and willing, or, as expressed in the declaration, "tendered," the remaining 80 cases; that none of the contract price had been paid; and that the whole of the \$5,750 was due and owing.

The defendants to that case, Borches & Co., pleaded non assumpsit, nil debit, and payment.

Upon these issues the cause was brought to a hearing in the United States Circuit Court. His honor, Judge Clark, presiding in that court, exercising his rights according to the practice obtaining in federal tribunals, peremptorily charged the jury that the testimony showed that Arbuckle Bros. had sold to Borches & Co. the 500 cases of coffee, and, in effect, settled this issue against Borches & Co. and in favor of Arbuckle Bros.; saying to the jury that the evidence was such that, if they should come to a different conclusion upon this issue, he would have to disregard their finding.

His honor Judge Clark, however, did submit to the jury, as raising doubtful questions of fact, the matters arising upon the issues of nil debit and payment. Bearing upon these issues, there was evidence tending to show that Borches & Co. had paid the whole sum in controversy, \$5,750, to one Gaut, as the agent of Arbuckle Bros. There was also evidence tending to show that the money was paid to Gaut in his individual character, and not as agent. Judge Clark left it to the jury to say whether the money had been paid to Gaut individually, or as the agent of Arbuckle Bros.; expressing his opin-

ion, however, to the jury, that the payment had been made to Gaut as agent.

He also submitted to the jury, under the issues of nil debit and payment, the question as to whether Gaut had authority to receive payment for Arbuckle Bros., as their agent and representative; it having been insisted on behalf of Arbuckle Bros. that Gaut was only a sales agent, and not entitled to collect, and that this fact was known to Borches & Co.; and, on the other hand, it having been insisted, in behalf of Borches & Co. that Gaut was a general agent, with authority not only to sell, but to collect as well.

Under the charge of the court, the jury returned a general verdict finding "the issues in favor of the defendants and against the plaintiffs." Judgment was rendered on this verdict in favor of Borches & Co. and against Arbuckle Bros. for the costs of the cause on March 26, 1901.

On appeal to the Circuit Court of Appeals at Cincinnati, the foregoing judgment was affirmed.

On March 11, 1902, after this judgment of affirmance, the present suit was brought in the chancery court of Knox county to recover the price of the 80 cases of coffee which had been paid for, but had not been delivered. The bill set out fully the foregoing proceedings in the federal court, and pleaded the judgment therein as *res adjudicata*. It also alleged, in terms, a purchase by Borches & Co. of 500 cases of coffee, at \$5,750, from Arbuckle Bros., the payment to the latter of the purchase price, the delivery of only 420 cases, and the failure to deliver the remaining 80 cases.

Arbuckle Bros. filed an answer in which they denied that they had ever made a sale of 500 cases of coffee to Borches & Co., or that they had delivered 420 cases, or that they had ever received any payment from Borches & Co.

After putting in this general denial, they then averred that Borches & Co. had bought the coffee from their agent, Gaut, individually; that Borches & Co. had corrupted this agent, and had misled them by false statements, and that they did not know what the real facts were until they heard the testimony in the federal court case; and that a fraud was thus practiced upon them. They alleged that, by corrupting this agent, Borches & Co. had fraudulently gotten possession of the 500 cases of coffee, and had never paid for them. They therefore sought by cross-bill to recover against Borches & Co. a judgment for \$5,750, the value of the 500 cases of coffee. This pleading likewise asked that the federal court's judgment be set aside because of "fraud, surprise, mistake, and accident."

Arbuckle Bros. also insisted in their pleading that Borches & Co. could in no event recover the value of the 80 cases of coffee, because they had declined to receive these 80 cases when tendered, and also because they had denied purchasing the coffee at all.

In the cross-bill, Arbuckle Bros. prayed for a decree adjudging Borches & Co. their debtors for the 420 cases of coffee, or \$11.50 per case; also that it be adjudged that the proceedings in the federal court case were not *res adjudicata* in every respect, or, if the judgment in that case should be held *res adjudicata*, then that it be set aside on the ground of fraud, accident, and mistake.

To this cross-bill Borches & Co. filed a demurrer, making the point that the judgment in the federal court case was *res adjudicata* upon the claim put forward for the recovery of the price of the 420 cases. They also demurred to so much of the bill as sought to set aside the judgment in the federal court because no sufficient allegations of fraud were made in the cross-bill.

The chancellor sustained both grounds of demurrer filed, as above stated, to the cross-bill. He sustained the original bill of Borches & Co., and granted them a judgment against Arbuckle Bros. for \$920, the contract price of the 80 cases of coffee, together with interest from the filing of the bill, \$77; in all, \$997.

From the foregoing decree Arbuckle Bros. prayed and obtained an appeal. The case was tried by the Court of Chancery Appeals, and in that court the decree of the chancellor was reversed in so far as it directed a judgment in favor of Borches & Co. for the \$997. In other respects it was affirmed. From that decree both parties have appealed to this court.

In the opinion filed by the Court of Chancery Appeals only a passing notice is given to the appeal prosecuted by Arbuckle Bros. in respect of the chancellor's disposition of the cross-bill, the court being clearly of the opinion that that claim was concluded by the judgment in the federal court; and really no serious contention is made to the contrary in this court, as, indeed, there could not be. The conclusion of the Court of Chancery Appeals upon this point is so manifestly sound that we need not consume any further time in considering it.

The real controversy arises over the claim preferred by Borches & Co. to recover the \$920 and interest for the 80 cases of coffee undelivered.

The Court of Chancery Appeals considered this matter in two aspects. The first standpoint from which the controversy is viewed is as to whether Borches & Co. are entitled to the benefit of *res adjudicata* as to the question of there having been a sale to them by Arbuckle Bros. of the 500 cases of coffee. The second view considered is whether Borches & Co. are estopped by their pleadings and their testimony in the federal court case.

The first of these controversies was determined against Borches & Co. on grounds to be presently stated, and the second was also determined against them.

In considering the second question, the Court of Chancery Appeals held, in sub-

stance, that Borches & Co. were estopped by their pleas to the effect that no such sale had been made as that alleged in the declaration in the federal court case. They also recited the testimony given by Mr. Borches in that case, and based on this an estoppel. They found that Mr. Borches had stated the real facts of the transactions with substantial accuracy (the facts on which the federal court based its finding that there had, indeed, been a contract of sale), but that he so construed the facts set forth in his testimony as to give them the color of a contract made between himself and the agent personally (that is, between him and Mr. Gaut), or, in other words, that Mr. Borches, in his testimony, construed the facts testified to by him to mean that he had made the purchase from Mr. Gaut personally, rather than from him as the agent of Arbuckle Bros.

The Court of Chancery Appeals also referred to a letter which Borches & Co. wrote to Arbuckle Bros. before the litigation began in the federal court, this letter being to the effect that Borches & Co. had bought the coffee from Mr. Gaut personally. That court says that probably this of itself would be sufficient to operate as an estoppel.

In connection with these three matters of estoppel, there appears in the opinion of the Court of Chancery Appeals a very able and learned discussion of estoppel of this character.

But in the view we take of this case, we need not go into these matters at all.

We think the fundamental error in the opinion filed by the Court of Chancery Appeals was in failing to give any weight to the action of his honor the circuit judge, sitting in the federal court, in disposing of the issue raised upon the fact of the sale of the 500 cases of coffee to Borches & Co.

We repeat that portion of the facts found by the Court of Chancery Appeals which bears upon this immediate point.

That court says: "When the United States Circuit Judge gave the charge to the jury, exercising his power to do so, he peremptorily charged them that the proof showed that Arbuckle Bros. had sold to Borches & Co. the five hundred cases of coffee, and, in effect, settled this issue against Borches & Co. and in favor of Arbuckle Bros.; saying to the jury that the proof was such that, if they were to come to a different conclusion upon this issue, he would have to disregard their finding and set it aside.

"The United States Circuit Judge, however, did submit to the jury, as a doubtful question of fact, the issue of nil debit and payment. He left it to the jury to say whether or not the money received from the bank on the discounted note was turned over to Gaut individually, or as the agent of Arbuckle Bros.; expressing, however, to the jury, his opinion that, under the facts, it was turned over to Gaut as agent. He also submitted to the jury, under the issue of nil

debit and payment, the question as to whether or not Gaut had authority to receive payment for Arbuckle Bros. as their agent and representative; it being insisted on behalf of Arbuckle Bros., in the argument, that Gaut was only a sales agent, and not entitled to collect, and that this fact was known to Borches & Co.; and, on the other hand, it being insisted that Gaut was a general agent, with authority not only to sell, but to collect.

"Under the charge of the court, the jury returned a general verdict finding the issues in favor of the plaintiffs, whereupon judgment dismissing the case, and rendering a judgment for costs against Arbuckle Bros. and sureties, was entered."

It is clear from this recital of what was done in the federal court that there was an issue between the present complainants and the present defendants as to whether there had been a sale of the 500 cases of coffee made by Arbuckle Bros. to Borches & Co., and that this issue was found in favor of Arbuckle Bros.; that is, it was settled in that case that Arbuckle Bros. had sold to Borches & Co. 500 cases of coffee, and (referring to the term of the declaration) had delivered 420 of these cases, leaving undelivered 80 cases.

It was also determined in that case, under the other issues, that Borches & Co. had paid to Arbuckle Bros. the price of these 500 cases.

In the opinion of the Court of Chancery Appeals, a point is made upon the fact that the jury responded only to the issue of nil debit and payment. It is said they did not respond to the issue as to whether there had been a contract made, and the goods delivered. It is said that when the jury brought in their verdict that they found the issues in favor of the defendants to that case, Borches & Co., it meant only the issues of nil debit and payment. The Court of Chancery Appeals held that the charge of the court could not be looked to for the purpose of determining this matter.

We think this a mistaken view. Under the practice in the federal court, a circuit judge has the right to give such a direction to the jury as was given in the case referred to; and the effect of such a direction, unless the jury disregard it and find in opposition thereto, is a decision upon the particular point in favor of the party for whom the direction is given.

There is a conflict of authority as to whether matters aliunde can be looked to for the purpose of determining the exact scope of a judgment under a plea of *res adjudicata*. That controversy has, however, in this state, been long settled in favor of the right to look to such matters aliunde.

In *Estill v. Taul*, 2 Yerg. 467, 469-471, 24 Am. Dec. 498, it is held that where judgment has been rendered by a justice of the peace, and in courts of record, where the judgment

is general, parol evidence is admissible to show the fact of issue tried.

In *Warwick v. Underwood*, 8 Head, 238, 75 Am. Dec. 767, it was held that where the former judgment was general and uncertain, parol evidence was admissible to show what was involved in the issue and settled by the judgment. In that case the parties were permitted to show that in the former suit the location of a certain line, by marks, acquiesced in, variant from the calls of the deeds, was tried and passed upon by the jury, in favor of Warwick, upon a proper plea involving that issue, and consequently that fact was held to be settled in the general verdict and judgment.

In *Williams v. Hollingsworth*, 5 Lea, 358, it was held that it was the duty of the court to construe a decree in a chancery cause for the purpose of ascertaining exactly what was decided.

In *Fowlkes v. State*, 14 Lea, 14, the court said: "As a general rule, the onus of establishing an estoppel is by law cast upon him who invokes it. Freeman on Judgments, § 276. 'There can be no doubt,' says Mr. Freeman, 'that in all cases in which, from the record alone, no intimation is given whether a particular matter has been determined or not, it is incumbent upon the party alleging that the matter has been settled by former adjudication to support his allegation by evidence aliunde. Parol evidence is always admissible to show the facts, even if it appear prima facie that the question has been adjudicated, when the record does not show that it was actually settled.'"

In *State v. Bank of Commerce*, 96 Tenn. 591, 36 S. W. 719, it was held that the opinion of the court, where the judgment was silent upon the point, might be looked to for the purpose of determining what was really decided by the court, and intended to be adjudged. In that case the decree adjudged that shares of stock of the bank in the hands of the shareholders were subject to general taxation. In the decree no reference was made to the capital stock, nor did it, in terms, adjudicate that the capital stock was not subject to general or ad valorem taxation; but the opinion then delivered went fully into the question, and it was held that the court had undoubtedly decided that the capital stock was not subject to general taxation. The court said: "Upon authority, we think it clear that we may look to the opinion, in connection with the decree, to ascertain what was intended to be and was by the court decided." Continuing, the court said: "We are of the opinion, and therefore hold, that the decree of the last term, construed in connection with the opinion, adjudged that the capital stock of the Bank of Commerce was not subject to general taxation."

Under these authorities, we think there can be no doubt that the court can look to the direction that the circuit judge gave to the jury,

and consider its effect, for the purpose of determining what was really settled in that case. This being done, we think there can be no doubt that the point was adjudicated between these same parties that the 500 cases of coffee had been sold by Arbuckle Bros. to Borches & Co., and that only 420 of these cases had been delivered, leaving 80 cases undelivered. It was also adjudged in that case that the price of the 500 cases had been paid.

It results that the complainants are entitled to recover the price of the 80 cases undelivered.

We do not think it necessary to dwell upon the question whether Borches & Co. should be held estopped by their pleadings and evidence in the federal court case, because, if it were true that an estoppel could arise out of such matters, in respect of and as against the very judgment pleaded as *res adjudicata*, the operation of judgments as adjudications between parties to a litigation would be so narrowed as to be practically destroyed, since there are few lawsuits in which there are not contending theories of fact and law. Indeed, it is these which are composed and settled by the judgment. When so settled, the adjudication is binding upon both parties, and is available, in its full force, to each, regardless of the constructions which they respectively championed while the battle was in progress.

It is insisted by defendants that complainants are estopped because they did not take some steps in the federal court to have the 80 cases of coffee delivered for the reason that, as is stated, they were tendered in the declaration. By this is meant simply that Arbuckle Bros., plaintiffs in that case, expressed in the declaration their readiness and willingness to perform their part of the contract which they alleged they had made with Borches & Co. We are not aware of any pleadings that could have been filed by Borches & Co. in that case that would have enabled the court to direct a delivery of the 80 cases. The substance of the declaration filed by Arbuckle Bros. was that they had sold the 500 cases of coffee to Borches & Co., and had delivered 420 cases, and had been paid for none of them, and that they were ready and willing to deliver the remaining 80 cases upon the payment of the purchase money for the whole 500 cases. In other words, in respect of the 80 cases, the declaration simply had, in substance, the averment of a readiness and willingness on the part of Arbuckle Bros. to perform their part of the contract.

In view of the construction which we have given to the proceedings in the federal circuit court, which we believe to be the only sound construction of those proceedings, it seems to follow necessarily that the decree of the Court of Chancery Appeals is erroneous, and that of the chancellor correct, and the chancellor's decree must be affirmed.

Let a decree be entered accordingly.

BRENT v. CHIPLEY.*

(Court of Appeals at Kansas City, Mo. Dec. 7, 1903.)

ADMINISTRATION OF ESTATE—LEASE BY DEVISEES—RIGHTS OF EXECUTRIX.

1. Under Rev. St. 1899, § 130, authorizing an administrator or executor to take possession and rent lands belonging to the heirs or devisees, when judicially ordered to do so, for the payment of debts, an executrix, who had not taken possession nor rented the lands under an order of court, could not collect the rents the tenant had agreed to pay the devisees, without the consent of the devisees and their agent.

Appeal from Circuit Court, Howard County; John A. Hockaday, Judge.

Action by Mary E. Brent, executrix of James H. Porter, deceased, against Henry Chipley, in justice court. From a judgment for defendant rendered on appeal to the circuit court, plaintiff appeals. Affirmed.

John Cosgrove, for appellant. Sam C. Major and W. W. Kingsbury, for respondent.

ELLISON, J. This action was instituted before a justice of the peace under the landlord and tenant statute (sections 4130, 4131, Rev. St. 1899) to recover the possession of certain real estate situated in Howard county. The judgment on appeal to the circuit court was for the defendant.

It appears that the farm was formerly owned by James H. Porter; that he died, and the premises then became the property of his devisees under the terms of his will; that George D. Gibson was acting as agent for the devisees, and for several years had rented the premises to the defendant, and again rented them to him from March, 1902, to March, 1903, for \$150, due January 1, 1903. The personal property left by Porter having proved insufficient to pay his debts, the probate court, under the provisions of section 130, Rev. St. 1899, on February 12, 1903, ordered the plaintiff, as executrix, to take charge of and rent the farm, whereby she might obtain further assets to use in the discharge of debts of the estate. Plaintiff charges that on March 3d following she notified Gibson and the defendant of the order of the probate court, and that Gibson surrendered all claims of agency for the children, and that defendant attorned to her by recognizing her and agreeing to pay to her the rent money as agreed upon with Gibson, viz., \$150, when it should become due at the end of the year; that afterwards defendant refused to pay said sum, whereupon plaintiff instituted the present action as stated.

The determination of this case depends upon the construction to be placed on section 130 aforesaid. It reads as follows: "No administrator or executor, except an executor acting under power conferred by will, or as provided in section 257 of this chapter, shall rent or control the real estate of the decas-

ed, unless the probate court having jurisdiction shall be satisfied that it is necessary to rent said estate for the payment of debts, and make an order of record requiring such administrator or executor to take possession of and rent the same for a period not exceeding two years; and upon such order, such executor or administrator may prosecute and maintain any action for the recovery of such real estate in the same manner and with like effect as the testator or intestate might have done in his lifetime." Without this statute the administrator would have no right to the land, its rents or profits. The land, its possession, rents, and profits, belong to the heir or devisee, and he, of course, may rent or lease it. *Hall v. Bank*, 145 Mo. 114, 46 S. W. 1000; *Bealey v. Blake's Adm'r*, 70 Mo. App. 234. If he does so, the tenant, on account of this statute, will hold by an uncertain tenure. His right obtained from the heir is liable to be cut off by the contingency of an order of the probate court for the purposes mentioned in the statute. The statute should not be construed as meaning that the tenant could be disturbed in growing and gathering the crop which he had sown at the time the order of the probate court became effective. It is the policy of the law, in the interest of agriculture, to permit the tenant to reap what he sows. The statute reads that the administrator must, when ordered by the probate court, take possession of the premises and rent them. But it does not mean so unreasonable a thing as that the administrator could deprive the tenant of his emblements. But in this case the plaintiffs are not seeking to disturb the right of this defendant tenant to his emblements. They seek to hold him for the rent he agreed to pay the heir. The statute reads that upon obtaining the order the executor or administrator shall take possession and rent. It is not pretended that the executrix did either. She made no effort to obtain possession; neither did she rent it. She therefore failed in that respect to bring herself within the terms of the statute, and, having failed, she has not put herself in position to demand rent of the defendant. She had no right to step in and appropriate a contract made by other parties.

Defendant insists that the case is not one in which there can be an attornment, such as is known to the statute and adjudications thereunder. Section 4112, Rev. St. 1899; *Dausch v. Crane*, 109 Mo. 335, 19 S. W. 61. But plaintiff contends, and there was evidence tending to support the contention, that, whether a technical attornment or not, she notified the agent who had the farm in charge for the devisees, and who rented it to defendant, that she proposed to take immediate charge of the land, and to appropriate the rent; that the agent consented; and that she afterwards notified the defendant that she was entitled to the rent under the order of the probate court, and that he consented to

*Rehearing denied February 1, 1904.

pay it to her. In short, it is plaintiff's contention that the devisees and the defendant consented that she take charge of the land as rented, and receive the rent therefor. We see no reason why that might not be legally done. But in this case the court, from the declarations of law given, must have found the fact to be that the agent and the defendant did not so understand it.

Our conclusion is that there is no way in which we can justify ourselves in overturning the judgment, and it is accordingly affirmed. All concur.

MATHEW v. WABASH R. CO.*

(Court of Appeals at Kansas City, Mo. Dec. 7, 1903.)

CARRIERS—INVALID PASSENGER—RIGHT TO TRAVEL—DEGREE OF CARE—AGGRAVATION OF AILMENTS—INSTRUCTIONS.

1. An instruction undertaking to cover the entire case, but omitting special defenses, is not error where such defenses are fully presented in subsequent instructions.

2. The right to railway passenger carriage is not confined to persons who are physically sound, but is open, within a reasonable degree, to those ailing and infirm.

3. An invalid passenger is entitled to receive the same general high degree of care as other passengers, though, in the absence of notice to the carrier of her condition, she is not entitled to special care.

4. An invalid passenger injured by the negligence of a railway company is entitled to recover for an increase of her existing ailments thereby occasioned.

5. Where the court cannot say, from all the evidence, that but one inference is deducible therefrom, and that is that plaintiff was negligent, the question of contributory negligence is for the jury.

6. In an action by a passenger for injuries, it is proper to instruct that if in making the coupling, the attempt to accomplish which occasioned the collision and consequent injury, the company used a degree of care or caution less, in however small a degree, than the utmost care of very cautious railroad men under the same or similar circumstances, then the defendant was not cautious.

Appeal from Circuit Court, Clay County; J. W. Alexander, Judge.

Action by Genevieve Halstead Mathew against the Wabash Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Geo. S. Grover, for appellant. Grant I. Rosenzweig, for respondent.

SMITH, P. J. This is an action to recover damages for personal injuries received by plaintiff in consequence of the negligence of defendant. The negligence alleged in the petition is "that defendant by its servants moved its said engine and its cars up to and against the still car in which plaintiff was seated, without due care or caution, negligently and carelessly, and with unduly and unreasonably great swiftness, speed, and suddenness, the defendant's moving engine and

cars striking the still car with overgreat force and violence, unreasonably and greatly jarring the same throughout. That this plaintiff, then sitting in the still car, and in the exercise of reasonable care, was by the shock of that collision forced and jammed back against the seat in which she was sitting, and against the sides and framework thereof, with such violence that this plaintiff's flesh on her back, legs, and hip was hurt and bruised, and her internal organs were disarranged and displaced, and were jarred and bruised so that they have ever since failed and refused to perform their functions. That in consequence thereof, and in order to save her life, the plaintiff's ovaries have been removed, and a surgical operation has been performed by which the faeces is made to pass, and has now for weeks passed, from the bowels out through an opening cut in the front of the abdomen, instead of through the natural channel, and plaintiff has endured the most intense pain and suffering." The answer was a general denial, coupled with which were two special defenses, that is to say: (1) That the plaintiff's physical condition did not result from the negligence of the defendant, but from a pre-existing injury and disease; and (2) that the jarring and jolting of the defendant's train at the time and place when and where the injury complained of happened was unavoidable by reason of the coupling apparatus then used and required to be used by an act of Congress of March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]. There was a trial, in which plaintiff had judgment, and defendant appealed.

An examination of the evidence has convinced us that it was ample to entitle the plaintiff to a submission of the case. Nor do we discover, as between the allegata and probata, that there is any fatal lack of correspondence. The defendant contends that, while plaintiff's first instruction was erroneous in that it undertook to cover the entire case, it excluded from the consideration of the jury the two special defenses pleaded by its answer; or, in other words, it excluded from the jury the consideration of the evidence tending to show that plaintiff had no right to recover. If the rule declared by Judge Scott in *Clark v. Hammerle*, 27 Mo., loc. cit. 70, and emphasized by the majority in *Sullivan v. Ry. Co.*, 88 Mo. 169, had not been overthrown in the later case of *Owen v. Ry. Co.*, 95 Mo. 169, 8 S. W. 350, 6 Am. St. Rep. 54, and in *Hughes v. Ry. Co.*, 127 Mo. 427, 30 S. W. 127, this contention would not be baseless. The rule now obtaining in this state is that where a series of instructions, taken in their entirety, present a full and complete exposition of the law applicable to every phase of the case, and a verdict is returned thereon, it will be upheld, even though, when taken separately, such instructions may be incomplete and subject to criticism. In such case there can be no neces-

*Rehearing denied February 1, 1904.

sity for qualifying each by reference to the others. They qualify themselves.

The defendant's third and fourth instructions given submitted the special defenses pleaded, and so the instructions, when taken in their entirety, cover every phase of the case, and thus meet the requirements of the rule. *McMahan v. Express Co.*, 132 Mo. 641, 34 S. W. 478, and *Goetz v. Ry. Co.*, 50 Mo. 472, cited by defendant, decide nothing at variance with the *Owen* and *Hughes* Cases already referred to. In the former—the *McMahan* and *Goetz* Cases—it was ruled that an instruction in itself erroneous cannot be supplied, but one that gives but part of a case may be; and this ruling is not repugnant to that made in the latter.

The defendant further objects that the action of the court in giving the plaintiff's instruction which authorized a finding for plaintiff for any necessary expenses incurred by her for the treatment of her injuries was erroneous, for the reason that there was no evidence adduced in support of it. After looking at the testimony of plaintiff herself, and that of Dr. Riegel, one of her physicians, and Helena Rowe, her nurse, relating to the extent and value of the medical and hospital services rendered plaintiff, we must conclude that the same was quite sufficient to justify the giving of the instruction. The evidence fully met the requirement of the rule laid down in the adjudged cases in this state. *Mirrieles v. Wabash Ry. Co.*, 163 Mo. 470, 63 S. W. 718; *Smith v. Ry. Co.*, 108 Mo. 251, 18 S. W. 971; *Robertson v. Ry. Co.*, 152 Mo. 393, 53 S. W. 1082; *Morris v. Ry. Co.*, 144 Mo. 500, 46 S. W. 170.

The defendant further objects that the court erred in giving plaintiff's fourth and fifth instructions. The fourth told the jury that the use of a railway passenger carrier was not confined alone to persons who were physically sound, but was open also to those ailing and infirm, within reasonable degrees; and that whether or not plaintiff was in reasonable physical condition to travel by defendant's railroad from and to the places mentioned in the petition, if the defendant had used proper care as defined in other instructions, was for the jury, under the evidence, to decide. The fifth went a step further, and told the jury that if plaintiff was not entirely well at the time she received the injury, but yet was reasonably able to have made the said trip without injury, had defendant used proper care as defined in other instructions, then if it (the jury) found the issues submitted by plaintiff's other instructions, the plaintiff was entitled to recover for the "increase of her former ailments, if any, and for such new injuries, if any, as it might believe resulted directly from the improper coupling, if any." Whether the plaintiff was sound or infirm in health at the time she received the injuries of which she complains, it was the duty of defendant, in the management and movement of the train on which

she was then riding as a passenger, to exercise the utmost diligence and care of very prudent persons. *Sweeney v. K. C. Cable Ry. Co.*, 150 Mo. 401, 51 S. W. 682; *O'Connell v. Ry. Co.*, 106 Mo. 484, 17 S. W. 494; *Leslie v. Ry. Co.*, 88 Mo. 55. And if, while exercising such care in the movement of its train, the plaintiff received the injuries of which she complains, there would be no liability.

It is suggested by the defendant that it had no notice of the plaintiff's infirmities at the time of the receipt of her injury. Assuming, as we must, that this was so, then the plaintiff was entitled to the same general degree of high care which was the right of all passengers. The effect of notice of the passenger's infirmities is to increase the measure of the carrier's duty. When there is no such notice, it owes him no other or higher duty than it does to the other passengers who are not infirm. *Hanks v. Ry. Co.*, 60 Mo. App. 274; *Deming v. Ry. Co.*, 80 Mo. App. 152; *Fleming v. Kansas City*, 89 Mo. App. 140; *Owens v. Kansas City*, 95 Mo. 169, 8 S. W. 350, 6 Am. St. Rep. 39. The physical condition of the plaintiff in no way diminished the liability of the defendant. *Brown v. Ry. Co.*, 66 Mo. 588.

It is further objected that the latter of said instructions—the fifth—authorized the jury to find for the increase of former ailments, and for such new injuries as had been occasioned by the accident. The defendant pleaded as a special defense, as has already been stated, that the plaintiff's injuries resulted from pre-existing infirmities, and not from an improper coupling of its cars at the time she alleged. There was evidence which tended to prove that the plaintiff at the time of the coupling was suffering from certain female ailments, and that the effect of the jolt occasioned by the coupling was to augment or aggravate such ailments. There was also some evidence tending to prove new and independent injuries were received in consequence of the jolt. The term "increase" is the synonym of "augment" or "aggravate," and its presence in the plaintiff's instruction was authorized by the pleadings and evidence. In authorizing a recovery for the aggravation or increase of the injuries, it did not mislead the jury to the prejudice of the defendant, because whether the injuries consisted of an aggravation or increase of a pre-existing ailment, or were new, could make no difference, if either or both were caused by the negligent act of the defendant as alleged in the petition. It was the province of the jury to apportion the injury to the respective causes. *Paul v. Ry. Co.*, 82 Mo. App. 500. And this instruction did not authorize a recovery for any injury that did not result from the defendant's negligence.

We cannot say, in the face of all the evidence, that there was but one inference to be deduced therefrom, and that was that the plaintiff was guilty of negligence; and there-

fore whether she was or was not guilty of negligence on her part was a question for the jury, which, under the requirements of plaintiff's first instruction, was submitted to it.

The plaintiff's instruction which told the jury that, "in making the coupling, if the defendant used a degree of care or caution less, in however small a degree, than the utmost care of very cautious railroad men under the same or similar circumstances, then the defendant was not cautious," was a correct expression of the rule, as may be seen by reference to *Waller v. Ry. Co.*, 83 Mo. 608, and the other cases elsewhere cited herein.

The case in some respects is rather a complicated one, but, when in all and all considered, we are of the opinion that it was fully and fairly submitted to the consideration of the jury, and with whose verdict no just ground for complaint has been made.

The judgment must be affirmed. All con-
cure.

BROWN v. MISSOURI, K. & T. RY. CO.

(Court of Appeals at Kansas City, Mo. Feb. 1, 1904.)

RAILROADS — ANIMAL ON TRACK — FRIGHT FROM PASSING TRAIN — INFERENCE FROM EVIDENCE — ADJOINING PASTURES — RIGHT OF WAY FENCE — DUTY OF COMPANY — ATTORNEY'S FEES — UNCONSTITUTIONAL STATUTE.

1. In an action against a railroad company for the death of plaintiff's horse on the right of way by an encounter with a barbed-wire fence, there was no direct evidence that the horse was frightened by a passing engine, nor did any witness testify that he saw or heard any train pass on the night of the accident. It was shown, however, that trains were due to pass during that night, and plaintiff's witnesses testified to having seen the horse's tracks along the right of way from the place where he got over the defective right of way fence, indicating that he ran down the track until he got upon a high embankment, and from there jumped or slid down the side thereof into the barbed-wire fence. *Held*, that the jury might reasonably infer that the animal got into the fence from the right of way side, and was frightened into doing so by a passing train.

2. Where a horse is being pastured by one whose pasture adjoins that of a third person without a dividing fence, and, by mutual consent of these adjoining proprietors, stock is allowed to pass back and forth from one field to the other, a railroad company owes the duty to the horse's owner of maintaining a proper right of way fence along the pasture of such third person.

3. In an action by the owner of a horse killed on a railroad track, the court below allowed an attorney's fee against the company, without its objection, as authorized by Rev. St. 1889, § 2613. On the case being certified to the Supreme Court after an appeal to the Court of Appeals, that court held that it did not have jurisdiction, and that, though the statute in question was unconstitutional, it could not avail the defendant, because not properly invoked in the trial court. *Held*, on remand to the Court of Appeals, that, notwithstanding this decision, the judgment would be modified so as to relieve defendant from the attorney's fee.

Appeal from Circuit Court, Randolph County; J. A. Hockaday, Judge.

Action by J. E. Brown against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff was affirmed by the Court of Appeals, and the case certified to the Supreme Court. On remand from the Supreme Court. 74 S. W. 973. Judgment below affirmed on conditions.

Geo. P. B. Jackson, for appellant.

J. W. Wight, for respondent, cites *Halferty v. Railroad*, 82 Mo. 90; *Blewett v. Railroad*, 72 Mo. 583; *Keltenbaugh v. St. Louis, A. & T. Ry. Co.*, 34 Mo. App. 147; *Combs v. Railroad*, 58 Mo. App. 467; *Allen v. City of Springfield*, 61 Mo. App. 270, *Karle v. Railroad*, 55 Mo. 476, 482; *Whalen v. Railroad*, 60 Mo. 323; *Muehlhausen v. Railroad*, 91 Mo. 332-346, 2 S. W. 315; *State v. Gregory*, 30 Mo. App. 582; *Dilly v. R. R.*, 55 Mo. App. 123; *Harbeston v. R. R.*, 65 Mo. App. 160; *Blewett v. R. R.*, 72 Mo. 583; *Taylor v. Penquite*, 35 Mo. App. 403; *Gaines v. Fender*, 82 Mo. 509; Rev. St. 1889, § 2302; *Fickle v. St. L., K. C. & N. R. R.*, 54 Mo. 219; *Vineyard v. Matney*, 68 Mo. 105; *Orr v. Rode*, 101 Mo. 399, 13 S. W. 1066; *Bartlett v. Veach*, 128 Mo. 93, 30 S. W. 347; *Brennan v. City of St. Louis*, 92 Mo. 489, 2 S. W. 481.

BROADDUS, J. On December 8, 1900, this cause was affirmed in this court. On the 12th day of said month a motion for rehearing was filed on the ground that the decision was in conflict with a controlling decision of the Supreme Court, to wit, *Paddock v. Mo. Pac. Ry. Co.*, 155 Mo. 524, 56 S. W. 453, wherein it was held that section 2613, Rev. St. 1889 (section 1107, Rev. St. 1899), that provided for an attorney's fee in case the owner of live stock should be compelled to sue for damages to such stock injured or killed, occasioned by reason of the failure of a railroad company to fence its tracks as provided by law, was unconstitutional. On the 17th day of December, 1900, said motion was sustained, and the cause certified to the Supreme Court. At the April term of said Supreme Court an opinion was handed down wherein the court held that it did not have the jurisdiction of the cause; that, notwithstanding the section in question was unconstitutional, it could not avail the defendant, as it was not "timely and properly invoked in the trial court"—and ordered the cause remanded to this court.

This is an action for damages, brought under the provisions of section 2612, Rev. St. 1889, to recover the value of plaintiff's horse, which escaped onto defendant's right of way at a place where there was not a lawful fence, was frightened by a passing train, and ran into a barbed-wire fence and was killed. In a trial below, plaintiff recovered \$25 for the loss of his horse, and \$25 attorney's fee, and defendant appealed.

¶ 2. See *Railroads*, vol. 41, Cent. Dig. § 1426.

1. A great part of defendant's brief and argument is taken up with the contention that the evidence failed to make a case for plaintiff, and that the court should have given a peremptory instruction for defendant. It seems that plaintiff was stopping or boarding with a farmer by the name of Murphy, whose pasture adjoined the defendant's right of way on the north. With Murphy's consent, plaintiff had his horse in this pasture. Immediately on the west of Murphy's land one Lusk had a pasture; but between these there was no division fence, and the stock, by common consent, was allowed to pass from one pasture to the other. Plaintiff was in the habit of feeding his horse morning and evening, but on the morning of October 15th the horse was missing, and plaintiff found the animal dead on the defendant's right of way. After an investigation, it was discovered that the horse had run into a barbed-wire fence, which so cut and lacerated his throat that he died from loss of blood. The testimony of plaintiff and some of his witnesses tended to show that the horse got upon the track where Lusk's pasture joined the right of way, and where the fence was defective, went from there along the track on a run until he got upon a dump or fill, and then jumped or slid down and onto the fence, where he was fatally injured. From there, the evidence showed, the animal walked down the right of way a short distance, where he was found dead. The evidence of both parties coincides as to where the horse was injured, but disagrees as to where he got upon the right of way; that of the defendant tending to prove that the horse was scared into or driven upon the fence where he was injured from the pasture side, while that of the plaintiff tended to prove that the animal got upon the railroad at another point, and was frightened and caused to run into the wire fence further east. It is true that there was no direct evidence that the horse was frightened by a passing engine, and thereby caused to run into the wire fence; neither did any witness testify that he saw or heard any train pass on the night when the animal was killed. The facts and circumstances detailed in evidence, however, tend to establish that such was the fact. It was shown that trains were due to pass during that night, and the jury might reasonably infer that one or more trains did pass. Plaintiff's witnesses also testified to having seen the horse's tracks along the right of way from the place where he got over the defective fence, indicating that he jumped and ran down the railroad track until he got upon a high fill or embankment, and that from there he jumped or slid down the side thereof, and into the wire fence, where he was badly cut and killed. These are circumstances from which the jury might reasonably infer that the animal got upon the track, and was frightened into the fence by a passing locomotive. The plain-

tiff was not compelled to establish this by direct proof. It was sufficient to prove such circumstances as justified the inference. See authorities cited in plaintiff's brief. The contention that, because plaintiff's horse got upon the defendant's right of way from Lusk's pasture, he could not recover, is based on a misapprehension of the testimony. While it is true that plaintiff's horse was being pastured by Murphy, yet, as already stated, the latter's pasture and that of his neighbor, Lusk, were adjoining, and there was no partition fence between them. It had been removed for the time being, preparatory to opening a public road; and, by mutual consent of these adjoining proprietors, the stock was allowed to pass back and forth from one pasture to the other. This is shown by the uncontradicted evidence in the case. The plaintiff's horse was not then trespassing on the premises of Lusk, but was there by the latter's consent. Under all the cases, then, the defendant owed the plaintiff the duty of maintaining a lawful fence at the point in question. It was sufficient to prove that the horse was on the premises by and with the consent of Lusk, the owner. *Geiser v. Ry.*, 61 Mo. App. 459-463, and cases cited.

2. The instructions have been examined and found to intelligently cover every branch of the case. The criticism that they refer the jury to the pleadings to ascertain the issues is unmerited. The only reference to the pleadings is found in plaintiff's first instruction, and there it was entirely harmless. The reference was there made for the mere purpose of shortening a description, and could not possibly do the defendant any harm, especially as other instructions fully and completely told the jury what were the facts necessary to be found. *Edelmann v. Transfer Co.*, 3 Mo. App. 503-506.

When the jury returned a verdict for the plaintiff for his damages, the court taxed against defendant a fee of \$25, as provided by section 2613, Rev. St. 1889—now section 1107, Rev. St. 1899. At the March term, 1899, the Supreme Court, in *Paddock v. Mo. Pac. Ry. Co.*, reported in 155 Mo. 524, 56 S. W. 453, declared that said provision for taxing an attorney's fee was unconstitutional and void. The decision refers to section 2612, but that is a clerical mistake, as that section only gives a right of action for damages to the owner of stock killed or injured by reason of the failure of railroad companies to maintain lawful fences inclosing their railroad tracks. Notwithstanding the Supreme Court returned the case to this court for the reason given, we are of the opinion that it is our duty—the section of the statute under which an attorney's fee was taxed against defendant being invalid—to relieve defendant of that part of said judgment. The section having been declared invalid, it is to be regarded, in law, as if it had never existed. It was therefore error in the trial court to tax an attorney's fee against defendant.

If the plaintiff will enter a remittitur of \$25, taxed as attorney's fee, within 20 days, the cause will be affirmed; otherwise it will stand reversed and remanded. All concur.

JOHNSON v. METROPOLITAN ST. RY. CO.*
(Court of Appeals at Kansas City, Mo. Jan. 4, 1904.)

MASTER AND SERVANT—PERSONAL INJURIES—
NEGLECT—PLEADING—GENERAL CHARGE—
EVIDENCE—SUFFICIENCY—ACCIDENT—
PRESUMPTION—FELLOW SERVANTS—STREET
RAILWAYS.

1. In an action against a master for personal injuries to a servant, a general charge of negligence is sufficient as against an objection first made on trial.

2. In an action against a master by a servant for personal injuries, evidence that a crowbar used by other servants fell through the floor to the next story, and struck plaintiff on the head, was sufficient to cast on defendant the necessity of showing that the accident was not the result of negligence.

3. Plaintiff, who was engaged in hauling away rubbish made by carpenters in their work, was a fellow servant with the carpenters, and could not recover for injuries inflicted by their negligence.

4. A street railway is not within the provisions of the fellow-servant statute applicable to railroads, whereby the master of common servants is made answerable for their negligence to each other.

5. Where an action was against the Metropolitan Street Railway Company, and the petition charged that such company was a common carrier, and a corporation organized and existing under the laws of the state, owning and operating street and electric railways between certain points, and that plaintiff was employed by defendant in hauling trash from its power house, there was sufficient in the case to show that defendant was a street railway company, and not within the fellow-servant statute applicable to railroads, though there was no direct and affirmative proof of such fact.

Appeal from Circuit Court, Jackson County;
A. F. Evans, Judge.

Action by Arthur W. Johnson against the Metropolitan Street Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Jno. H. Lucas, for appellant. Joseph S. Rust, for respondent.

ELLISON, J. This is an action for personal injury received by plaintiff, who was an employé of defendant. The judgment in the trial court was for plaintiff. The defendant had carpenters employed in the story next above the ground floor of its power house, taking up and relaying floors. Plaintiff, a negro man, was engaged, with his horse and cart, in hauling out the trash made by the carpenters. It appears that the carpenters used, among other implements, a heavy iron bar, called a "crowbar," with which they prized up the old floor. This bar fell from the floor above, and struck plaintiff "on the head, and glanced off." It does not appear from the evidence how it came to fall, or whether

it was at the moment being used by the carpenters above. Nor does the petition charge how it happened. The pleader has rested content by simply charging, generally, that defendant's servants negligently caused it to fall.

1. Defendant objected to any evidence being received for the reason stated—that the petition made only a general charge of negligence, and therefore stated no cause of action. The case of *Waldhler v. Ry. Co.*, 71 Mo. 516, is cited to support the point. An expression is used in that case which supports defendant. But it has never been regarded as authoritative. The point decided in that case was that, when a petition charges specific acts of negligence as the ground of action, a recovery cannot be had for acts not charged. Such was stated to be that decision in *Schneider v. Ry. Co.*, 75 Mo. 295, where it was held, in an opinion by the same judge who wrote that in the *Waldhler* Case, that a general charge of negligence was sufficient. And it was so held in *Goodwin v. Ry. Co.*, 75 Mo. 76; *Mack v. Ry. Co.*, 77 Mo. 232; *Le May v. Ry. Co.*, 105 Mo. 361, 16 S. W. 1049. In cases later than these, it seems to be held that, if there is objection at the "proper time before trial," such petition would be held insufficient. *Conrad v. DeMontcourt*, 138 Mo. 311, 325, 39 S. W. 805. In *Foster v. Ry. Co.*, 115 Mo. 165, 177, 21 S. W. 916, it is said that a general charge of negligence is good "*after answer*" (italics ours). So, therefore, if we are to regard the Supreme Court as now holding that such general charge is insufficient if objected to before the trial, defendant's point is still not tenable, since its objection was first made after the trial opened.

2. Defendant next objects to the sufficiency of the proof of plaintiff's case—that it is not shown that the fall of the bar was caused by negligence. Looking at the entire evidence, it appears that the carpenters were prying up a board or joist when the bar fell. The only evidence is that it fell and struck plaintiff on the head. There is nothing to show why or how it fell. We believe such evidence sufficient to cast upon defendant the necessity of explaining. Unless defendant can account for the fall of the implement in such way as to exculpate itself, it will be held to have done the act negligently. We stated the rule to be, in *Shuler v. Ry. Co.*, 87 Mo. App. 618, 623, "that when an accident proceeds from an act of such a character that, when due care is taken in its performance, no injury ordinarily ensues from it in similar cases, it will be presumed to be negligent." In the case of *Dougherty v. Mo. Pac. Ry. Co.*, 9 Mo. App. 478, Judge Thompson has gathered some cases which fully support what we have said: "Thus a traveler is passing under a 'bridge' which a railway company has thrown across a highway. At the same time a train is passing over the bridge on the railway. A brick falls from the wall of the bridge upon the traveler and hurts him. There is no evidence

*Rehearing denied February 1, 1904.

whatever as to how the brick came to be loosened from its place. The railway company must explain that the brick came to fall from some cause consistent with its innocence, or pay damages to the traveler. *Kearney v. Ry. Co.*, L. R. 5 Q. B. 411, and L. R. 6 Q. B. 759; s. c. 2 *Thomp. on Negl.* 1220. A traveler passing along the street is struck by a barrel of flour falling from the window of an abutting warehouse. There are no other facts in evidence. The occupier of the warehouse must pay damages to the traveler unless he can show that there was no negligence on the part of himself or his servants. *Byrne v. Boadle*, 2 Hurl. & Colt. 722; s. c. 33 L. J. (Exch.) 13. An officer of customs is passing, in the discharge of his duty, from one door of a warehouse to another, when some bags of sugar fall on him. There is no other evidence. The proprietor must excuse himself or pay damages. *Scott v. Dock Co.*, 10 Jur. (N. S.) 1108. A person calls at the door of the defendant's place of business to make an inquiry. While there, a packing case which has been negligently set up against the wall falls on him. There is no evidence as to how the packing case came to fall, or who placed it against the wall. Here, again, the defendant must explain or pay damages. *Briggs v. Oliver*, 4 Hurl. & Colt. 403; s. c. 35 L. J. (Exch.) 163. A person is lawfully on the street, when, without fault on his part, an adjoining building falls down, injuring him. He makes out a case for damages against the owner by proving these facts, without more. *Mullen v. St. John*, 57 N. Y. 567 [15 Am. Rep. 530]; *Vincett v. Cook*, 4 Hun, 318. So, if water escapes from the hydrant of the tenant of the upper floor of a building, and does damage to the tenant of the lower floor, the latter makes out a prima facie case for damages by proving this fact, without more. *Warren v. Kaufman*, 2 Phila. 259." We are therefore led to hold that plaintiff sufficiently both alleged and proved his case.

3. But notwithstanding this, there is a further objection made by defendant which we conclude bars plaintiff's recovery. It is that plaintiff and the carpenters who were using the iron bar were fellow servants. Engaged as plaintiff was in hauling away the trash and rubbish made by the carpenters in their work, there can be no doubt of their relationship being that of fellow servants. While we have in this state what is known as a "fellow-servant statute," whereby the master of common servants is answerable for their negligence to each other, it only applies to railroads, as that word is commonly understood. And in a recent case decided by the Supreme Court it is held that a street railway is not within the provisions of such statute, and that therefore the servants of such railway cannot hold the master for an injury inflicted through the negligence of fellow servants. *Sams v. Ry. Co.*, 174 Mo. 53, 73 S. W. 686, 61 L. R. A. 475. In avoidance of this objection, plaintiff suggests that there is nothing in this case to

show that defendant is a street railway company. We think there is. The action itself is brought against the "Metropolitan Street Railway Company." The petition charges that such company "is a common carrier, and a corporation organized and existing under the laws of the state of Missouri, owning and operating street and electric railways in Kansas City, Missouri, and between Kansas City, Missouri, and Argentine, Kansas, and Independence, Missouri, and from Argentine, Kansas, to Independence, Missouri; that on the 2d day of August, 1902, plaintiff was in the employ of defendant, engaged in hauling trash from the basement of its power house [the evidence shows it was a "cable house"] at Thirteenth and Charlotte streets in Kansas City, Missouri." While there is no direct and affirmative proof that defendant was a street railway company, yet the whole case shows that that was assumed. The allegations of the petition show it to be such. It is true, the petition uses the language "street and electric railways in Kansas City, Missouri," and between Kansas City and Argentine and Independence, yet the court will take judicial notice that these are but suburbs of Kansas City, and that, though Argentine is separated by the state line between Missouri and Kansas, yet they are in fact one continuous urban population. The street railway defendant in the case (*supra*) decided by the Supreme Court was one which operated on the streets in St. Louis, and between that city and its suburb known as "Kirkwood." There can be no doubt that the full force of the reason employed by Judge Valliant in the case referred to finds direct application to this street railway defendant.

It follows that defendant's demurrer to the evidence should have been sustained. The judgment will be reversed. All concur.

CITY OF SEDALIA v. SCOTT.*

(Court of Appeals at Kansas City, Mo. Jan. 4, 1904.)

STREET IMPROVEMENTS—SPECIAL TAXES—JURISDICTION OF COUNCIL—RECORD—REMONSTRANCE—SIGNING BY AGENT—WAIVER OF RULES.

1. Under Laws 1893, p. 92, c. 44, § 110, providing that when the council deem it necessary to make a street improvement, for which a special tax bill is to be issued, they shall make and publish a resolution, and, if a majority of the resident owners of property liable to taxation therefor shall not within 10 days thereafter file with the city clerk their protest against the improvement, the council shall have power to cause the improvement to be made, jurisdiction of the council is ousted by the filing of remonstrance signed by a majority of the property owners, and cannot be reconferred by a portion of the signers thereafter withdrawing from the protest.

2. The records of a city council in proceedings for public improvements at the expense of nonconsenting citizens must show jurisdiction, and, failing to do so, its action is void, and cannot be validated by oral testimony.

*Rehearing denied February 1, 1904.

3. Authority of an agent or of an officer of a corporation, assuming to sign for his principal a remonstrance against a municipal improvement need not accompany the remonstrance.

4. A city council need not act in accordance with its rules or by-laws, but may waive them.

Error to Circuit Court, Pettis County; Geo. F. Longan, Judge.

Action by the city of Sedalia, ex rel., against Jennie R. Scott. Judgment for defendant. Plaintiff brings error. Affirmed.

Geo. P. B. Jackson and Montgomery & Montgomery, for plaintiff in error. Barnett & Barnett, for defendant in error.

ELLISON, J. This is an action based on a special tax bill for street paving in the city of Sedalia. The bill is one of a number of others issued against the property of different property owners abutting on the improvement. One of these property owners brought a suit in equity to declare void the bill issued against his property. In that case, on appeal to this court, it was decided that the bill was invalid. *Knopf v. Roofing & Paving Co.*, 92 Mo. App. 279. Suit in this and 16 other cases was brought at law against other property owners by the holder of the tax bills for the same improvement. The trial court found that a majority of the property owners on the street to be improved filed with the city clerk their remonstrance against the improvement within 10 days of the publication of the resolution proposing the work, and rendered judgment for defendant. The plaintiff brought each case here by writ of error. They are all submitted on the briefs in this one, and are to abide the result reached in this one.

1. The record now before us is in most respects identical with that in the *Knopf Case*, and the opinion in that case has not been questioned by counsel, though other and additional points have been set out and urged to sustain the validity of the tax. As stated in the *Knopf Case*, it is provided by Laws 1893, p. 92, c. 44, § 110, that, when the council shall deem it necessary to pave or otherwise improve a street for which a special tax bill is to be issued, " * * * they shall by resolution declare such work or improvements necessary to be done, and cause such resolution to be published in some newspaper published in the city, for two consecutive weeks; and if a majority of the resident owners of the property liable to taxation therefor shall not, within ten days thereafter, file with the clerk of the city their protest against such improvements, then the council shall have power to cause such improvements to be made, and to contract therefor, and to levy the tax as herein provided. * * *

" * * " A resolution was passed and published looking to the paving in question, and within 10 days a majority of the resident owners of property liable to be taxed filed with the city clerk their remonstrance against the improvement. Afterwards, but within 10

days of the publication, a sufficient number of those signing and filing the remonstrance withdrew therefrom to reduce the number remaining below a majority. We decided in that case that, when a majority of property owners signed a remonstrance and filed it with the city clerk, it ousted the council of jurisdiction, and that, after signing and filing with the clerk, a portion of the signers could not withdraw therefrom, so as to reconfer jurisdiction, and that, if it was still desired to make the improvement, a new proceeding should be begun.

2. We regard the papers known as the remonstrance, and the written withdrawals therefrom, and the report of the committee to which these were referred, as parts of the record of the city council. From these it appears that there were 61 property owners, and that 43 signed the remonstrance; that, of the latter, 1 signed and filed a withdrawal from the remonstrance several days before it was filed with the city clerk, and 6 others (making 7 in all) signed and filed their withdrawal the next day after it was filed with the clerk. The record, however, further shows that the committee must have determined that only 5 of the 7 were competent to be counted as withdrawing, for only 5 were reported. This was probably from the fact that it determined that 2 were not proper remonstrants, and, not being persons who could remonstrate in the first instance, of course, could not withdraw. The committee cut out 11 of those signing the remonstrance, thereby reducing the number to 32 proper remonstrants, in the opinion of the committee. From these it subtracted 5 as having withdrawn, leaving, in the opinion of the committee, only 27 remonstrants. We readily concede that a remonstrant may withdraw from the remonstrance before it is filed. For till then it is not an effective paper, since it has not been delivered, so to speak, by filing with the clerk of the council. So, therefore, when the one property owner withdrew her protest before the paper was filed, it reduced the qualified remonstrants, as found by the committee, to 31. But the subsequent withdrawal of the 4 others did not affect the remonstrance, leaving it still numbering 31; and, that being a majority of the 61 property owners, it left the council without jurisdiction, and consequently its subsequent issue of the tax bills in controversy was an unauthorized act, and such bills are void, unless such action is validated by the following considerations based upon the record of the council which have been urged upon us by plaintiff.

3. It is shown by the record of the council that the remonstrance and the withdrawals therefrom were by the council "referred to the city counselor, the street and alley committee, and the city engineer, for investigation." These officials afterwards, as above stated, made report to the council, in which they stated that they had been guided by

the city attorney in determining who were qualified to sign the remonstrance, and when they might withdraw therefrom, viz.: "The names of parties competent to be counted for or against the paving have been determined upon the advice of the city counselor, as is shown in the attached letter from him." The part of the attorney's letter which is pertinent to present inquiry is as follows:

"You submitted the following questions of law for my decision, connected with the matter of the contemplated paving of Sixth street, from Lamine avenue to the west line of Grand avenue: * * * 2nd. Can a person who has signed a remonstrance change the effect of such signing so as to be counted for instead of against the pavement when the change is made in the form of a written request, signed and filed before the time for remonstrance expires? 3rd. Can the administrator of an estate sign a remonstrance, or be counted, when the estate owns land on the street? * * *

"2nd. It is my opinion that when a person has signed a remonstrance and before the time expires for the protest to be filed, directs his name to be withdrawn, and does this in writing, with his name signed thereto, he should not be counted as remonstrating, and may be legally counted as in favor of the improvement.

"3rd. An administrator of an estate cannot sign a remonstrance or be counted as in favor of the pavement, so as to affect the owners. The lands of a deceased person always descend directly to the heirs, and never are taken charge of by the administrator, except for the payment of debts of the estate. No personal judgment could be rendered against the estate for the cost of the paving. The land alone is liable and the heirs are the owners, and if residents, must be counted."

The record of the council then shows that at a meeting of the council, "on motion of Rickman, it was seconded and carried, the report be received and placed on file." That thereupon at the same meeting the ordinance providing for the improvement in question was put in course of passage by being read the first time, and then immediately, by a suspension of rules, "placed on its second reading, and read the second time." Afterwards, at the first meeting of the council when a quorum was present, the ordinance was read "the third time," and then, on suspension of rules, was immediately duly passed. It is thus seen that the report of the committee, including the city attorney, found that there were 61 resident property owners; that of these there were 32 competent to remonstrate who did remonstrate, but that 5 of them had withdrawn from the remonstrance. To repeat again, the remonstrance was signed by 43 persons, and the withdrawals were signed by 7 of these. But the committee, in ascertaining who were proper remonstrants, and acting under the advice of the attorney

as to who was a resident owner of property, and as to whether an administrator could remonstrate for the estate he represented, found that there were 61 resident property owners, and that, of the number signing the remonstrance, there were 32 competent, and that, of these, 5 had withdrawn from the remonstrance. The 2 others signing the withdrawal, evidently not having been counted as remonstrants, were not counted as withdrawing. Thus under this report the council, on the basis of 61 resident property owners and 32 remonstrants, less 5 withdrawals, which, if effective, reduced the remonstrants to less than a majority, proceeded to pass the ordinance. If, therefore, there were not enough withdrawals to reduce the 32 competent remonstrants to less than a majority of the 61 property owners, the council was clearly without authority to pass the ordinance. Of these 5, 1 withdrew before the remonstrance was completed and filed. We have already said that such withdrawal was effective. But the withdrawal of the other 4 was non-effective, since the remonstrance had already completed and fulfilled its purpose. It follows that plaintiff's point based on this view of the record is not well taken.

4. But plaintiff endeavored to show by a witness that the committee counted as one of the 32 remonstrants the estate of Mary A. Hogue, which was signed to the remonstrance as "Mary A. Hogue by J. N. Dalby, admr." This offer of proof was made on the idea that, if such signature was not competent as signed to the remonstrance, it showed that there were but 31 remonstrants. From which it stands conceded there was one withdrawal made before the remonstrance was filed, thus (under this idea) reducing the number to 30, which was less than a majority. The court refused the offer. The refusal was proper. If the record of a city council in proceedings for public improvements at the expense of the property of the citizen, without his consent, fails to show that the council had jurisdiction, the action taken under such record is void, and cannot be validated by oral testimony. 2 Dillon on Munic. Corp. § 800; Ogden City v. Armstrong, 168 U. S. 224, 18 Sup. Ct. 98, 42 L. Ed. 444; Miller v. Amsterdam, 149 N. Y. 288, 43 N. E. 632. Property owners are not parties to the contract for such improvements. The proceedings as to them are in invitum, and their property is not affected unless it is brought within the strict meaning of the statute. Thornton v. City of Clinton, 148 Mo., loc. cit. 663, 50 S. W. 295. And as we said in the Knopf Case, this has been the rule in this state in kindred matters. Whitely v. Platte Co., 73 Mo. 30; Zimmerman v. Snowden, 88 Mo. 218; Chicago Ry Co. v. Young, 96 Mo. 39, 8 S. W. 776.

5. But plaintiff does not stand on the mere refusal to hear such oral testimony. Plaintiff further urges that the record itself shows that 1 of the 32 remonstrants counted by the

committee was the estate of Mary A. Hogue, signed by the administrator; that the administrator had no authority to sign; and that therefore the record itself shows there were only 81 competent remonstrants, and 1 withdrawal conceded to be valid reduced the number below a majority. But the record does not sustain plaintiff's position. The report of the committee, as above set out, shows that there were 32 remonstrants, which, the report says, were counted as ascertained under the written guidance of the city attorney. The attorney's directions, as shown by the report, were that a name signed by an administrator was an unauthorized signature, and could not be counted as a remonstrant. It therefore appears of record that no name signed by an administrator was counted in making up the total number of 32 remonstrants. It was therefore proper, under the authorities aforesaid, to refuse evidence tending either to contradict the record, or to supplement it in such vital particular.

6. It is true that on the original remonstrance, as filed with the city clerk, there appears among the signers thereto the signature already referred to, viz., "Mary A. Hogue by J. N. Dalby, admr." But as just stated, the record discloses that it was not counted. The figures "24" are found to the left of her name on the line of the signature. It is not pretended that they were there when her name was written. On the contrary, it is claimed by plaintiff that the city engineer put them there as the number which he counted her, and which went to make up the total of 32 which he reported. Such claim is in the face of the report, disclosing that they did not count it. While we may surmise that her name was possibly counted, yet, if we go into mere conjecture, could we not with much more reason say that the number may have been placed opposite her name, with other numbers and memoranda which appear at other places, at some time during the investigation by the committee, but not relied upon or considered when the final result was reached, as embodied in the report to the council? Suppose, for instance, the committee found, in going over its work before making out its report, that it had erroneously classed some other signer as a non-resident and incompetent to sign, and, in view of the attorney's opinion, had erroneously classed the administrator's signature as competent; their report would have been just as it is found in the record. But the true answer to make to all these suggestions is that the record must control, and that it cannot be contradicted by surmise or conjecture, nor eked out by oral evidence in any substantial particular.

7. Other objections are presented which it is claimed were also not made in the Knopf Case. These objections are of such character as to fully illustrate the wisdom of the rule which requires that the record of the council must show that it had jurisdiction when it

took action involving the power to levy assessments against property without the consent of its owners. First, it is claimed that the court erred in refusing to permit plaintiff to show that the names of several of those appearing in the remonstrance were not the signatures of such persons; that others did not own property on the street; that there were more than 61 resident property owners on the street to be paved; that the name of the First Congregational Church was signed by the chairman of its board of trustees without consulting the other trustees, and should, therefore, not have been considered; that the Sedalia Building & Loan Association and the Equitable Loan & Investment Association were signed by their presidents without authority from their board of directors. These objections show to what length the courts are asked to go in support of a proceeding against the right and property of the citizen. They mean that the record upon which a tribunal vested with extraordinary taxing power, upon which property is to be taken against the will of its owner, may be modified, changed, or destroyed altogether in order to consummate such purpose. There are numerous cases where oral testimony has been permitted for the purpose of overthrowing and destroying a record providing for the exercise of eminent domain, for public work at the expense of the abutting owner, and the like, but such evidence was received and offered in behalf of the citizen whose property was sought to be taken. In such instances, as we pointed out in the Knopf Case, abundantly supported by authorities, the record of the council may be disputed (except where made conclusive by statute) by the property owner. But that it cannot be questioned by the city in any substantial particular is made apparent by the suggestion that to hold it would be tantamount to holding that no record at all would be necessary in such cases.

8. If the committee counted the signatures referred to as composing a part of the 32 remonstrants, it must have been for the reason that they were satisfied these different agents were in fact acting for the persons and corporations for whom they assumed to act. If the names were counted by the committee, they were accepted by the council as having been properly signed. That they could properly be so accepted is manifest. It was not necessary that authority of an agent, or of the officer of a corporation assuming to act for the principal, should accompany the remonstrance. *Los Angeles v. Los Angeles*, 106 Cal. 156, 39 Pac. 535; *Tibbetts v. St. Ry. Co.*, 153 Ill. 147, 38 N. E. 664; *Allen v. City of Portland*, 35 Or. 420, 58 Pac. 509; *Day v. Fairview*, 62 N. J. Law, 621, 43 Atl. 578.

9. Plaintiff introduced at the trial an ordinance of the city adopting Cushing's Manual as a rule governing its parliamentary action. Certain sections of the manual were then

introduced to show that the proceedings of the council do not disclose that it governed its action by the report, and that the council might have ascertained in other ways, independent of the report, that the remonstrance, when filed with the clerk, did not contain the names of a majority of the property owners. These sections of the manual (286, 287, 289, 290, 295) show the usual parliamentary manner of procedure when a committee makes a report. We cannot discover anything in them to aid the plaintiff, but rather the contrary. The last section (295) introduced reads that: "When a report is received * * * the committee is discharged, and the report becomes the basis of the future proceedings of the assembly on the subject to which it relates." In this case, as already stated, the committee's report that the remonstrance did not contain a majority, by reason of the withdrawals, was "received and placed on file"; and the council thereupon, at the same meeting, proceeded with the ordinance for the improvement. That is to say, the council, as indicated by the rule, accepted the report as a basis for its future action by immediately going ahead with the ordinance for the improvement. That the report of the committee that there were 61 property owners, of whom 32, less 5 withdrawals, had protested, was the foundation of the council's action, none can doubt. That there was any other basis is only suggested as a conjecture. So that even if it should be conceded that, according to the sections of the manual introduced in evidence, the council did not act on the report, the whole record shows that, beyond any doubt, the council did take it as a basis of its action. But even if the council had acted out of harmony or in contradiction of the rules of the manual, it did no more than it legally might do, since such body is not bound to act in accordance with its rules or by-laws. Such bodies may, and perhaps do, offend more than otherwise, waive them. *Holt v. City Council of Somerville*, 127 Mass. 411; *Bennett v. New Bedford*, 110 Mass. 433; *Ex parte Mayor of Albany*, 23 Wend. 280.

After full consideration of the points suggested in behalf of plaintiff against the judgment of the trial court, we have found no error, and consequently order its affirmance. All concur.

**BARBER ASPHALT PAVING CO. v.
MUCHENBERGER et al.***

(Court of Appeals at Kansas City, Mo. Nov. 23, 1903.)

MUNICIPAL CORPORATIONS—LIABILITY FOR STREET IMPROVEMENT—NATURE OF WORK—PROPOSED ORDINANCE—TIME OF PUBLICATION—INCLUSION OF SUNDAYS.

1. The legality of the publication of a proposed ordinance for a street improvement for five consecutive days, pursuant to Rev. St. 1899,

§ 5661, relating to cities of the second class, is not affected by the fact that the last day of publication was on Sunday, which may be included in the computation of the time.

2. In performing a contract for a street improvement the old asphaltum was removed, and the old concrete base was replaced by new material where necessary. Where no concrete existed, new concrete was used, not more than six inches in depth, and the finished surface was made to conform to a plane parallel with and three inches below the finished surface of the pavement. Wherever the earth where the new concrete was used was soft and spongy, it was dug up and repaired. Wherever the concrete base then in place was below a point parallel to three inches below the finished surface of the pavement, new concrete was laid on the old so as to bring its surface up to such parallel; and wherever such base was above such point it was cut down to the same parallel. In addition, a binder course of bituminous concrete, 1½ inches thick, composed of clean broken stone, was laid on the concrete base, and on this foundation a compressed asphalt wearing surface 1½ inches thick was placed. *Held*, that the work done was not repairs, within the meaning of Rev. St. 1899, § 5681, providing, as to cities of the second class, that the cost of the repairing and keeping in repair of all streets shall be paid out of the general revenue fund, and exempting abutting property owners from liability therefor.

Appeal from Circuit Court, Buchanan County; W. K. James, Judge.

Action by the Barber Asphalt Paving Company against Leo J. Muchenberger and others. From a judgment for plaintiff, defendants appeal. Affirmed.

James F. Pitt, for appellants. R. A. Brown and Scarritt, Griffith & Jones, for respondent.

SMITH, P. J. This suit was brought by the plaintiff, the Barber Asphalt Paving Company, to recover upon a special tax bill issued against the defendants' property for paying with asphalt a portion of Felix street, in the city of St. Joseph. Defendants set up by special plea two defenses: First, that the service upon the property owners by publishing the proposed ordinance, known as "Document 29,698," was insufficient, in that one of the five days of publication was Sunday, and the service for that reason void, and insufficient to confer jurisdiction upon the common council to condemn defendants' property; and, second, that the work ordered and in fact done upon the street was repairs, for which the city, and not the defendants, was liable. This publication of the proposed ordinance was made May 30, 31, June 1, 2, and 3, 1900, this last date being Sunday. Afterwards, and on the 18th day of June, 1900, this Document 29,698, so published, was approved as Special Ordinance No. 2,695, under which the work was done. On the same day the council also passed an ordinance (No. 2,694) finding and declaring that special ordinance known as "Document 29,698," providing for the paving of Felix street from Third to Eighth street, had been published for five consecutive days in the St. Joseph Gazette, the newspaper at the time doing the city

*Rehearing denied February 1, 1904.

phating. The contract was duly let and confirmed by the passage and approval of a special ordinance. The cause was tried before the court, a jury being dispensed with. The judgment was for plaintiff, and defendants appealed. The question to be decided is whether or not said special ordinance ordering the improvement to be made was published for five consecutive days before the passage thereof by the city council, as required by section 5661, Rev. St. 1899.

It is not disputed but that the said ordinance was published for five consecutive days before the passage thereof, but it is insisted that, as the last day on which it was published was Sunday, it was only published for four days, and for that reason there was an absence of authority in the council to pass it. But if the publication on the last day, which was Sunday, is to be included in the computation, then it sufficiently met the statutory requirement, and the said ordinance is not vulnerable to attack on that account. Cities of the second class, of which the city of St. Joseph was one, have no power under their charter (section 5661, Rev. St. 1899) to pass an ordinance like that here in question until the publication required by said section 5661 is made. The publication of the proposed ordinance is in the nature of notice to the property holders, and is required to be made for the purpose of affording them an opportunity to appear before the common council and interpose any objection they may have to its passage. *Dennison v. City*, 95 Mo. 416, 8 S. W. 429. Was this notice given in this case? It cannot be denied that it was published for the requisite number of days, but because the last day was Sunday it is insisted that it must be excluded from the count, and therefore there was in legal effect no notice whatever. The statute (section 4688, Rev. St. 1899) provides that no person shall serve or execute any writ or process on Sunday. While the publication here was notice, and in some respects analogous to the service of a writ of summons by publication, yet it was not the judicial "writ or process" specified in the statute. The prohibition in that statute has reference only to personal service of such writs and process. It is obviously inapplicable in any case of constructive service, and especially so in cases like the present, where there is a statute requiring notice to be given by publication in a newspaper for a stated number of days or period of time. It is, in effect, conceded that the common council did not pass the special ordinance until after it had been published for five consecutive days, so that an opportunity was afforded the abutting lot owners to appear and object to its passage. If five days intervened between the first day of the publication and the date of the passage of the special ordinance, as was the fact, the notice was all that was required to vest in the council the power to pass the ordinance.

Drainage Dist. v. Campbell, 154 Mo. 151, 55 S. W. 276. The case of *City ex rel. Bank v. Landis*, 54 Mo. App. 315, was where the ordinance ordering the improvement to be made required the city engineer to advertise for 10 days for proposals to do the work. The publication was made for 10 days if two Sundays were included in the computation; otherwise not. The rule that in computing statute time Sunday must not be excluded (*State v. Green*, 66 Mo., loc. cit. 645; *Ex parte Dodge*, 7 Cow. 147; *Anderson v. Baughman*, 6 Mich. 298) was held applicable, and, accordingly, that the publication met the requirements of the ordinance. *Clapton v. Taylor*, 49 Mo. App. 117, was where an ordinance required notice of the letting of the contract to be published five days before the time fixed for opening the bids. The publication was made for five consecutive days, but the last day was Sunday. It was objected that, as the last day of the publication was Sunday, the notice was insufficient to authorize the letting of the contract; but in disposing of this objection it was curtly and correctly said that the fact that the last day of the publication was on Sunday did not affect the legality of that class of notices. The notices referred to in *City ex rel. Bank v. Landis* and in *Clapton v. Taylor* related to matters that affected the substantial rights of the property owners, and it was ruled in those cases that a fair compliance with the ordinance requiring the publication to be made was a condition precedent, whether prescribed by charter or ordinance. *Cole v. Skrainka*, 105 Mo. 308, 16 S. W. 491. Or, in other words, until the publication was made, there was no authority to let the contract. No good reason is seen, if in the computation of the time of the publication of such notices as those referred to in *City ex rel. Bank v. Landis* and in *Clapton v. Taylor* the Sunday inclusive rule is applicable, why that rule may not be properly invoked and applied in the computation of the time of the publication of the notice in the present case. The publication, we think, sufficiently met the statutory requirement.

But this is not all. The common council by ordinance expressly found and determined that said special ordinance had been published for five days. Section 5661, Rev. St. 1899, provides that, if the common council shall find and declare that such special ordinance has been published for the time and in the manner required, such finding and recitals shall be conclusive upon all the parties concerned, and no tax bill shall be held invalid on account of the insufficiency of such ordinance and notice. The finding and declaration of the common council in such cases as this has been declared to be "conclusive for all purposes." *Adkins v. Ry.*, 36 Mo. App. 662; *Dennison v. City*, supra; *Buchan v. Broadwell*, 88 Mo. 31. We do not, however, think that the ordinance finding and declaration of

the common council was required to render it valid, but that it was valid without that, as respects the publication.

2. Section 5681, Rev. St. 1899, from which we have previously herein quoted, further provides that: "The common council shall have power to cause to be graded, constructed, reconstructed, paved, or otherwise improved and repaired, all streets, sidewalks, alleys and public highways or parts thereof, within the city, at such time and to such extent, and of such dimensions and with such materials, and in such manner and under such regulations as shall be provided by ordinance; and all ordinances and contracts for such work shall specify how the work shall be paid for; and in case payment is to be made in special tax bills, the city shall, in no event, nor in any manner whatever, be liable for on account of work except as is otherwise provided for in the following section." The special ordinance under which the improvement was made required that Felix street, between certain designated intersecting streets, be paved with an asphalt pavement to consist as follows, to wit: "The concrete base now in place on said street shall be built up where necessary with hydraulic cement concrete of such thickness as to bring its surface parallel to and three inches below the finished surface of the pavement and established grade of the street. Upon this shall be laid a binder course of bituminous concrete one and one-half inches in thickness; upon this binder course shall be placed a wearing surface one and one-half inches in thickness, the matrix of which shall be asphalt; said pavement to be constructed of such material and in such manner that it will endure without the need of any repairs for a period of ten years after the completion." The contract required the work to be done according to the specifications, the requirements of which were: "All of the old asphaltum shall be removed from the street. The old concrete base shall be replaced, where necessary, by new hydraulic cement concrete. New concrete shall be used where no concrete exists, and such new concrete shall not be less than 6 inches in depth, and the finished surface of the same shall conform to a plane parallel with and 3 inches below the finished surface of the pavement. Should the earth where new concrete is used be soft or spongy, it must be dug up and repaired with broken stone or with loam well rammed. Wherever the concrete base now in place on said street is below a point parallel to 3 inches below the finished surface of the pavement, new concrete shall be laid on the old of such thickness as to bring its surface parallel to and 3 inches below the surface of the pavement. Wherever the concrete base now in place on said street shall be above a point parallel to and 3 inches below the finished surface of the pavement the concrete shall be cut down so as to bring its surface parallel to and 3

inches below the finished surface of the pavement." Here follow specifications for a binder course of bituminous concrete $1\frac{1}{2}$ inches thick, composed of clean broken stone, to be laid upon the hydraulic concrete base, and upon this foundation "there shall be placed an asphalt wearing surface no less than one and one-half inches in thickness when thoroughly compressed, which shall be manufactured and made strictly in accordance with the formula accompanying the proposal." The work was performed according to the specifications of the contract, and accepted by the city. Section 5681, Rev. St. 1899, provides that the cost of repairing and keeping in repair the paving of all streets and avenues shall be paid out of the general revenue of the city, etc. The defendants' contention is that the work ordered and done by the plaintiff was only that of repairing the pavement of the street, and that, therefore, the cost of making it was payable out of the general revenue of the city, and not chargeable against the property abutting on the improved part of the street. The defendants asked and the court gave an instruction which declared that, if the work done under the contract was repairs to the street improved, then the finding should be for them. The case was submitted on the defendants' theory of it. There can be no complaint of the action of the court on that score. The court, from the evidence, found the fact to be that the work done under the contract was not repairs, and gave judgment accordingly for plaintiff. As the court accorded to the defendants a consideration of the case on their theory, but only found against them because the facts which the evidence conduced to prove did not sustain that theory, there was little or nothing left of which they could or can complain.

The vital issue of fact tendered by the second special plea of the answer was by that declaration submitted and passed upon adversely to defendants. We are unable to discover that the finding of fact by the court was contrary to the evidence, or unauthorized by it. Neither of the special defenses pleaded in the answer were sustained by the evidence, and it results that the plaintiff's prima facie case as established by the recitals in the tax bills was not rebutted.

The argument presented in the latter part of defendants' brief is made to support the theory of the case embodied in the declaration of law to which we have just referred, and, as they succeeded in prevailing on the trial court at the trial to consider the case on that theory, no further notice need be here taken of that.

Defendants have called our attention to no other adverse ruling of the court that was prejudicial to them on the merits. It therefore results that the judgment must be affirmed. All concur.

HENRY v. OREAR.*

Court of Appeals at Kansas City, Mo. Jan. 4, 1904.)

MORTGAGES—PAYMENT—FAILURE TO RELEASE—PENALTY—RIGHTS OF ASSIGNEE—PARTIAL PAYMENTS—APPEAL.

1. Under Rev. St. 1899, §§ 4358, 4363, providing that if a mortgagee, receiving satisfaction, does not within 30 days after request acknowledge the same of record, or execute a release, he shall forfeit 10 per cent. on the amount of the mortgage, a debt remaining due the mortgagee, not a part of the mortgage debt, does not excuse him for not releasing the mortgage.

2. In an action to recover the penalty imposed by Rev. St. 1899, § 4363, for refusal to release a mortgage after receiving satisfaction, the defense that an agreement had been made whereby the mortgagee was entitled to hold the mortgage as security for another debt should have been specially pleaded to be available.

3. Under Rev. St. 1899, § 4358, requiring any mortgagee, cestui que trust, or assignee receiving satisfaction of a mortgage to acknowledge the same of record or execute a release, and section 4363 imposing a penalty on "any such person" for failure to do so, an assignee of a mortgage for collection is liable to the penalty on failure to comply with the statute.

4. The penalty of 10 per cent. "on the amount of a mortgage absolutely" imposed on a mortgagee by Rev. St. 1899, § 4363, for refusal to release the mortgage on receiving satisfaction, does not permit of deductions on account of partial payments or releases of portions of the land.

5. In an action against a mortgagee to recover the penalty for refusal to release the mortgage after receiving satisfaction, the point that the plaintiff's wife, who was a principal in the mortgage, but who was not a party to the action, was entitled to one-half, and plaintiff could not recover the whole, could not be raised for the first time on appeal.

Appeal from Circuit Court, Sullivan County; Jno. P. Butler, Judge.

Proceedings by Thomas W. Henry against Lislle L. Orear for a penalty for defendant's failure to release a mortgage after it was satisfied. From an order granting defendant's motion to set aside a verdict in plaintiff's favor and granting a new trial, he appeals. Reversed.

Harber & Knight and Childers Bros., for appellant. Wilson & Clapp, for respondent.

ELLISON, J. Plaintiff gave a mortgage to the New England Loan & Trust Company on 620 acres of land in Sullivan county to secure a note of \$7,400. The note was assigned to defendant. Plaintiff claimed that he had paid the note in full, amounting, with interest, to the sum of \$7,844, together with 25 cents recorder's fee for releasing the mortgage on the margin of the record where it was recorded, and that he had demanded its release, which defendant for more than 30 days had refused. Plaintiff thereupon brought this suit for 10 per cent. on the amount of the mortgage as a penalty for failing to release. Sections 4358, 4363, Rev. St. 1899. He obtained a verdict in the trial

court, which, on motion of defendant, was set aside on account of the court concluding that error was committed in refusing the following instruction: "If the jury believe from the evidence that Orear advanced \$60 of his own money to make up the total amount of the draft of \$7,844 sent to the trust company, and that the \$60 has never been paid by Henry to Orear, then the verdict of the jury must be for the defendant." Plaintiff appealed to this court.

It appears that defendant obtained the loan for which the mortgage in controversy was given from the New England Loan & Trust Company of Kansas City, Mo.; that defendant was what the evidence designated as a "loan agent," and that he lived in Milan, Mo., where the loan was negotiated and the mortgage recorded. The note and mortgage appear to have been assigned to parties in New York, and were held by them when the money was paid which it is claimed discharged the loan. The evidence shows that payment was made to defendant substantially in the following way: Plaintiff sold 140 acres of the mortgaged land to one Reger for a sum which the parties do not agree upon, but it was near \$2,700; that Reger, to pay for it, borrowed of the New England Loan & Trust Company \$2,400, through defendant; that that sum was turned over to defendant by plaintiff for payment on the latter's note, and at the same time plaintiff gave him his check for \$5,444—making a total of \$7,840, which he claims to be in full of his note, with interest. Defendant's claim is that there was due him as commission for the Reger loan the sum of \$60. How that was treated by defendant is not clear. The theory evidenced by the refused instruction above set out is that defendant advanced that much money for plaintiff when he remitted the \$7,840 to New York. It may be that plaintiff paid to defendant the proceeds of the Reger sale, and just enough more to make the total of what was due on his note, and that defendant, knowing that \$60 was due him, and that he did not keep it out of the moneys paid to him, sending it all to the holders of plaintiff's note, considered that he advanced that sum for plaintiff.

1. But, be that as it may, it is undoubtedly the law that, notwithstanding a mortgagor may owe a mortgagee, yet, unless the debt is a part of the mortgage debt, its nonpayment by the mortgagor will not excuse the mortgagee from releasing the mortgage upon payment of the mortgage debt. But, assuming that plaintiff could have made a valid agreement with defendant that, if the latter would advance \$60 for him to the mortgagee, he could hold the mortgage as a lien for that amount, yet there is no pretense of such agreement. There is not a particle of evidence to that effect. Having no foundation in evidence, there was nothing upon which defendant could place or fix a right to hold onto the mortgage until the \$60 was

*Rehearing denied February 1, 1904.

paid. If plaintiff owes him that sum, he is liable to him for it, apart from any relation to the mortgage.

2. Furthermore, if there was any such agreement, or any of that nature, whereby the debt of Reger, as commission for his loan, was to become the debt of plaintiff, to be paid to defendant, and for which defendant was by some mode to become entitled to hold the mortgage for it, it certainly was a defense of such affirmative new matter, which should have been specially pleaded, as contended by the plaintiff. The answer here being merely a general denial, defendant had no right to make it, or to ask an instruction upon it. In the case of *Wiener v. Peacock*, 31 Mo. App., loc. cit. 246, Judge Rombauer said: "We deem it unnecessary to express an opinion on defendant's fourth point, since his answer is a mere general denial, and matters of excuse or justification of refusal to enter satisfaction, it would seem, should be especially pleaded." 2 *Jones on Mort.* (3d Ed.) § 991; *Northrup v. Ins. Co.*, 47 Mo. 435, 4 Am. Rep. 337; *Musser v. Adler*, 86 Mo. 445; *Mize v. Glenn*, 38 Mo. App. 98; *Brooks v. Blackwell*, 78 Mo. 309. The instruction aforesaid was therefore properly refused by the trial court, and its refusal was not good ground upon which to sustain the motion for new trial.

3. Defendant finds additional ground for sustaining the motion in that he was merely assignee of the note and mortgage for collection, and that, not being in fact the beneficiary, he is not liable to the penalty imposed by the statute. We think he is. The statute expressly names and includes the assignee within its terms. By the assignment he became the legal owner of the note, and was the proper party to release the mortgage. It has been so decided by the Supreme Court. *Ewings v. Shelton*, 34 Mo. 518; *Joerdens v. Schrimpf*, 77 Mo. 383.

4. Defendant further claims that as the case showed that upon the payment of \$2,400 arising from a sale to Reger of 140 acres of the original 620 acres mortgaged he immediately released the 140 acres, the amount of the mortgage or deed of trust money was reduced by that sum, and plaintiff is therefore only entitled to the 10 per cent. forfeiture on the amount of the mortgage after deducting that sum. We do not think so. The forfeiture of "ten per cent. upon the amount of the mortgage or deed of trust money, absolutely," as declared by the statute, means 10 per cent. of the mortgage money, without regard to or reduction by partial payments, or releases of portions of the land. The greater part of a mortgage debt might be paid, and the mortgagee might, in consequence, release only a small part of the land. The statute does not recognize any variation from its absolute demand that the whole of the land shall be relieved of the lien, else a forfeiture of 10 per cent. of the entire mortgage sum will occur.

The object of the statute was to enforce the duty of the mortgagee to clear the title of the mortgagor, so that it became apparent on examination that the incumbrance of record no longer existed. *Fink v. Brühl*, 47 Mo. 173. An illustration of the absolute nature of the forfeiture may be seen in *Collar v. Harrison*, 28 Mich. 518, where the prescribed penalty of \$100 was recovered, though the mortgage had been reduced below that sum; and where the penalty was exacted for failing to release within the proper time, though it was entered before suit brought. *Deeter v. Crossley*, 28 Iowa, 180. And for failing to make the release upon request in a case where the mortgage had been duly discharged by the judgment of a court. *Fink v. Brühl*, supra.

5. The further claim of defendant is that the mortgage and note were executed by plaintiff and his wife; that the wife was a principal in the mortgage, and had not merely joined in its execution to free her dower; that therefore plaintiff was not entitled to the whole penalty, but that she, as a mortgagor, was entitled to her portion of it, and that she had not been joined in the action as a party plaintiff. It was so held in an action on a statute of this kind in *Harris v. Swanson*, 62 Ala. 299. But the point cannot avail defendant, since it was not made in the trial court. There was no plea of misjoinder. The answer, as already stated, was merely a general denial. The question whether the plaintiff paid to defendant the recorder's release fee was determined by the jury.

The order granting new trial will be reversed, and cause remanded that judgment may be entered on the verdict. All concur.

MARSH v. KANSAS CITY SOUTHERN RY. CO.*

(Court of Appeals at Kansas City, Mo. Jan. 4, 1904.)

RAILROADS—CROSSING ACCIDENT—AMOUNT OF RECOVERY—APPELLATE JURISDICTION—CONTRIBUTORY NEGLIGENCE.

1. Rev. St. 1899, § 2864, providing that in case of death from negligent running of a train the railroad company shall forfeit and pay for every person so dying \$5,000, which may be sued for and recovered by certain relatives, is not strictly a penal statute; so that suit may be for less than \$5,000.

2. Though recovery in case of death from negligent running of a train may, under Rev. St. 1899 be \$5,000, yet, only \$4,500 having been sued for and recovered, \$4,500 is the amount in dispute, as regards appellate jurisdiction.

3. Recovery for death of a person killed by a train negligently run is not defeated by negligence of the driver of the wagon in which he was riding at the invitation of the driver, he not having known of the driver's negligence.

Appeal from Circuit Court, Vernon County; H. C. Timmonds, Judge.

*Rehearing denied February 1, 1904.

† 3. See *Negligence*, vol. 37, Cent. Dig. § 147.

Action by Grace E. Marsh against the Kansas City Southern Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Lathrop, Morrow, Fox & Moore, Cyrus Crane, and O. H. Hoss, for appellant. J. I. Shepherd and Scott & Bowker, for respondent.

ELLISON, J. Plaintiff is the widow of G. W. Marsh, who was killed by one of defendant's trains in the village of Hume. She recovered judgment for \$4,500, and defendant appealed to this court.

The deceased, with Willis Harrold and two others, all in Harrold's wagon, had driven into the town to do some shopping. In returning Harrold and one of the others were on the front seat, Harrold driving, while the deceased and the other man were sitting in the rear on the bottom of the wagon bed. The evidence tended to show that defendant's road runs from north to south through the town, and that in approaching the track along the street from the direction these parties were traveling neither the track to the south nor trains thereon could be seen, on account of buildings and other obstructions, at but one place between the business portion of the town and a point between 6 and 20 feet from the track. That point was two blocks away, and then the view was of only a small part of the track. The street along which they drove was smooth, so that the wagon did not make sufficient noise to prevent them hearing any signal which an approaching train might make. From the point where they had a view of the track to the south, they drove slowly down to within a few feet of the track where they intended to stop and again look for a train. But just as they arrived at that place a fast moving train came from behind the buildings, which frightened the horses so that they leaped forward across the track, throwing the deceased out, where he was immediately struck and killed by the engine, the team and other occupants of the wagon escaping.

1. An important point is raised by the defendant as to the jurisdiction of this court to entertain the appeal. The point is based on the statute (section 2864, Rev. St. 1899) fixing the sum of \$5,000 as the liability which a defendant must forfeit and pay in a case of this kind; that that being the fixed sum in such case, and that being a sum in excess of our jurisdiction, the appellate jurisdiction is with the Supreme Court. As has been stated, the amount sued for and recovered was \$4,500, and the trial court instructed the jury that, if they found for the plaintiff, they must find that sum. The same point was made by motion in this court to transfer to the Supreme Court, and, with a view of having the question finally determined, we sustained that motion. When the case was received in the Supreme Court plaintiff filed

her motion to transfer back to this court on the ground that this, and not that, court had jurisdiction. That motion was sustained, and the case returned to us. Unfortunately, that court did not express its views in an opinion, but we must accept its action on plaintiff's motion as a determination that it had no jurisdiction of the case. Indeed, it is clear that that court could not have determined otherwise. That court has jurisdiction of money demands only "where the amount in dispute, exclusive of costs, exceeds the sum" of \$4,500. In sums of \$4,500 or less the jurisdiction is with this court. The "amount in dispute" in this case is \$4,500, for that is the sum plaintiff asserts she has been damaged, and which she claims defendant is liable for, and for which she asks judgment; and that is the sum for which defendant denies a liability. Plainly, the only "dispute" between the parties as to amount is over the sum of \$4,500. Defendant contends that, if plaintiff has any right to a judgment, it can only be for the stated sum of \$5,000, named in the statute, and that, therefore, the amount in dispute must be \$5,000. But this contention involves the remarkable necessity of forcing plaintiff into a "dispute" which she specially disclaims. In our view, the point which defendant seeks to make has nothing to do with the question of jurisdiction. The point simply involves the right of plaintiff to recover at all on a statute naming a fixed sum as the amount to which she is entitled, when she asks a recovery for a less sum; that is, can a plaintiff seeking a judgment under a statute which creates the cause of action and names a fixed sum as the liability, ask for and recover a less sum? Defendant claims that the sum fixed is a penalty, and that in suits on penal statutes the petition must be based on the statute as it reads, and that the recovery must either be for the sum fixed (no more, no less) or not at all. In civil actions for what is known as strictly a penalty, and based on a strictly penal statute, that is the rule. *Duffy v. Averitt*, 27 N. C. 455; *Dowd v. Seawell*, 14 N. C. 185. In the case last cited it was held that the precise penalty must be demanded. The court state in the decision in *Cunningham v. Bennett*, 1 Geo. 1 C. B., "that a penal action could not be for less than the penalty given by the statute; and, though the plaintiff had a verdict, judgment was arrested. I conclude, therefore, that wherever a statute gives a certain sum in numero, that exact sum must be demanded; else it cannot be taken to be the penalty given by that statute." Such penalties are those which are forfeited to the state in whole or in part, and are collected in the name of the state, or an informer authorized by the state. But the statute on which this action is based is not strictly a penal statute. It is undoubtedly remedial and compensatory, as well as penal. It subserves a double purpose: "First, com-

pensation; and, second, as a penalty to protect the public against repetition of like wrongs." *King v. Ry. Co.*, 98 Mo. 230, 11 S. W. 563; *Philpott v. Ry. Co.*, 85 Mo. 164. And when it is not strictly a penal statute it is not absolutely necessary that the individual who falls under the relief of its provisions should demand the whole sum allowed him. He must, it is true, found his petition on the statute, but he is not compelled to demand all the statute enables him to seek if he is willing to receive less. It is true that it was remarked in *Proctor v. Ry. Co.*, 64 Mo. 112, 122, that the damages to be recovered under the statute in question were \$5,000, "no more and no less." But manifestly the court, in using that language, was merely meaning to say that the sum recoverable was a fixed and definite sum, leaving the jury no discretion as to amount when it was demanded—a discretion the jury would have were the action under another statute. There was no intention to say, and it was not said, that the party entitled to that sum could not sue for nor accept less. Defendant also cites us to *Rafferty v. Ry. Co.*, 15 Mo. App. 559, but that case in no way involves the question presented in the one at bar. That case involved the return of a verdict for a less sum than that demanded, and which the court stated should be found if there was a finding for plaintiff at all. That verdict was unasked, and was at first repudiated by the plaintiff. The question whether a plaintiff could sue for and accept less than the sum fixed by the statute was not mentioned, and perhaps was not thought of, in the consideration of the case.

That this is not strictly a penal statute is made manifest by some observations on what a penal statute is understood to be, as well as the consequences which would flow from such construction. Penal statutes "are those imposing punishment for an offense committed against the state, and which, by the English and American constitutions, the executive of the state has the power to pardon." And the suit for such penalty, whether civil or criminal, must be in favor of and for the state. *Huntington v. Atterill*, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123. If the action was for a penalty in the strict sense, it would be local, and could not be maintained in the courts of any other state; for it is a fundamental rule of law that the courts of one sovereignty will not enforce the penal laws of another sovereignty. Yet we know the courts of one state do entertain suits by the proper parties for death claims arising under statutes like the one under consideration. *Dennick v. Ry. Co.*, 103 U. S. 11, 26 L. Ed. 439. And we further know that it is the common practice for suits under such statutes to be removed from a state to a federal court when the citizenship of the litigants meet the proper requirement; a practice which is not allowed in actions for a penalty forfeited to the state. And so a

new trial may be granted though the verdict be for the defendant. The statute of Illinois fixed a penalty of \$300 in favor of parents for issuing a marriage license to a minor without consent of such parent (*Gilbert v. Bone*, 64 Ill. 518); yet it was held that a new trial could be had on motion of plaintiff on the same ground as in ordinary civil actions (*Gilbert v. Bone*, 79 Ill. 341). The statute of this state provided that if one sold liquor to an infant the parent could recover a stated sum of \$50, yet this was held not to be strictly penal, but essentially a civil action for damages fixed by the statute, and a bond for costs need not be filed with the petition, as would have been necessary if it had been penal. *Edwards v. Brown*, 67 Mo. 377. So there are a number of statutes where, as here, a part of the fixed sum in which the offending party is mulcted is in the interest of the public, and wholly outside and beyond the matter of compensation to the party injured; yet when the exclusive right to set the law in motion for the wrong is given to the injured party, and the whole sum is his, the statute is not a penal statute in the sense of an offense against the state. It is essentially a remedial statute, under the terms of which the injured party may, at his election, recover all or any part of what may be allowed him. Among such statutes are those allowing double damages against railways when an injury is done to stock at a point where the track was required to be fenced (*Railway Co. v. Humes*, 115 U. S. 512, 6 Sup. Ct. 110, 29 L. Ed. 463), and where double damages are given against a town for an injury on defective walks (*Read v. Chemsford*, 10 Pick. 128; *Reed v. Northfield*, 13 Pick. 94, 23 Am. Dec. 662), and where double and treble damages are given for specific trespasses (*Blewitt v. Smith*, 74 Mo. 404). In each of these the penalty becomes a fixed sum, under the statute, the moment the actual damage is ascertained; and yet no one would think that the injured party must demand it all or else lose all. In such instances the whole sum is the plaintiff's, and it is termed "accumulative damages." They bear a likeness to the point we are now considering in this statute. They put a punishment on the defendant in the interest of the public in addition to compensating the injured party. An interesting collection of instances in which a specified sum is forfeited to the injured party to be collected by him at his private suit is set out in *Humes v. Ry. Co.*, 82 Mo., at pages 228, 229, 52 Am. Rep. 369. They well serve to show the consequences of adopting defendant's theory of this case. This statute giving a fixed sum is partly in the interest of the public, though the whole sum goes to the person supposed to have been damaged by the wrongful act. The damages, in this sense, are accumulative, and the statute allowing such party to recover the whole sum, like those in the cases just referred to, is a remedial statute. A penalty in

a fixed sum does not necessarily mean that no other less sum can be recovered. If the penalty is a fixed sum of money, or other stated punishment as an expiation due the state, that specific sum or that other punishment must be demanded at the suit of the state, for no one is authorized by the state to accept less. But if it be a penalty given to an injured party in addition to his damages, it must be intended that it is within his election to exact it all, or a part of it, or none at all. So it has been held that a penalty going to the party aggrieved could be compromised by him. *Anonymous*, *Loffts*, 155. If the purpose of the law is solely to punish an offense against the law, it is penal in the sense that the sum fixed must be exacted; but if it is to advance a private remedy it is not. And when the purpose is (as in this case) to advance a private right or remedy, and there is added thereto a penalty for the individual who has been injured, it is a mere incident to the main right. So, therefore, we conclude the following to be a proper statement of the law on the head here considered; that is to say: That when the statute blends a penalty with the measure of damages to the injured party as one claim fixed at a stated amount, and confers upon such party the right to recover the full sum, it leaves such party in control of the action, and he may accept or sue for whatever sum he chooses within the amount fixed by the statute.

2. Abiding by the verdict of the jury, we must consider that the defendant's servants neither rang the bell nor sounded the whistle in approaching the crossing where the accident happened. That fact made the defendant guilty of negligence, for which it must respond in damages, unless it is excused by some negligence of deceased contributing thereto. It is settled that the negligence of Harrold, who was driving the wagon, cannot be imputed to the deceased (*Becke v. Ry. Co.*, 102 Mo. 544, 13 S. W. 1053, 9 L. R. A. 157; *Dickson v. Ry. Co.*, 104 Mo. 491, 504, 16 S. W. 381), unless he was the agent or representative of plaintiff—of which there is no pretense, since he was merely in company with the driver, being invited by him (*Munger v. City of Sedalia*, 66 Mo. App. 629). There is no pretense of any identity between the two, or responsibility of the one for the other. *Profit v. Ry. Co.*, 91 Mo. App. 369. But, notwithstanding this, it is said "that, if the negligence of the occupant contributes with that of the driver and a third person, there can be no recovery against the latter." *Beach on Contributory Negl.* § 115. In discussing the same subject, *Elliott on Railroads*, vol. 3, § 1174, says that: "If the person riding in the vehicle knows that the driver is negligent, and he takes no precautions to guard against injury, he cannot recover, for in such case the negligence is his own, and not simply that of the driver. The plaintiff cannot rightfully omit to use care in

blind dependence upon another, but must use care proportionate to the danger of which the facts convey knowledge." And the same rule has been frequently announced in the adjudication of cases involving the question direct. *Township v. Anderson*, 114 Pa. 643, 8 Atl. 379, 60 Am. Rep. 367; *Brickell v. Ry. Co.*, 120 N. Y. 290, 24 N. E. 449, 17 Am. St. Rep. 648; *Griffith v. Ry. Co.* (C. C.) 44 Fed. 574; *Dean v. Ry. Co.*, 129 Pa. 514, 18 Atl. 718, 6 L. R. A. 143, 15 Am. St. Rep. 733; *Smith v. Ry. Co.*, 87 Me. 339, 32 Atl. 967; *Miller v. Ry. Co.*, 128 Ind. 97, 27 N. E. 339, 25 Am. St. Rep. 416. And defendant earnestly insists that the evidence disclosed that the deceased was guilty of great negligence in not looking out for himself; that such evidence is so clear and undisputed as to have demanded a declaration, as a matter of law, that plaintiff could not recover. We have gone carefully over the evidence in this respect, and defendant's argument thereon, and find that its contention is without reasonable support. Indeed, the circumstances considered, we fail to find anything justly tending to support the charge of negligence against deceased. There was nothing to show that he had any reason to distrust the care and prudence of Harrold as a driver. He was not with him in the driver's seat; but, as before stated, was in the rear, seated on the bottom of the wagon bed. It is not reasonable to expect that he should have the same care of the team that the driver had, or that he should observe every act of the driver, whether of commission or omission. There may be instances in which the relation of the parties and their immediate situation at the time of an accident would render a party injured as culpable as the driver himself. Defendant has cited some such in his brief. But we do not regard this as one of that character. But, be that as it may, the question of deceased being guilty of contributory negligence was submitted to the jury, and we have the verdict in response thereto. Some portions of the instructions offered by defendant were proper enough, but they were coupled with other matter which rendered them incorrect, and they were properly refused.

We are satisfied with the result in the trial court, and affirm the judgment. All concur.

CITY OF LOUISIANA v. SHAFFNER.

(Court of Appeals at St. Louis, Mo. Jan. 19, 1904.)

MUNICIPAL CORPORATIONS—CONSTRUCTION OF SIDEWALK—DEFECTIVE ADVERTISEMENT—RIGHT TO LIEN.

1. In a proceeding by a city under Rev. St. 1899, §§ 6261, 6262, a sidewalk was laid in front of defendant's lot pursuant to an advertisement for bids, which referred for the specifications to an ordinance which neither mentioned such walk, nor contained specifications therefor. *Held*, that the lot was not subject to a lien therefor.

Appeal from Louisiana Court of Common Pleas; D. H. Eby, Judge.

Action by the city of Louisiana against Harriet Shaffner. From a judgment for defendant, plaintiff appeals. Affirmed.

Jo W. Reynolds, for appellant.

GOODE, J. Action by the city of Louisiana to recover the amount paid by it for the construction of a granitoid sidewalk in front of lot 291, block 42, in the original town site of the city of Louisiana, which lot is alleged to have been owned by the defendant. Said city works under a special charter, but this sidewalk was put down by virtue of the power conferred by sections 6261, 6262, Rev. St. 1899. The construction of the walk was directed by an ordinance (No. 1626) which required the owners of certain lots, including the one named, to build sidewalks, in the manner and of the material stated in the ordinance, in front of their lots. Most of the sidewalks were ordered to be built of granitoid, but some were to be made of boards. The width of the granitoid walks, the mode of their construction with regard to the separate layers of cinders and gravel, and the thickness of the layers, were specified in said ordinance. It contained, too, a provision that if the owners did not begin to build the walks by a designated date, and finish them in a reasonable interval, the city council should cause them to be built, and in that contingency their cost should constitute a lien on the abutting property. Some of the property owners failed to put in walks within the time limited, and thereafter another ordinance (No. 1659) was passed, which directed the city engineer to advertise for bids for the construction of granitoid walks in front of the lots of the delinquent owners, of whom this defendant was one. The engineer advertised for bids for putting in the sidewalks, but the advertisement solicited bids for the construction of sidewalks of the kind and dimensions specified—not in Ordinance No. 1626, which had authorized the laying of the sidewalks, but in another ordinance previously passed, to wit, No. 1619, which had no reference to, and made no mention of, a walk in front of the defendant's lot. Bids were taken under this advertisement, a contract was let, and the walks laid.

We have no knowledge concerning the contents of Ordinance No. 1619, as it was not put in evidence, though it is conceded, as stated, that it neither mentioned a walk in front of defendant's lot, nor contained specifications for one. We do not know even that it asked for bids for granitoid walks. It may as well have called for bids for walks of wood, brick, or stone. The alleged advertisement for bids, therefore, inasmuch as it called for bids for walks of the kind specified in an ordinance which contained no specifications or provision for a walk in front of the defendant's lot, and no known specifications of any kind, was, in effect, no advertisement at all.

But an advertisement for bids should invite competitive bidding for an improvement of the character designated in the order for the particular improvement intended, as that is the only kind property owners can be made to pay for, and they cannot be made to pay unless the work was competitively let on proper specifications. *Clapton v. Taylor*, 49 Mo. App. 117; *City of De Soto ex rel. v. Showman*, 100 Mo. App. 323, 78 S. W. 257. In consequence, the contract for the walk, and all the proceedings were ineffectual to place a lien on defendant's lot. This case is not one on a special tax bill, in which, by statutory mandate, the bill makes a prima facie case. The plaintiff introduced all the ordinances and records on which its lien was supposed to be founded, and they prove that it has no lien.

The judgment is affirmed.

BLAND, P. J., and REYBURN, J., concur.

GEE et al. v. VAN NATTA-LYNDS DRUG CO.

(Court of Appeals at Kansas City, Mo. Dec. 7, 1903.)

CHattel MORTGAGE—SALE OF MORTGAGED GOODS—ACCOUNTING FOR PROCEEDS—FRAUD.

1. That an unconditional note and mortgage were given, not to secure a debt, but merely to secure the mortgagee against loss as surety of the mortgagor on another debt, does not render them void as to creditors of the maker.

2. A mortgage on a stock of goods, under which the mortgagor is permitted to remain in possession and sell them in the usual course of business, without turning over or accounting for the proceeds, is fraudulent and void as to his creditors.

Appeal from Circuit Court, Nodaway County; A. D. Burnes, Judge.

Action by the Van Natta-Lynds Drug Company against George Aley, Jr., and John H. Gee and another, interpleaders. From a judgment in favor of the interpleaders, the plaintiff appeals. Reversed, and motion for rehearing overruled.

B. R. Martin and Culver & Phillip, for appellant. W. C. Ellison, for respondents.

BROADDUS, J. The undisputed facts taken from appellant's statement are as follows: On June 20, 1902, the Van Natta-Lynds Drug Company sued George Aley, Jr., on account for merchandise sold for \$251.46, and obtained a writ of attachment in aid of said suit, which was levied upon a stock of drugs belonging to the debtor, situated in his store at Quitman, Mo. Afterwards the respondents interpleaded for the goods, claiming the right to possession by virtue of a chattel mortgage executed to them by Aley, Jr., on March 25, 1902, to secure a note for \$1,290. A trial resulted in a verdict and

¶ 1. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. § 212.

judgment for the interpleaders, and the drug company appeals.

It appears from respondents' evidence without dispute that in 1900 Aleý, Jr., purchased the stock from Dr. Carter. He borrowed \$800 of the purchase price from a Mr. Weber, a banker, to whom he executed a first mortgage on the goods, and the balance of the purchase money was secured to Dr. Carter by a second mortgage on the same property. Aleý took possession of the store, and conducted his business in the usual course of trade for about two years, during which time he paid nothing upon his debt. In March, 1902, Mr. Weber became dissatisfied with his security, and thereupon he advanced sufficient money to pay off the Carter mortgage, and Aleý executed to Weber his personal note, due on or about one year after date, for the entire indebtedness, amounting to \$1,290, for the payment of which Aleý's father and brother-in-law, interpleaders herein, became sureties. At the same time Aleý, Jr., executed to his father and brother-in-law an unconditional note for \$1,290, payable on or before one year after date, and secured it by mortgage upon his stock of drugs—the mortgage under which they claim title here. The testimony for the interpleaders is that Aleý, Jr., was not indebted to them in any sum, and that the note and mortgage was given to indemnify them against any loss they might sustain as sureties upon the Weber note. But the note upon its face is an unconditional promise, for value received, to pay the sum of \$1,290 at maturity, and the mortgage upon its face purports to secure an absolute existing indebtedness, evidenced by the note aforesaid, in consideration of the sum of \$1,290 paid by the interpleaders to the mortgagor. The mortgage provides that, "if the mortgagor shall pay to the mortgagees the aforesaid sum of \$1,290 according to the terms of said note," it shall be void, otherwise the mortgagees are empowered to take and sell the property, and apply the proceeds to the payment of said note. In other words, the note and mortgage, which was duly recorded, created and secured an apparent indebtedness which, it is conceded, never in fact existed, for the interpleaders had paid nothing upon the Weber note, nor had they assumed the payment of it. It was further provided in the mortgage that until default, or until such time as the mortgagees should deem themselves insecure, the mortgagor might remain in possession of the property, with "permission granted [him] to sell at retail from the above stock and to apply the proceeds on said note as the same can be spared from running expenses of said business." From the time the mortgage was given to the levy of the attachment, Aleý, Jr., continued in possession of the store, and conducted his business, buying and selling just as he did before the mortgage was given, during which time he paid but \$100 on the Weber

note. The interpleader Gee (who was the only witness) testified that he lived 7 or 8 miles from Quitman; that he was the brother-in-law of the mortgagor, and had been for 25 years; that after the giving of the mortgage and the levy he was in Aleý's store 3 or 4 times; that Aleý, Jr., was in possession, running the business, selling his goods in the regular way, and buying from wholesale houses whatever was necessary, if he needed anything, just like any other merchant; that there was no difference in the manner in which the business was conducted before and after the mortgage was given; that he did not know that Aleý, Jr., was buying from the wholesale houses partly on credit and partly for cash, but supposed he was, that being his idea of the way Aleý was doing; that there was no agreement or understanding as to what Aleý, Jr., was to receive for his services, nor what the expenses were to be, nor was there any limit put upon them, nor did the interpleaders know how much had been used for expenses; that the mortgagor made no report or account of either his expenses or sales, and none was required or requested; that none of the proceeds were turned over to the interpleaders, nor up to the time of the levy had the interpleaders required the mortgagor to apply any of the proceeds of the sales to the payment of the debt, because it was not due; and that the mortgagor "had been permitted to run that business since the execution of the mortgage just as he had before that mortgage was given." Gee further testified that he and his father-in-law took the mortgage to secure themselves, and so that George could go on with his business. The evidence showed that at the time the interplea was filed no default had occurred in the mortgage, but, as the interpleaders "deemed themselves insecure," they claimed the right to possession under the clause in the mortgage which authorized them to take possession on that ground. On these undisputed facts disclosed by respondents' evidence, it is insisted by appellant that the mortgage is invalid, and that the court erred in refusing a demurrer to the evidence. Error in the instructions is also assigned.

Appellant contends that the mortgage is void for the reason that it discloses that its object was to secure an indebtedness that did not exist; that the note evidenced a fictitious lien; and that both concealed the actual liabilities of the mortgagor, and the interest he had in the mortgaged goods, which was calculated to deceive his creditors. It is not denied that, as between the parties thereto, the mortgage in question is valid, and that it was competent to show that, notwithstanding it purported on its face to be for an existing indebtedness, in fact it was in the nature of an indemnity. *Williams v. Alnutt*, 72 Mo. App. 62; *Sparks v. Brown*, 33 Mo. App. 505. In *Ayres v. Husted*, 15 Conn., loc. cit. 513, the court held: "The tendency of

an absolute, unconditional note, given merely for the security of one who has assumed only a conditional liability for the maker, is directly to delude the creditors of the maker, and to mislead them as to his resources for the payment of his debts." See, also, *Sanford v. Wheeler*, 33 Am. Dec. 389, 13 Conn. 165; *Bramhall v. Flood*, 41 Conn. 71.

Pattison v. Letton, 56 Mo. App. 325, *Mokaska Mfg. Co. v. Steele*, 36 Mo. App. 496, and *Galbreath v. Cook*, 30 Ark. 417, have no application to the question under consideration. We find only one decision in this state decisive of the question, viz., *Sparks v. Brown*, 33 Mo. App. 505, the holding being that, in the absence of fraud, a mortgage on its face, although purporting to secure an unconditional debt, yet in fact to secure a contingent liability, is not void as to creditors. And so it was held in *Blincoe v. Lee*, 12 Bush, 358; *Goodheart v. Johnson*, 88 Ill. 58. Consistency, at least, requires that we adhere to a former decision of this court, especially where it is founded upon respectable authority, although it may appear that other courts of equal respectability have held differently.

It is claimed that as the evidence showed that the mortgagor was permitted to remain in possession and sell his goods in the regular course of trade, without being obligated to apply the proceeds to the mortgage debt, and was permitted to run the business as he did before the mortgage was given, the mortgage is to the use of the mortgagor, and void as to creditors. In *Rubber Mfg. Co. v. Supply Co.*, 149 Mo. 538, 50 S. W. 912, it was held that: "If the grantor remains in possession after having made a deed of trust on his stock of goods for the benefit of another, and conducts the business as he had previously done, with no obligation to turn over the proceeds to the beneficiary, his conduct is fraudulent in law." In *McDonald v. Hoover*, 142 Mo. 484, 44 S. W. 334, the holding was that: "The same facts that will render a conveyance void if expressed on its face, will also render it void if proven aliunde." *Rubber Mfg. Co. v. Supply Co.*, supra. There are many cases in this state in harmony with the latter case, but we do not deem it necessary to cite them, as the law is too well settled for dispute. And it seems that the court so held in instruction No. 1 given for plaintiff. The evidence disclosed that the mortgagor remained in possession of the goods with the knowledge and consent of plaintiff, and conducted the business as he had previously, without being required to turn over the proceeds to the mortgagees or to the banker, Weber, the payee in the note for which interpleaders were the sureties for the mortgagor, Aley, Jr. As already set out herein, the only witness who testified in the case was the plaintiff Gee, who stated that he did not know that Aley, Jr., bought goods partly on credit and partly for cash, but he supposed that he did, which was

equivalent to knowledge of the fact. Under these undisputed facts it was the duty of the court to have instructed the jury peremptorily to return a verdict for defendant.

But our attention is called to later decisions of the appellate courts in which it is claimed that the ruling in *Rubber Mfg. Co. v. Supply Co.*, ante, has been modified, viz.: *Dunham v. Stevens*, 160 Mo. 95, 60 S. W. 1064; *State ex rel. v. Fidelity Co.*, 94 Mo. App. 184, 67 S. W. 958. In the former the holding was that: "A mortgage of a stock of goods is not rendered fraudulent by the fact that the mortgagor is to remain in possession and sell in the usual course of trade, if he is required to account to the mortgagee of the proceeds of his sales, to be applied to the mortgage debt." The same rule is also announced in the *Fidelity Co. Case*. But it is not perceptible that these two cases are in the least in conflict with the *Rubber Mfg. Co. Case*. The difference lies in the fact that in the two former cases the mortgagor was required to account for the proceeds of sales, while in the latter he was not, and it is the latter fact that makes the mortgage fraudulent.

There was no conflict in the evidence, as there was but one witness, who was one of the plaintiffs, and, no question being raised as to his credibility, it became the duty of the court, upon this uncontradicted testimony, to declare the effect of his testimony as a matter of law. Under this undisputed evidence the mortgage became fraudulent in law, and the defendant's demurrer should have been sustained.

The cause is reversed.

On Motion for Rehearing.

(Feb. 1, 1904.)

It is still insisted by respondents that the court misapprehends the effect of the decision in *Dunham v. Stevens*, 160 Mo. 95, 60 S. W. 1064. In the original opinion we held that the ruling in *Rubber Mfg. Co. v. Supply Co.*, 149 Mo. 538, 50 S. W. 912, had not been modified by that in *Dunham v. Stevens*, supra. The contention of the respondents, therefore, is to the effect that in the latter case the holding is that, where a mortgagor by the terms of the mortgage is permitted to remain in possession of the mortgaged goods and to sell at retail and apply the proceeds on the debt, his failure, by the permission of the mortgagee, to make such application, does not render the mortgage void as to creditors. It is not conceivable that the court intended to enunciate a conclusion so radically opposed to the well-established rule that the permission of the mortgagee to the mortgagor to sell and divert the proceeds of mortgaged property from the payment of the debt is void as to creditors. The object of the provision in the mortgage to allow the mortgagor to remain in possession and to sell is that the proceeds shall go to the ex-

tinguishment of the debt; otherwise, such a provision would afford the most effective method that could be devised to defeat creditors in the collection of their claims. In *Dunham v. Stevens* the mortgagee acted in good faith. For 18 months the mortgagor returned to him each month a statement showing the amount of purchases and sales of goods, and profits, after deducting expenses. Not much was paid on the debt, as the profits were small. The mortgagor kept up the stock to about its original value, and the business was continued until the mortgagee became dissatisfied because his debt was not being paid as the mortgage provided, when he asserted his right to take possession. Not so in this case. The mortgagees made no inquiries whatever as to what the mortgagor was doing in the business, and the mortgagor made no reports to them, and they never at any time took notice of what the mortgagor was doing, but supposed he was conducting the business as he had been before the giving of the mortgage—that is, in the usual and ordinary course, for his own benefit. When it was shown that the mortgagor had not applied the proceeds of the sale of the goods upon the debt, it made a *prima facie* case against the mortgagees at least, which they did not attempt to meet.

The motion for rehearing is overruled.

RALLS COUNTY v. STEPHENS et al.

(Court of Appeals at St. Louis, Mo. Jan. 19, 1904.)

REWARDS—PERSON ENTITLED.

1. S., knowing of a murder, and of a reward for the apprehension, arrest, and conviction of the murderer, and becoming suspicious that J. was guilty, took steps to locate him, and, having done so, telegraphed C., a sheriff, to arrest him, which he did, without knowing of what he was suspected; C. then telegraphing the fact to S., at S.'s expense, receiving a fee for the arrest, and turning J. over to S. who elicited a confession from him, on which he was convicted. *Held*, that S., as against C., was entitled to the reward.

Appeal from Circuit Court, Ralls County; D. H. Eby, Judge.

Ralls county interpleaded John W. Stephens, George T. Carter, and another, to determine their rights to a reward. From a judgment for Stephens, Carter and another appeal. *Affirmed*.

Roy & Hays and David Wallace, for appellants. J. W. Hays, for respondent county. W. T. Ragland and J. O. Allison, for respondent Stephens.

GOODE, J. These parties are in litigation over an award offered by Ralls county for the murderer of one of its citizens, Marcus D. McRae, who was slain and robbed on April 28, 1902. The cause was tried on an agreed statement of the facts, but, as the re-

citals of that statement are more elaborate than we care to copy in full, we will extract from it the important facts on which we rest our decision: Stephens was deputy sheriff of Monroe county at the time stated, and resided in Monroe City, a short distance from the scene of the murder, which was in the northwest corner of Ralls county. On May 1st, three days after the murder, William Testerman, who resided at Withers Mill, notified Stephens that a negro had gotten on a west-bound freight train at Withers Mill the morning following the day McRae was killed. This information aroused a suspicion in the mind of Stephens that the negro referred to by Testerman was Jesse Johnson, whom he (Stephens) knew. He interviewed the conductor of the freight train on which the negro had traveled, and, from the description given by the conductor, became convinced that Johnson was the man. He also learned from the conductor that Johnson left the train at Brookfield. Stephens knew of the reward that had been offered by Ralls county, and, in order to apprehend Johnson, telephoned to the marshal at Brookfield a description of him, asked if such a man had been at Brookfield, and received a reply that he had been there, but had left for Milan in Sullivan county. Thereupon Stephens telegraphed the marshal of Milan to arrest Johnson, giving a description of him. The appellant George T. Carter was the marshal of Milan, and in obedience to Stephens' telegram he made the arrest; notifying Stephens that he had done so by a telegram, the charge for which the latter paid. Carter also received a fee of \$1 for the arrest. When he made it, he did not know what Johnson was wanted for, nor that a reward had been offered for the murderer of McRae. While Stephens was on the train on his way to Brookfield, he received Carter's message that Johnson had been taken. Carter turned Johnson over to Denbro, a secret service man in the employ of the Hannibal & St. Joseph Railway, who was in Milan on the day of the capture, to be taken to Brookfield and delivered to Stephens, as was done. Stephens in due time surrendered him to the sheriff of Ralls county, but, while Johnson was still in his custody, Stephens elicited from him a confession of the murder of McRae, which was instrumental in securing his conviction. The reward offered by the county court was "for the apprehension, arrest, and conviction" of the person guilty of McRae's murder. Testerman, Carter, and Stephens all claimed the reward; but Testerman did not appeal from the decision of the court below, which was in Stephens' favor. Carter appealed, and contends that, on the agreed facts, he was entitled to the reward, inasmuch as he made the arrest.

Who earned the reward? is the question; and, on reading the above recital of the material facts of the controversy, one perceives that the meritorious claim is that of the re-

¶ 1. See *Rewards*, vol. 42, Cent. Dig. § 13.

spondent, Stephens. He, alone of the parties, when he learned of the murder and the reward for its perpetrator, became active and enterprising in endeavoring to effect a capture. He took prompt and energetic measures, spent time and money, made a journey, sent telegrams, and did what he could to bring the criminal within the grasp of the law. Testerman, it is true, furnished a little news, which started the activity of Stephens; but Testerman's claim has no force, because he did not comply with the conditions of the offer of the reward. *Shuey v. U. S.*, 92 U. S. 73, 23 L. Ed. 697; *Everman v. Hyman*, 3 Ind. App. 459, 29 N. E. 1140; *Juniata Co. v. McDonald*, 122 Pa. 115, 15 Atl. 696; *Adair v. Cooper*, 25 Tex. 548; 21 Am. & Eng. Ency. Law (1st Ed.) p. 396, note 1. He neither pursued the offender, nor followed up his clue sufficiently to satisfy himself that he suspected the right man. Besides, his claim is not before us, as he submitted to the judgment against him. Carter was the first to lay hands on Johnson after the commission of the crime, but he did so as the agent, or, one may say, the arm, of Stephens. He acted entirely for Stephens, and by the latter's direction, without knowing what crime Johnson was wanted for, or that a reward had been offered for his apprehension. It is true, as argued by appellant's counsel, that it would have been appellant's duty, as town marshal and an officer of the state, to make the arrest, if he had known, or had good reason to suspect, that Johnson was guilty of the crime. *Rev. St. 1899, § 2468*. But he neither knew the crime of which Johnson was guilty had been committed, nor had the slightest reason, except the intimation of Stephens' message, to believe Johnson guilty of any crime. A peace officer has no right to arrest a citizen on mere whim or caprice, or without good ground for suspecting he has committed a felony. If he acts without a warrant, it must be upon reasonable suspicion. *State v. Grant*, 76 Mo. 236; *Id.*, 79 Mo. 113, 49 Am. Rep. 218. It follows that there is no merit in the argument that, because Carter was city marshal of Milan, it was his duty to arrest Johnson, and that he is therefore entitled to the reward, as having made the arrest as marshal, instead of as Stephens' agent. It is plain, he acted as Stephens' agent, and in obedience to the latter's direction. In sending a message, at Stephens' cost, announcing the arrest, Carter showed that he understood he had no duty to perform except to act on Stephens' suggestion, keep the latter advised, and observe his orders. Then, too, he did not retain his captive, but forthwith surrendered him to Denbro for Stephens, with the understanding that Denbro would convey him to Brookfield, and turn him over to Stephens, which was tantamount to recognizing Johnson to be Stephens' prisoner. The hue and cry for McRae's murderer rendered it proper for Ste-

phens to pursue him. *Rev. St. 1899, § 2468*. Having learned who the murderer probably was, and where he was, it became Stephens' duty to have him seized at once, in the surest way possible, before he absconded. To perform this duty, Stephens promptly telegraphed to the marshal of Milan, where he knew Johnson to be, to take him into custody. This was as much an arrest by Stephens, so far as entitling him to the reward is concerned, as if he had personally laid hands on Johnson, and actually captured him, for an arrest may be made in such circumstances by an agent. 21 Am. & Eng. Ency. Law (1st Ed.) 402; *Montgomery Co. v. Robinson*, 85 Ill. 174; *Pruitt v. Miller*, 3 Ind. 16; *Russell v. Stewart*, 44 Vt. 170. When Carter made the arrest, he did so in obedience to Stephens' order, and with no knowledge whatever of the cause for it. So we think the arrest, while technically by Carter, was, for the purpose of earning the reward, by Stephens, who was the immediate cause of it. *Crawshaw v. City of Roxbury*, 7 Gray, 374; *Jenkins v. Kelren*, 12 Gray, 330, 74 Am. Dec. 596; *Besse v. Dyer*, 9 Allen, 151, 85 Am. Dec. 747; *Stevens v. Brooks*, 2 Bush, 137; *Brennan v. Haff*, 1 Hilt. 151. To order this money paid to Carter would be to ignore all the effective work that was done to accomplish the capture of Johnson, and give weight to nothing but the incident of Carter's putting his hand out and taking him—taking him blindly at the suggestion of one who had developed the evidence pointing to his guilt, discovered his whereabouts, and knew the truth. That person, in the real sense of the word, "apprehended" the criminal, and deserves to be rewarded.

No point is made in respect to the doctrine of the law which denies rewards to officers on grounds of public policy, and we have not considered the case in that light.

The judgment of the court below was for the right party, and is affirmed.

BLAND, P. J., and REYBURN, J., concur.

CAMPBELL v. CITY OF STANBERRY.*

(Court of Appeals at Kansas City, Mo. Dec. 7, 1903.)

MUNICIPAL CORPORATION—ACTION AGAINST—STREETS—EXCAVATION—NEGLIGENCE—INSTRUCTIONS.

1. An action for negligence may be brought against a chartered municipality for failure to keep its streets in a reasonably fit condition for use by any number of the public for any purpose for which a public street is designed.

2. Any error in an instruction requiring a city both to place a guard rail or barricade about a street excavation, and to place lights along its sides, is harmless, where there is no evidence that either precaution was taken to prevent injury.

3. An instruction that a city was negligent in leaving a street excavation unlighted and unguarded was not objectionable as excluding the

*Rehearing denied February 1, 1904.

consideration of other possible protection, where there was no evidence that it was protected in any way.

4. An instruction that it was a city's duty to keep a street, where excavated, in a reasonably safe condition, and that if it left the excavation open, unguarded, and unlighted where an injury occurred, whereby it became dangerous to persons crossing at night, this was a breach of the duty, is not objectionable as requiring, without qualification, that the street be kept absolutely safe.

5. That an instruction on the negligence of a city in leaving an open street excavation unguarded did not submit the issue of contributory negligence was not erroneous, where that issue was submitted in other instructions.

6. An instruction that one had the right, in crossing the street, to assume that it was in a "safe condition," is not erroneous in failing to say "reasonably safe condition," where other instructions state that the city was only required to keep its streets in a reasonably safe condition, and that it was not an insurer against accidents on the streets, nor liable for every defect therein.

7. Evidence that one injured in a street excavation had been under the care of a physician for about six years, and had paid on that account \$97, and still owed \$400 more, was sufficient to warrant an instruction that in determining the measure of damages the jury might take into consideration the necessary expenses for medicine and medical attention.

8. An instruction, in an action for injuries from falling into a street excavation, that if the injuries were merely the result of an accident there could be no recovery, was properly refused.

9. In an action for injuries, an instruction that the jury might take into consideration statements made by the plaintiff to different witnesses, and that the law presumed that statements against her interest were true, was properly refused, it being controverted whether any such statements had been made.

Appeal from Circuit Court, Gentry County; Gallatin Craig, Judge.

Action by Nellie Campbell against the city of Stanberry. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

See 85 Mo. App. 159; 68 S. W. 587.

Aleshire & Benson, for appellant. Peery & Lyons, J. L. McCullough, and J. C. Wilson, for respondent.

SMITH, P. J. This is an action which was brought by plaintiff against defendant, a city of the fourth class, to recover damages for injuries occasioned by negligence. The evidence tends to prove that at the time of the injury the defendant was putting in a system of waterworks and had dug a ditch along Sixth street in front of the grounds of the Normal School, where plaintiff was then working, and had left it open, and without guard rails or lights, for about one month; that opposite the entrance of the Normal grounds a narrow path or passway had been left, where the ground was unbroken; that on the night in question, which was very dark, the plaintiff attempted to cross the street south of said grounds, to visit friends living on that side of the street, and fell into the ditch and was rendered unconscious, and lay there for perhaps an hour, when she was discovered by a stranger passing, who res-

cued her; that at that time she was a strong, healthy young woman of 26, and had never had any serious illness; and that, as a result of the injuries received under the circumstances aforesaid, her health was completely wrecked, so that for years she has been unable to work, and for more than six years before the trial had been continuously under the care of the doctor, and much of the time in the hospital. There was a trial, which resulted in a judgment for plaintiff, and defendant appealed.

The defendant assails the judgment on a great number of grounds, the first of which being that the petition does not state facts sufficient to constitute a cause of action, or, if so, that the evidence is insufficient to support it. By the common law of England, as it is interpreted in the English courts, by the Supreme Court of the United States, and by the highest courts of most of the states, an action on the case for negligence can always be brought against a chartered municipality for neglect to keep the streets over which it has control in a reasonably fit condition for use by any number of the public for any purpose for which a public street is designed. *Jones on Negl. Munic. Corp.* § 72; *Bail v. Independence*, 41 Mo. App., loc. cit. 475. The evidence as presented by the abstract in the present case is not materially variant from that brought before us by the former appeal (85 Mo. App. 159), where, after an examination of it, we concluded it was ample to entitle the plaintiff to a submission to the jury; and we are unable now to discern any reason why we should depart from that conclusion. Besides this, the abstract now before us does not purport to contain all the evidence adduced at the trial, and for that reason we do not feel at liberty to examine it for the purpose of determining whether or not the evidence was sufficient to make out for plaintiff a prima facie case. Nor do we think this to be a case where the undisputed facts were such that reasonable minds could draw no other conclusion from them than that the plaintiff was guilty of contributory negligence, and that therefore the question of negligence was one for the court. *Fowler v. Randall* (Mo. App.) 73 S. W. 931; *Meyers v. Ry. Co.* (decided at present term) 77 S. W. 149. Nothing is seen in *Holding v. St. Joseph*, 92 Mo. App. 143, that requires us to overthrow the judgment in this case. The evidence here shows that plaintiff attempted to pass over the street on a crossing that had been in constant use by the public for many years, and in doing so she fell into an unguarded and unlighted excavation, and was there hurt; while the facts in that—the *Holding Case*—as may be seen by reference to it, were essentially different.

The defendant objects that the first instruction given for plaintiff is erroneous in that it imposed upon it (defendant) the performance of the double duty to maintain along the sides of the street excavation a

guard rail or barricade, and also to place lights along the same in such manner as to light the crossing over the same. Possibly this instruction is subject to the criticism of being needlessly verbose, but beyond that we do not think it faulty. It in substance told the jury that it was the duty of the defendant to keep its streets in a reasonably safe condition, so that those having occasion to use them could do so in safety. It further told it (the jury) that it was the duty of the defendant to keep Sixth street in a reasonably safe condition at the point covered by the excavation in question, and if it found that the defendant neglected to provide guard rails for said excavation at said street crossing, and neglected to light the same by night, and that in consequence of which the said street at said crossing was rendered unsafe for persons attempting to cross it in the nighttime, etc., it should find for plaintiff. The uncontradicted evidence showed that the defendant had taken neither of these precautions. Whether defendant had taken one or both was not an issue of fact in the case. If it had taken one of them, and the jury had been told that it was required to take both, there would have been some substantial ground for complaint. The court, in instructing the jury, might, without any breach of propriety, have well assumed that the excavation in the street in front of the Normal school building at the time of the plaintiff's injury was neither guarded nor lighted. Even if it be conceded that the instruction was clumsily and inartistically worded, yet, in view of the evidence, it could not have misled the jury to the prejudice of the defendant.

The defendant suggests that it was error for the court to instruct the jury that, if the excavation was unguarded and unlighted, the defendant was guilty of negligence, because such excavation might have been protected in other ways. It is a sufficient answer to this to say that the fact is clearly inferable from all the evidence that the excavation was wholly unprotected in any way. The instruction, in submitting the issue of negligence, was as broad as the allegation of the petition, and that was all that was required. If the excavation was protected in some other way, that, no doubt, would have constituted a defense; but, if so, there was no evidence offered tending to prove it. The court very properly, by the instruction, confined the attention of the jury to the negligence specified in the petition.

The defendant further questions this instruction on the ground that it declared it to be its duty, without qualification, to keep its street absolutely safe, without regard to any degree of safety or unsafety. This results, no doubt, from a misconception of the language employed in it. It first declared that it was the duty of the defendant to keep Sixth street in a reasonably safe condition at the place covered by the excavation. This

declaration was followed by the information that if it found that defendant left such excavation open and unguarded and unlighted at the place where the injury happened, whereby it became unsafe and dangerous to persons attempting to cross it in the nighttime, etc., this was a breach of defendant's duty. The instruction, considered in its entirety, we think, left it to the jury to find whether or not the street at the place of injury was kept in a reasonably safe condition. The instruction did not declare it to be the duty of the defendant to keep its street safe or absolutely safe, but that the duty imposed was to keep it reasonably safe. The qualification was not, therefore, wanting.

And, finally, the defendant contends that this instruction does not submit the defense of contributory negligence. It is submitted in a number of defendant's instructions, and this is sufficient. *Hughes v. Ry. Co.*, 127 Mo., loc. cit. 452, 30 S. W. 127.

The second instruction given for plaintiff told the jury that plaintiff "*had the right, in crossing the street, to assume that the same was in a safe condition, unless she knew or had reason to suppose that it was unsafe.*" And although the plaintiff may have known, or have been previously informed, that said ditch had been dug along the north side of Sixth street, south of the Normal grounds, yet that fact alone would not prevent her from recovering in this action; but in that case she would be required to use the care and caution which a person of ordinary prudence, knowing such fact, would exercise under similar circumstances." The defendant contends that the words "safe condition," contained in the *italicized* part thereof, should have been preceded with the qualifying word "*reasonable.*" If the court, in its instruction No. 1 given for plaintiff, had not told the jury that the defendant was only required to keep its streets in a reasonably safe condition for travel, and, in its No. 2 for defendant, that it was not an insurer against accidents on its walks or streets, nor was it liable for every defect therein, then, perhaps, it would have ground for complaint. *King v. King*, 155 Mo., loc. cit. 423, 56 S. W. 534. Besides, in its present form it meets the views expressed by us when disposing of the objections there urged to it on the former appeal, and it is not, therefore, open to further criticism.

The plaintiff's third, telling the jury that in determining the measure of damages it might take into consideration the necessary expenses for medicine and medical attention, was fully warranted by the evidence, which tended to prove that she had been under the care of a physician, receiving daily and weekly treatment, for about six years, much of that time she had been in a hospital, and had paid on that account \$97, and still owed \$400 more. This was sufficient. *Morris v. Ry. Co.*, 144 Mo. 500, 46 S. W. 170; *Robertson v. Ry. Co.*, 152 Mo. 382, 53 S. W. 1082.

The defendant's ninth, which was refused, was to the effect that, "if the injuries received by plaintiff were merely the result of an accident upon her part," there could be no recovery. Under this instruction, even if the defendant was guilty of negligence, and but for which the accident on plaintiff's part would not have happened, or if the injury was the joint result of defendant's negligence and an unavoidable accident on plaintiff's part, there could have been no recovery, even though plaintiff was guilty of no contributory negligence. It was not, therefore, a correct expression of the law in a case of this kind. *Vogelgesang v. St. Louis*, 139 Mo. 127, 40 S. W. 653; *Voegel v. West Plains*, 73 Mo. App. 588. By it the negligence of the defendant, which the evidence tended to prove, was eliminated, and the case was left to stand as if the injury had been self-inflicted. Such an instruction, if applicable in any case, was wholly inapplicable where the facts are as in this. *Beauvais v. St. Louis*, 169 Mo. 500, 69 S. W. 1043. When the cause was here on the former appeal, we declined to condemn the action of the court in refusing this same instruction, and that ruling must be regarded as conclusive. And the same remark is alike applicable to the defendant's ninth, which is identical with its tenth of its series when the case was here before.

The defendant's eleventh, which was refused, in substance told the jury that it might take into consideration all the statements made by plaintiff and to different witnesses, and that the law presumed all statements made against her own interest to be true, because made by her, but what she may have stated to her own interest it (the jury) might believe or disbelieve accordingly as it might think, from all the facts and circumstances detailed in the evidence, were entitled to credit. The admissions to which this instruction referred were extrajudicial. Those to which the instructions in *Feary v. Ry. Co.* (Mo. Sup.) 62 S. W. 460, and in *State v. Brooks*, 99 Mo. 137, 12 S. W. 633, referred were judicial. There is a well-recognized distinction between the two. The personal admissions of a defendant when made in his own cause, in the presence of his counsel, under our statute permitting him to testify, are regarded as conclusive upon him for the purposes of the case in which they are made. When the admission is verbal and extrajudicial, it ought to be received with great caution. The evidence, consisting, as it does, in the mere repetition of oral statements, is subject to much imperfection and mistake, the party himself either being misinformed, or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens, also, that the witness, by unintentionally altering a few expressions really used, gives an effect to the statement completely at variance with what the party actually did say. 1 *Greenleaf on Evl.* § 200; *Holmes v. Leadbetter* (Mo.

App.) 69 S. W., loc. cit. 24; *Feary v. Ry. Co.* (Mo. Sup.) 62 S. W., loc. cit. 460. It is thus seen that the conclusive effect which is given to judicial admissions cannot be given to those that are extrajudicial. Such an instruction as this could not be given in a criminal case without error. *State v. Wisdom*, 119 Mo., loc. cit. 552, 24 S. W. 1047; *State v. Howell*, 117 Mo., loc. cit. 323, 23 S. W. 263; *State v. Inks*, 135 Mo., loc. cit. 689, 37 S. W. 942. And even though an instruction declaring what effect should be given to extrajudicial admissions, like that given in *State v. Wisdom*, supra, be proper in a civil case, that here under review, it is seen, falls far short of the mark. It is obvious that it assumes a controverted fact, namely, that plaintiff made admissions to other witnesses against her interests. This was a question for the jury, and not for the court, and for that reason, if for no other, it was properly refused.

Much space in the briefs of counsel is devoted to the discussion of the various rulings of the court made in respect to the admission and exclusion of evidence. The grounds of objection to these we have examined, and have concluded the same were not well taken. We cannot discover that a different ruling would have altered the result, or that the defendant, in consequence thereof, was prejudiced on the merits.

It results that the judgment must be affirmed. All concur.

BRIGGS v. MORGAN.

(Court of Appeals at St. Louis, Mo. Jan. 19, 1904.)

SALE—CONTRACT—PARTIAL PERFORMANCE—LIABILITY.

1. Where one enters into a contract to sell a certain quantity of hay, of which he delivers a part, but fails to deliver the balance, while he cannot recover under the contract, he may, where the hay was accepted and used, recover its reasonable value, subject to any set-off on account of damage suffered by the purchaser through the failure to complete the contract.

Appeal from Circuit Court, Scotland County; E. R. McKee, Judge.

Action by William D. Briggs against Oscar Morgan. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Smoot, Boyd & Smoot, for appellant. John M. Doran, for respondent.

BLAND, P. J. The suit originated before a justice of the peace on the following account:

Oscar Morgan, Dr. to Wm. D. Briggs.

1902, Nov. 15, Hay, 2050 lbs.

1902, Dec. 1, Hay, 3125 lbs.

Total, 5175 lbs. at \$3.00 per ton... \$20 70

From a judgment recovered by plaintiff before the justice, defendant appealed. On the trial in the circuit court, defendant ad-

mitted that he had received the number of pounds of hay sued for, and that he had agreed to pay \$8 per ton for the hay. His defense was that he contracted with plaintiff for 10 tons of hay, at \$8 per ton, to be delivered from time to time during the winter of 1902 and 1903, and that the plaintiff failed and refused to deliver all the hay. Defendant assumed the burden of proof. His evidence tended to prove that he contracted with plaintiff for 10 tons of hay, at \$8 per ton, the hay to be delivered during the winter of the years 1902 and 1903; that, after delivering the hay sued for, the plaintiff refused to let him have any more hay. On this evidence, and the following instruction given by the court, the jury found the issues for the defendant: "The court instructs the jury that if you believe from the evidence that the plaintiff contracted with the defendant to sell the defendant ten tons of hay for the price and the sum of eight dollars per ton, and nothing said about when payment to be made, to be delivered to the defendant during the winter of 1902 and 1903, then said contract was an entire contract, and plaintiff cannot recover for a partial performance thereof; and if you find from the evidence that plaintiff, after having delivered a part of said hay, refused to deliver the remainder, then the plaintiff cannot recover, and your verdict should be for the defendant." Plaintiff, within four days after the rendition of the verdict, filed his motion for new trial. The court offered to grant plaintiff a new trial if he would agree that the verdict might be set aside at his cost. The plaintiff declined to accept the terms offered by the court, whereupon the court overruled his motion, and plaintiff perfected his appeal.

Where a contract is apportionable, as is a contract to deliver 10 tons of hay by installments or at different times, if the party to make the delivery, without fault of the other party, fails to deliver all the hay, but delivers a portion of it, and the portion delivered is accepted and used by the other party, as was the hay sued for, the party making the partial delivery is not entitled to sue on the contract, but may sue in assumption for the value of the hay delivered and accepted under the contract, and recover its value, not exceeding the contract price. *Smith v. Coal Co.*, 36 Mo. App. 567, and cases cited; *Halpin Mfg. Co. v. School District*, 54 Mo. App. 371; *Dempsey v. Lawson*, 76 Mo. App. 522. If the other party was damaged by the failure of the party suing to deliver all the hay contracted for, he may plead such damages as a set-off. The trial court misconceived the law of the case, and erroneously instructed the jury, and should have granted the motion for new trial without imposing terms upon plaintiff. On the admission of defendant that he received the hay, and agreed to pay the price charged, there being no set-off filed, the jury should

have been instructed to find for the plaintiff.

The judgment is reversed, and the cause remanded, with directions to the lower court to enter judgment for plaintiff for \$20.70, with 6 per cent. interest per annum thereon from the date the suit was commenced before the justice.

REYBURN and GOODE, JJ., concur.

MATTHEWS v. WALLACE.

(Court of Appeals at St. Louis, Mo. Jan. 19, 1904.)

STATUTE OF FRAUDS—PLEADING—CONTRACT OF EMPLOYMENT—EVIDENCE—DAMAGES—HARMLESS ERROR.

1. A complaint need not show a contract is without the statute of frauds; it is a matter of defense to show it is within the statute.

2. A contract of hiring for an indefinite time is not within the statute of frauds, as it may be performed to the satisfaction of the parties within a year.

3. Admission of hearsay evidence bearing exclusively on a fact that is undisputed is harmless.

4. Plaintiff, to diminish his damages by reason of defendant's breach of his employment, is not bound to seek other employment, where he is waiting in reasonable expectation of being called into service by defendant at any time.

5. That plaintiff is paid commissions on sales of horses to defendant after the time he testifies he was employed by defendant to train his horses is not inconsistent with his assertion of employment, the sales having been initiated prior to the employment.

Appeal from Circuit Court, Pike County; David H. Eby, Judge.

Action by E. Foss Matthews against William A. Wallace. Judgment for plaintiff. Defendant appeals. Affirmed.

G. W. Emerson and E. W. Major, for appellant. Tapley & Fitzgerald, for respondent.

Opinion.

GOODE, J. Plaintiff sued on a contract of hiring, alleging that in September, 1902, he and the defendant made an agreement by which the defendant employed him as a horse trainer at the wage of \$40 a month, and, as an additional consideration, plaintiff's board; that plaintiff then notified defendant he was ready to begin work; and that he remained ready to begin it from the time the contract was made until this suit was started. Certain acts of employment performed by the plaintiff under the contract are also stated, with an allegation that plaintiff fully performed all the conditions of the contract, but that the defendant wholly failed to perform. The suit originated before a justice of the peace, and no answer was filed by the defendant.

It is said that plaintiff cannot recover because of the insufficiency of the complaint in failing to allege that the work which the plaintiff was required to do could be per-

¶ 1. See *Frauds*, Statute of, vol. 23, Cent. Dig. §§ 70, 74.

formed within a year, which omission authorized the inference that the contract was within the statute of frauds. It was not incumbent on the plaintiff to show affirmatively in his complaint that the contract fell outside the statute of frauds. That it was within the statute was matter of defense, if the fact could be shown. But in truth the hiring was for no definite time, and it was therefore without the statute, because the contract might have been performed to the satisfaction of the parties within a year. *Blest v. Ver Steeg Shoe Co.*, 97 Mo. App. 137, 70 S. W. 1081.

The point is made that the weight of the evidence is against the plaintiff's version of the hiring; as to which it suffices to say that, if we thought this was so, we would be powerless to interfere, as there is substantial evidence on both sides of the question as to what were the terms of the contract. Plaintiff swore he hired the defendant in August, 1902, provided he could obtain a release from a contract he had previously made with J. S. Thomas. Plaintiff is a trainer of horses, and was hired by the defendant to train horses. He had previously agreed with Thomas to train a horse for him. Thomas readily released him when asked to do so, and plaintiff testified that on September 4th he notified the defendant of that fact, and made a binding contract with the latter to work for him on the terms above stated; that the defendant agreed to have him go to work as soon as defendant's wife could prepare a room for him to occupy; that defendant declared, from time to time, he would put him to work when that event happened, but never furnished him any employment. Defendant's testimony was that the arrangement between him and the plaintiff was not to become effective as a contract of employment unless defendant succeeded in getting rid of a man and his wife who were then in his service, and that he was unable to get rid of them because his (defendant's) wife wanted to keep said employer's wife to do housework. A square issue of fact was presented as to what the arrangement was, and the finding of the jury settled the issue.

A letter from Thomas to the plaintiff was introduced in evidence to show that Thomas released the plaintiff from his employment, thereby enabling him to take service with the defendant. This letter was objected to as hearsay. Its admission ought not to work a reversal of the judgment, since the essential facts relating to this particular point were that the plaintiff was released from his prior engagement, and was thus at liberty to work for the defendant, who was apprised that this was so, and concluded the contract with plaintiff. It was unnecessary to put the letter in evidence; but its admission could not have worked prejudicial error, inasmuch as there was no defense made on the ground that plaintiff was withheld from defendant's service on account of his previous contract

with Thomas. If there had been such a defense, it would have been necessary to overcome it with evidence, and, of course, with direct evidence. But the only defense interposed was that the hiring of plaintiff was contingent on the discharge by the defendant of the man, already in his service, whose place, according to defendant's contention, plaintiff was to take. Perhaps the letter was not competent; but as it bore exclusively on a fact that was undisputed, it affords no cause to reverse the judgment.

It is insisted that, even if plaintiff's version of the agreement is true, he was bound to seek work elsewhere during the time he was waiting to enter defendant's service, in order to diminish the sum the defendant would have to pay on account of failing to carry out the contract. There might be merit in this point if plaintiff had been notified the defendant would not give him employment. But all the evidence goes to show plaintiff waited in expectation of being called into service by the defendant at any time. With that expectation, reasonably founded as it was, it would have been improper for him to engage to work for some one else.

After September 4, 1902, on which date plaintiff swore he was employed, he was paid commissions by two persons on sales of horses made to the defendant. These payments are cited as inconsistent with the plaintiff's assertion that he was then in the defendant's employ, since he could not legally be working for the defendant, and at the same time earning money as the agent of other persons in sales of horses to the defendant. Those commissions were paid for sales which had been initiated prior to the time plaintiff was employed by the defendant, and were compatible with fair dealing on his part under his contract of employment.

The judgment is affirmed.

BLAND, P. J., and REYBURN, J., concur.

SISSON v. SUPREME COURT OF HONOR.

(Court of Appeals at St. Louis, Mo. Jan. 19, 1904.)

BENEFIT ASSOCIATION — CONSTITUTION—CONSTRUCTION—AMENDMENT AFTER ISSUING CERTIFICATE—EFFECT.

1. Where a benefit certificate issued by a mutual benefit association provides that, if a member lose a hand, he shall receive a certain sum, the member may recover such sum if his hand is so injured as to be practically useless to him, though it is not entirely amputated.

2. A member of a benefit association is not bound by an amendment to its constitution, passed after he received his benefit certificate, limiting his right to recover in case of injury, unless he expressly consented thereto, though his certificate states that it is issued on condition that he comply with the constitution then in force or thereafter to be enacted; such provision relating only to his duties as a member of the association.

Appeal from Circuit Court, Pike County; David H. Eby, Judge.

Action by Harve W. Sisson against the Supreme Court of Honor. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Jas. W. Reynolds, for appellant. Geo. W. Emerson, for respondent.

BLAND, P. J. The defendant is a mutual benefit association organized under the laws of Illinois, and is doing an insurance business on the assessment plan. On June 2, 1897, plaintiff became a member of the defendant association, and received a certificate of membership therein, which contains a contract whereby the defendant insured the life of plaintiff in favor of his wife in the sum of \$2,000. The certificate of insurance also provides that, if plaintiff should become disabled, the association will pay him such an amount as should be provided by its constitution and by-laws. At the time the certificate was issued, section 1, art. 2, of the constitution and by-laws of the association, provided as follows: "If a member lose a foot or hand by accident, he shall receive one-fourth of the amount of his certificate of membership in cash and the other three-fourths at death." The certificate states that it was issued upon the express condition that the insured should comply with the constitution, laws, rules, and regulations of the order then in force or that might be thereafter enacted. In May, 1900, the defendant association amended its constitution by enacting section 106, art. 13, which reads as follows: "If a member lose a foot or a hand by accident, resulting in amputation or severance at or above the ankle or wrist, he shall receive one-fourth of the amount of his certificate of membership in cash." On October 24, 1901, plaintiff, while pursuing his usual avocation (operating a brick plant), accidentally caught his left hand under a brick press, and it was severely lacerated and injured. The suit was to recover for the loss of the left hand. Plaintiff recovered a judgment of \$500, from which the defendant appealed.

There are but two questions presented by the briefs and arguments of counsel. (All other questions arising at the trial are conceded to have been correctly resolved in favor of the plaintiff.) The first question is, does the evidence show that plaintiff lost his hand within the meaning of his certificate of insurance? The evidence is that the brick press came down on plaintiff's left hand, and mashed off the two middle fingers at the knuckle joint and the index finger above the second joint. Dr. T. E. Walker testified that he was called to treat the injury at the time it happened, and that he found the hand pretty badly mashed up, but not so badly injured as to require an amputation of the entire hand, in his judgment; that he and Dr.

Love amputated the second and third fingers at the knuckle joint and the index finger at the second joint; that for all practical purposes the hand is lost; that the stub of the index finger is stiff, and cannot be used for any purpose, and it would have been better if it had been amputated at the knuckle; that there was still a partial action of the little finger and thumb, but their action was impaired by the injury to the leaders in the back of the hand. Plaintiff testified that the circulation in his hand was bad; that his hand got cold, and even in hot weather he had to keep it in his pocket, or hold it in his right hand, to keep it warm; that it was weak, and got tired very soon when he attempted to use it; that he used it all he could, but found it was practically useless as a hand; that he was keeping a small general store, and assisted his wife in selling goods, but could not use his left hand to tie up packages; that he could lift light articles for a little while with it, but in trying to handle queensware, such as cups and saucers and plates, he would let them fall, they would slip out of his hand, and he could not hold on to them; that the leaders in the back of his hand seemed to be drawn, and on account of this he could not bend his little finger without pain; that his thumb was weak, and the thumb and little finger were of very little use; that he never gave his consent to the passage of section 106, art. 13, supra, and did not know that any change had been made in the constitution until after he had received his injury. There was counter-vailing evidence, not material to be noticed in this discussion, as the question for solution is, should the court have consulted the plaintiff on his own evidence? In other words, does the evidence introduced on behalf of plaintiff tend to show that he lost his left hand within the meaning of the certificate of insurance? The term "accidentally," in a policy, it has been repeatedly held, is used in its ordinary and popular sense. *United States Mutual Accident Association v. Barry*, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60; *North American Life & Accident Insurance Company v. Burroughs*, 69 Pa. 43, 8 Am. Rep. 212. In *Sheanon v. Pacific Mutual Life Ins. Co.*, 77 Wis. 618, 46 N. W. 799, 9 L. R. A. 685, 20 Am. St. Rep. 151, it was held that the entire destruction of both a person's feet by paralysis, caused by an accidental pistol wound in the back, was within the provisions of an accident insurance policy providing for the loss of two entire feet, notwithstanding they were not amputated from the body. In *Sneck v. Traveler's Ins. Co. of Hartford*, 88 Hun, 94, 34 N. Y. Supp. 545, the plaintiff was injured by an accident. His insurance policy provided for the payment of certain sums if, by certain enumerated causes, he should lose an entire hand by severance. The evidence tended to show that about one-half of plaintiff's hand, anatomically considered, was cut off by a

planer, but that the rest of the hand was absolutely useless. Plaintiff was nonsuited by the trial court. On appeal the Supreme Court of New York said that, inasmuch as some men might conclude from the evidence that for all practical purposes to which a hand is adapted there was an entire loss of the use thereof, while others might consider that neither in its anatomical construction nor in its practical use as a hand was it entirely destroyed, the question was one of fact for the jury, and it was erroneous for the court to decide it as a matter of law.

We are of the opinion that the phrase, "should lose a hand," used in section 1, art. 12, of the constitution of the defendant association, in force when plaintiff received his certificate of insurance, was used in its ordinary and popular sense, and does not mean that there should be a total destruction of the hand, anatomically speaking, but that the loss of the use of it for the purposes to which a hand is adapted would be a loss of it, within the meaning of section 1, supra, of the laws of the society. The physician who operated on his hand and treated it afterwards testified that it was lost in the sense that it was of no practical use. The evidence of the plaintiff is such as to show that the hand is more a source of inconvenience and annoyance than of utility, and that for the purposes to which a hand is adapted it is practically worthless. In the light of this character of evidence, we think the question of whether or not there was a loss of the hand was properly submitted to the jury.

The second question presented for solution is whether or not the contract of insurance must be interpreted by section 1, art. 12, of the constitution, in force at the time of its issuance, or by the amendment of May, 1900. In his application for membership and insurance plaintiff agreed to conform in all respects to the constitution, laws, rules, and usages of the order then in force or which might be adopted thereafter by the supreme council of the association. By reason of this agreement and a similar one in the certificate of membership and insurance it is contended that plaintiff is bound by section 106, art. 13, supra, passed in May, 1900, and could not recover, for the reason he had not lost his whole hand. In the case of *Morton v. Supreme Council of Royal League*, 73 S. W. 259, Judge Goode, of this court, made an exhaustive review of the authorities on this question, citing numerous cases in this and other states, and conclusively demonstrated that the doctrine is well established that stipulations in a contract of insurance like the one in hand, to comply with future by-laws and regulations, mean the member will comply with such by-laws, rules, and regulations as relate to his duties as a member of the association, but do not mean that the society may interfere with the essential provisions of the contract of insurance; and that it is powerless by by-laws or otherwise to change

or modify the essentials of the contract of insurance without the express consent of the member. We adhere to this ruling, and hold that the certificate of insurance is in no wise affected by section 106, art. 13, supra.

The judgment is affirmed.

REYBURN and GOODE, JJ., concur.

SHY v. SHY.

(Court of Appeals at St. Louis, Mo. Jan. 19, 1904.)

DIVORCE—INTOLERABLE INDIGNITIES—EVIDENCE.

1. Evidence in a suit in which both parties sought a divorce on the ground of intolerable indignities held to authorize the denial thereof to the wife, but not the denial to the husband.

Appeal from Circuit Court, Pike County; D. H. Eby, Judge.

Suit by Ora Shy against Simeon Shy for divorce. Defendant filed a cross-bill. Divorce denied, and both parties appeal. Modified.

Pearson & Pearson, for plaintiff. Ball & Sparrow, for defendant.

REYBURN, J. Plaintiff sued defendant for divorce, and defendant in turn by cross-bill asked like relief, each charging against the other in statutory language the perpetration of intolerable indignities, specifically detailed, and which will appear in the course of the consideration of the case. Upon full hearing, the circuit court refused a divorce to either party, and both husband and wife have appealed. The court further made an order of allowance to the latter of \$25 per month as temporary alimony pending appeal, \$50 for attorneys' fees, and \$50 for suit money, and defendant excepted to this ruling and also appealed therefrom. After an acquaintance of several years, the parties hereto were married on the 14th day of November, 1900, and on the 4th day of May, 1901, the wife left her husband and remained apart from him until the 8th day of October, 1901, when she resumed marital relations with him, but again on the 20th day of July, 1902, plaintiff left finally, and on the 21st day of November, 1902, brought this action. Both parties were natives of Pike county, where the suit was brought. Plaintiff, a daughter of a tailor, had been educated in the public schools of Louisiana, and at the time of the beginning of the acquaintance with her future husband was commendably earning her own livelihood in a millinery store in that city. Defendant had always resided on a farm, and to within a year or two of his marriage had farmed in partnership with a married brother, and made his home with him. At death of the latter he had continued to live with the widow and her two small children, and conducted the farm for the joint benefit of his sister-in-law, her children, and himself. The precise ages of the parties were not dis-

closed, but from the testimony plaintiff appeared to have been about 25 years old, and defendant was probably 10 years her senior, at time of their union. Defendant took his bride to the house of his widowed sister-in-law to reside. Undoubtedly the surroundings of this new life proved distasteful to plaintiff, and the hard work upon the farm soon became laborious, and almost from the first she showed great dissatisfaction, and, as recited, after a brief trial she departed, and began a proceeding for divorce, which was dismissed, when the defendant, after much persuasion and earnest entreaties, prevailed on her to return upon the condition and assurance that he should build a home for herself, where they could live away from the sister-in-law and children, and he fulfilled this promise by building a small house under her directions and according to plans approved by her. After completion and occupancy of the new dwelling by them, plaintiff's dissatisfaction continued unabated, and her final departure ensued, and this second suit for divorce was begun.

The causes of divorce set forth by plaintiff, and upon which she relied for legal separation, were that her husband was always quarrelsome and gruff to her and never had a kind or pleasant word for her; that they lived on a farm, and she did all the housework and cooking for them and a hired hand, and defendant's treatment of her was that of a hireling or servant woman working simply for her board; that he gave her no money to purchase clothes with, although a man in well to do circumstances, and they had barely sufficient articles in the house for housekeeping, and he refused to let her buy necessary articles for housekeeping; that he refused to bring her to town to see her parents, or to let her have a horse to come to town, and she was forced to walk five or six miles to get to town; that he would insist on her rising as early as 3 o'clock in the morning to get breakfast, and, when she declined, would threaten her with violence, and but for the timely appearance of the hired hand might have done her bodily harm; that he frequently spoke disrespectfully of and cursed her mother; that he was dirty and filthy in his person, and would not wash, and kept himself in such condition thereby that to come in contact with him as his wife was repulsive and loathing to plaintiff, and finally became intolerable.

The cross-bill of defendant was based on the averments that at the time of her first departure, before and thereafter, she accused him of having another woman, meaning defendant's sister-in-law, with whom he lived as his wife, all of which was absolutely untrue, and to the great injustice of his sister-in-law as well as himself; that he had offered every inducement in his power to persuade her to return and live with him; that she demanded that he build her a home, and, to induce plaintiff to again return and live

with him, he did build a house, and she demanded in addition that he have his life insured for \$2,000 and make her a deed to 40 acres of land; that he declined the last proposition, but she returned to live with him after he built the house, but her conduct towards him became worse, and that she abused him, and applied towards him names such as "old fool, jackass, and scoundrel"; that time and again she locked him out of the house, pulled his mustache and hair, slapped him in the face, and rarely spoke a kind word to him; that when he was sick in bed for several days he sent for plaintiff, who was then visiting her parents, and entreated her to come to him, which she refused, declining to visit him or care for him; that she refused to cook for the hands during harvest, and insisted at such season upon going to town, when defendant was exceedingly busy with the harvest; that she told him repeatedly she did not love him, but hated him, and would not live with him, and that there were other men in the world besides him, and some of them had hugged and kissed her. These, the chief allegations contained in both petition and cross-bill, are thus substantially reproduced, because it is not deemed essential to epitomize the bulky record exhibiting the lengthy examination of the numerous witnesses produced.

The testimony of the plaintiff herself substantiated the grounds of her petition fully and in detail. Of her family, her mother testified, but her evidence did not confirm the statements of plaintiff, nor touch upon any material fact. The testimony of a married sister, however, in a measure and within limits, corroborated the evidence of plaintiff. This witness deposed that, while she was visiting them, plaintiff was ill at night, and affiant had been compelled to go to her aid, as defendant continued to slumber undisturbed and indifferent; also, that on one occasion, when the children had been summarily left by their mother and were dirty, plaintiff and deponent had cleaned and cared for them, but they cried and annoyed plaintiff, and witness suggested to defendant that he ought to take his wife away, that she could not bother with these children, and, with profanity and anger, he replied it was none of her business; that defendant accused plaintiff to this witness of laziness, indolence, and extravagance, and swore at her. To this meager extent, and no further, did the statements of plaintiff receive support and confirmation by any other testimony, while they were denied and refuted, not only by defendant and his sister-in-law, but by the avowals of the many witnesses examined on behalf of defendant. This latter testimony was elicited from the tradesmen with whom defendant had dealt for many years; many of his neighbors, knowing him all his life, who were familiar with his habits and mode of life, and had frequent and daily opportunities to observe and judge of his personal con-

duct, and witness his deportment towards his wife and his sister-in-law; the carpenter and his assistant who aided in planning the house and built it, and during its construction lived with defendant; the contractor who plastered the new house, worked on it and the barn, and also resided at the house of plaintiff for four weeks during the work; the cashier of the bank with which defendant transacted business, and who, at his solicitation, called on plaintiff after the first separation to bring about a reconciliation; the negro hand who had worked for defendant for 17 years; the white farm hand who was with defendant when the new house was erected; the owner of the threshing machine who threshed defendant's wheat. In a word, about all the persons who, in the narrow routine and course of defendant's daily life, had been brought into close and familiar intercourse with him for many years, inclusive of the period of his marriage, appeared at the trial and gave their testimony. These witnesses, in unbroken line, negated emphatically the accusations and complaints made by the plaintiff in her petition and by her testimony; and some in one detail, and some in other particulars, all tended to confirm and verify the grounds of divorce advanced on defendant's behalf. From this mass of testimony the conclusion is irresistibly drawn, and it was established as facts beyond doubt, that defendant lived in a plain manner, but in the usual style befitting his class; that his personal habits respecting cleanliness of person were criticised without just cause; that his sister-in-law was a woman of honest, upright, and admirable character, industrious in her habits, who after her husband's death had endeavored to take his place, as far as she could, in continuing the farming partnership existing between him and her brother-in-law, and bring up her small children; that the imputations upon her conduct and insinuations of her relations with the defendant, her brother-in-law, were wholly unfounded and grossly unjust to her; that defendant himself was a plain, industrious, unassuming citizen, engaged diligently in farming pursuits, and during his brief marital experience had discharged his duties towards plaintiff as her husband with kindness and affection, and that his deportment towards her had been characterized by a degree of patience, kindness, and forgiveness rarely encountered; that the base charges made against him, imputing improper relations with the widow of his dead brother, to whom it appeared he was sincerely attached, and whose death he continued to lament, were wholly untrue and devoid of any foundation. Upon a careful review and consideration of the voluminous testimony submitted, we have no hesitancy in concluding that defendant was the innocent and injured party, and that he fully made out the allegations of his cross-bill, and is entitled to the relief afforded by the statute. The judgment dismissing plaintiff's petition

is accordingly affirmed, and the order awarding plaintiff temporary alimony is reversed, but the allowance for attorneys' fees and for suit money is affirmed, and the judgment dismissing defendant's cross-bill is reversed, and the cause remanded with directions to the trial court to award him a decree of divorce from plaintiff.

BLAND, P. J., and GOODE, J., concur.

BLACK v. GOLDEN et al.*

(Court of Appeals at St. Louis, Mo. Jan. 19, 1904.)

LANDLORD AND TENANT — CROPPER'S CONTRACT—CONSTRUCTION—CONVERSION—COSTS.

1. Where defendants rented certain lands from plaintiff, on which to raise a crop of corn, agreeing to deliver in plaintiff's crib two-fifths of the corn raised on the land, as rent, and nothing was said as to the fodder, the parties were tenants in common thereof, and hence plaintiff was entitled to recover two-fifths of the fodder in addition to the corn.

2. In an action for the wrongful conversion of certain fodder by a tenant, defendant is not entitled to recover costs, though plaintiff's recovery was only \$47 damages.

Appeal from Circuit Court, Knox County; E. R. McKee, Judge.

Action by Ambrose E. Black against Scott Golden and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

O. D. Jones and Jas. Doran, for appellants. C. D. Stewart, for respondent.

BLAND, P. J. Omitting caption, the petition is as follows: "The plaintiff states that he is now, and was during the year 1901, and for several years prior thereto, the owner of the southwest fourth of the southeast quarter of section thirty-one (31), township sixty-two (62), range twelve (12), Knox county, Missouri, and that he rented said land to defendants for the year 1901 to be cultivated in corn, and that defendants agreed and promised plaintiff to give him two-fifths of the crop raised on said land, and to husk plaintiff's part of the corn and put it in plaintiff's crib; and plaintiff says that defendants cut the stalks and corn raised on said land and put it in shocks, and that they refused and failed to deliver or account for plaintiff's part of the shock fodder, and converted the same to their own use, and that plaintiff's part of said fodder was reasonably worth eighty (\$80) dollars. Wherefore plaintiff prays judgment for the sum of eighty (\$80) dollars and his costs." The answer admitted that plaintiff was the owner of the land described; admitted that the defendants rented the land for the year 1901, to be cultivated in corn; admitted that they agreed to give plaintiff, as his rent, for the use of the said land, two-fifths of the corn raised on said land, to be delivered in the plaintiff's

*Rehearing denied February 2, 1904.

crib; admitted that they cut the corn raised on the land, and that they refused to deliver to plaintiff one-third of the shock fodder, and converted the same to their own use; and alleged that, in delivering two-fifths of the corn in plaintiff's crib, they paid plaintiff all the rent reserved for the use of the land. Wiseman, who was the agent of plaintiff for the purpose of renting the land, testified that the defendants applied to him to rent the land, and he made two propositions to them: first, that they could have the land for one-half the corn in the field; second, for two-fifths in the crib—and, after considering the propositions, they accepted the latter, and agreed to deliver two-fifths of the corn in the crib; that there was nothing said about the shock fodder or stalks. The testimony of the defendants is that they rented from plaintiff through Wiseman, his agent, and agreed to pay two-fifths of the corn, delivered in the crib, as rent. It is admitted that two-fifths of the corn was husked by defendants, and delivered in the plaintiff's crib. The defendants did not reside upon the land, nor did the plaintiff. The testimony shows that defendants occupied the land until the 1st of March, 1902, without objection from the plaintiff. On this evidence the trial court ruled that plaintiff and defendants were tenants in common of the corn and the shock fodder, and that plaintiff was entitled, as such tenant in common, to two-fifths of the shock fodder. Under this ruling the jury found for plaintiff, and assessed his damages at the sum of \$47. After unavailing motions for new trial and in arrest of judgment, defendants appealed.

The case is on all fours with *Moser v. Lower*, 48 Mo. App. 85, and, on the authority of that case, we hold that the plaintiff was entitled to recover.

Defendants moved to tax the cost to the plaintiff, for the reason, as alleged, that the suit is on contract, and, the recovery being for \$47, under the statute plaintiff was liable for the costs. The subject-matter of the suit arose out of contract, but it is not on the contract to recover two-fifths of the fodder corn, in kind, but for damages for its wrongful conversion by the defendants, and hence sounds in tort, and defendants were properly taxed with the costs.

The judgment is affirmed.

REYBURN and GOODE, JJ., concur.

SPALDING v. CITY OF EDINA.

(Court of Appeals at St. Louis, Mo. Jan. 19, 1904.)

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—HEARSAY—APPEAL.

1. On a motion by defendant for a new trial on the ground of newly discovered evidence, in an action for injuries, affidavits of conversations with plaintiff's husband as to her physical condition before the injury should be disregarded as hearsay.

2. Where the evidence was conflicting in an action for injuries, the court's action in setting aside a verdict for plaintiff as against the weight of evidence is not reviewable on appeal.

Appeal from Circuit Court, Knox County; E. R. McKee, Judge.

Action by Ellen C. Spalding against the city of Edina. From an order setting aside a verdict in favor of plaintiff, and granting a new trial, she appeals. Affirmed.

O. R. Fowler and L. F. Cottey, for appellant. F. J. O'Reilly, C. D. Stewart, and G. R. Balthrope, for respondent.

BLAND, P. J. The suit is to recover damages alleged in the petition to have resulted from a fall by plaintiff, caused by a defective sidewalk negligently maintained on the side of one of its streets by the defendant city. The answer was a general denial and a plea of contributory negligence. The verdict was for the plaintiff, which, on motion of defendant, the court set aside and awarded a new trial, assigning as reasons for its action, first, "on account of newly discovered evidence since the trial"; and, second, "on the further ground that the verdict is against the greater weight of the evidence in the cause." From the order setting aside the verdict and granting a new trial, plaintiff duly appealed.

The evidence is voluminous, and we will content ourselves with a brief statement of what we find it tends to prove. For plaintiff it tends to prove that on the night of October 17, 1900, she and her husband were walking side by side on the east side of Main street, between Jackson and Smallwood streets, in the defendant city, when her husband stepped on the end of a loose board in the sidewalk, causing it to fly up, and plaintiff, in the act of stepping, caught her foot under the board, and was thrown forward, falling on the sidewalk with such force as to knock her senseless for the time being; that, after recovering from the immediate shock caused by the fall, with the aid of her husband, she walked to her home (a short distance). She testified that the fall caused her such great pain that she had to take morphine before she could sleep; that since the fall, and down to the day of the trial, she had suffered almost continuously from severe pain in her back and in the back of her head; that there is a sore spot between her shoulders from which the pain seems to start, and then runs into the back of her head like wires; that at times these pains shoot down her spine causing a heavy sensation in her lower limbs and feet, and that this condition has continually grown worse since her fall; that she is unable to either sit or stand with her back in an erect position; that prior to and up to the day of her fall she was in good health and flesh, was strong, and weighed from 165 to 170 pounds. She further testified that she had frequently passed over the sidewalk before her fall, and knew that some of the

boards in it were loose, and that the walk was out of repair, but it was the usual and direct route to and from her home to the town, and she could not have reached her home on the night of her injury without going a considerable distance out of her way; that when she fell she was walking along in the usual way, was looking at the boards in front of her; that the walk was used by other people, and she had no idea but that she could walk over it in safety. She also testified that about 13 months prior to falling on the walk she fell about three or four feet down a stairway, hurting her right shoulder, and that the soreness in her shoulder continued for a few days thereafter; but she suffered no discomfort from the stairway fall, and after its occurrence she never had better health in her life up to the time she fell on the sidewalk. Dr. Jergin testified that plaintiff called on him the last of October or the first of November, 1900, for treatment for the injury she claimed to have received from the fall on the sidewalk; that at the time she complained of intense pain in the back of her neck, head, and shoulder; that he prescribed for her, and continued to do so until the last of November, when he moved away from the town; that he had examined her once since; that there was no change in her condition except in her appearance and loss of flesh; that she was suffering from a nervous affliction known as "localized neuritis," which could be caused by a fall or shock, and that the injury plaintiff complained of could be caused by the fall she had on the sidewalk, and in his judgment the fall did cause the injury. Dr. Jergin's evidence was corroborated by that of Dr. Brown, who treated plaintiff in January, 1901. The sidewalk was constructed by laying three parallel stringers lengthwise on the street and nailing boards crosswise thereon. The evidence for plaintiff is that the stringers in the sidewalk where plaintiff fell were so rotten that they would not hold nails, that some of the boards were loose, and that this defective condition was observable to any one passing over the sidewalk. The evidence further shows that John F. Beal, a member of the board of aldermen of defendant city, frequently passed over the walk before plaintiff's fall on it. Samuel Randolph testified that he was street commissioner of the defendant city for six years prior to May, 1900, and was well acquainted with the sidewalk in question; that it was in bad condition in April, 1900; that in an effort to repair the walk he drove nails in the stringers to fasten down the loose boards, but the stringers were so rotten they would not hold the nails. The evidence also is that the walk was not repaired between the months of April and November, 1900. For the defendant the evidence tends to show that the surface of the walk appeared to be in good condition, and that the stringers were not all rotten, but were partially decayed, and to a casual ob-

server no defects appeared to exist in the sidewalk. Dr. O'Brien testified for defendant that he lived just across the street from plaintiff in the years 1899 and 1900; that in 1899 plaintiff, in a conversation with him, stated that she had spells with her back, and felt feeble; that she had pains through her body, and could not endure what she had endured at other times; that she had fallen downstairs, and it had injured her very much; that early in the spring of 1900 he had a second conversation with her; that she was carrying a hoe at the time, and he said to her that she ought not to do such hard work, and she replied that if she had the strength she once had she would not mind such work, but her health was not as good as it used to be, and she did not have the same endurance as in former years; that since she had fallen downstairs she did not feel so well; that he concluded she was suffering from rheumatism and female weakness; that he never examined her, and never prescribed for her; that she never consulted him as a physician; that he noticed the plaintiff at her ordinary work about her house until up to the time he removed to St. Louis (November 28, 1900.) He gave it as his opinion that plaintiff's present condition could not have been caused by the fall on the sidewalk, but was caused by the fall on the stairway and excess of urea in her system. Dr. Campbell testified that he was consulted by plaintiff after she fell down the stairway, but not after she fell on the sidewalk, and, in his opinion, her condition was caused by the fall on the stairway, which condition was aggravated by the fall on the sidewalk. Mrs. Freel testified that she met plaintiff after she had fallen down the stairway, and plaintiff was all doubled over, and said she had fallen down a stairway in a kind of twist, and did not believe she would ever get over it; that she got a twist in the fall.

With the motion to set aside the verdict for new trial was filed the affidavit of the city attorney and the affidavits of the newly discovered witnesses. The affidavits of the witnesses are as follows:

"Mrs. Ellen McKendry on her oath states: That she now resides in the city of Edina, Knox county, Missouri, and that she is acquainted with Mrs. Ellen Spaulding, plaintiff in the cause now pending in Knox circuit court wherein the city of Edina is defendant. That she first formed an acquaintance with the said Ellen Spaulding on the 18th day of August, 1893, who was then living in the town of Baring, Mo., at the residence of John Spaulding, who was then living in the city of Edina, and with whom affiant was then living and continued to live till about the 17th day of December, 1898. That during that time the said Ellen Spaulding often visited the house of the said John Spaulding, who was her father-in-law, and the affiant, in conversation with Ellen Spaulding during that time,

was often informed by the said Ellen Spaulding that she was suffering with great and intense pains in her back and limbs, and that said pains in her back and limbs had been continuous for several years prior to that time; and that, owing to the condition of her back, she was often in such a condition as to render her unable to do anything, and was often compelled to take to her bed. And that said Ellen Spaulding often told the affiant that she (Spaulding) for the last several years could not, on the account of the condition of her back and limbs, lift or carry a bucket of water, or even lift the tea kettle off or on the stove. Affiant further says that said Ellen Spaulding was still in that condition, and she so stated that fact to the affiant, at the last conversation she had with affiant about the 15th day of December, 1899; and affiant further says that all the time affiant was living with the family of John Spaulding as aforesaid the health of the said Ellen Spaulding was very delicate, and bad on account of the condition of her back and limbs."

"John Gill, on his oath states: That he is acquainted with Ellen Spaulding, plaintiff in the cause now pending in the circuit court of Knox county, wherein the city of Edina is defendant, and is also acquainted with her husband, Clark Spaulding. That on or about the 15th day of July, 1900, the said Clark Spaulding, who was then working for affiant, informed affiant that his wife, the plaintiff, had that day fallen down the stairway at their residence in the city of Edina, and badly crippled herself; and a few days thereafter—about the 20th day of July, 1900—affiant saw plaintiff, Ellen Spaulding, at her said house in Edina, and she then and there told affiant that she had fallen down her own stairway a few days prior thereto, and badly injured her back and body, and that she was in great pain and misery in her back on account of said fall. And affiant states that he will testify to the foregoing facts on the retrial of said cause should the court grant a new trial therein."

"Katie Maloney, on her oath states: That on or about the 15th day of October, 1900, I had a conversation with Clark Spaulding, the husband of Ellen Spaulding, who is plaintiff in the case now pending in the Knox circuit court, wherein the city of Edina is defendant, in which he stated that his wife, the said Ellen Spaulding, had fallen down the stairs, and was not able to do anything."

The affidavit of Katie Maloney contains only hearsay evidence, and should not have been considered. The same remark applies to that portion of John Gill's affidavit detailing what Clark Spaulding told him about his wife falling downstairs. It seems to us the evidence in respect to the defective condition of the sidewalk and the knowledge of the city officials of that condition greatly preponderates in favor of plaintiff, but as to whether or not the diseased condition of plaintiff was

caused by her fall on the sidewalk or by the previous fall down the stairway there is substantial evidence both ways. The jury, however, resolved that issue in favor of the plaintiff. The trial judge, however, was of the opinion that the verdict was against the weight of the evidence, and assigned that as one of the reasons for setting aside the verdict. It was said in *Kuenzel v. Stevens*, 155 Mo. 280, 56 S. W. 1076, that the power to grant a new trial should be exercised with great care, and that it is only when it very clearly appears that the action of the trial court has not been guided by a wise discretion that an appellate court will interfere. In *Chouquette v. Railway*, 152 Mo. 257, 53 S. W. 897, it was ruled that an appellate court will not interfere with the action of the trial court in setting aside a verdict of a jury unless it satisfactorily appears that its discretion has been arbitrarily and unreasonably exercised. The same ruling was made in *Bemis Bros. Bag Co. v. Ryan Com. Co.*, 74 Mo. App. 627. The general rule is that the trial judge should be satisfied with the verdict of the jury, otherwise he should set it aside and grant a new trial (*The State v. Young*, 119 Mo. 495, 24 S. W. 1038); and, if he is satisfied that the verdict is against the weight of the evidence, he should set it aside (*Iron Mountain Bank v. Armstrong*, 92 Mo. 285, 4 S. W. 720; *Lawson v. Mills*, 130 Mo. 170, 31 S. W. 1051; *Dean v. Fire Ass'n*, 65 Mo. App. 209). When a verdict has been set aside by the trial judge for the reason that, in his opinion, it is against the weight of the evidence, it is only in cases free from doubt that an appellate court will review the discretion of the trial judge. *Carr v. Dawes*, 46 Mo. App. 598; *Reid, Murdock & Co. v. Lloyd & Moorman*, 61 Mo. App. 646; *Mason & Henry v. Onan*, 67 Mo. App. 290; *McCullough v. Ins. Co.*, 113 Mo. 606, 21 S. W. 207. In *Loessing v. Loessing*, 88 Mo. App. 494, it was held that an appeal from the ruling of a trial court granting a new trial presents only questions of law for review, and does not authorize an appellate court to pass on the weight of the evidence, nor to overrule the lower court in the legitimate exercise of the discretion vested in it to award new trials on the ground that the verdict is opposed to the weight of the evidence. Substantially the same ruling was made in *Kansas City Suburban Belt Railway Company v. McElroy*, 161 Mo. 584, 61 S. W. 871.

In respect to the cause of plaintiff's diseased condition, as we have said, the evidence was conflicting. This being so, the exercise of the discretion of the trial court in setting aside the verdict on the ground that it was against the weight of the evidence cannot be reviewed by us. This view makes it unnecessary to discuss the other ground assigned by the court for setting aside the verdict.

The judgment is affirmed.

REYBURN and GOODE, JJ., concur.

MCGEE et al. v. SMITH et al.

(Court of Appeals at St. Louis, Mo. Jan. 19, 1904.)

BONDS FOR COSTS—TITLE OF ACTION—
ESTOPPEL.

1. In an action on a bond for costs in a previous action in which a city was a nominal party, the bond was admissible in evidence, notwithstanding the omission of the city's name in the title given therein, where it clearly appeared that the bond was the one given in the former action.

2. Where parties executed a bond for costs, whereby the principal obligor was enabled to continue his suit and to compel his opponent to incur additional costs, they are estopped to deny that the bond was given in that suit, though the name of a city which was a nominal party was omitted from the title given in the bond.

Appeal from Circuit Court, Monroe County; David H. Hby, Judge.

Action by W. R. McGee and others against James H. Smith and others. From a judgment in favor of defendants, plaintiffs appeal. Reversed.

T. F. Hurd, for appellants. J. H. Whitecotton, for respondents.

Statement.

BLAND, P. J. The suit is to recover on the following cost bond: "James H. Smith, Plaintiff, against W. R. McGee et al., Defendants. In the Circuit Court of Monroe County, Missouri. We, the undersigned residents of Monroe county, Missouri, do hereby acknowledge ourselves bound to pay all the costs which have accrued or may accrue in the above-entitled cause. Witness our signatures this — day of June, 1894. Jas. H. Smith. C. F. Mahan. Wm. H. Johnson. Jas. R. Jackson. Allen Bryan, D. C. Bryan. June 16th, 1894. Approved this date. Chas. A. Oreigh, Clerk." The answer was a general denial and a plea of payment. Plaintiffs proved by the records of the Monroe circuit court that in a case wherein the City of Paris ex rel. James H. Smith was plaintiff, and these plaintiffs were defendants (brought on the official bond of McGee given to the city of Paris for the faithful performance of his duties as the marshal of said city), the other defendants (plaintiffs herein) being sureties on the bond, Smith was required by an order of the court to give security for costs; that, in compliance with said order, Smith filed bond for costs. The suit resulted in a judgment against Smith for the costs, but no judgment was entered against any one as surety for such costs. Evidence was offered showing the amount of costs that had accrued to defendants in the action, both before and after the rendition of the judgment, and that an execution had been issued against Smith for the costs, which had been returned not satisfied. Under date of June 16, 1894, the record contains the following entry: "City of Paris ex rel. James H. Smith, Plaintiff, v. W. R. McGee et al., Defendants. At this day comes

the plaintiff herein by attorney, and files his bond for costs in this cause." The clerk of the court testified that he approved and filed the bond. He was asked in what suit it was filed. The question was objected to on the ground that the record shows in what suit it was filed, and that it (the record) could not be changed by parol evidence. The objection was sustained, to which ruling plaintiffs' counsel then and there objected and excepted. Plaintiffs offered the bond in evidence. The court ruled that it might be admitted as "the paper that was approved and filed by the clerk." The following then took place. By counsel for the plaintiffs: "I wish to ask the witness whether or not this was the bond filed in that cause at that time? A. Yes, sir. That is the bond that was filed in the Smith case vs. McGee on that day, 16th of June, 1894. On cross-examination witness testified as follows: Q. Why did you enter on the record there a different title to the suit than this bond? Why did you enter on the record here, June 16, 1894, City of Paris ex rel. James H. Smith vs. W. R. McGee et al., Defendants? Do you remember why you made that entry in that case, when the bond shows upon its face it was Jas. H. Smith vs. W. R. McGee? A. There was a bond offered in that case of Jas. H. Smith vs. W. R. McGee. Q. Don't you know there was another suit against McGee? A. There was no suit at that time. Q. Either prior to that or subsequent to that? A. Yes, sir; there was subsequent to that; there was none prior to that." The court to whom the cause had been submitted, sitting as a jury, took the case under advisement for a few days, and on April 15, 1902, found the issues for the defendants. A timely motion for new trial was filed, which the court overruled, whereupon plaintiffs appealed to this court.

Opinion.

No instructions were asked or given, and, as there was no dispute but that a part of the costs that had accrued in the case of the City of Paris ex rel. Smith against McGee et al. was unpaid, the only theory upon which the finding of the learned trial judge can be supported is that, in his opinion, the bond read in evidence varied from the one described in the petition, and for that reason was excluded as evidence. It is conclusively shown by the records of the Monroe circuit court that Smith, in the case of the City of Paris ex rel. Smith against McGee et al., was required to file bond for the costs, and that he complied with that order by filing a cost bond that was approved by the circuit clerk, and was thereafter permitted by the court to prosecute his suit to a final termination. It is also shown that at the time the cost bond read in evidence was filed there was no other suit pending in the Monroe circuit court wherein Smith was plaintiff and McGee et al. were defendants, so that it appears beyond a doubt that the bond offered in evidence was the bond which Smith filed in

the case of the City of Paris ex rel. Smith against McGee et al. The bond was prepared by these defendants or their attorney, and was signed by the defendants, and filed by them in the court as security for the costs in the suit brought by Smith on McGee's bond as marshal of the city of Paris. The city of Paris was but a nominal party to the suit, had no interest in it, and was not and could not be made liable for any of the costs. If there had been two suits pending in the Monroe circuit court wherein Smith was a party plaintiff and McGee a party defendant, in both of which an order had been made on plaintiffs to give security for costs, and the bond sued on had been filed after the making of such orders, there would be some question as to which of the two suits the bond was filed in. But there being but the one suit, and but the one order to give security for costs, there can be no doubt that the bond was filed as security for costs in the only suit then pending wherein Smith was a plaintiff and McGee a defendant, to wit, the case of the City of Paris ex rel. Smith against McGee et al. Under this state of the proof the bond should have been admitted as evidence, for there is no material variance between it and the one alleged in the petition to have been filed.

It also seems to us that the defendants, having executed and filed a bond as security for costs in the suit wherein the City of Paris ex rel. Smith was plaintiff and McGee et al. were defendants, on the faith of which bond Smith was enabled to continue the prosecution of his suit and to force the defendants to incur additional costs in the preparation for and in presenting their defense to the suit, they ought, under the evidence in this case, to be estopped to deny the bond offered in evidence was not the bond sued on.

The judgment is reversed, and the cause remanded.

REYBURN and GOODE, JJ., concur.

LONDON GUARANTY & ACCIDENT CO.,
Limited, v. MISSOURI & I. COAL CO.*

(Court of Appeals at St. Louis, Mo. Dec. 15, 1903.)

INSURANCE AGENTS—AUTHORITY—CHANGE
OF RATE.

1. Where an insurance agent's duties extended no farther than to solicit risks and deliver policies, and he had no authority to pass on applications, countersign or issue policies, or to collect accruing premiums, and an employer's liability policy negotiated by him fixed the rate of premium at 65 cents for each \$100 of wages paid by insured, and declared that no provision of the policy should be waived or altered except by the general manager of the company for the United States, such soliciting agent had no authority to change the rate to 40 cents either by parol, or by a letter written on the insurer's stationery and signed by such agent in the name of the insurer's general agent.

*Rehearing denied February 2, 1904.

Appeal from St. Louis Circuit Court; Warwick Hough, Judge.

Action by the London Guaranty & Accident Company, Limited, against the Missouri & Illinois Coal Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Stewart, Cunningham & Elliot, for appellant. Robt. A. Holland, Jr., for respondent.

Statement.

REYBURN, J. This case and the similar case of the same plaintiff against the Scott-Wilson Coal Company were submitted together to the court as a jury. The petition in this case alleged: "On November 20, 1899, defendant made an application in writing to plaintiff for an employer's liability policy to protect defendant against claims growing out of personal injuries sustained by its employees through negligence of defendant, and agreed to pay for said insurance policy at the rate of 65 cents per \$100 of wages expended; that on the same day a policy was issued, pursuant to said application, and delivered to defendant, which policy was to be in force for a period of 12 months from said date, and was so in force; that, at the time said policy was issued, defendant estimated its probable pay roll at \$30,000, and thereupon paid plaintiff \$195, being the premium at the rate of 65 cents per \$100 of wages on an estimated pay roll of \$30,000; that defendant further agreed that, in case its pay roll exceeded said estimated pay roll of \$30,000, it would, at the end of said year, beginning November 20, 1899, and ending November 20, 1900, pay to plaintiff a premium at the rate of 65 cents per \$100 in excess of wages paid over and above said \$30,000; that defendant's pay roll during said year did exceed the sum of \$30,000, and that it amounted to \$100,000; that the excess pay roll over and above the estimated pay roll was \$70,000, upon which no premium whatever has been paid by defendant, and that, at the agreed rate of 65 cents per \$100, said unearned premium would amount to \$455."

The second count of the petition stated: "That at the expiration of the year, to wit, 20th day of November, 1900, plaintiff delivered to defendant a binder, running 10 days from said date, by which plaintiff extended the insurance under said policy for a period of 10 days, and under the same conditions expressed in said policy; that defendant agreed to pay for same at the rate of 65 cents per \$100 of wages paid; that the wages paid by defendant during said 10 days amounted to \$2,777, and the premium due thereon amounted to \$17.05, which amount has never been paid by defendant."

The answer admitted that: "Plaintiff did deliver to defendant on the 24th day of November, 1899, an employer's liability policy, and that, together with said policy and contemporaneously therewith, the plaintiff de-

livered to defendant its agreement in writing (which was filed with the answer), attached to and becoming part of the said policy, by which the plaintiff agreed that the premium rate to be paid by the defendant for said policy should be 40 cents per \$100 of defendant's pay roll during the period of one year covered by the policy; that by agreement the policy was extended for 10 days beyond the year mentioned; that the total compensation due to plaintiff was the sum of \$411.11, of which defendant paid \$195; that there remained due the plaintiff the sum of \$216.11, for which sum, with interest, defendant offered to allow plaintiff to take judgment, and formal offer to that effect was made by defendant, as provided for in section 751, Rev. St. Mo. 1899."

By its reply plaintiff denied that it ever delivered to defendant the additional agreement making the premium 40 cents per \$100 wages, instead of 65 cents, and denied under oath that any such agreement was executed by the plaintiff, or that it was signed by any one having authority to execute such an agreement for the plaintiff.

The testimony consisted, first, of the application for the insurance, addressed to plaintiff, containing the following pertinent portions:

"Dated Nov. 20, 1899.

"Term 12 mons.

"Expiration Nov. 20, 1900.

"Estimated Annual Wages, \$30,000.

"Liability Limits:

"One person, \$5,000.

"One accident, \$10,000.

"Premium, \$195.00.

"The estimated expenditures for wages for the time of this policy is \$30,000. The premium rate is 65 cents for each \$100 of wages.

"Rate 65c.

"[Signed] Missouri & Illinois Coal Co.

"By W. S. Scott, V. P.

"Dated Nov. 20, 1899.

"Broker R. R. W.

"General Agent, F. C. Case."

The policy was introduced, and contained especially the following provisions:

"No condition or provision of this Policy shall be waived or altered by any one unless by written consent of the General Manager of the Company for the United States of America, nor shall notice to any agent nor shall knowledge possessed by any agent, or by any other person be held to effect a waiver or change in this contract or any part of it."

"C. The premium is based on the compensation to employes to be expended by the assured during the period of this policy. If the compensation actually paid exceeds the sum stated in the schedule hereinafter given, the assured shall pay the additional premium earned; if less than the sum stated the Company will return to the assured the unearned premium pro rata; but the Company shall first retain not less than Fifty Dollars (\$50.00),

it being understood and agreed that this sum shall be the minimum earned premium under this policy."

"F. The statements contained in the Schedule hereinafter given are hereby made a part of this contract, which statements the assured makes on the acceptance of this policy and warrants to be true, saving as to matters which are declared to be matters of estimate only."

Here follows a schedule, being a copy of the application above mentioned, which contains the following provision:

"(12) The estimated expenditure for wages for the term of this policy is \$30,000. The premium rate is 65 cents for each \$100 of wages. The minimum premium is \$50.00."

After the introduction of above instruments it was admitted that the pay roll of defendant during the year of the life of the policy was \$100,000, and during the term of the binder \$2,277, the total being \$102,277, and the premium of \$195 had been paid on the pay roll, estimated \$30,000, at rate of 65 cents per \$100. The excess pay roll, therefore, upon which no premium had been paid, was \$72,277. Defendant's vice president and general manager deposed on its behalf that he had conducted the negotiations for the insurance solely with one Moreton, who had delivered the policy, and admitted he knew the application, signed by him, and the policy, both recited the rate to be 65 cents per \$100; and in reading the policy he had observed the limitation upon the authority of agents, and that the application was incorporated in the policy. That he had paid a cash premium of \$195, at rate of 65 cents on the estimated pay roll. That when the policy was delivered, the following letter was delivered to him in connection therewith:

"London Guarantee and Accident Company, Limited, of London, England, United States Branch: Head office, Chicago, Ill. A. W. Masters, General Manager. Frank C. Case, General Agent, 117 North Third St. St. Louis, Mo. R. Reynolds-Moreton, Resident Manager, Telephone, Main 1549. St. Louis, Mo. November 24, 1899.

"Scott-Wilson Coal Co., Missouri and Illinois Coal Co., City—Dear Sirs: It is understood and agreed that the policies issued at your request, bearing dates of November 9th and 20th, in the above company, shall at the expiration of same be taxed only at the rate of forty cents per \$100 of pay roll expended. Yours truly,

"Frank C. Case, General Agent.

"R. Reynolds-Moreton."

This letter was excluded by the court, the objection made thereto being that it bore a date subsequent to that of the policy; that it was not shown who Moreton was, or what authority he or Case had to write such a letter, and, if Case had signed it, that he had any authority so to do; and the court's attention was directed to the clause of the policy prohibiting the waiver or alteration

of any of its conditions or provisions except by written consent of the general manager for the United States, nor should notice to or knowledge of any agent or other person be held to effect a waiver or change in the contract or any part of it. This witness further testified that he knew Case, and he was the general agent of the company, and he had no notice that Moreton's authority was limited otherwise than by the notice in the policy. The deposition of George D. Webb, taken on behalf of plaintiff, was then read in evidence by the defendant, who testified that he was general agent of plaintiff for several states, Missouri included; that Case was appointed by witness as general agent for the city of St. Louis to solicit insurance, receive applications, countersign and deliver policies, collect and remit premiums; that Case had no authority, nor had he, to deponent's knowledge, waived any condition of the policies; that in the regular course of business Case would receive an application for insurance, and transmit it to the office of witness at Chicago, and policies were then issued by deponent's firm and sent to Case for signature of the latter and delivery to the assured; that neither Case nor Moreton had any authority to change any rate mentioned in the policy, nor had they, with knowledge or approval of witness, altered any of its conditions; that arrangements were made with Moreton in the presence of the witness, and his authority was confined to soliciting insurance and delivering policies. This witness further stated that his firm had authority to issue and countersign policies, appoint agents for that purpose, and to collect and remit premiums, but had no authority whatever to waive any of the printed terms of the policy, or to delegate such authority to any agent, and that Moreton derived all his authority from Case. The defendant had interposed objections to much of the testimony of the witness, especially to any special instructions of secret authority of Case, on the ground that defendant had dealt with him in the capacity of a general agent, as he was held out by the plaintiff so to be; also objections to the questions whether Case had ever waived or changed any condition of the written policies, to the knowledge of Webb, and what was the regular channel through which a policy would pass from the time its application was received by Case; also renewing objection to the questions whether Case as general agent, or Moreton, had authority to change the rate mentioned in the policy. This witness further deposed that Moreton was employed as a soliciting agent, and for the sake of dignity was given title of "Resident Manager"; that defendant's policy was prepared in the office of witness; and sent to Case for signature by him as general agent and delivery. On cross-examination, it was elicited that Moreton had been in the employ of plaintiff two years, and witness had received

and approved policies solicited by him, and received premiums thereon. The witness identified the paper adopted for the letter of date November 24, 1899, as one of the letter heads used by Case in his correspondence with witness, and one of letter heads furnished by witness to Case, printed or prepared by the company for Case's use, and also identified Moreton's signature, but denied ever having seen or heard of the above letter. Defendant thereupon requested the court to state in writing the conclusions of fact in form following:

"Now comes the defendant in the above entitled cause and moves the court, sitting as a jury, to state, in writing, the conclusions of facts found by it separately from the conclusions of law, in conformity with section 695, Rev. St. of Mo. 1899.

"And in conformity with the evidence adduced, the defendant moves the court to make the following findings of fact separately:

"(1) That W. S. Scott is a credible witness, and stands unimpeached in the case.

"(2) That the plaintiff held out to the public that R. Reynolds-Moreton was resident manager of the business of the plaintiff in the city of St. Louis, Mo.

"(3) That R. Reynolds-Moreton had authority from the plaintiff to solicit of the defendant the purchase or acceptance of the accident insurance.

"(4) That R. Reynolds-Moreton had authority from the plaintiff to negotiate with defendant for accident insurance in the plaintiff company, and to state the rate of premium which would be charged.

"(5) That R. Reynolds-Moreton had authority to deliver a policy of insurance of the plaintiff company to the defendant.

"(6) That R. Reynolds-Moreton had apparent authority given him by the plaintiff to manage the business of the plaintiff company in St. Louis.

"(7) That R. Reynolds-Moreton had apparent authority to make a contract of insurance on behalf of the plaintiff with the defendant.

"(8) That there was no evidence at the trial that the plaintiff company accepted the defendant's application, if such application was made, except through R. Reynolds-Moreton as its agent.

"(9) That there was no evidence at the trial that the plaintiff accepted the defendant's application at any other time than on the 24th day of November, 1899.

"(10) That the plaintiff never delivered the policy of insurance sued upon in this case to the defendant, otherwise than through R. Reynolds-Moreton as its agent, or otherwise by his act.

"(11) That the plaintiff never delivered the policy of insurance sued on to the defendant, except with the memorandum attached, dated November 24, 1899, excluded from the evidence by the court.

"(12) That the policy sued upon contained terms and conditions not referred to or mentioned in the application.

"(13) That the defendant never accepted the policy sued on in any other form, or under any other conditions, than as the same was delivered to it by R. Reynolds-Moreton.

"(14) That the defendant never accepted the policy sued on, except with the memorandum of November 24, 1899, attached.

"(15) That R. Reynolds-Moreton delivered to the defendant, contemporaneously with, and as a part of the same transaction, with the policy, a memorandum in writing, dated November 24, 1899, addressed to the defendant, signed by R. Reynolds-Moreton for F. C. Case, general agent of the plaintiff company, in the following form: "London Guarantee and Accident Company, Limited, of London, England. United States Branch, Head Office, Chicago, Ill. A. W. Masters, General Manager. Frank Case, General Agent, 117 North Third Street, St. Louis, Mo. R. Reynolds-Moreton, Resident Manager. Telephone Main 1549.

"St. Louis, Mo., November 24, 1899.

"Scott & Wilson Coal Co., Missouri & Illinois Coal Co., City—Dear Sirs: It is understood and agreed that policies issued at your request, bearing dates of November 9th and 20th, in the above company, shall at expiration of same be taxable only at rate of 40 cents per \$100 of pay roll expended. Yours truly,

"Frank C. Case, General Agent,

"R. Reynolds-Moreton."

"(16) That the plaintiff company employed Frank C. Case as its general agent for the conduct of its business in St. Louis.

"(17) That Frank C. Case had apparent authority to manage the business of the plaintiff company in St. Louis.

"(18) That there is no evidence in this case, that Frank C. Case, as general agent of the plaintiff company, ever delivered the policy of insurance sued upon to the defendant, except through R. Reynolds-Moreton as his representative, or under any other conditions than with the memorandum of November 24, 1899, attached thereto.

"And the defendant moves the court to make the following declarations of law, among its conclusions of law in this case:

"The court declares the law to be that there is no contract between persons unless their assent is given to the same thing; that an application for insurance is not binding in respect to its terms upon the applicant unless accepted by the company; that an acceptance of an application for insurance by an insurance company is not binding upon the applicant unless such acceptance is communicated to the applicant; that, if all the terms of a policy of insurance are not included in the form of application, no contract of insurance can exist thereon until the policy has been accepted by the applicant; that no contract is binding until the

same has been delivered; that an acceptance of a policy of insurance upon a condition expressed by the receiver is not in law an acceptance of a policy of insurance unconditionally; that the physical possession of a policy does not establish its delivery to the person holding the same if the evidence discloses that, when the same was received by him, a second supplemental contract, in terms purporting to modify the policy, was received by him at the same time and as part of the same transaction."

"And the defendant moves the court to make the following declaration of law:

"That an insurance company is bound by the acts of any person, whom it has made its agent, within the scope of the authority which he is held out by the company to have; that when an insurance company holds out to the public that a certain person is "resident manager" of the company in a certain city, the public has a right to presume that such person has full and complete authority to conduct the business of the company, whatsoever that may be in that city; that an agent of an insurance company who has authority to solicit insurance, and to deliver policies, has presumed authority, which the public has a right to rely upon, to waive the terms of the policy, or to change or modify the terms of the proposed contract; that the actual authority given an agent of an insurance company is immaterial, and not binding upon a person dealing with the company, unless notice of the limitation of authority is given, so long as the agent acts within the scope of the apparent authority with which he is clothed."

"And the defendant moves the court to make the following declaration of law:

"A condition contained in an insurance policy to the effect that no person can waive or alter its provisions, except the general agent of the company for the United States, is void, if it appears that the insurance was solicited by another person as agent of the company, and the policy was intrusted to him for delivery, and that person undertook to and did waive any condition thereof."

"And the defendant moves the court to make the following declaration of law:

"Upon the entire evidence adduced in this case, the court declares that the plaintiff is not entitled to recover a sum greater than two hundred and sixteen and $\frac{10}{100}$ dollars, with interest at 6 per cent. per annum from the 11th day of April, 1901."

This motion was overruled, and the court rendered judgment for plaintiff for the amount claimed, filing the following as its finding of law and fact:

"(1) The court finds that defendant in this suit executed and delivered to the plaintiff an application for employer's liability insurance, said application being dated November 20, 1899; that the said application contained a statement that the estimated pay roll of the

defendant was \$30,000, and that the premium rate was to be 65 cents for each \$100 of wages.

"(2) The court further finds that in November, 1899, plaintiff delivered to defendant a policy of employer's liability insurance, and that said policy was in force from November 20, 1899, to November 20, 1900.

"(3) The court further finds that said policy provides that the premium to be paid by defendant for said insurance was at the rate of 65 cents per \$100 of wages expended by defendant to its employes during said year.

"(4) And the court further finds that the total pay roll of defendant during said year amounted to \$100,000.

"(5) The court further finds that, according to the terms of said policy, the pay roll of defendant during said period was estimated at \$30,000, and that the defendant paid plaintiff, within a few months after the said policy was issued, the sum of \$195, being a premium at the rate of 65 cents per \$100 of said estimated pay roll of \$30,000.

"(6) The court finds that the excess pay roll of defendant during said year, that is, the pay roll over and above the said estimated pay roll of \$30,000, was \$70,000; that the premium due on said excess pay roll was \$455; that said amount was due on the 20th day of November, 1900; and that plaintiff is entitled to said amount, with interest to the date of judgment.

"(7) The court further finds that on or about the 20th day of November, 1900, the plaintiff delivered to defendant a binder, by which the said employer's liability insurance was extended from the 20th day of November, 1900, to the 30th day of November, 1900, and by the terms of said binder the defendant was to pay the plaintiff a premium at the rate of 65 cents per \$100 of wages expended by defendant to its employes during said 10 days; that said pay roll of defendant during said period amounted to \$2,777; that plaintiff is entitled to recover from defendant, for premium on said binder during said period, \$18.05, with interest from November 30, 1900.

"(8) The court finds that the said clause of said policy which fixes the premium at 65 cents per \$100 of wages was never waived or altered by the parties.

"And the court declares the law to be that on the foregoing facts the plaintiff is entitled to recover from the defendant the sum of \$537.10."

Opinion.

From the preceding recapitulation of the facts, it is obvious that the sole question in issue was the premium rate to be paid. An eminent author, in his treatise upon the law of fire insurance, which is recognized as a leading authority upon the subject, enunciates the rule that, in order to create a valid contract of insurance, the following elements must coexist, namely, the subject-matter to which the policy is to attach, the risk insured

against, the amount of indemnity definitely fixed, the duration of the risk, and the consideration to be paid for the insurance agreed upon. 1 Wood, Fire Ins. (2d Ed.) § 5. This court, in *Worth v. Ins. Co.*, 64 Mo. App. 583, approved and adopted the foregoing rule. The appellant, with plausible, if not convincing, reasoning, submits that the respondent has failed to establish a contract of insurance embracing the concurrence of these essential conditions; but it is content to waive such position, if tenable, and confine its reliance for reversal to the proposition that the rate of premium was established at 40 cents per \$100 of the pay roll. The ultimate question, sharply defined and controlling this controversy, is whether the subagent, Moreton, had authority to modify the terms of the proposed contract by a reduction in the rate of the insurance premium. As a general rule, such indemnifying agreement is perfected and becomes valid upon the acceptance by the company of the application by the insured, and the execution of the policy embodying the contract. *Keim v. Ins. Co.*, 42 Mo. 38, 97 Am. Dec. 291. The policy issued to appellant by respondent conformed to the application, and by its provisions the latter constituted a part of the policy, and both were based upon the higher premium rate at which the cash installment was computed, and paid by appellant, without protest or comment. If, therefore, the contract was not consummated at the rate fixed, alike by the application and the policy issued thereunder, the original proposition was impliedly abandoned or declined by respondent, and a counter and new proposition, differing from the contract first contemplated by the parties in the material respect of a substantial reduction of the premium rate, was submitted to appellant and accepted by it, and the question is resolved into the inquiry whether Moreton either was deputized with the express power, or was held out by respondent to have the authority, to negotiate, consummate, and substitute such new agreement in lieu of the first contract. There is no room to infer from the evidence that any such right to so obligate respondent existed, unless by implication resulting from the conduct of respondent. No such authority could justly be deduced from the mere knowledge by Webb that Moreton was acting as a subagent under Case, soliciting risks for respondent, or that risks, accepted by the respondent through Webb, had been secured by Moreton. No issue is presented affecting the range of the authority of Case, express or implied, for there was no proof that Moreton had any authority to sign Case's name to the letter, and the letter is entitled to no greater weight or consideration than if it bore Moreton's signature alone. The ultimate test is not whether Moreton had power to modify the terms or waive performance of conditions of a pre-existing contract, but the issue is whether Moreton was authorized to set aside and ignore the premium rate named in appellant's applica-

tion, formally accepted by and carried into the policy delivered to appellant, and substitute a much lower rate. If Moreton's agency was sufficient to warrant a departure from the provisions of the policy by a reduction of the premium rate, then his power could not be denied to vary the terms of the contract in any other material direction, and not merely modify a single provision, but deviate therefrom as far as he chose, and in effect obligate the plaintiff to any form of liability he saw fit to impose. It may be conceded, as appellant contends, that the courts of this state have construed the authority of agents of foreign insurance corporations quite broadly, and even to the length of transmitting a greater measure of power than possessed by agents of companies organized in this state. *Schmidt v. Ins. Co.*, 2 Mo. App. 339; *Franklin v. Ins. Co.*, 42 Mo. 456; *Burdick v. Ins. Co.*, 77 Mo. App. 629. Nor has been disregarded the full extent to which the scope of the agency of general agents of insurance companies has been expansively interpreted by the courts of this state in the decisions cited by appellant, and other cases that might be invoked. Amongst the latest additional expressions of the appellate courts, the cases of *Ross-Langford v. Ins. Co.*, 97 Mo. App. 79, 71 S. W. 720, and *Thompson v. Ins. Co.*, 169 Mo. 12, 68 S. W. 889, may be adverted to, in both of which, after elaborate discussion and review of the authorities, it was ruled that insurance corporations, like individuals, may, by parol or in writing, modify or enlarge the powers of their agents, or by their conduct and course of business dealings estop themselves from denying the power of such agents to waive forfeitures, proofs, and the like, notwithstanding limitations of authority in the appointments, and, in general, that the acts of the insurance agent will bind his principal within the bounds of the apparent authority which the company appears to have committed to him. But these cases relate to existing contracts, the original validity of which were not impeached or assailed, and an examination of this line of authorities will also reveal that the agents whose conduct was relied upon as waiving the requirements of the policies are usually policy-writing or general agents of the companies affected. We have found no decision, nor have we been referred to any case in this state or elsewhere, holding that an agent of such circumscribed powers may alter or waive conditions of such a contract. The person whose action is here involved is not declared to have either the title or powers of a policy-writing or general agent; the record discloses that his duties extended no farther than to solicit risks and deliver policies, and that he manifestly had no right to pass upon applications, countersign or issue policies, nor even to collect the accruing premiums. Given the greatest weight deserved, the title in the letter head was but a circumstance to be considered in connection with the other evidence, and not a fact conclusive of unlimited authority. The power of

a principal, corporate or individual, to restrict the authority of an agent, and to define the limits of his agency, has been recognized and upheld by the courts of this state in *Lama v. Ins. Co.*, 51 Mo. App. 447; and, in what is probably the most recent case upon the subject from the Supreme Court, the opinion expressly disavows that the rule alluded to above, and now firmly established in this state as well as other states, impairs the power of the principal to limit the authority of his agent, and expressly disclaims that it tends to bind the principal for the unauthorized acts of the agent in excess of the power conferred, but declares, on the contrary, that it holds the principal liable only so far as he has made himself responsible, but measures the responsibility of the principal for the acts of the agent, not alone by the terms of the original power, but also by subsequent express authority, or powers implied from the conduct of the principal or of his agent, with his knowledge, and from their course of business with third persons, which estop the principal from repudiating the right of the agent to perform the particular act relied on, although the power to take such action was not only not conferred, but expressly denied, by the terms of the original agency. *Thompson v. Ins. Co.*, 169 Mo. 12, 68 S. W. 889.

The eighth finding of facts by the trial court is to the effect that the clause of the policy fixing the premium rate at 65 cents per \$100 of wages was never waived or altered by the parties. This finding, as well as those anterior, import that the court found against the theory that Moreton had been held out by the insurance company as an agent with power to do more than solicit insurance and deliver the policies therefor. This conclusion finds abundant support in the evidence—although the testimony might be deemed conflicting—and will not be disturbed.

The judgment is affirmed.

BLAND, P. J., and GOODE, J., concur.

STATE v. HOTTLE.

(Court of Appeals at St. Louis, Mo. Jan. 19, 1904.)

CRIMINAL LAW—VENUE—PROOF.

1. Where, in a prosecution of a druggist for permitting the drinking of intoxicating liquors in his place of business, the evidence showed that defendant was a registered pharmacist of C. county, that he resided in W., and various witnesses living in W. testified that they had drunk intoxicating liquors in defendant's drug store, but there was no evidence that the town of W., in which defendant's drug store was located, was in C. county, the evidence was insufficient to establish the venue in such county.

Appeal from Circuit Court, Clark County; E. R. McKee, Judge.

William Hottle was convicted of permitting the drinking of intoxicating liquors in his drug store, and he appeals. Reversed.

J. A. Whiteside, for appellant. W. T. Rutherford, for the State.

BLAND, P. J. The defendant, a proprietor of a drug store, was convicted of a violation of section 8051, Rev. St. 1899, for permitting the drinking of intoxicating liquors in his place of business. From this conviction he appealed. It is contended by appellant that there was no proof of the venue. The evidence showed that Dr. J. W. Peckstein was a registered pharmacist in Clark county; that he resided in Wyaconda, and had his office in the same building in which the defendant kept a drug store; and that he was the owner of the building. Witness Spear testified that he lived in Wyaconda, and that he had drunk beer in the back room of defendant's drug store. On this evidence it reasonably appears that defendant's drug store was kept in Wyaconda; but it nowhere appears that Wyaconda, if a town or village, is in Clark county or in this state. Such evidence is insufficient to establish the venue. *State v. King*, 111 Mo. 576, 20 S. W. 299, and cases cited.

The judgment is reversed, and the cause remanded.

REYBURN and GOODE, JJ., concur.

FARRELL v. ST. LOUIS TRANSIT CO.*
(Court of Appeals at St. Louis, Mo. Dec. 1, 1903.)

NEW TRIALS—DISCRETION OF TRIAL COURT—MALICIOUS PROSECUTION—DAMAGES—EXCESSIVE VERDICTS.

1. The granting of new trials rests peculiarly within the sound discretion of the trial court.

2. In circuit courts is vested the authority and the duty to supervise verdicts, and to grant new trials if the verdict is improper or not sustained by the evidence.

3. In an action for malicious prosecution, although plaintiff's evidence established his high character, and unjust denouncement by defendant's servants upon the charge of breach of the peace, and their detention of him prior to arrest, his release on bail, and discharge after trial, coupled with unprovoked and unjustified insult, so that plaintiff was entitled to liberal redress and punitive damages, a verdict for \$1,500 actual damages and \$1,000 exemplary damages was excessive.

Appeal from St. Louis Circuit Court; Jesse A. McDonald, Judge.

Action by James Farrell against the St. Louis Transit Company. There was verdict for plaintiff, and from an order granting defendant a new trial plaintiff appeals. Affirmed.

Paxson & Clark, for appellant. Boyle, Priest & Lehman, for respondent.

REYBURN, J. Plaintiff, on the evening of March 14, 1902, between 6 and 7 o'clock, was a passenger on a car of defendant on his

way homeward. At a point just beyond Lee avenue, on Prairie avenue, the conductor gave an order that the car be vacated by all passengers, which they complied with, and walked forward to the first of several other cars ahead, where they were informed by the motorman that he was behind time, and would not go on, and the several cars then backed down to the car sheds. With about 15 other passengers emptied out of these cars, plaintiff proceeded to await the arrival of another car, being still about three-quarters of a mile from his destination. The first car to arrive, in response to a signal, slackened speed, but without stopping, and some one of the waiting passengers threw a handful of pebbles against the windows; and as another car arrived five minutes later, some man in the crowd, a stranger to plaintiff, saying, "This car will stop," picked up a rock, and as the car was about to pass as the preceding one had, threw it through a car window, whereupon the motorman stopped the car, and the group of passengers got on board, and as plaintiff was about to enter the motorman and conductor accused him of being the man who threw the stone. He denied the charge, and pointed out a man going down the street as the responsible party. Ultimately they permitted him to get on the car, stating they would have him arrested at Newstead avenue, where they sent for a policeman, and put him under arrest; and the officer, accompanied by one or more of defendant's employees, took him to the Grand avenue police station, where he was searched, a charge of disturbing the peace lodged against him, and after detention there less than an hour he gave bond and was released. On the 20th of March, 1902, plaintiff was arraigned, tried, and found not guilty, in the Second District Police Court of the city of St. Louis, of the charge of disturbing the peace.

Stripped of matters in aggravation, consisting of grossly abusive conduct towards him on part of defendant's servants while plaintiff was detained by them pending the arrival of the officer, and somewhat abridged, the foregoing narrative presents a fair statement of the transaction from which this action for damages for malicious prosecution emanated, and the plaintiff's narrative of which was fully established in all important details by the corroborative testimony of disinterested witnesses. Defendant offered no testimony, and a jury returned a verdict in favor of plaintiff for actual damages in the sum of \$1,500 and exemplary damages in the amount of \$1,000. Defendant's motion for new trial was sustained, the court assigning as reasons the admission of irrelevant and immaterial testimony, the giving of improper instructions, and the excessive verdict.

The rule of law in Missouri has been announced with wearisome repetition that the function or duty of granting a new trial rests peculiarly and specially within the

*Rehearing denied February 2, 1904.

¶ 1. See New Trial, vol. 27, Cent. Dig. § 8.

sound discretion of the trial court, and, unless it is manifest and apparent that its judicial discretion has been abused, or that injustice has been done, its ruling in that regard will not be disturbed by an appellate court. *Kuenzel v. Stevens*, 155 Mo. 280, 56 S. W. 1076; *Chouquette v. Railroad*, 152 Mo. 257, 53 S. W. 897; *Lee v. Geo. Knapp & Co.*, 137 Mo. 885, 38 S. W. 1107; *Parker v. Cassingham*, 130 Mo. 348, 32 S. W. 487; *Bank v. Wood*, 124 Mo. 72, 27 S. W. 554; *Hewitt v. Steele*, 118 Mo. 463, 24 S. W. 440; *McCullough v. Ins. Co.*, 118 Mo. 606, 21 S. W. 207; *Pice v. Evans*, 49 Mo. 396; *Beld v. Ins. Co.*, 58 Mo. 425; *Woodfolk v. Tate*, 25 Mo. 597; *Mason v. Onan*, 67 Mo. App. 290; *Powell v. Railway*, 59 Mo. App. 335; *Ensor v. Smith*, 57 Mo. App. 584; *Langdon v. Kelly*, 51 Mo. App. 572. Circuit courts are vested not only with the authority, but are charged with the duty, to supervise the verdicts of juries, and to grant new trials, if, in their judgment, the verdict is improper, or not sustained by the evidence. *Bank v. Wood and Beld v. Ins. Co.*, *supra*. The testimony offered strongly tended to establish that plaintiff, a peaceable, lawabiding citizen of high character, without cause for suspicion, was unjustly denounced, and subsequently prosecuted, by defendant's servants, upon the charge of disturbing the peace, and his detention by them prior to arrest by the officer was attended by rough, insulting, and offensive conduct on their part toward him wholly unprovoked, and which defendant made no effort to palliate, justify, or explain, and appears to have continued the perpetrators in its employ at the time of the trial of this cause. Assuming the verity of the evidence on behalf of plaintiff—which, as stated, defendant did not seek to deny—the plaintiff was entitled to liberal and full redress for the wrong done him, and the testimony authorized punitive damages as well as actual damages; but we cannot escape the conclusion that the jury permitted the sympathy aroused for plaintiff to outweigh its judgment in the return of a verdict for \$1,500 actual damages and \$1,000 exemplary damages. This court has quite recently had occasion to review actions for malicious prosecution. In the one, a verdict of \$2,000, equally divided by the jury as punitive and actual damages, was condemned as excessive and appearing vindictive, and \$1,000 adjudged full compensation to plaintiff for the actual damages suffered by him and sufficient punishment of defendant for the wrong committed. *Ruth v. Transit Co.* (Mo. App.) 71, S. W. 1055. In the other case a total finding of \$2,000 was made, of which \$375 was assessed as the punitive portion. This court required a remittitur of the excess of \$950 over \$500 upon the finding on the second count, stating that the latter sum would be adequate compensation for all the injury sustained. While the case under consideration appears to be distinguished from the above cases by circum-

stances of weightier aggravation inflicting more serious wrong on the plaintiff, yet we cannot dissent from the opinion of the circuit court that the verdict was excessive, and the circuit court performed its duty in setting it aside.

Judgment affirmed. All concur.

H. W. CROOKER SHOE CO. v. FRY.

(Court of Appeals at St. Louis, Mo. Jan. 19, 1904.)

JUSTICES OF THE PEACE—JUDGMENT BY DEFAULT—VACATION—INSUFFICIENCY OF SERVICE—COLLATERAL ATTACK.

1. Since Rev. St. 1899, § 3969, prescribing when and in what manner a justice of the peace may set aside a default, only authorizes the judgment to be set aside at the instance of defendant or his agent, a justice is without power to set aside a judgment at the instance of plaintiff.

2. Where a justice of the peace renders judgment by default on service within, and less than, the period provided by law, the judgment is valid, and not subject to attack collaterally because of the insufficiency of service.

Appeal from Louisiana Court of Common Pleas; D. H. Eby, Judge.

Action by the H. W. Crooker Shoe Company against John C. Fry in justice court. From a judgment for plaintiff in the common pleas, rendered on a trial de novo on appeal from a judgment by default, defendant appeals. Reversed.

Ball & Sparrow, for appellant.

REYBURN, J. On April 10, 1903, plaintiff (respondent herein) brought an action upon an account against defendant (appellant herein) before a justice of the peace in Pike county, and recovered judgment by default, from which an appeal was taken to the Louisiana court of common pleas. Upon trial anew, appellant admitted the correctness of the account sued on, but interposed as his defense the plea of former adjudication, and substantiated it by establishing that on March 31, 1903, respondent instituted an action against him before the same magistrate on the same account, and the summons issued and service was had on that date, made returnable April 9, 1903, when the justice rendered judgment by default for the amount asked. On April 10th the justice, at request of plaintiff, set aside this judgment as invalid for want of proper service, and the respondent instituted the second action above detailed. From judgment for plaintiff in the court of common pleas, defendant has appealed.

The justice's court, being of statutory origin, was circumscribed and confined within the bounds of the provisions of the statute, and could not transcend the powers and authority thereby conferred. Section 3969, Rev. St. 1899, prescribes when and in what

* 1. See *Justices of the Peace*, vol. 31, Cent. Dig. § 411.

manner a justice shall have power to set aside a judgment by default. The action of the justice in setting aside the first judgment was not empowered by the statute, and was without jurisdiction, and the judgment remained in full force. The statute authorized this judgment to be set aside by the justice at instance of defendant or his agent, but not otherwise. In *Leonard v. Sparks*, 117 Mo. 103, 22 S. W. 899, 38 Am. St. Rep. 646, the Supreme Court, in an exhaustive opinion arraying the conflicting authorities in this state and other jurisdictions, considered the effect of a judgment of a justice rendered upon service within and less than the period provided by law, and held such judgment valid, and not subject to attack collaterally because of the insufficiency of the service.

It follows, therefore, that the judgment of the trial court was erroneous, and it is reversed.

BLAND, P. J., and GOODE, J., concur.

CITY OF LOUISIANA v. McALLISTER.

(Court of Appeals at St. Louis, Mo. Jan. 19, 1904.)

MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENT—ASSESSMENT AS OWNER—PART OWNERSHIP—LIABILITY—ESTOPPEL.

1. One owning a fractional interest in property abutting on a street was liable for his proportion of an improvement, though notice was served on him as sole owner, and no notice served on the other owners.

2. Where one in possession of real estate in a city for many years paid taxes on it assessed to him, and after notice to him, as sole owner, of an ordinance requiring a street improvement, appeared before the city council and sought to be relieved for the time being, he was estopped to set up, in an action by the city for the cost of the improvement, the defense that he was not the sole owner.

Appeal from Louisiana Court of Common Pleas; D. H. Eby, Judge.

In an action by the city of Louisiana against J. D. McAllister. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. W. Reynolds, for respondent. Pearson & Pearson, for appellant.

REYBURN, J. This is an action by the city of Louisiana to recover the amount paid by it for construction of a granitoid sidewalk in front of a lot whereon is erected a business house, and also a dwelling, described as the east 60 feet of lot No. 588 in block numbered 74 in the original town of Louisiana. In August, 1900, the city council of plaintiff enacted an ordinance requiring the owners of land adjoining this and other lots to construct new pavements; and, in compliance with the statutory requirement, it caused notice to be served on such owners. Defendant had been in possession of the above property for many years, occupying

the dwelling and in charge of the store building. During that time he had made the statutory returns for assessment purposes, verified by his affidavit, the property had been assessed to him, and he had paid the taxes thereon; and accordingly notice concerning the sidewalk in front of this property was served upon him as its presumed owner. After such service of notice he appeared before the city council, and asked to be relieved of putting down the walk at that time, which was refused, but he remained silent regarding the true ownership of the lot. The council then passed further ordinances for letting the contract for the reconstruction, and the successful contractor performed the work, and was paid therefor by plaintiff. In the defense of defendant to the action of plaintiff upon the tax bill, his answer averred that he was an owner of only an undivided one-fourth interest; and the reply reiterated that, if not sole owner, he was owner of such undivided interest. The court found in favor of plaintiff, but adjudged that, as owner of one-fourth interest, defendant should pay but the like proportion of the cost of reconstruction, and rendered a judgment accordingly, from which he has appealed.

The plaintiff operates under a special charter, and the work herein was performed under sections 6261, 6262, Rev. St. 1899; and no special tax bill, which by statutory enactment creates a presumptive case, was issued. The industry of counsel, as well as the investigation of the court, have failed to unearth any direct authority upon the defense herein interposed; and especially the decisions of the appellate courts of this state seem devoid of any such question. The proceedings are confessedly regular, so far as defendant is concerned, except that he was treated as sole owner, while in truth he was possessed of an undivided fractional interest; but, to the extent of his ownership, his share of the lot was benefited by the reconstruction, and no good reason has been suggested why he should be heard to complain that his co-owners were not notified of the contemplated improvement, or that the proceedings were such an entirety that, being void and ineffectual as to those owners not receiving statutory notice, they should be held invalid as to him. This general doctrine has obtained recognition in analogous proceedings. *Elliott on Roads* (2d Ed.) § 318, intimates that "in such cases [i. e., failure to give notice to some of the property owners] the better opinion is that the proceeding is void only as to those who have not been notified, but valid as to those who had notice." That a part owner may pay a special tax bill against the realty owned in common, and maintain an action for contribution against his co-owners, has been expressly held by this court. *Granite Co. v. Taylor*, 64 Mo. App. 37.

Again, under the facts peculiar to this

case, the defendant might have been well held estopped from setting up the defense of part ownership of the lot affected. His course of conduct, not only by remaining mute before the city council regarding the divided ownership, but in the returns made by him to the assessor, the permitting the property to be assessed to him as such owner, and payment of taxes thereon as such, though the latter were suffered without any such intent or purpose on his part, were all calculated to mislead and misinform plaintiff as to the title of the realty.

The judgment of the court threw on defendant no more than his proportion of the cost of the reconstruction, and is affirmed.

BLAND, P. J., and GOODE, J., concur.

SECRIST v. EUBANK et al.

(Court of Appeals at St. Louis, Mo. Jan. 19, 1904.)

NEW TRIAL—MOTION—STATEMENT OF REASONS—WEIGHT OF EVIDENCE—WITNESSES—HUSBAND AND WIFE—OBJECTION—WAIVER.

1. Where an order sustaining a motion for a new trial contains no statement of the reason or ground on which the circuit court sustained it, as required by Rev. St. 1899, § 801, the appellate court cannot overrule the circuit court's decision unless every assignment in the motion was without merit.

2. An order granting a new trial on the ground that the verdict was against the weight of evidence will not be interfered with on appeal if there is substantial evidence against the verdict.

3. Where statements by a husband as to his ownership of the property in controversy were admitted without objection in an action in which his wife filed an interpleader, they were entitled to consideration, though they might have formed the proper subject for exceptions.

Appeal from Circuit Court, Shelby County; N. M. Shelton, Judge.

Action by John W. Secrist against Nelson Eubank, in which Fannie Eubank files a petition as interpleader. From an order setting aside a verdict in favor of the interpleader and granting a new trial, she appeals. Affirmed.

Enoch O'Bryen, for appellant. J. D. Dale and G. W. Humphrey, for respondent.

GOODE, J. The interpleader, Mrs. Fannie Eubank, appealed from an order of the circuit court setting aside a verdict in her favor and granting a new trial. The litigation is over a mare attached at the suit of the plaintiff as the property of the defendant Nelson Eubank, whose wife the interpleader is. She filed her verified petition or claim for the mare after the levy of the attachment, and a trial of her right to the property ensued, in which she prevailed. A motion for new trial was made by the plaintiff and sustained. It assigned six reasons why a new trial should be granted, among which was one that the verdict was against the evidence. It appears

to be taken for granted by appellant's counsel that the new trial was granted because no proof was made that the mare had been seized under the attachment writ, or withheld from appellant's possession, and his argument aims to convince us that the court erred in so holding. We would scarcely lay much stress on the omission to introduce the constable's return of the writ showing a levy on the mare, for the case was tried by both sides on the assumption that the animal had been levied on and taken, and, besides, there was some testimony tending to prove the fact. The difficulty with the interpleader's appeal is that the order sustaining the motion for new trial contains no statement of the reason or ground on which the circuit court sustained it, as the statutes provide it should. Rev. St. 1899, § 801. We are therefore powerless to overrule that court's decision unless every assignment in the motion was without merit. But as to the verdict being contrary to the evidence or the weight of the evidence, it was the peculiar function of the trial court to decide, and we must defer to its opinion, if there was any substantial evidence against the interpleader's claim. State ex rel. v. Todd, 92 Mo. App. 1. There was such evidence, principally in the form of statements made by her husband, tending to prove he owned the mare. Likely the testimony as to those statements was incompetent against the interpleader if its admission had been opposed; but it was not, and, having been admitted, was entitled to consideration. The court below had a discretion to order a new trial on the ground that the verdict was against the weight of the evidence, and, as that ground was assigned in the motion, we must approve the ruling and remand the case to be retried.

BLAND, P. J., and REYBURN, J., concur.

STATE ex rel. MCKINNEY et al. v. PULLIAM et al.*

(Court of Appeals at St. Louis, Mo. Jan. 19, 1904.)

APPEAL—BILL OF EXCEPTIONS.

1. To authorize review on appeal of a ruling on a motion, there must be an exception to the ruling, preserved by a bill of exceptions.

Error to Circuit Court, Ripley County; J. L. Fort, Judge.

Certiorari on the relation of J. J. McKinney and others against John A. Pulliam and others, judges of the county court. Judgment was adverse to defendants, and they bring error. Affirmed.

T. F. Lane and Alfred Perkins, for plaintiffs in error. J. M. Etkinson, for defendants in error.

GOODE, J. This cause was brought here by a writ of error to the circuit court of

*Rehearing denied February 2, 1904.

Ripley. A dramshop license was granted by the county court of said county to C. E. Smith. Thereupon the relators sued out a writ of certiorari in the circuit court, directing the defendants, who are the judges of the county court, to send up the record of the proceedings relating to the license. The defendants made return to the writ of certiorari by filing in the circuit court a complete transcript of the proceedings in the county court. The relators subsequently moved the circuit court to quash the return, assigning in support of the motion lack of authority in the county court to grant the license at a special term, as was done; further, that the petition for license was inadequate, in failing to specifically describe the place where the dramshop was to be kept, and that it designated the town of Naylor as the place, instead of Thomas township, which was designated in the license. This motion was sustained, and the proceedings in the county court and the license itself quashed. Motions for new trial and in arrest were filed, but no bill of exceptions was taken. This omission precludes us from reviewing the action of the circuit court on the motion. An exception to a court's ruling on a motion, and a bill to preserve the exception, are prerequisites to the consideration by an appellate court of an assignment that error was committed in disposing of the motion. *Monroe City Bank v. Finks*, 40 Mo. App. 367; *Carver v. Swan*, 52 Mo. App. 647; *St. Louis v. Brooks*, 107 Mo. 390, 18 S. W. 22; *Finkelsburg*, App. Prac. 67.

Judgment affirmed.

BLAND, P. J., and REYBURN, J., concur.

JORDAN et al. v. VAUGHN.

(Court of Appeals at St. Louis, Mo. Jan. 19, 1904.)

COSTS—LOST BOND—REINSTATEMENT—MOTION—JUDGMENT.

1. Rev. St. 1899, § 4560, provides that when any document or paper filed or being in any court of record or justice's court shall have been lost, any person interested, or his agent or attorney, may make out a statement in writing, verified by affidavit, setting out as near as may be the full contents of the lost paper, and file the same in the clerk's office. *Held*, that where a lost bond for costs had been filed, as required by said section, the court might enter judgment thereon, and the parties supplying it need not proceed by notice of four weeks, as required by section 4561 in the case of certain lost documents there enumerated, not including the bond for costs.

2. Motion for judgment on such reinstated bond was not an action on a lost instrument, within the meaning of sections 642 and 643, permitting actions on "any instrument," and proceedings thereon need not be under those sections.

3. On dismissal of action for failure to prosecute it the court might, on motion of the defendant, enter judgment against the sureties on the bond for costs.

Appeal from Circuit Court, Monroe County; D. H. Eby, Judge.

Action by James F. Yowell against B. F. Vaughn. On motion of the defendant the court entered judgment against plaintiff and James G. Jordan and another, sureties on plaintiff's bond for costs, and the sureties appeal. Affirmed.

R. B. Bristow, for appellants. J. H. Whitecotton, for respondent.

GOODE, J. Yowell had an action in the circuit court of Monroe county against the defendant Vaughn. The other parties, Thompson and Jordan, who are the appellants here, were the sureties of Yowell on a cost bond. After one trial of the action and a reversal of the judgment by this court, it was dismissed for failure to prosecute it, and afterwards the court, on motion of the defendant, entered judgment against Yowell and his two sureties for the costs. The sureties took this appeal.

The cost bond was lost before judgment was rendered on it, but its contents were proven, and were substantially that the parties to it bound themselves to pay all the costs that had or might accrue in the cause. An affidavit to show its loss and its contents was duly filed in the circuit court prior to the judgment. That it was lost, and what it contained were proven, too, by one of the attorneys for the sureties, and there is no dispute about those facts.

Several objections were raised by the sureties to judgment being rendered against them for the costs, but only one point is discussed in their brief on this appeal, namely, that it devolved on the defendant Vaughn to proceed under sections 4560 and 4561 of the Revised Statutes of 1899 to supply the bond. Section 4560 was, as stated, complied with when the affidavit containing a statement in writing of the full contents of the lost instrument was filed. Section 4561 enumerates the instruments to which its provisions are intended to apply, and a bond for costs is not one of them. That section relates to judgments, inventories, sale bills, or other orders of a county or probate court. It provides two distinct procedures; one to supply lost judgments or executions, the other to supply a lost inventory, sale bill, or order of a county or a probate court. The court committed no error in supplying the bond on the proof made, as such a procedure fell within its general powers. *State v. Simpson*, 67 Mo. 647; *St. L., etc., R. R. v. Holladay*, 131 Mo. 440, 33 S. W. 49.

This is not an action on a lost instrument within the meaning of sections 642 and 643, and it is conceded that plaintiff did not have to proceed according to those sections.

The judgment for costs was properly rendered against the sureties on the bond (*Schwacker v. McLaughlin*, 139 Mo. 333, 40 S. W. 935), and is affirmed.

BLAND, P. J., and REYBURN, J., concur.

Ex parte HINKLE

(Court of Appeals at St. Louis, Mo. Jan. 19, 1904.)

INTOXICATING LIQUORS—LICENSE—CITIES OF THE FOURTH CLASS—AUTHORITY—ORDINANCES—VALIDITY—EXORBITANT LICENSE FEE.

1. Where an ordinance provided that no one should conduct a dramshop in the city without obtaining a license and paying a license fee, a second ordinance, which, without altering these provisions, provided regulations which must be complied with by an applicant for a license, was not inconsistent with, and did not repeal, the first ordinance.

2. Under Rev. St. 1899, § 5978, expressly permitting the mayor and board of aldermen of cities of the fourth class to license and regulate dramshops, saloons, and liquor sellers, a city of that class had authority to exact a license fee after the licensee had duly obtained from the county court a license to keep a dramshop in such city.

3. In proceedings questioning the validity of a city ordinance it will be presumed that it was legally adopted, unless it exceeds the legislative power of the city.

4. An ordinance declaring it to be unlawful for any person to carry on the enumerated occupations, including that of a dramshop keeper, without obtaining a license, the fee for which in the case of dramshops was fixed at \$1,000 a year, or \$500 for six months, was not objectionable for uncertainty.

5. One thousand dollars a year for a saloon license by a city of the fourth class is not so unreasonable a charge as to justify a court in declaring void the ordinance fixing it.

Application by W. J. Hinkle for writ of habeas corpus, returnable to the Court of Appeals. On hearing, petitioner remanded.

F. M. Mansfield, for petitioner. J. W. Jackson, for respondents.

GOODE, J. The petitioner, Hinkle, procured a writ of habeas corpus from one of the judges of this court in vacation, returnable to the October term. He was at that time in the custody of the marshal of the city of Mountain Grove under a warrant issued by the mayor and ex officio police judge of that city for conducting a dramshop and selling intoxicating liquors in less quantities than three gallons without having a license to do so. The writ was granted by consent of the city authorities, and therefore without an examination of the merits of the petition, and the cause will be disposed of with no inquiry into the propriety of the proceeding as a means of testing the validity of the city ordinances relating to dramshop license. The invalidity of those ordinances is the ground on which the petitioner is averred to be unlawfully restrained of his liberty. Many averments are made in the petition against the right of the city to enact them, or to exact the license fee imposed on dramshop keepers, which will be disregarded for the reason that the parties have filed the following stipulation as embodying the essential facts on which they desire the case to be decided: "For the purpose of a trial of this cause, and in order to save cost of taking depositions, the following facts are

agreed upon: That the petitioner on the 18th day of April, 1903, duly obtained from the county court of Wright county a license to keep a dramshop at his stand in the town of Mt. Grove, Missouri, for a period of 6 months from that date; that at the time of his arrest he was keeping a dramshop in the said city of Mt. Grove under and by authority of his said county license, and was selling intoxicating liquors in less quantities than 3 gallons without having a license as such dramshop keeper from the said city of Mt. Grove. That he had at no time been engaged in the business or avocation of keeping, maintaining, or conducting a saloon other than that of his said dramshop. That on the — day of June, 1903, the petitioner was, by virtue of a warrant issued by the respondent, Rose, as mayor and acting police judge of said city, upon a complaint made by the said John A. Stephens, charging him with unlawfully carrying on and engaging in the business of keeping, maintaining, and conducting a saloon in the said city of Mt. Grove, on the 8th, 9th, 11th, 12th, 18th, and 14th days of May, 1903, without first taking out and having from the said city of Mt. Grove a license to engage in and carry on said business, contrary to section 2 of an ordinance number —, being an ordinance levying and fixing the amount to be charged as license tax on certain objects and persons, passed and approved April 13, 1903; and with having on the 2d day of May, 1903, at the said city of Mt. Grove, unlawfully sold intoxicating liquors in less quantities than 3 gallons without first taking out and having a license from the said city of Mt. Grove as a dramshop keeper, contrary to section 6 of an ordinance entitled 'An Ordinance concerning Dramshops and Saloons,' passed and approved April 30, 1903—a copy of which complaint so filed against your petitioner is hereto annexed. That at the time of issuing and service of the writ of habeas corpus herein the petitioner was in the custody of the respondent John A. Stephens under and by virtue of the warrant issued by the respondent Rose as aforesaid. That he has not been discharged from said arrest, but that he is under arrest and in the custody of the respondent Stephens; and that the said complaint and charges were and are still pending against him. [Signed] F. M. Mansfield, Atty. for Petitioner. E. H. Farnsworth, Atty. for Respondent."

It appears from the above agreed facts that Hinkle was granted a license to keep a dramshop in Mountain Grove by the Wright county court on April 13, 1903. He opened a dramshop under said license, and was selling intoxicating liquors as a dramshop keeper without procuring a license from the city of Mountain Grove, although there was an ordinance in force, enacted on April 13, 1903, requiring such a license and fixing the fee for it at \$1,000 a year, or \$500 for six months. Another ordinance was enacted April 20th,

not abolishing the requirement of a license or changing the license fee, but prescribing the terms on which a license as a dramshop keeper could be obtained, namely, on the petition of the majority of the taxpaying citizens in a city block, and compliance with other conditions in all respects like the general statutes of the state on the subject. Both the ordinances are before us as exhibits attached to the pleadings. It is said in the petitioner's brief that the one of April 20th repealed the one of April 13th; but it certainly had no such effect. The two ordinances are perfectly consistent. The first provided that no one should conduct a dramshop in the city of Mountain Grove without obtaining a license and paying the license fee. The second, without altering these provisions of the first one, simply provided regulations which must be complied with by an applicant for license in order to get it. What Hinkle did was to run a dramshop without procuring or attempting to procure a city license, and in disregard of both the ordinances. Of course, he was guilty of an offense unless the ordinances are void, and they are said to be void because Mountain Grove, as a city of the fourth class, had no power to pass them. Cities of the fourth class are given power by an express statutory enactment both to regulate and to license dramshops, saloons, and liquor sellers. Section 5978, Rev. St. 1899.

It is said the ordinance of April 13th was illegally passed over the mayor's veto, but no showing is made in the stipulated facts on that proposition, and we must assume it was legally adopted, unless it exceeds the legislative power of the city.

The ordinance is also attacked as uncertain in its provisions, and therefore void. We think, on the contrary, that it is quite precise, as it declares it to be unlawful for any person to carry on or engage in the enumerated occupations, including that of dramshop keeper, without obtaining a license, the fee for which in the case of dramshops is fixed, as stated, at \$1,000 a year, or \$500 for six months.

The further contention is that it was unjust and oppressive, both as exacting an exorbitant fee and as discriminating against the petitioner. One thousand dollars a year for city saloon license is not so unreasonable a charge that a court would be justified in declaring the ordinance fixing it void. License fees of that amount are often exacted by cities, and the exaction upheld by the courts. Certainly the ordinance does not discriminate against Hinkle, for he was not mentioned, nor in any manner indicated, in it, as it was a general ordinance applicable to all persons who might wish to conduct a saloon in Mountain Grove.

Judging from the petitioner's brief, his counsel must have overlooked the clause of section 5978, Rev. St. 1899, which allows the mayor and board of aldermen of cities of

the fourth class to license and regulate dramshops, saloons, and liquor sellers; for the brief points out several clauses of that section as being the only ones which confer any authority to enact such an ordinance, but omits the clause which expressly confers it. The brief refers to the power given to prohibit the selling of liquors to minors and drunkards; to the clause providing that a license tax shall be regulated by ordinance, and no license issued until the amount to be paid for it is paid to the city clerk, and other provisions regulating the issuance of licenses. Those grants of power are argued to be inadequate as authority for the ordinances in question, and likely they are inadequate. But the power to pass the ordinances is not derived from them, but from the other clause directly conferring authority broad enough to support the municipal legislation for violation of which Hinkle is in custody.

It is argued that the statutes dealing with cities of the fourth class do not leave it discretionary with the mayor and aldermen to grant or refuse saloon licenses, which is asserted to be a matter of local option, and subject to the will of the voters expressed according to the local option statutes. Granting this argument to be sound, the question comes down to this: Do the ordinances in question prohibit the sale of intoxicating liquors in Mountain Grove, or regulate it? They undoubtedly regulate it, unless the fee exacted is so onerous as to entirely prohibit the business. We hold the fee was fixed at an amount within the discretion of the city officials in executing, by legislation, their statutory power to regulate dramshops and liquor selling.

The petitioner is remanded to the custody of the marshal of the city of Mountain Grove.

BLAND, P. J., and REYBURN, J., concur.

WHITECOTTON v. ST. LOUIS & H. RY. CO.
(Court of Appeals at St. Louis, Mo. Jan. 19, 1904.)

RAILROADS—RIGHT OF WAY—ACTION—PARTIES
PLAINTIFF—DEFENSE—MEASURE
OF RECOVERY.

1. Where defendant by its answer displays knowledge of matters tending to show a defect of parties plaintiff, but raises no objection in the answer on that ground, the defect cannot be taken advantage of on appeal.

2. Where plaintiff acquired title to land by purchase on foreclosure of a deed of trust, the trustee under prior deeds of trust in force against the same tract, when plaintiff began an action against a railroad to recover the value of ground used by it as a right of way, is not a proper party plaintiff therein, where such prior deeds were discharged before the defendant answered in the action.

3. The defense that plaintiff, who sued for the value of land taken by defendant for a right of way, acquired no title under the conveyance to him, by reason of a breach of contract with

the owner of the land by the bank of which plaintiff was an officer, is not available to the railroad; it not being a party to the contract, nor one for whose benefit the contract was made.

4. Where plaintiff in an action for the value of land taken by a railroad for a right of way through his farm did not own the land at the time entry was made by the railroad, he is entitled to nothing for the incidental injury to the farm by reason of right of way; his measure of damage being simply the value of the ground taken.

Appeal from Circuit Court, Ralls County; D. H. Eby, Judge.

Action by George W. Whitecotton against the St. Louis & Hannibal Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

J. D. Hostetter, J. O. Allison, and Geo. A. Mahan, for appellant. Roy & Hays, for respondent.

GOODE, J. Judgment was given against the appellant for the value of a strip of ground used by it as a right of way through a farm owned by the respondent, and the judgment is now assailed for reasons arising on the mode in which the respondent acquired the farm, which previously had belonged to Geo. W. Briggs. While Briggs owned it he gave three deeds of trust on it to William Christian as trustee for A. R. Levering, and subsequently, in 1891 and 1892, made quitclaim deeds to the St. Louis, Hannibal & Kansas City Railroad Company, predecessor of the appellant, for the strip whose value is the subject-matter of this litigation; said predecessor having conveyed the strip to the appellant in May, 1893. Besides the deeds of trust in favor of Levering, Briggs subsequently executed three other deeds of trust in favor of the Ralls County Bank. The last one, given for Levering's benefit, was foreclosed by sale February 2, 1899, and the farm purchased by the respondent, Mr. Whitecotton, who afterwards began the present action. After it was begun, but before trial or answer filed, the two earlier Levering deeds of trust were paid by the bank. The appellant contends that as those first deeds were in force when the action was begun, and as their conditions had been broken, the right of action for the value of the strip was then in the trustee, Christian, instead of Whitecotton, the purchaser under the third Levering deed. If there was a defect of parties on account of the interest of said trustee in the proceeds of the litigation, the objection should have been made in the answer, for the appellant recited the deeds of trust prior to the one under which the respondent purchased, but raised no point on them against Whitecotton's right to sue, as it should have done, to be able to take advantage of such a point on appeal. Appellant's answer shows it knew the facts when the answer was filed; hence it should have

objected then, so that Christian could have been made a party to the action, if necessary. *Stewart v. Gibson*, 71 Mo. App. 232. But before the appellant answered, the prior deeds of trust had been discharged, and the trustee, after their discharge, had no further interest in the land; and the appellant was in no danger of an action by him to recover the value of the right of way, and he was not a necessary party, nor even a proper one, as was decided in a case like the present one in respect to the question of parties. *Matthews v. Ry. Co.*, 142 Mo. 645, 44 S. W. 802.

It is said the respondent's right of action must have been complete when he sued, and that, if it was not, his action must fail. The argument in this connection is that the right to sue for the value of the right of way was in Christian, as trustee in the first two deeds of trust, to the exclusion of Whitecotton's right as purchaser at the sale under the third one. The *Matthews Case* is decisive of this contention, which involves the erroneous notion that, when there are several mortgages on land, no one but the first incumbrancer, or his trustee, can maintain an action for the land, or its value, if wrongfully taken, or for waste committed on it. The effect of such a rule would be to render junior incumbrancers and the mortgagor himself helpless against an ouster or trespasses submitted to by the first incumbrancer, though they, as well as he, are interested in keeping the freehold in possession and unimpaired. The owner is thus interested because of his right of redemption; and the junior mortgagees, because the land is their security. We have no call to expatiate generally in this opinion on the law of successive incumbrances, or to determine when, if ever, the senior incumbrancer is a necessary party to an action to recover the land, or its value, or damages for an injury to it, and will rest content with quoting a passage from the opinion in the *Matthews Case*, which disposes of the point we have to decide: "It is unnecessary to inquire in this case whether the trustee was a necessary party to the suit when instituted, for the secured debt was paid before the trial, and the trustee at that time, at least, was neither a necessary nor a proper party. Plaintiff, as the substantial owner of the farm when the barn was burned, was the real party damaged; neither the trustee nor the secured creditor is complaining, and we are unable to see that defendant, who is in no wise interested in the deed of trust, has a right to complain after satisfaction of the debt. If the defendant is liable for the damages, there can be no difference to whom it is paid, if payment discharged the liability, and is a bar to an action by another party."

Among other things, the railroad company answered that when Briggs made a quitclaim deed to the farm to the Ralls County Bank, as he did March 2, 1894, the bank agreed with him to pay the Levering deeds

* 4. See *Eminent Domain*, vol. 18, Cent. Dig. §§ 408, 409.

of trust, and that it thereupon became its duty to do so, instead of letting the farm go to sale under one of them; that Whitecotton was an officer of the bank, purchased at the deed of trust sale with money of the bank, for its benefit, stands in its shoes, and therefore cannot maintain the present action; that permitting the sale of the land, and purchasing it through its representative, were acts done by the bank in violation of its agreement with Briggs to discharge his indebtedness secured by the deeds of trust. The gravamen of this contention is that Whitecotton acquired no title by his purchase, as the bank simply paid a debt which it had assumed and made its own when he bought for the bank at the foreclosure sale. This matter of the answer was stricken out on appellant's motion, and error is assigned as to that ruling. Whitecotton acquired title by the trustee's deed executed to him as the purchaser at the sale; granting, for argument's sake, that Briggs could have had the sale set aside because of the supposed agreement. His title was good until it was divested at the instance of the person possessed of an equity against it. *Springfield E. & T. Co. v. Donovan*, 120 Mo. 423, 25 S. W. 536; *Simerson v. Bank*, 12 Ala. 205. As he acquired the title, and under a conveyance which was prior and paramount to those by which the defendant acquired its right of way, he is in a position to recover the value of the right of way, unless, by virtue of the alleged agreement, the appellant has an equitable defense or set-off against him. But it is apparent that Briggs was the only person aggrieved by the bank's breach of contract in failing to pay his indebtedness, and thereby discharge the liens on the land, and that any demand for damages on that score belongs to him, and is not available to the appellant by way of defense, set-off or counterclaim. The railway company was no party to the alleged contract, nor was the contract entered into by Briggs for its benefit. It does not even enjoy any covenant by virtue of which it can assert a right as Briggs' covenantee, since it holds under quitclaim deeds. As no one but a party to a contract, or one for whose benefit it was made, can sue on it, the rejected matter of the answer stated no defense in favor of the railway company. *Howson v. Trenton Water Co.*, 119 Mo. 804, 24 S. W. 784, 23 L. R. A. 146, 41 Am. St. Rep. 654; *Roddy v. Railway*, 104 Mo. 234, 15 S. W. 1112, 12 L. R. A. 746, 24 Am. St. Rep. 333.

A complaint is preferred because the court, in assessing respondent's damages, allowed as damages not only the value of the ground taken, but the injury done to the remainder of the farm by locating and making the road through it, less the value of the peculiar benefits, if any, accruing to the farm. It is the appellant's view that, as plaintiff did not own the land when the entry for right of way purposes was made, he cannot recover

incidental damages. We regard this position as well taken. Whitecotton's purchase at the foreclosure sale gave him the right to recover the value of the right of way, because it vested the title to it in him. But he bought the remainder of the farm for a price which, it is fair to presume, was diminished from what it would have brought but for the location of the railway, if that event unfavorably affected its value. To permit him to recover incidental damages in this action would therefore be giving him those damages twice. This proposition was discussed and decided in *Livermon v. R. R.*, 109 N. C. 52, 13 S. E. 734, and the purchaser at the mortgage sale ruled to have no right to such incidental damages. Those damages might have been demanded by the mortgagee, *Levering*, as an impairment of his security, or by Briggs, the owner of the farm. But if they chose to pass them by, a subsequent purchaser has no just claim to them. It is said by the respondent that his title relates back to the date of the deed of trust under which he bought, and it does for some purposes (*Booher v. Allen*, 153 Mo. 613, 55 S. W. 238), but not so as to clothe him with a right to recover for waste or injury to the freehold. His title is good as of that date, but incidental injuries to the freehold, committed previous to his purchase, in no manner impair his title, nor detract from what he bought. It is because of the relation of his title that respondent is entitled to recover the ground taken for a right of way. He bought that ground as much as any, but he did not buy any demand for incidental injury to the remainder of the farm. He simply bought the remainder as it was. Suppose timber had been cut off the farm before respondent purchased it; could he recover its value? Plainly not. The remedy for such losses belongs to the owner and to the mortgagee. 1 Jones, *Mortgages* (5th Ed.) § 659 et seq. We think the respondent's recovery should be the value of the land appropriated by the defendant.

The judgment is therefore reversed, and the cause remanded.

BLAND, P. J., and REYBURN, J., concur.

COLUMBIA PAPER STOCK CO. v. FIDELITY & CASUALTY CO. OF NEW YORK.*

(Court of Appeals at St. Louis, Mo. Jan. 19, 1904.)

INSURANCE — EMPLOYERS' LIABILITY — ACCIDENT — INFECTION WITH DISEASE — NOTICE TO INSURER — IMMEDIATE NOTICE — POLICY — CONSTRUCTION.

1. A requirement in an employers' liability policy that the assured shall give immediate notice to the insurer of any accident is material and reasonable.

2. A requirement in an employers' liability policy that the assured shall give "immediate"

*Rehearing denied February 2, 1904.

notice to the insurer of any accident is to be construed as meaning within a reasonable time with regard to the attending circumstances.

3. Where an employers' liability policy required that the employer should give the insurer immediate notice of any accident, notice to a forewoman in the employer's establishment that a servant who had previously worked under her was ill, and claimed her illness to be due to her having been poisoned, owing to the work she was required to do for the employer, was not notice to the employer, so as to render him in fault for not notifying the insurer; the forewoman being a mere superintendent of work, with no authority to employ or discharge servants.

4. Kidney disease produced in a servant by handling infected rags in the discharge of her duties was within an employers' liability policy insuring against loss from liability on account of bodily injuries accidentally suffered.

Appeal from St. Louis Circuit Court; D. D. Fisher, Judge.

Action by the Columbia Paper Stock Company against the Fidelity & Casualty Company of New York. From a judgment for plaintiff, defendant appeals. Affirmed.

Percy Werner, for appellant. Judson & Green, for respondent.

Statement.

REYBURN, J. The statement of facts submitted by appellant has been accepted by respondent, and—commending such practice—therefore, with slight modifications, is adopted in the decision of the case.

This is an appeal from a judgment against appellant on a claim arising under a so-called "employers' liability" insurance policy. The petition, which recites the issuance and the substance of the policy, sets up that one of plaintiff's employes sued it in the circuit court of Jackson county, Mo., for an alleged common-law liability "for injuries suffered by her in said premises, to wit, from accidental blood poisoning caused by contact with material used in plaintiff's business," and the recovery of a judgment by said employe of \$1,650, the payment thereof by plaintiff, and the refusal of defendant to indemnify plaintiff therefor. The contracting clause of the policy, which was filed with the petition, is an agreement to indemnify, under certain conditions, "against loss from common-law or statutory liability on account of bodily injuries, fatal or nonfatal, accidentally suffered within the period of this policy by any person or persons while within the premises hereinafter mentioned." The only condition of the policy appealed to in defense of this action is that covered by No. 1 of the general agreements embodied in the policy, which reads as follows: "(1) The assured upon the occurrence of an accident shall give immediate notice thereof with the fullest information obtainable at the time, to the home office of the company at New York City, or to its duly authorized local agent. He shall give like notice with full particulars of any claim that may be made on account of such accident, and shall at all times render to the company all co-operation and assistance in

his power." The answer admitted the issuance and delivery of the policy; admitted that plaintiff had been compelled to pay the said judgment, and that defendant refused to indemnify plaintiff therefor; denied that said judgment was recovered on account of accidental injuries as alleged; and set up as special defense the failure of the defendant to give immediate notice of the alleged accident, upon the happening thereof, or at any time prior to the institution of suit by the said employer. The reply denied the new matter set up in the answer.

Plaintiff, after introducing the policy, introduced evidence tending to show that one of its servants (Anna Nickel) on May 30, 1900, made claim against plaintiff by instituting suit against it on account of bodily disease caused by the handling of infected rags, or of wall paper containing arsenic, in the ordinary course of defendant's business (the said Anna Nickel being at said time employed by it on its premises in Kansas City), and recovered judgment for \$1,650 on said claim, which judgment was affirmed on appeal by the Kansas City Court of Appeals in June, 1902, and which, with interest and costs, amounted at the time of payment to \$1,848.10. Plaintiff introduced the pleadings in the Nickel Case, the petition in which it charged defendant (plaintiff here) with negligence in delivering to plaintiff, to be sorted and cleaned, a bale of steaming hot material, consisting of waste paper mixed with wall paper, and also a sack of waste paper, old bandages and rags, and pieces of decaying human flesh, all more or less impregnated with some poisonous drug or drugs made up from the cleaning of a hospital, and that she thereby was poisoned and made violently sick by coming in necessary personal contact with said material, and that Bright's disease and dropsy resulted therefrom, and her health became permanently broken down and ruined, to her damage in the sum of \$5,000, for which the suit was brought. The answer set up that the injuries were the result of risks of the employment which plaintiff had assumed. Plaintiff also introduced in evidence the instructions given to the jury in the Nickel Case. Those for plaintiff told the jury that the employer was bound to use reasonable means to protect the health of his employes; that, if they found her health had been injured through failure to use such means, a recovery might be had for such injury to her health; and that plaintiff did not assume in such employment any unknown peril to her health. Plaintiff likewise introduced in evidence the opinion of the Kansas City Court of Appeals. 95 Mo. App. 226, 68 S. W. 955.

Defendant introduced evidence tending to show that the bodily injury sustained by said Anna Nickel was acute kidney disease or dropsy, engendered by absorption of poison resulting from exposure in handling infected rags or wall paper in the regular course of her employment, and without violent exter-

nal injury of any kind, which disease had its apparent inception on April 14, 1900, in an attack of vomiting, which was witnessed by the assistant forewoman of plaintiff, under whom said Anna Nickel worked on the said premises, at which time the said Anna Nickel gave up her employment, and went home, and no more returned to plaintiff's place of business; that on April 24, 1900, the forewoman of plaintiff, under whom the said Anna Nickel worked for plaintiff, was notified that said Anna Nickel was ill, and that she claimed that her sickness was caused by handling infected paper and rags at defendant's place of business; that the duties of said forewoman were merely to direct employes where to work and how to do their work, and she had no power to engage or discharge employes; that plaintiff's chief office and place of business was at St. Louis, Mo.; that it did not notify defendant of the said injury to or illness of said Anna Nickel on said 24th day of April, or before that time; and that defendant was not notified of such occurrence until May 31, 1900, nor until after suit had been instituted by the said Mrs. Nickel to recover damages for the said injury.

Instructions in the form of propositions of law (jury having been waived, and trial had by the court sitting as a jury) were requested by both parties, and exceptions duly saved as indicated. The finding and judgment of the court were in favor of plaintiff for \$1,935.85, and motion for new trial duly filed was subsequently overruled, and appeal perfected to this court.

Opinion.

1. The assignments of error presented by appellant are subdivided, but the argument on its behalf may be reduced to two principal contentions: The first of the general agreements, as they are termed in the policy, stipulated that the assured, upon the occurrence of an accident, should give immediate notice thereof, with the fullest information obtainable at the time, to the home office of appellant, at New York, or its duly authorized agent, etc. It appeared in evidence that the chief office of respondent was in the city of St. Louis, with a subordinate office at Kansas City, where the event occurred, in charge of a general or assistant general manager, neither of whom knew of the illness of Anna Nickel until suit against respondent was brought by her May 31, 1900, in the Kansas City circuit court, which thereupon, without delay, notified appellant of the claim and action. It further appeared that Anna Nickel was suffering from acute kidney disease or dropsy, occasioned by the absorption of virus in handling infected rags or poisonous wall paper, the first stage of which, on April 14, 1900, developed in an attack of vomiting, in presence of the assistant forewoman of respondent, under whom Anna Nickel worked. At this the

commencement of her illness the latter abandoned her employment, and, on April 24th ensuing, this forewoman learned of the continued illness, and that the sufferer claimed her sickness had been produced by handling infected paper and rags at respondent's place of business. The duties of this forewoman were to direct employes where and how to work, but without power in her to engage or discharge them. The general manager and his assistant had general charge and superintendence of the business of respondent at Kansas City, and alone were authorized to employ or discharge subordinates. Under this state of facts, appellant insists that respondent failed to comply with the provision of the policy respecting notice. The demand of such notice, under the qualifications presently defined, is reasonable, and it is material and important to the insurer. The purpose, manifestly, is to advise appellant promptly of the existence of any claim, putting it upon inquiry, and so afford it full opportunity to investigate the facts attending the occurrence, and to enable it to adjust and pay the loss, or prepare to resist it, as it may conclude just or expedient. It may be conceded, as asserted by appellant, that, in construing and giving effect to this and similarly worded provisions of like contracts, it has been declared by authority entitled to respect and consideration that the giving of notice, alike when the accident occurred, and when the claim therefor was made, constituted a condition precedent, which the employer was bound to perform in order to maintain an action on the policy, even in the absence of a forfeiture clause therein, as in the case of *Underwood Veneer Co. v. London, etc., Co.*, 100 Wis. 378, 75 N. W. 996, where it was further held, after announcement of above principle, that a notice of claim for damages after claim for damages had been made, and first advanced nine months after the accident, did not satisfy the requirement that immediate notice should be given of the occurrence of the accident; but the doctrine of this line of decisions is opposed to the weight of authority, and the sounder opposing conclusions reached in other states, as well as in this state. As indicated by an eminent commentator on the law of insurance, to give the word "immediate," in such contracts, a literal significance, in most cases, would deprive the insured of indemnity, and policies of insurance would be converted into instruments of fraud. 2 May, Insurance (4th Ed.) § 462. In *McFarland v. Accident Ass'n*, 124 Mo. 218, 27 S. W. 436, the legal translation of the word "immediate," as applied to notice, was directly considered, and it was held that this term could not be construed literally without in many cases causing a forfeiture, and that it was frequently impossible, under the circumstances of the accident, to give immediate notice, and that this and similar words should be construed to mean within a reasonable time. The de-

cision continued: "So, though the time in which the notice shall be given is fixed under the contract, if the circumstances of the accident are such as to make it impossible to comply with the condition, giving the notice within a reasonable time after it becomes possible has been held sufficient." This language is adopted as expressive of the true rule in the well-considered case of *Woodmen, etc., Ass'n v. Pratt*, 62 Neb. 673, 87 N. W. 546, 55 L. R. A. 291, 89 Am. St. Rep. 777. Provisions of this description also affecting the action of the assured subsequent to the event, the subject of indemnity, and consequently after the loss, if any, has ensued, and the liability measurably attached, have received in this state a construction of the utmost liberality toward the beneficiary, to obviate a forfeiture. Our conclusion, therefore, is that, if no time is specified or notice is required to be given immediately, notice given with diligence and in a reasonable time, due regard being had to the attending circumstances, is a legal compliance with such condition. *McFarland v. Accident, etc., Ass'n*, supra; *Mandell v. Casualty Co.*, 170 Mass. 173, 49 N. E. 110, 64 Am. St. Rep. 291; *Dezell v. Casualty Co.* (Mo. Sup.) 75 S. W. 1102; *Hoffman v. Accident, etc., Co.*, 56 Mo. App. 301; *Anoka, etc., Co. v. Casualty Co.* (Minn.) 65 N. W. 353, 30 L. R. A. 689; *Trippe v. Provident, etc., Society*, 140 N. Y. 23, 35 N. E. 316, 22 L. R. A. 482, 37 Am. St. Rep. 529. Nor can the knowledge of the assistant forewoman of respondent of the original attack of sickness of the sufferer, its continuance, and its assigned cause be imputed to respondent. Respondent, as employer and principal, would not be charged with any knowledge of or notice to its forewoman, unless such knowledge or notice was in respect to a matter within the scope of her duties in respondent's employ. It is obvious that so ordinary an occurrence as the illness and consequent absence of an employé imported no claim or liability under the policy, and it is equally apparent that the knowledge of the forewoman was not derived as the result or consequence of any notice sought to be given her by virtue of her service in respondent's employ or as its representative. Knowledge of those in the control and the conduct and superintendence of respondent's business at its premises at Kansas City, its general manager and assistant manager, if they had possessed the knowledge of the forewoman—especially that, upon the continuation of her illness, Anna Nickel had claimed that her sickness was attributable to handling infected rags and poisonous paper in respondent's employ—might have been asserted to have been the knowledge of the respondent, but not such knowledge on the part of an assistant forewoman, an employé of power and authority proven to have been so limited. A corporate principal is affected with notice to its agents to the same extent and in the same manner as an individual,

and can only be charged with notice of those facts in the knowledge of its agents, within the scope of the business intrusted to them. *Doham v. Hahn*, 127 Mo. 439, 30 S. W. 134; *Hickman v. Green*, 123 Mo. 165, 22 S. W. 455, 27 S. W. 440, 29 L. R. A. 39.

2. Appellant further puts forward the contention that a disease produced by a known cause cannot be accidental, and therefore such a disease as acute kidney disease or dropsy produced by the absorption of poison, consequent on handling infected paper or rags in the course of employment, is not covered by the policy; and the legal question is thus sharply presented whether the injuries consequent on such illness resulted from a cause against which the insurance was issued. In the construction of such contracts, it is well established that not only should they be given a fair and reasonable construction, so as to give effect to the objects intended by the parties thereto, but any obscurity in the language employed in the contract is to be resolved against the insurer, and to receive a broad and liberal interpretation in favor of the assured. Again borrowing from the eminent authority on the law of insurance, above referred to: "No rule in the interpretation of a policy is more fully established, or more imperative and controlling, than that which declares that in all cases it must be liberally construed in favor of the insured, so as not to defeat, without a plain necessity, his claim to the indemnity which, in making the insurance, it was his object to secure. When the words are, without violence, susceptible of two interpretations, that which will sustain his claim and cover the loss must, in preference, be adopted. 1 May, Insurance (4th Ed.) §§ 174, 175. This doctrine has obtained recognition and application in the recent decision by the Supreme Court of Missouri already adverted to (*Dezell v. Casualty Co.*, supra), wherein it was, in substance, held that a policy insuring against bodily injuries sustained through external, violent, and accidental means, but in terms not covering injuries, fatal or otherwise, resulting from poison, or anything accidentally taken, administered, absorbed, or inhaled, did not bar recovery for unintentional death resulting from medicine, though containing poison administered, bona fide, to alleviate physical suffering. The rule of construction that an uncertainty respecting the meaning of terms of an insurance contract must be determined in favor of that interpretation favoring the assured, even though otherwise intended by the insurer, has received the sanction of this court. *Hoffman v. Accident Co.*, supra; *Hale v. Ins. Co.*, 46 Mo. App. 509; *La Force v. Ins. Co.*, 43 Mo. App. 530. See, also, *American Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977; *Trippe v. Provident, etc., Soc.*, supra. As further illustrative of the tendency of the courts, especially in this state, toward the direction suggested, in rendering and giving ef-

fect to the language adopted in contracts of indemnity against death or injury by causes asserted as accidental, in *Lovelace v. Travellers' Protective Ass'n*, 126 Mo. 104, 28 S. W. 877, 30 L. R. A. 209, 47 Am. St. Rep. 638, the Supreme Court, in defining the term "accident," after a lengthy revision of the various definitions offered by authoritative lexicographers and accepted by appellate courts, held that death resulting from an affray provoked by the deceased in an effort to eject an intruder from a hotel office was death by accident, within the language of the mortuary certificate involved. An extensive array of decisions in England, as well as in America, submitted by respondent, tend to negative the proposition laboriously sought to be sustained by appellant—that a disease superinduced by a recognized cause is not to be considered accidental. In *Isitt v. Railway Passengers' Assurance Company*, 22 Queen's Bench Division, 504, the court held that where pneumonia supervened, with fatal effect, as result of a cold, where deceased had fallen and dislocated his shoulder, and his catching cold and its fatal results were attributable to the condition of health to which he had been reduced by the accident, the death of the assured was due to the effects of injury caused by accident, within the meaning of the policy. In *Travelers' Ins. Co. v. Melick*, 65 Fed. 178, 12 C. C. A. 544, 27 L. R. A. 629, the federal Circuit Court of Appeals, Eighth Circuit, decided that where the insured accidentally inflicted a gunshot wound on himself, which produced lockjaw, and 18 days thereafter he was found with his throat cut and a scalpel in hand, having also been in the throes of tetanic spasms causing intense agony, the question of the proximate cause of his death was for the jury, although the language of the policy insured against death that should result from bodily injuries effected through external, violent, and accidental means alone, independent of all other causes, and should not cover death by suicide, sane or insane. In *Peck v. Equitable, etc., Ass'n*, 52 Hun, 255, 5 N. Y. Supp. 215, the Supreme Court of New York held that death from embolism or thrombus, which evidence in the case inclined to prove as resulting from a broken arm, was within the terms of a policy covering injuries effected through external, violent, and accidental means. In *Freeman v. Mercantile, etc., Ass'n*, 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753, the Supreme Judicial Court of Massachusetts adjudged that peritonitis ensuing fatally from a fall was embraced in the scope of a policy against bodily injuries effected through external, violent, and accidental means, and that the ruling establishing such a significance was in accordance with the apparent purpose and intention of the parties, and made the contract a beneficent provision for the beneficiaries therein named. In *McCarthy v. Travelers', etc., Co.*, 8 Biss. 362, Fed. Cas. No. 8,682, the United States Circuit

Court, Eastern Division of Wisconsin, held that death from rupture of a blood vessel, sustained while exercising when the lungs of the deceased were in weak and diseased condition, warranted recovery under a policy restricted to injuries through external, violent, or accidental means, and not extending to any bodily injury of which there should be no external or visible sign, nor to any injury happening directly or indirectly in consequence of disease. In *U. S., etc., Ass'n v. Barry*, 181 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60, the federal Supreme Court decided that death from inflammation or stricture of the duodenum, resultant from a jump or downward step, might properly be an accident effected through external, violent, and accidental means, although the benefits of the insurance should not extend to any injury of which there was no external and visible sign, nor to any injury happening directly or indirectly in consequence of disease. In *Young v. Accident, etc., Co.*, 6 Montreal Law Rep. 3, the superior court of Montreal declared that death from erysipelas consequent on a fall and bruising of right leg of assured was embraced within the language of a policy indemnifying against bodily injuries effected through external, accidental, and violent means. In *Martin v. Travellers', etc., Co.*, 1 Foster & F. 505, the policy protected against any bodily injury resulting from any accident or violence, provided that the injury should be occasioned by any external or material cause operating on the person of the insured; and a recovery was sustained where, in lifting a heavy burden, the spine was injured. In *North America, etc., Co. v. Burroughs*, 69 Pa. 43, 8 Am. Rep. 212, the policy insured against death in consequence of an accident in case death was caused solely by an accidental injury; and the court held that an accidental strain, terminating fatally, was within the meaning of the policy. Finally, in the case of *Fetter v. Fidelity, etc., Co.*, 174 Mo. 256, 73 S. W. 592, 61 L. R. A. 459, the Supreme Court of this state has declared that where the deceased, in a policy to compensate for death, independent of all other causes, by accidental means, in attempt to close a window fell against a chair, causing a rupture of a kidney, from which rupture ensued a hemorrhage causing death, it was properly for the jury to decide whether the cancerous condition resulted from the rupture, or whether the rupture would not have occurred, had there not been a weakened, cancerous condition pre-existing. Appellant has invoked and appealed to several cases as upholding the doctrine contended for—that a disease produced by a known cause cannot be a bodily injury accidentally suffered, and therefore in conflict with the foregoing authorities. In the case of *Bacon v. U. S., etc., Ass'n*, 123 N. Y. 304, 25 N. E. 399, 9 L. R. A. 617, 20 Am. St. Rep. 748, the Court of Appeals of New York (two of the judges dissenting) held that deceased

did not die from any accident within the range of the policy, but came to his death by disease, within the provision of immunity of the contract from death caused wholly or in part by bodily infirmities or disease existing prior or subsequent to date of mortuary benefit certificate, when it was conceded the assured died from a malignant pustule produced by contact with putrid animal matter, and which was denominated by the deciding judge as plainly a disease as smallpox or typhoid fever; and the policy in this case is distinguishable from the case before us as excepting liability for any bodily injury happening directly or indirectly in consequence of disease or death caused by disease. In *Dozier v. Fidelity, etc., Co.* (C. C.) 46 Fed. 446, 13 L. R. A. 114, the United States Circuit Court of the Western Division of Missouri, after assenting to the proposition that a disease produced by a known cause could not be considered as accidental, merely decided that sun prostration (i. e., commonly called "sunstroke") incurred by decedent in the current course of his business was not embraced in bounds of a contract of assurance against bodily injuries sustained through external, violent, and accidental means, and excluding any disease or bodily infirmity. In *Sinclair v. Maritime, etc., Co.*, 3 Ellis & Ellis, 478, the Court of Queen's Bench merely held that the term "accident" necessarily involved some violence, casualty, or vis major, and that death from sunstroke must be considered to have arisen from a natural cause, and not from accident happening to deceased upon any ocean, sea, river, or lake, within the legal meaning of the policy. In *Southard v. Railway, etc., Co.*, 34 Conn. 574, Fed. Cas. No. 13,182, it was held, under a policy against death by violent and accidental means, that a death, though violent, must be accidental as well, and the contract, in terms, embraced only cases where the elements of force and accident concurred in effecting the injury, and that, as insured was injured internally by jumping from a railroad and running a considerable distance, this was not caused by accidental means. In *Feder v. Iowa, etc., Ass'n*, 107 Iowa, 538, 78 N. W. 252, 43 L. R. A. 693, 70 Am. St. Rep. 212, the death of an insured was considered not accidental by the Supreme Court, consequent on rupture of an artery in reaching to close a window. In so far as these latter cases are opposed to the rulings hereinabove relied on, we must dissent from such conclusions, and adhere to what we deem the sounder reasoning and weight of authority. If, for example, in lieu of producing the more gradual and protracted infirmities of acute kidney disease or dropsical affection, the infected material submitted to defendant's workwoman had emitted poisonous gases or fumes, producing her instantaneous death, or resulting in immediate and violent convulsions, under numberless authorities the occurrence would, in legal contemplation, and within the interpreta-

tion of policies insuring against accidents, be confidently pronounced accidental, yet such consequences would be disease produced by known causes.

In conclusion, after full consideration, upon a fair and legal construction of the terms of this policy, which were for indemnity against loss from common-law or statutory liability for damages on account of bodily injuries, fatal or nonfatal, accidentally suffered, the injury sustained by respondent's employé upon its premises in handling the infected rags and wall paper fell fairly within the true meaning and intent. The judgment below was rendered for the right party, and is affirmed.

BLAND, P. J., and GOODE, J., concur.

LAVIN v. GRAND LODGE A. O. U. W. OF MISSOURI.*

(Court of Appeals at St. Louis, Mo. Dec. 15, 1903.)

BENEFICIAL ASSOCIATIONS — FORFEITURES — SELF-EXECUTING BY-LAWS — VALIDITY — WAIVER — AUTHORITY OF SUBORDINATE AGENTS — EVIDENCE.

1. Where a by-law of a beneficial association provided for the payment of an assessment according to a specified rate on or before a certain day of each month, another by-law declaring that a failure to pay any assessment on the day when due should ipso facto, and without any action on the part of the lodge or any officer thereof, work a suspension and forfeiture of all rights under the beneficiary certificate, is a valid and binding agreement between the association and the member.

2. The enforcement of a law of a beneficial association to insure prompt payment of assessments may be waived by the association.

3. When the law of a beneficial association made it the duty of subordinate lodges to collect and remit assessments, an officer appointed, by the subordinate lodge to perform that duty was not an agent of the grand lodge; and his action in receiving assessments from delinquent members did not bind the grand lodge, nor constitute notice of such habit, on which a waiver of suspension for delinquency, could be predicated.

4. In an action on a beneficial certificate, a letter signed by the beneficiary, stating that her husband was a member of the lodge, that she had been unable to keep up his payments, and that she would appreciate assistance from the brotherhood, was competent evidence that the member had abandoned the order, although the beneficiary denied the writing thereof, and it was not addressed to anybody, when a lodge officer testified that the beneficiary came to him and asked him to intercede with the lodge for her, that he told her to write a letter to the lodge, and that the letter was afterwards handed to him either by the beneficiary or her daughter, and was read in open lodge.

5. Where the proper officer of a beneficial association was tendered the assessment for a given month before the day that it fell due, there could be no forfeiture of the insurance for nonpayment of the assessment for that month.

Appeal from St. Louis Circuit Court; Daniel G. Taylor, Judge.

*Rehearing denied January 19, 1904.

† 3. See Insurance, vol. 28, Cent. Dig. §§ 1909, 1911, 1914.

Action by Annie Lavin against the Grand Lodge of the Ancient Order of United Workmen of Missouri. From a judgment for plaintiff, defendant appeals. Reversed.

F. H. Bacon, for appellant. J. J. O'Donohoe, for respondent.

Statement.

BLAND, P. J. The defendant is a fraternal beneficiary association having grand and subordinate lodges. Prior to July 24, 1901, Patrick Lavin had taken the workman degree of the order, and was a member of Standard Lodge, No. 80, and had received from the grand lodge a beneficiary certificate, No. 53,306, insuring his life in the sum of \$2,000, payable at his death to his wife, Annie Lavin, the plaintiff. On July 24, 1901, Patrick Lavin died. The defendant refused to pay the insurance, and this suit was brought to enforce its payment.

There are two defenses set up by the answer: First, that Patrick Lavin failed and neglected to pay the monthly assessment of \$2.62 for the month of September, 1900, as required by the laws of the order, on or before the 28th day of said month, by reason of which failure the certificate sued on ipso facto, under the laws of the order, became null and void; second, on November 1, 1900, Patrick Lavin abandoned his membership and severed his connection with the lodge. It was shown by the laws of the order that each member is required to pay a monthly assessment for the purpose of providing a fund to meet death losses, and that special monthly assessments for the same purpose may be made from time to time by the grand officer of the order when the death losses are more than normal. These assessments are classified according to the ages of the members, and increase with their ages. The monthly assessments of the members of the age of Patrick Lavin for September, 1900, was \$2.62. In addition to this assessment, each member of a subordinate lodge is required to pay in advance \$1 per quarter as quarterly dues. The income from quarterly dues is used for the purpose of defraying the expenses of the grand and subordinate lodges, and to pay the salaries of the officers.

Law 196 of the order is as follows:

"Levy and Payment of Assessments. Every member of the Order who has received the Workman Degree shall, beginning with the month following his initiation, on or before the twenty-eighth day of each month, pay to the Financier of the Lodge of which he is a member, or if a member of a defunct Lodge, or a Lodge remaining suspended for more than ten days, to the Grand Recorder, one assessment according to the foregoing rates."

Law 197 is as follows:

"Suspension for Non-Payment of Assessments. A failure or neglect of any member to pay any assessment on or before the twen-

ty-eighth day of the month in which the same is payable to the Financier of his Subordinate Lodge, or to the Grand Recorder, as provided by law, shall work ipso facto a suspension and forfeiture of all rights under any Beneficiary Certificate issued to him to whomsoever the same may be payable, and no action on the part of the Lodge or any officer thereof shall be required as essential to such suspension and forfeiture.

"Any person suspended or expelled from the Order for any cause whatever, forfeits all claim to the Beneficiary Fund during suspension or expulsion."

The order has an official organ, called "The Overseer," issued monthly, and mailed free to every member. It was admitted that Patrick Lavin received the September, 1900, number of the Overseer. This number contained the following:

"St. Louis, Mo., Sept. 1, 1900.

"To Officers and Members of Subordinate Lodges A. O. U. W., in Missouri—Brethren: You are reminded that under the Laws of the Order one assessment under the Classified Plan, according to age, is payable on or before the twenty-eighth day of September, 1900, by all members who have received the Workman Degree before the first day of September, 1900.

"This assessment will be known officially as Assessment No. 9 of 1900.

"For the information of members I certify that the following deaths of members of the Order in good standing in their respective lodges have been officially reported to me since my last monthly report: [Here follows list of deaths, which is omitted as immaterial.]

"No Notice of Assessment Required—Members Not Paying Stand Suspended. The Laws of the Order do not provide for any notice of assessments either to lodges or members, but that every member of the Order who has received the Workman Degree shall, beginning with the month following his initiation, on or before the twenty-eighth day of each month, pay to the Financier of the Lodge of which he is a member, or, if a member of a defunct lodge, or a lodge suspended for more than ten days, to the Grand Recorder, one assessment according to the Classified Rates according to age. If such assessment is not paid on or before the twenty-eighth day of the month the member stands suspended, and can only be reinstated on compliance with the laws relating to reinstatement.

"Lodges Must Pay Promptly.

"Subordinate Lodges, on the first day of each month, are required by law to forward to the Grand Recorder, the amount then in its Beneficiary Fund, which should be equal to one Classified Assessment, according to age, for all the members of the lodge in good standing on the twenty-ninth day of the previous month, and such sums as have been

received since the last report for reinstatements. Such assessment, payable by the lodge, is due on the first day of each month, is delinquent after the eighth of the month, and if not paid on or before the fifteenth of the month when due, the lodge stands suspended and can only be reinstated upon paying all arrearages of assessments and their indebtedness to the Grand Lodge, together with a fine of five cents per member for each assessment unpaid, and with the consent of the Grand Master Workman.

"No officer of the Grand Lodge nor of any subordinate lodge has any power to waive or dispense with any of the provisions or requirements of the laws of the Order, and all lodges and members must understand that the laws of the Order must and will be strictly enforced.

"Yours in C., H. and P.,

"Henry W. Meyer,

"Grand Recorder."

Other laws of the Order provide for a reinstatement of a beneficiary certificate after three months, and after six months, but they are of no importance in this case, as no application was made by Lavin at any time for reinstatement.

John Walsh was the financier of Standard Lodge, No. 80. He testified that the assessments collected in any one month he transmitted to the grand recorder early in the next succeeding month, usually about the 11th or 12th; that with the remittance he transmitted a report of the membership of his lodge, and the names of those who were suspended for failure to pay the assessments of the previous month; and that he, as financier, was required to pay to the grand recorder the full amount of the assessments of all members of his lodge not reported as suspended for nonpayment of assessments. He testified that his report to the grand lodge for September, 1900, was made out on the 12th of October, 1900; that Patrick Lavin failed to pay the September, 1900, assessment, and when he made his report he reported Lavin as suspended for nonpayment of the September assessment. This report was introduced in evidence, and showed under the head of "Decrease of membership since last report, Patrick Lavin, whose certificate is No. 53-366, forty-seven years old, rate of assessment \$2.62, date of suspension, 9/29, 1900." He further testified that it was his habit to receive monthly assessments from any member of his lodge, if paid at any time before he made up his monthly report, and, when so paid, he did not report him as suspended, although the payment was made after the 28th day of the previous month, and that Patrick Lavin had frequently paid his monthly assessments, prior to September, 1900, later than the 28th of the month, the day on which it was payable, and had been reported as having paid on the 28th of the month. He further testified that neither Patrick Lavin, nor any one for him, on the 28th

of September, 1900, or on any day prior to the making and forwarding of the report for that month, had paid or offered to pay the September, 1900, assessment, and that it had at no time been paid or tendered. He also testified that, for the accommodation of the members of his lodge, he had authorized his daughter to receive payment of their assessments at his home. He further testified that in the spring of 1902 the plaintiff came to him about the certificate of insurance; that he advised her to write a letter to the lodge and give it to him, and he would present the letter to the lodge; that a few days afterwards she or one of her children handed him a letter, which he gave to the recorder of the lodge. Plaintiff swore she could not write, and that she did not authorize any one to write to the lodge for her, and that she neither gave nor sent a letter to Walsh. The letter was offered in evidence by the defendant, but was excluded by the court. It reads as follows

"St. Louis, Mo., April 17, 1902.

"Dear Sir [not addressed to anybody]: I am writing you this letter to ask assistance for myself and five helpless children. My husband, Patrick Lavin, died nine months ago. He was a member of your lodge. I was unable, utterly unable, to keep up payments of his lodge, so he fell back during the strike, was never able to catch up. He was in poor health, but always tried to keep on his feet, and to work, as we had no other support than his wages, which were \$1.25 per day. Now since he is dead I am left to pay rent, get food and clothing and support myself and five children. I have got heart trouble, and of a very delicate constitution, and not really able to work to support such a heavy charge. I would be very grateful and appreciate any assistance given me from the brotherhood.

"Yours very respectfully,

"Mrs. Pat. Lavin."

The minutes of the lodge show that the letter was read in open lodge and referred to a special committee.

Walsh testified that some time in October, 1900, after his report had been made up, as he remembered, Patrick Lavin's little girl came to his house one evening and offered to pay him \$2 on her father's assessment for September, 1900; that he told her it was not enough, and refused to receive the money; that on a previous occasion Lavin had paid but \$2 on his assessment and he (witness) made up the balance, 62 cents; that he never got this back, and he could not afford to keep up this practice of paying for Lavin; that Lavin's little boy, a few days after the girl had been at his house, came to the house and offered to pay him some money on the September assessment, but that he did not have enough money to pay it, and he refused to take the money, and told the boy that it was not enough. The little girl testified that she offered Walsh \$3 on

the 3d day of September, 1900, but he would not take it, saying it was not enough; and the boy swore that, a few days after his sister had been to Walsh's, he went there and offered to pay him \$5, but he would not take it, saying that it was not enough to pay Lavin's assessments and dues. Walsh flatly denied that either the girl or boy offered to pay him any money whatever in the month of September, 1900, and claimed that the offers they did make were in October, and after his report of the September assessments had been made up, and that neither the boy nor the girl offered enough money to pay Lavin's September assessment. Walsh testified that he told Lavin's children in October to tell Lavin he had been suspended, but he did not see Lavin personally to notify him. The minutes of the meeting of the lodge on October 28, 1900, show that Patrick Lavin was reported suspended.

The plaintiff put in evidence the laws of the order in respect to sick benefits, to the effect that the assessments of sick members, in certain circumstances, should be paid by his lodge—also evidence that Patrick Lavin was sick in the fall of 1900—but offered no evidence that Patrick Lavin notified his lodge of his sickness or made claim for any sick benefits, or that any member of the lodge had been informed or knew that he was sick.

The issues were submitted to the court, sitting as a jury, who found for the plaintiff, and rendered judgment for the full amount of the certificate of insurance, with interest. The court handed down the following memorandum of its finding and opinion, which is incorporated in the abstract, and which we here copy for the purpose of showing the views entertained by the court, and the reasons given for its conclusion:

"The production of the benefit certificate issued by defendant to Patrick Lavin, which has never been surrendered, together with the proof of Lavin's death, and the refusal of defendant to make payment of the amount called for by the certificate, made plaintiff's prima facie case, and threw the burden of proof on the defendant. Defendant pleaded two defenses: The first one, the suspension of Lavin as a member of defendant's order for failure to pay the monthly assessment of \$2.62 for the month of September, 1900, which he was required to pay, by the by-laws of the order, on or before the 28th day of September, 1900. The second defense pleaded was that 'on the last day of November, 1900, said Lavin abandoned his membership in said order, and severed his connection therewith, whereby his benefit certificate issued to him became void.' For the first defense, defendant relies upon the provisions of law 197 of defendant order, to the effect that failure of a member to pay any assessment on or before the 28th day of the month in which the same is payable shall work ipso facto a suspension and forfeiture of all right

under any beneficiary certificate issued to him. To this defense of defendant, plaintiff has, by reply, pleaded waiver. It was clearly shown by the evidence that it was the universal custom of the lodge to which defendant belonged to grant the members, whenever desired by them, an extension of about twelve or fifteen days, and that the benefit of this custom had been repeatedly extended to Lavin, deceased. It is our view that the adoption of this custom constituted waiver of the provision of law 197, and the method of suspension pursued by defendant, to wit, that of waiting until the financier made his report to the grand lodge before deeming the suspension to have taken place, and then dating the suspension back to the 28th of the previous month, was not justified by the by-laws, and that, before effective suspension could be had in this adopted manner, notice should have been given to the member. No notice was given to Lavin. It is therefore the court's view that the pretended suspension of Lavin for failure to pay the assessment due on September 28th is a nullity, and constitutes no defense to plaintiff's claim.

"While the court is inclined to the view that a member of a beneficiary organization is not entitled, because of a void suspension, to lay back and refuse to pay further dues, and at the end of a long period of delinquency claim his right that such course of conduct would constitute an abandonment of membership, yet in the case at bar a reading of the entire record fails to show any evidence of Lavin's abandonment of his membership. There is not one word of evidence to show what his relations to the association were between September or October of 1900, and July, 1901, the date of his death. Defendant offered in evidence a letter containing an admission of plaintiff that Lavin had not paid his dues, but this letter was properly excluded by the court, for it was not shown by defendant that it was written by or under authority of plaintiff. The question asked of plaintiff as to her knowledge, at the time of demanding payment of the grand lodge, that Lavin had not paid his dues for nine months, elicited the reply that she did not know this to be a fact. No other effort was made to prove abandonment of his membership by Lavin. If such were the case, defendant could easily have proved it by its officers. This it chose not to do, and leaves the case without any evidence of abandonment."

The instructions given are in harmony with the views as expressed in the opinion of the trial judge, and need not be quoted.

Opinion.

1. Law 197 of the order, which provides that failure of a member to pay any assessment on or before the 28th day of the month in which the same is payable shall ipso facto suspend his beneficiary certificate, is attacked by the plaintiff as being harsh, unconstitu-

tional, and not self-enforcing. She contends that, under all circumstances, a nonpaying member of a beneficiary association is entitled to notice and to a hearing, under the laws of the land, before he can be lawfully suspended; and the cases of *Seehorn v. Catholic Knights of America*, 95 Mo. App. 233, *State ex rel. v. Merchants' Exchange*, 2 Mo. App. 96, *Lewis v. Benefit Ass'n*, 77 Mo. App. 586, and *McMahon v. Maccabees*, 151 Mo. 522, 52 S. W. 384, are cited as supporting this contention. In the *Seehorn Case*, it appears that any branch of the order was permitted to carry a delinquent member by paying his assessments to the grand body, and that, when it tired of this, the president of the branch might suspend the member. The member attempted to be suspended was in arrears for three assessments, which his branch had paid for him. The branch became tired of paying his assessments, and by vote suspended him, and entered its action on the minutes of its proceedings. The president then verbally proclaimed him suspended. It was held that the action of the branch was void, for the reason the power to suspend was not vested in the branch, and that the president could not suspend by a mere oral proclamation, and that the member was entitled to notice and a hearing. In *State ex rel. v. Merchants' Exchange*, supra, a by-law of the exchange which compelled members to submit their business controversies to arbitration, on pain of suspension or expulsion, was held unreasonable and void. In this case it was held that membership in the *Merchants' Exchange* was a property right. In *Lewis v. Benefit Ass'n*, supra, the laws of the order provided that the benefit certificate is annulled by the suspension of a member, and the by-laws of the subordinate council of the order provided that any member 13 weeks in arrears for dues forfeited all rights and privileges. The deceased was in arrears for 24 weeks' dues, but was never formally suspended by the order. It was held that the forfeiture did not attach until the member is actually and legally suspended, and that he was entitled to notice and to a hearing; citing *Puhr v. Grand Lodge*, etc., 77 Mo. App. 47. The case of *McMahon v. Maccabees*, supra, does not discuss the validity of laws like the one in hand. In none of the above cases was a by-law like No. 197 of the defendant order brought under review, and in none of them was it held beyond the power of a benevolent beneficiary association doing an insurance business to pass and enforce a law which ipso facto forfeits a beneficiary certificate for failure to pay any assessment made for the purpose of meeting death losses. The regular assessments levied by the defendant order to pay death losses are classified according to the age of the members. They are monthly, and payable on or before the 28th day of each month. They are as regular as clockwork; are certain as to amount and time of pay-

ment; hence no special notice of their levy or of the amount or time of payment was necessary. A member holding a beneficiary certificate of the order receives this notice once for all when he receives the certificate, which, in effect, incorporates this law of the order into the contract of insurance; and a member, by accepting the certificate, agrees to pay the monthly assessments as required by law 196, as a condition precedent to the continuance of his certificate in force. That it is competent for a beneficiary association, and a member thereof, to so agree, it seems to us, admits of no doubt, and that such an agreement is just and fair to all the members of the order holding insurance certificates is self-evident. A self-executing law of this kind was held valid in the following cases: *Boyce v. Royal Circle*, 73 S. W. 800, 99 Mo. App. 349; *Borgraefe v. Knights of Honor*, 22 Mo. App. 127; *Harvey v. Grand Lodge A. O. U. W.*, 50 Mo. App. 472; *Scheele v. State Home Lodge*, 63 Mo. App. 277; *Smith v. Knights of Father Matthew*, 36 Mo. App. 184; *Curtin v. Grand Lodge A. O. U. W.*, 65 Mo. App., loc. cit. 300; *Zepp v. Grand Lodge A. O. U. W.*, 69 Mo. App., loc. cit. 493; *Benevolent Society v. Baldwin*, 86 Ill. 479. In *Modern Woodmen of America v. Tevis*, 117 Fed. 369, 54 C. C. A. 293, it is said: "Stipulations to insure the prompt payment of the benefit assessments constitute the substance and the essence of insurance contracts of beneficial associations."

2. The learned trial court found the law (No. 197) requiring prompt payment had been waived. It is well-settled law that the enforcement of a law to insure prompt payment may be waived by the order issuing the certificate of insurance. The evidence upon which the court found a waiver of the law came from Walsh, the financier of *Standard Lodge*, No. 80. The laws of the order required the subordinate lodge to collect the monthly assessments from the members, and to make remittances on the 1st day of the succeeding month to the grand recorder. If the remittances were not made by the 8th of the month, the law pronounced the subordinate lodge in default; and, if not made by the 15th, the lodge stood suspended. Walsh testified that his practice was to make up the report, and send it in, with the assessments, anywhere from the 1st to the 12th or 13th of the following month, and that, at any time prior to sending in this report and remittance, his practice was to receive assessments from any delinquent member, and report him as having paid the assessment, and that prior to September, 1900, he had frequently extended this favor to Patrick Lavin, and continued him on the roll of membership in good standing; but there is not a syllable of evidence that the grand recorder, or any other grand officer of the order, or the grand lodge, had any knowledge or information of this practice of Walsh of receiving assessments after the 28th of the

month, and then reporting them as having been paid on that day; nor is there any evidence that Walsh's lodge, as a body, had any knowledge of this practice of its financier; nor is there any evidence that the financier of any subordinate lodge, other than Standard Lodge, No. 80, indulged in this negligent, benevolent practice toward his brethren of the order. There is therefore absolutely no evidence that the grand officers of the grand lodge ever knew of or assented to, this negligent practice of Walsh. Walsh was not appointed by the grand lodge or by any of its grand officers to collect assessments. The laws of the order made it the duty of the subordinate lodge to collect and remit assessments. Walsh's authority to make these collections came from his local lodge, and he was accountable to it, not to the grand lodge, for his conduct. The fact that the local lodge used him as its officer to make the collections and remittances for it did not transform him into an agent of the grand lodge, nor bind the latter by any habit he may have practiced in respect to such collections, nor impart notice to it of such habit. That the officer of a subordinate lodge, who is not even an agent of the grand lodge, has power to waive a by-law of the order, seems to us preposterous. That he cannot do this has been ruled in many cases. *Borgraefe v. Knights of Honor*, 22 Mo. App., loc. cit. 141; *Chadwick v. Order of Triple Alliance*, 56 Mo. App. 463; *Harvey v. Grand Lodge A. O. U. W.*, 50 Mo. App., loc. cit. 477; *McMahon v. Maccabees*, 151 Mo. 522, 52 S. W. 384; *Lyon v. Royal Society of Good Fellows*, 153 Mass. 83, 26 N. E. 236; *McCoy v. Roman Catholic Mutual Ins. Co.*, 152 Mass. 272, 25 N. E. 239; *Miller v. Hillsborough Fire Ass'n*, 42 N. J. Eq. 459, 7 Atl. 895; *Royal Highlanders v. Scoville* (Neb.) 92 N. W. 206; *Graves v. Modern Woodmen of America* (Minn.) 89 N. W. 6, is on all fours with the case at bar. There the clerk of the subordinate camp collected and forwarded the assessments, and he, like Walsh, would collect assessments after the day they were due, and report them as collected on the day they were due. It was held that this custom of the clerk was insufficient as a waiver, being unknown to the society. The same ruling was made in *Boyce v. Royal Circle*, supra. In similar circumstances the Supreme Court of Virginia, in *Knights of Honor v. Oeters*, 95 Va. 610, 29 S. E. 322, held: "The forfeiture of a certificate in a benefit society is not waived by the fact that the financial reporter of a subordinate lodge is in the habit of receiving payment of assessments after the end of the month for which they are levied, and within which they are payable, under the penalty of suspension and a forfeiture of the benefit certificate, when there is no evidence that the supreme lodge, which is sued on the certificate, is aware of such habit."

3. The letter offered in evidence, and pur-

porting to have been written by the plaintiff, and evidently intended for the lodge of which Patrick Lavin had been a member, we think, should have been admitted in evidence. True, Mrs. Lavin testified that she did not write it, nor authorize its writing; but Walsh testified she came to him and asked him to intercede with the lodge in her behalf; that he told her to write a letter to the lodge; that afterwards the letter was handed to him, either by the plaintiff or one of her daughters. It was received and read in open lodge. It was an issuable fact, under this evidence, as to whether or not the plaintiff wrote the letter, or had it written for her benefit. If she did write it, and put it into the hands of Walsh to be presented to the lodge, it was very important evidence to support the second defense set up in the answer, viz., that Patrick Lavin abandoned the order several months prior to his death. If this letter is genuine, it, in connection with the fact that Patrick Lavin, for two-thirds of a year prior to his death, paid no monthly assessments, and at no time made any effort to have himself reinstated within the three or six months period allowed him by the laws of the order after he must have known he was suspended for nonpayment of monthly assessments, seems to us to be very convincing evidence that he had abandoned his connection with the order. *State ex rel. v. Grand Lodge A. O. U. W.*, 78 Mo. App. 546; *Gardon v. Supreme Lodge Knights of Pythias*, 50 Mo. App. 45; *Supreme Lodge K. P. W. v. Wilson*, 66 Fed. 785, 14 C. C. A. 264; *In re Hullitt* (C. C.) 96 Fed. 786.

4. If the September, 1900, assessment was tendered Walsh on the 3d and 5th of that month, as Lavin's children testified it was, then there could be no forfeiture of the certificate of insurance for the nonpayment of the assessment for that month, and the plaintiff is entitled to recover, unless the defendant is able to substantiate its second defense, which is that Lavin, after September, 1900, wholly abandoned the order. That these issues of fact may be properly tried, the judgment is reversed, and the cause remanded.

REYBURN and GOODE, JJ., concur.

DOOLEY v. JACKSON.

(Court of Appeals at St. Louis, Mo. Jan. 19, 1904.)

ELECTIONS—WAGERS—RECOVERY OF MONEY—STATUTES—STAKEHOLDER'S LIABILITY—PUBLIC POLICY.

1. Rev. St. 1899, § 3430, declares that bets on any "election authorized by the Constitution and laws of the state" are gaming, and section 3431 authorizes the maintenance of an action to recover money bet thereon from the stakeholder. *Held*, that such sections were limited to constitutional elections for the selection of persons to a public office, and did not apply to primary elections for the selection of candidates.

2. Where plaintiff made a wager on the result of a primary election, but did not notify

the stakeholder not to pay over the money until after the result of the election had been ascertained, he was not thereafter entitled to recover the money so wagered from the stakeholder on the ground that the wager was illegal at common law.

Appeal from Circuit Court, Monroe County; David H. Eby, Judge.

Action by A. G. Dooley against W. R. P. Jackson. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

W. E. & G. W. Whitecotton and E. W. Major, for appellant. J. H. Whitecotton and W. T. Ragland, for respondent.

BLAND, P. J. The petition, omitting caption, is as follows: "Plaintiff, for cause of action against defendant, states that heretofore, to wit, on the 26th day of March, 1902, in the county of Monroe and state of Missouri, said plaintiff and one Hugh Mudd made and entered into a wager or bet on the late Democratic primary election then pending, said election being held on the 29th day of March, 1902, which said primary election was duly authorized by the laws of the state of Missouri, the same having been ordered by the duly elected, qualified, and acting Democratic central committee in and for the said county of Monroe for the purpose of nominating candidates for the various offices in said county to be voted on at the next regular election in November in and for the state of Missouri. Plaintiff states that he bet or wagered five hundred dollars that one Nathan Rogers, who was then a candidate for the nomination at said primary election to the office of collector of said Monroe county, would get more votes at said primary election than one Thomas Yates, who was also a candidate for the nomination to the office of collector in said county; that said Hugh Mudd bet or wagered the same amount, to wit, five hundred dollars, that said Thomas Yates would get more votes at said primary election than said Nathan Rogers. The plaintiff placed the sum of money so bet or wagered by him, to wit, the sum of five hundred dollars, in lawful money of the United States, in the hands of the defendant, W. R. P. Jackson, as stakeholder, to abide the result of said primary election. That said defendant well knew that the money so placed in his hands by this plaintiff was bet or wagered by plaintiff that said Nathan Rogers would get more votes at said primary election than said Thomas Yates. That afterwards, to wit, on the 31st day of March, 1902, and while such sum of money so bet or wagered was still in the hands of the defendant, W. R. P. Jackson, and not paid over by him to the other party to such bet or wager, and before the expiration of the time agreed upon by the parties for the determination of said bet or wager, the plaintiff demanded the return of said sum of money so bet or wagered and placed in the hands of defendant herein as

such stakeholder, and the defendant herein refused to return the said sum so bet or wagered, or any part thereof, to this plaintiff, whereby a right of action accrued to this plaintiff according to the statutes of this state in such cases made and provided. Wherefore plaintiff prays judgment against defendant herein, for the said sum of five hundred dollars, together with interest thereon from the said 31st day of March, 1902, together with the costs of this suit." There is no controversy about the facts. Briefly stated, they are as follows: Nathan Rogers and Timothy Yates were opposing candidates before the primary election to be held by the Democratic party of Monroe county for nomination to the office of collector for said county to be voted for at the election in November, 1902. Dooley, the plaintiff, and H. B. Mudd made a bet on the result of the vote to be cast at the Democratic primary election between Rogers and Yates, and executed the following memorandum of their bet:

"Paris, Mo., March 21, 1902.

"This is to certify that we have made a bet as follows: A. G. Dooley bets Mr. H. B. Mudd five hundred dollars that Nathan Rogers will get more votes in the Democratic primary in Monroe county for collector than Thomas Yates and have placed twenty-five each as forfeit.

"H. B. Mudd.

"A. G. Dooley."

They agreed upon the defendant as stakeholder, and delivered to him the above memorandum, and each put into his hands a stake of \$500, with the understanding that he should pay the same to the winner of the bet. The county executive committee of the Democratic party of Monroe county had called a primary election to be held in each school district of the county on the 29th day of March, 1902, for the purpose of nominating candidates of the Democratic party for county officers of Monroe county, including the office of collector, and formulated rules and regulations for holding said primary. On the day designated by the committee the primary election was held, and the pollbooks of the election were returned to the Democratic central committee, which had adjourned on March 29th to meet on April 5, 1902. The committee met on April 5th, pursuant to adjournment, and canvassed the vote cast at the primary election. By the canvass it was shown that Rogers had received 644 votes and Yates 722. It appears that before the canvass was made it was generally known throughout the county that Yates had received more votes than Rogers, and on the 3d day of April defendant handed over to H. B. Mudd the stake, to wit, \$1,000, which he held as stakeholder. On the previous day (April 2d) plaintiff served on the defendant the following written notice by delivering or causing to be delivered to him a copy of the same, to wit:

"To W. R. P. Jackson. Monroe City, Mo.: You are hereby notified not to pay over to Hugh Mudd, or any one else, any monies, held by you as stakeholder, bet by me with Hugh Mudd, on the result of the vote at the primary election as to the candidacy of Nathan Rogers and Thos. Yates for Collector of Monroe county, Missouri, said primary election having been held on March 29th, 1902. This 2nd day of April, 1902.

"A. G. Dooley."

Within three months after defendant handed the stake over to Mudd, the petition in this cause was filed in the office of the circuit clerk of Monroe county, and the summons issued thereon was duly served on defendant.

The plaintiff moved the court to instruct the jury as follows: "(1) The court instructs the jury that under the law and the evidence your verdict must be for the plaintiff. (2) The court instructs the jury that if they find from the evidence in the cause that the plaintiff on or about March 21, 1902, entered into a bet or wager in Monroe county, Missouri, on the Democratic primary election, if any, then pending, and to be held in said county and state, and which was held in said county and state on March 29, 1902, if the jury so find, the plaintiff betting one Hugh B. Mudd the sum of five hundred dollars that one Nathan Rogers would at said election get more votes for the nomination to the office of collector of the county of Monroe and state of Missouri than one Thomas Yates, and Hugh B. Mudd betting plaintiff the sum of five hundred dollars that the said Nathan Rogers would not at said primary election get more votes for the nomination to the office of collector of the county of Monroe and state of Missouri than Thomas Yates, if the jury so find, and that said sums so bet or wagered, if any, were by said plaintiff and Hugh B. Mudd put into the hands of defendant, Jackson, as stakeholder, to abide the result of the vote cast at the said primary election for the said Nathan Rogers and Thomas Yates for the nomination to the office of collector of said county and state as aforesaid, and that defendant knew that said sums were staked as a bet or wager on said primary election, and knew that fact, if any, at any time prior to his paying said sum over to said Mudd; and if the jury further find from the greater weight of the evidence in the cause that the plaintiff notified the defendant not to pay over to the said Hugh B. Mudd the sum of money so bet by plaintiff before the defendant Jackson paid said sum over to the said Hugh B. Mudd—then your verdict must be for the plaintiff." The court refused these instructions, and the cause was submitted to the jury without any instructions. The verdict was for the defendant. A motion for new trial proving of no avail, plaintiff brings his case here by appeal.

Section 3430, Rev. St. 1899, declares: "Bets

and wagers on any election authorized by the Constitution and laws of this state are gaming within the meaning of this chapter" (chapter 32). The next succeeding section (section 3431) reads as follows: "Every stakeholder who shall knowingly receive any money or property, staked upon any betting declared gaming by the foregoing provisions, shall be liable to the party who placed such money or property in his hands, both before and after the determination of such bet; and the delivery of the money or property to the winner shall be no defense to any action brought by the losing party for the recovery thereof: provided, that no stakeholder shall be liable afterward unless a demand has been made of such stakeholder for the money or property in his possession, previous to the expiration of the time agreed upon by the parties for the determination of the bet or wager." As originally enacted (Sess. Acts 1840-41), the statute declared it to be gaming to bet or wager any money, etc., on the result of any election or any vote to be given at such election authorized by the Constitution or laws of the state. In the revision of 1855 and in all subsequent revisions the section reads as at present. If the primary election upon which the bet was made was an election within the meaning of section 3430, *supra*, and was authorized by the Constitution and laws of this state, the bet was gaming, within the meaning of section 3430, *supra*, and plaintiff was entitled to the peremptory instruction asked by him directing the jury to find the verdict in his favor. Section 7081, Rev. St. 1899, authorizes the nomination of candidates for office by a political party at a primary election if the party at the previous general election cast at least 3 per cent. of the vote of the county. Section 7082 defines a primary election to be an "election held within the state, county, district or subdivision thereof by the members of any political party for the purpose of nominating candidates for office." Section 7083 provides that the certificate of nomination to office, when made by a primary election, shall be signed by the presiding officer and secretary of the political committee under whose directions the primary was held. Section 7088 defines what is a central political committee, and its powers to make nominations to fill vacancies. Section 7127 requires that the judges and clerks of any primary election held for the purpose of nominating candidates shall, before entering upon their duties, take and subscribe the oath prescribed by law for judges and clerks of election. Section 7128 prescribes the penalty for illegal voting at primary elections, and section 7180 prescribes the penalty for making fraudulent returns of a primary election by the judges, clerks, or tellers thereof. The certificate of nomination provided for by section 7083 is under the statute made an official document, and evidence of the nomination of the person nam-

ed in the certificate, and the filing of this certificate with the county clerk of the county in which the primary is held authorizes and requires him to enter the name of the person therein named as nominated upon the poll-books, and to have his name printed on the official ballot.

The legislation above referred to makes it plain that primary elections are authorized by the laws of the state. But, to constitute the offense of gaming on the result of an election, the election must have been such a one as is mentioned in the statute; that is, it must have been authorized by both the Constitution and laws of the state, and come within the meaning of the term "election" as used in the statute. At first blush it might seem that an act of the Legislature is authorized by the Constitution if it is a valid act. But a state Legislature, unlike the national Congress, has full legislative power wherever it is not restrained by the Constitution; whereas Congress has power only when it is granted by the Constitution. Hence the Legislature does not need express constitutional authority to legislate on a subject, but only lack of a constitutional prohibition. "Authority" given by the Constitution to pass a law means, therefore, more than that there is no restriction against passing a law: it means a positive constitutional direction in regard to it. It follows that the Constitution of the state does not authorize the passage of an act regarding primary elections, although such an act of the Legislature is valid, for it is not prohibited by the Constitution. The word "election" frequently occurs in the Constitution of the state. First in section 9, art. 2; and article 8 of that instrument is wholly devoted to the subject of elections. But, wherever used in the Constitution, it is used in the sense of choosing a person or persons for office by vote, and nowhere in the sense of nominating a candidate for an office by a political party. "Where a word is used in a certain or restricted sense in the Constitution, and the Legislature uses the same word without restriction or qualification in an act in respect to the same subject-matter, the word in the statute should receive the same interpretation that the Constitution has given it." *Mayor of Valverde v. Shattuck* (Colo. Sup.) 34 Pac. 947, 41 Am. St. Rep., loc. cit. 215; *Commonwealth v. Kirk*, 4 B. Mon., loc. cit. 2. "All acts which relate to the same subject, notwithstanding some of them may be expired or are not referred to, must be taken to be one system, and construed consistently," said Lord Mansfield in *Rex v. Loxdale*, 1 Burr. 447. "Where in the body of the laws of the state words are used in a particular meaning, such words, when used in a subsequent statute, are to be understood in the same sense." *Collins v. Wilhoit*, 35 Mo. App. 585; *Dawson v. Dawson*, 23 Mo. App. 169. In *State ex rel. v. McGowan*, 138 Mo. 187, 39 S. W. 771, it is said, "The words of a statute must be so limited as to be in harmony with

the Constitution." "A legislative act is always to be considered with reference to the pre-existing body of law to which it is added and of which it is thenceforth to form a part. * * * Hence arises the rule that in case of doubt or ambiguity the statute is to be construed as to be consistent with itself throughout its extent, and so as to harmonize with the other laws relating to the same kindred matters"—says Black on Interpretation of Laws, p. 60. A Pennsylvania act approved July 2, 1839, relating to elections, declared that "any person who shall make a bet or wager or shall offer to make a bet or wager, or shall challenge or invite any person to make a bet or wager, upon the result of any election within this commonwealth, upon conviction thereof shall forfeit and pay three times the amount so bet or offered to be bet," etc. It had been the custom in that state for many years for members of the Democratic Party in Greene county to hold primary elections to nominate candidates to be voted for at the next general election. On May 27, 1882, Ross, Brant, and Patton were candidates for nomination in Greene county for the office of state senator, and as such were voted for at a primary election by the qualified voters of the Democratic Party. Rinehart and Cole, both qualified voters of Greene county, wagered or bet \$200 on the result of the election between Brant, Patton, and Ross, and placed the money so bet in the hands of William Wells. In a suit by the commonwealth against Wells to recover the penalty provided for by the act of July 2, 1839, it was held that the words "any election within the commonwealth," as used in said act, applied only to the election of public officers, and that Wells was not liable for the penalty. *Commonwealth v. Wells*, 110 Pa. 463, 1 Atl. 310. Section 182 of the Criminal Code of Nebraska provided that "any person who shall have voted in any precinct, or in any ward of any city in this state in which he is not actually a resident ten days or such length of time as required by law next preceding the election or into which he shall have come for temporary purposes shall be fined in a sum not exceeding \$500 nor less than \$50, or be imprisoned in the jail of the proper county for not more than six months." In *State of Nebraska v. Chichester*, 47 N. W. 934, 11 L. R. A. 104, it was held that the defendant was not amenable to the penalties of section 182 for having unlawfully voted at a village election, for the reason that such elections were not specifically mentioned in the section, and that the word "precinct" did not include "village." It is a universal rule in English and American jurisprudence that penal statutes are to be strictly construed, and not extended by implication, intendments, analogies, or equitable considerations. Black on Interpretations of Laws, p. 286; *Sutherland on Statutory Construction*, § 208; *Sedgwick on the Construction of Statutory and Constitution Law* (2d Ed.) p. 281; *City of St. Louis v.*

Goebel, 82 Mo. 295; Rozelle v. Harmon, 103 Mo. 339, 15 S. W. 432, 12 L. R. A. 187; Mellor v. Railway, 105 Mo. 459, 16 S. W. 849, 10 L. R. A. 36; St. Charles v. Hackman, 133 Mo. 634, 34 S. W. 878; The State v. Reid, 125 Mo. 43, 28 S. W. 172; The State v. Schuchmann, 133 Mo. 111, 33 S. W. 35, 34 S. W. 842; Vogelsmeier v. Prendergast, 137 Mo. 286, 39 S. W. 83; State ex inf. v. Bland, 144 Mo., loc. cit. 555, 46 S. W. 440, 41 L. R. A. 297. If there be any doubt whether a statute embraces the offense, the doubt is to be resolved in favor of the accused. 1 Bishop on Criminal Law, §§ 134, 135; United States v. Morris, 14 Pet. 464, 10 L. Ed. 543; United States v. Sheldon, 15 Wheat. 119, 4 L. Ed. 199. The word "election," as used in the Constitution, is used in a restricted and political sense, and means the election of political officers. Mayor of Valverde v. Shattuck, supra. In Commonwealth v. Kirk, supra, an election was defined as the vote or the taking of the vote of the citizens from members to represent them in the General Assembly or other political stations. The lexicographers define election as follows: "The act of choosing a person to fill an office as by a ballot, uplifted hands, vive voce; as the election of a president or a mayor." Webster. "The act or process of choosing a person or persons for office by vote; a polling for office; also the occasion or set time and provision for making such choice; as a general or special election." Century Dictionary. "The act of electing, choosing, or selecting out of a number by vote for appointment to any office or employment." American Encyclopedia Dictionary. Anderson's Law Dictionary says that in its constitutional sense it means "a selection by popular voice of district, county, town, or city, or by some organized body, in contradistinction to appointment by some single person or officer." Bouvier's Law Dictionary defines it to be "the choice, selection of one person from a special class to discharge certain duties in a state, corporation, or city." We think it is clear that the word "election," as used in the statute, is used in its political sense, and in the same sense in which it is used in the Constitution, and means an election for public office, and does not include a primary election for the purpose of nominating a candidate for public office; and also that a primary election is not an election authorized by the Constitution.

2. Plaintiff contends that, if not entitled to recover on the statute, he is entitled to recover at common law. A wager on the result of an election is illegal at common law because against public policy; but when the losing party to the illegal contract remains silent until the contract is executed by the determination of the result upon which the wager was made, he cannot recover his part of the stake. Hickerson v. Benson & Workman, 8 Mo. 8, 40 Am. Dec. 115; Humphreys v. Magee, 13 Mo. 435; Cutshall v. McGowan (Mo. App.) 73 S. W. 933. The uncontradicted evi-

dence is that, notwithstanding the central committee had not met and canvassed the vote on which the wager was made, yet prior to the service on defendant of the notice (set out in the statement) not to pay the stake to Mudd the result of that election had been ascertained and was well known, and was known to the parties to this suit. This state of the evidence shows that plaintiff put off the day of repentance until the common law closed the door of hope against him.

The judgment is affirmed.

REYBURN and GOODE, JJ., concur.

RODGERS et al. v. KALLMEYER et al.
(Court of Appeals at St. Louis, Mo. Jan. 19, 1904.)

APPEAL—FINAL JUDGMENT—DEMURRER.

1. Under Rev. St. 1899, § 806, permitting appeals from final judgments, no appeal will lie from a judgment overruling or sustaining a demurrer.

Appeal from Circuit Court, Montgomery County; E. M. Hughes, Judge.

Proceedings by Jacob R. Rodgers and others against Frank H. Kallmeyer and others. From a judgment for defendants, plaintiffs appeal. Appeal dismissed.

J. M. Barker, for appellants. E. Rosenberg & Son, for respondents.

REYBURN, J. The petition filed in this proceeding was unavoidably lengthy, but, summarized, the action was entitled to construe and reform the will of Thomas J. Powell, deceased, and was instituted by appellants Jacob R. Rodgers, Nancy V., his wife, James H. Powell, and Mary Fanny Devault against the administrators with will annexed of estate of Thomas J. Powell, deceased, and the legatees and devisees under such will; the plaintiffs Nancy V. Rodgers, Mary Fanny Devault, and James H. Powell being children of the testator. The object of the action and prayer of the complaint was to have plaintiff James H. Powell declared a pretermitted heir, and also to have the will construed or reformed so as to relieve his co-plaintiff Nancy V. Rodgers from payment of interest upon a note described, to conform to the alleged intention of the testator. Defendants filed a joint demurrer to the petition on the ground that it failed to state facts sufficient to constitute a cause of action against defendants. Upon submission the court sustained the demurrer only to those portions of the petition relating to the relief sought by Nancy V. Rodgers, and on the same day the court further entered an order as follows: "Now at this day, this cause coming on to be heard, the plaintiffs appear by their attorney, John M. Barker, and the defendants appear by their attor-

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. §§ 465, 467.

neys, E. Rosenberg & Son, and the cause being called for trial, both parties announcing themselves ready for trial, whereupon said cause is submitted to the court upon the pleadings in the cause, and after listening to the argument of the attorneys the court construes the will of Thomas J. Powell as to the ninth item of said will to be: The court, considering the will as to the ninth item of said will, finds that James H. Powell, one of the children of the testator, Thomas J. Powell, is not provided for therein, and that the court further finds that it was the intention of the testator that all of his thirteen children share alike, and subject to whatever advancements he had made to them, and that it was the intention of the said testator that each one of his thirteen children, including the said James H. Powell, should take a one-thirteenth part of the residuary assets of said estate, subject to whatever advancements he had made to them, and that through the neglect or inadvertence of the scrivener who drew said will the said Thomas J. Powell was inadvertently omitted from sharing in the residuary assets. And the court further finds that the said James H. Powell is a pretermitted heir as to the one-thirteenth part of the residuary assets of the estate of Thomas J. Powell, deceased and the plaintiffs consent to the construction of the court in open court as to James H. Powell only. It is further adjudged that the plaintiffs have and recover of the defendants their costs in this behalf expended, and that execution issue therefor." Plaintiffs Jacob R. and Nancy V. Rodgers then moved in arrest, and also filed motion to set aside the judgment rendered upon the demurrer, and proceed with the trial upon the petition and on the merits of the case. No action by the court upon these motions appears in the abstract of record prepared, nor does it exhibit any exceptions saved by appellants.

The judgment herein merely sustaining the demurrer to a portion of the petition was not such judgment as an appeal would lie from under the provisions of the statute. Rev. St. 1899, § 806. No appeal will lie from a judgment overruling or sustaining a demurrer. *City of Plattsburg v. Allen*, 84 Mo. App. 432. It follows that this court is devoid of jurisdiction of the cause, and the appeal is accordingly dismissed.

BLAND, P. J., and GOODE, J., concur.

OLIVER v. LOVE et al.

(Court of Appeals at St. Louis, Mo. Jan. 19, 1904.)

ACTION ON NOTE—COUNTERCLAIM—INSTRUCTIONS—SALE—EVIDENCE—SUFFICIENCY—VERDICT FOR COUNTERCLAIMANT—INTEREST.

1. Where, in an action on a note, a counterclaim is filed bringing numerous items into controversy, and the replication admits certain of them, it is error to charge that the burden is

on defendants to prove each and every item of their counterclaim, and that, if they fail so to do, the verdict should be for the plaintiff for all of those not thus proved.

2. Evidence in an action on a note, where a counterclaim was filed alleging money due for hogs sold to plaintiff, held sufficient to show sale as claimed.

3. Where, in an action on a note, a counterclaim is filed, a refusal to charge that there was a presumption of law that the defendants owed plaintiff the amount of the note when it was executed is proper where there was evidence from which the jury might find what was then owing, and what transactions were included in it.

4. Where, in an action on a note, a counterclaim is filed on which there is a verdict in defendant's favor, he is entitled to interest on verdict from its rendition to the date of final judgment.

Appeal from Louisiana Court of Common Pleas; D. H. Eby, Judge.

Action by G. J. Oliver against J. D. Love and others. From a judgment for plaintiff, both parties appeal. Reversed.

J. W. Reynolds, for plaintiff. Matson & May, for defendants.

GOODE, J. Both the parties to this action appealed, and their appeals have been consolidated. Plaintiff sued the defendants on a promissory note dated November 10, 1897, bearing interest from date at the rate of 8 per cent., compounded if not paid annually. The execution of the note was admitted by the defendants, as were certain payments on it, which were enumerated in the petition. Their answer, after making these admissions, averred that the note had been paid and discharged prior to the institution of this action. A counterclaim was declared on by the defendants, consisting of various items amounting to \$213.35. It was made up of a running account based on sales of grain to the plaintiff, pasturage for cattle, differences due the defendants on cattle trades, and other transactions, which need not be stated. A replication was filed, in which it is averred that the account between the parties was converted into an account stated for \$530 by a settlement between the parties prior to the execution of the note in suit; that at the time the account was stated and the note executed it was agreed the note should be in full settlement of all past transactions and dealings between the parties. The replication says further that five of the items in the counterclaim, amounting to \$108, were included in the note. Certain other items of the counterclaim are then enumerated in the replication, whose total plaintiff concedes the defendants were entitled to be credited with on the note, and avers that the balance due thereon is \$183.07. It thus appears that as to part of the items in the counterclaim there was no controversy, and this disposes of one of the plaintiff's assignments of error, to wit, the trial court's refusal of an instruction asked by the plaintiff that the burden was on the defendants to prove each and every item of their counterclaim, and that,

if they failed to prove any of them by the greater weight of the evidence, the verdict should be for the plaintiff for all of those not thus proved. This charge was wrong, for, while it was incumbent on the defendants to establish by a preponderance of the evidence the validity of the disputed items, it was not incumbent on them to prove the undisputed ones. One item of the counterclaim was for \$17.60 for three hogs, alleged to have been sold to plaintiff by defendants May 10, 1896. Two instructions were asked by plaintiff as to this transaction to the effect that the finding on it must be for the plaintiff. Those instructions were refused, the plaintiff says, erroneously. His argument is that the undisputed evidence shows the three hogs were sold by the defendants to Tim Lambertson, and by Lambertson to Oliver, instead of being sold by the defendants to Oliver; that, therefore, Oliver did not owe the defendants for the hogs. The evidence is that, just as Lambertson had purchased from the defendants a bunch of hogs, including the three in dispute, Oliver came up, and said he would like to have those three, and Lambertson agreed he might have them. They were separated from the others, and Oliver drove them off. The testimony is certainly susceptible of the inference that, instead of Lambertson selling the hogs to Oliver, he waived his right to them, and allowed the defendants to sell them to Oliver, which they did, Oliver acquiring them by a purchase from the defendants, and becoming thereby indebted to the defendants. We therefore overrule the assignment of error based on the refusal of the instructions directing the jury to find for the plaintiff on this item of the counterclaim.

It is asserted the court erred in refusing to charge the jury that there was a presumption of law that the defendants owed Oliver \$500 at the time they executed the note in suit, and, consequently, unless the defendants had shown by the weight of the evidence that some of the items of the counterclaim were not embraced in said settlement, the verdict should be for the plaintiff on the counterclaim. The court instructed the jury to disallow such items of the counterclaim as they might find from the evidence were included in the settlement, and this was a sound instruction. It was not proper to instruct that there was a legal presumption as to how much the defendants owed the plaintiff at the date of the settlement, when there was evidence from which they were to find what was then owing, and what transactions were included in it. *Haycraft v. Grigsby*, 88 Mo. App. loc. cit. 362.

The only point, in this appeal, of doubt, or deserving any comment, arises on the contention that the defendant J. D. Love was entitled to interest from the date of the verdict to the rendition of final judgment, on the amount found by the jury in his favor on the counterclaim. To make this point intelligi-

ble, the course the case took in the circuit court must be stated. At the first trial the jury found a verdict for the plaintiff on the note in the sum of \$190.98, and in favor of the defendant J. D. Love on the counterclaim for \$185.35, assessing plaintiff's damages at the difference between the two amounts, to wit, \$5.63. Judgment was entered in accordance with this verdict. That verdict was returned June 4, 1902. On the same day plaintiff filed a motion for new trial and in arrest. On June 4, 1902, defendants filed motions asking the court to amend the verdict and correct the judgment, stating, in support of the motion, that the verdict on the note was for more than the petition asked, and that the amount actually due on it was \$184.24, instead of \$190.98, as found by the jury; that it was the plain intention of the jury to render a verdict for the difference between the amount actually due and the amount of the counterclaim, and the court was prayed to find the difference and enter judgment for it. On June 28, 1902, the court overruled said motion; but, having found the verdict to be inaccurate, and that the true amount due on the note could be found by computation, it entered an order that, unless the plaintiff would remit the excess of the verdict in his favor, it would set it aside. Plaintiff refused to enter a remittitur, and the finding on the note was set aside, but not the finding on the counterclaim, which was left standing. At the same term plaintiff's motions for new trial and in arrest were overruled, and he appealed. It seems the defendants filed another motion admitting the amount due on the note was the balance that would remain after deducting the credits indorsed on it, and praying that it be computed, and judgment entered in accordance with the finding and verdict of the jury. This motion the court refused to pass on, and defendants excepted. Plaintiff dismissed his aforesaid appeal on June 28, 1902, and on December 8, 1902, the mandate of this court showing the dismissal was filed in the circuit court. On December 27, 1902, the circuit court continued the case on its own motion to the next term. At the next term, to wit, in June, 1903, the defendants' last motion for judgment was overruled, and they excepted. On June 5, 1903 the case was continued, on plaintiff's application, until June 30th, at which date plaintiff's cause of action was tried before the court, resulting in a finding in his favor for \$188.41, which was \$3.06 in excess of the amount found by the jury in favor of J. D. Love on the counterclaim; so judgment was entered in favor of the plaintiff for the said sum of \$3.06. The circuit court refused to allow said defendants interest from the date of the verdict, June 4, 1902, to June 30, 1903, when final judgment was rendered on the amount found by the verdict to be due him. If interest had been allowed, the amount would have exceeded the finding for the

plaintiff on the note, and the costs would have been cast on him instead of on the defendants. The question is, was J. D. Love entitled to interest? There is no statute regulating this matter, but there is a settled rule of the common law that regulates it in so far as judgment was delayed by the plaintiff. For that period the prevailing defendant was certainly entitled to interest, as the verdict was on an interest-bearing claim. *Bull v. Ketchum*, 2 Denio, 188; *Vredenbergh v. Hallett*, 1 Johns. Cas. 27; *People v. Gaine*, 1 Johns. 343; *Lord v. Mayor*, 3 Hill, 426; *Henning v. Van Tyne*, 19 Wend. 101; *Gibson v. Cln. Enquirer*, 2 Flip. 88, Fed. Cas. No. 5,391; *Dowell v. Griswold*, 5 Sawy. 23, Fed. Cas. No. 4,040. Part of the delay in entering judgment was undoubtedly occasioned by the unjustifiable refusal of the plaintiff to remit a palpable excess of the verdict in his favor, and the frivolous appeal he took before final judgment was rendered, which appeal he dismissed shortly after taking it. Plaintiff's course appears to have prevented judgment during the interval from June 4, 1902, to December 8th; for otherwise the case would probably have been disposed of, as the finding on the counterclaim really settled all the controverted issues. The delay in giving judgment while the cause stood adjourned on the court's own motion cannot be charged to the plaintiff. At the June term, 1903, plaintiff procured a continuance for about a month, thus again postponing judgment. Should interest have been allowed on the verdict on the defendants' counterclaim for the period during which the case remained undisposed of on account of the continuance ordered by the circuit court on its own motion? Interest on plaintiff's note accumulated all the time (whether allowed finally or not), and the defendants' counterclaim was as much an interest-bearing demand, after it was preferred in the suit, as was the note. The justice of the matter undoubtedly requires that it bear interest during the entire period from the time the verdict was returned until judgment was entered on it, for defendants were in no way to blame for the delay, but were asking judgment. There was no second trial on the counterclaim, as the verdict of the jury was never set aside. The second trial was on plaintiff's cause of action on the note. It would be obviously wrong, from a moral point of view, to deny interest during a delay of which defendants were innocent, thereby throwing the costs on them. Interest to verdict is always given on an interest-bearing demand, even if a trial is delayed on the court's motion, and there is as good reason for giving interest after verdict, if the court delays judgment. The point has received the attention of courts before, and, while the decisions are not uniform, the weight of authority is to allow interest in the circumstances stated. A discussion of the question may be found in *Griffith v. Rail-*

way Co. (C. C.) 44 Fed. 574, 584. In that case, which was in tort, and furnished the plaintiff poorer ground for claiming interest than the present defendant, J. D. Love, possesses, a verdict was returned for \$5,000 at one term, and stood over to the next term on a motion for new trial. Interest was allowed on the verdict to the date of the judgment, notwithstanding there was no statute to warrant it. *Gibson v. Enquirer*, 2 Flip. 88, Fed. Cas. No. 5,391, has a good opinion on the point, and after citing most of the cases that deal with it, reaches a conclusion in favor of giving interest to the entry of judgment. The subject was fully gone into by the Court of King's Bench on a case reserved expressly to consider it with a view to altering the prevailing rule. The decision was that interest should be given to the date of judgment. *Robinson v. Bland*, 2 Burr, 1077. The opinion, which was by Lord Mansfield, says the practice in the English courts had been to allow interest only "until writ brought," namely, to the commencement of the action—a rule which has never prevailed in this country, we believe, for the uniform practice here is for interest to be added by the jury to the date of the verdict, or, in trials by the court, to the date of entering judgment. In *Robinson v. Bland* the rule was deliberately altered because of its inherent injustice and inconsistency with the general doctrine that damages or rights accruing on a cause of action in suit for which a new suit will not lie shall be redressed or satisfied by the judgment in the pending suit. In *Johnson v. Railroad*, 43 N. H. 410. it was said: "No solid reason, we think, can be given for withholding the interest between the finding of the jury and the rendering of judgment, as it is quite clear, under our law and practice, interest should be allowed at all other times from the commencement of the suit, at least, until judgment and satisfaction of the judgment." In *Sproat's Ex'r v. Cutler, Wright*, 157, interest was allowed on an award of arbitrators from its date, and this was contested. The Supreme Court of Ohio approved the allowance, saying: "The law allows interest on all balances due on settlements. 29 Ohio Laws, p. 451. Here is a balance found due. If it were the verdict of a jury, and judgment had been delayed, we should allow interest, if asked, although we know no practice of the kind in this state." In *Winthrop v. Curtis*, 4 Me. 297, interest was computed on the sum named in the verdict, and added to that sum by the court in giving judgment, although the delay was caused by the court reserving the case on a point of law. Cases have been decided by the Supreme Court of the United States wherein the jurisdiction of that court depended on the validity of the interest added by the trial court to the jury's verdict, as without added interest the amount of the judgment was for a sum below the minimum jurisdiction of the Supreme Court. *Quebec*

Steamship Co. v. Merchant, 133 U. S. 375, 10 Sup. Ct. 397, 33 L. Ed. 656; *New York El. R. R. v. Bank*, 118 U. S. 608, 7 Sup. Ct. 23, 30 L. Ed. 259. In those cases the point was noticed, and the jurisdiction retained. Most of the decisions allowed interest on the verdict because judgment had been postponed by some motion or procedure of the unsuccessful party; but the decision by Lord Mansfield, and some of the other authorities cited, did not rely on such a circumstance, which, indeed, had not occurred. If the party asking interest has not himself caused delay, it seems to be just that he should have interest. Usually his adversary may pay the amount of the verdict if he pleases, and thus prevent interest from running on it. Taking account of the essential equity of the matter, we think the adjudications referred to are a sufficient sanction for ruling that interest should have been added to the verdict on the counterclaim to the date of final judgment. This rule will accord exactly with the ancient practice to render judgment as of an earlier date when the delay in giving judgment was caused by the court. *Mitchell v. Overman*, 103 U. S., loc. cit. 64, 26 L. Ed. 369. In the present case the judgment was necessarily delayed, for it could not go on the counterclaim until the main action was tried, as there can be but one final judgment in a cause. *Seay v. Sanders*, 88 Mo. App. 478.

The judgment is reversed, and the cause remanded, with a direction to the circuit court to compute the interest on the note, and also on the counterclaim to June 30, 1903, and render judgment as of that date for the difference between the two amounts in favor of the party entitled to the difference.

BLAND, P. J., and REYBURN, J., concur.

WARDER, BUSHNELL & GLESSNER CO. v. LIBBY.*

(Court of Appeals at St. Louis, Mo. Jan. 19, 1904.)

ACTION ON LOST NOTES—STATEMENT IN JUSTICE COURT—SUFFICIENCY—MISSING RECORDS AND FILES—APPEAL—REVIEW—PRE-SUMPTION—APPROVAL OF INDEMNITY BOND—FINDING BY JURY.

1. Rev. St. 1899, § 3854, requires that if an instrument in writing, on which an action in justice court is founded, and which is required to be filed with the justice, is alleged to be lost, it shall be sufficient to file an affidavit as to such loss, and setting forth the substance of the instrument. *Held*, that a statement filed with the justice, verified by plaintiff's counsel, comprising a statement of the loss of notes sued on, the substance of which was fully set forth, accompanied by copies thereof, authenticated by affidavit of an officer of plaintiff, was a sufficient compliance with the statute.

2. Independent of statute, a court has power to supply its missing papers, records, or files.

3. Where in an action on lost notes the indemnifying bond, required by statute to be ap-

proved before judgment was rendered, was filed prior to the trial, and a memorandum in the clerk's minute book showed that it was approved, this was sufficient, as it would be presumed that the entry was made by direction of the court.

4. The finding of the jury is conclusive on controverted questions of fact.

Appeal from Circuit Court, Pike County; D. H. Eby, Judge.

Action by the Warder, Bushnell & Glessner Company against Henry A. Libby in justice court to recover on promissory notes. From a judgment for plaintiff, defendant appealed to the circuit court, and from a judgment therein for plaintiff on a trial de novo defendant again appeals. *Affirmed*.

J. H. Blair & Son, for appellant. W. W. Botts, for respondent.

Statement.

REYBURN, J. In June, 1896, plaintiff, an Ohio corporation, through its agents at Vandalla, sold to defendant a Champion binder, which was delivered to defendant, set up, and operated on his farm. The contract of purchase was in form of a written order addressed to the agents by defendant, containing an agreement to pay \$120 in installments to be evidenced by notes executed upon receipt of the machine, or later, when demanded. The instrument contained warranties by vendor of material, make, and durability. Shortly after the machine was started, complaint of a defect or imperfection was made to the selling agents by the purchaser, and a new roller adjusted, and the machine continued in use to the time of trial. After the first season in which the appliance had been used and tested, defendant delivered plaintiff's agents the notes required by the terms of sale, the first of which was paid when due, but the other two, for \$30 and \$60, respectively, payable severally on or before the 1st days of January and October, 1897, after delivery, were forwarded by the agents to the office of plaintiff at Chicago, and remitted at maturity to a bank at Vandalla for collection, and all trace of them disappeared. In October, 1900, plaintiff brought suit upon them before a justice of the peace in Pike county, from which court, after sundry proceedings, all the papers relating to the action disappeared. Shortly after, the official term of the justice expired, and this proceeding originated March, 1901, by a motion by defendant in the circuit court for a rule on the succeeding justice to amend his records, and file a complete transcript of the docket of his predecessor in office, which was sustained. In June, 1901, plaintiff filed in the circuit court a verified copy of the original statement of the cause of action filed before the justice, which described the notes, alleged nonpayment, with prayer for judgment, and averred their loss and destruction, for which reason they could not be filed; but stated that correct verified copies accompanied the petition. At the same time plaintiff filed a

*Rehearing denied February 2, 1904.

motion to require the justice then in office to amend the docket entries in the cause so as to show that plaintiff had filed for suit verified copies of the notes, and had deposited an amount of cash as security for costs with the constable, which motion was denied; and later the justice, in obedience to the rule granted earlier on defendant's motion, filed a complete transcript of his amended record. This transcript contained recitals that plaintiff had filed a claim against defendant, and summons thereon had been issued, and placed in the hands of the constable of the township, and made returnable October 25, 1900, on which date, the cause coming on for trial, a motion for security for costs was filed by defendant, and a continuance granted to November 1, 1900, when, defendant defaulting and plaintiff appearing, the justice proceeded to hear the evidence in support of plaintiff's claim, and, the notes having been lost, the plaintiff produced certified copies and filed indemnifying bond in sum of \$250; and after hearing the evidence the justice found that defendant was indebted to plaintiff in the sum named, and rendered judgment accordingly; and on the 5th of November following defendant perfected his appeal, and an appeal was granted by the justice to the circuit court of Pike county. On the 14th of October, 1902, plaintiff filed in the circuit court an indemnifying bond in due form, with sureties. The regular minute book of the clerk showed the approval of this bond by the court, which entry, however, by inadvertence or oversight, was not, in accordance with the custom and practice prevailing, transferred in more extended form on the records of the court, as is shown by a certificate of the circuit clerk. October 22, 1902, defendant filed and the court overruled a motion to dismiss, and the trial proceeded before a jury, and terminated in a verdict for \$125.81, from judgment upon which this appeal has been duly taken. The evidence of plaintiff, oral, documentary, and in form of depositions, tended to prove the averments of plaintiff's complaint. In his defense, defendant, by his own testimony, as well as by some of his neighbors, who saw the machine, sought to establish a breach of the terms of the contract by showing that the machine delivered did not perform the work well, and in their opinion was not a first-class machine.

Opinion.

1. Appellant urges that the motion to dismiss was erroneously overruled, as there should have been a sworn statement filed as the cause of action alleging the loss of the notes, and stating their substance. Section 3854, Rev. St. 1899, requires that, if the instrument in writing upon which the action is founded (which, by the preceding section, is required to be filed with the justice) is alleged to be lost or destroyed, it shall be sufficient for the plaintiff to file with the justice

the affidavit of himself or some other credible person stating such loss or destruction, and setting forth the substance of such instrument. The original statement, which the evidence established, was filed with the justice, and a copy of which was a part of the record in the trial court, was composed of a comprehensive petition, verified by affidavit of plaintiff's counsel, comprising, among other appropriate allegations, a statement of the loss or destruction of the notes involved, the substance of which were fully set forth; and this petition was accompanied by copies of the notes authenticated by affidavit of an officer of plaintiff. The obvious purpose of the enactment was attained, and in truth the terms of the statute were literally and carefully complied with. It may be remarked that, independent of the statute, a court has the power of supplying its missing papers, records, or files. *St. Louis, etc., R. R. v. Holladay*, 131 Mo. 440, 33 S. W. 49; *State v. Simpson*, 67 Mo. 647.

2. Appellant next insists that the indemnifying bond was not approved by the court, and no judgment could be rendered until such approval. Until the enactment of the present statute (Rev. St. 1879, § 3652, now section 745, Rev. St. 1899), no action at law could be maintained upon such lost instrument, but the remedy of its holder was in equity, and usually granted with such conditions of recovery by requirement of indemnifying bond or otherwise as might be deemed equitable. *Barrows v. Million*, 43 Mo. App. 79. In construing this section the Supreme Court has held that the petition need not state that the bond of indemnity has been given, but the plaintiff must execute the bond before the court can render judgment in his favor. *Eans v. Bank*, 79 Mo. 182. In the present proceeding the bond was filed prior to the trial, and its approval by the court was sufficiently shown by the entry in the clerk's minute book, even though such memorandum of approval was not transcribed into the record book proper. Such entry will be presumed to have been made by the direction of the court and by the clerk under proper authority. *Read v. Sutton*, 2 Cush. 115. The bond having been tendered and the judgment rendered thereafter, the presumption might fairly be indulged in that it had been approved and ordered filed by the court. "Acts done which presuppose the existence of other acts to make them legally operative are presumptive proof of the latter." *Macey v. Stark*, 116 Mo. 481, 21 S. W. 1088.

3. The case was submitted to the jury upon a charge embracing three instructions asked by plaintiff, two given by the court of its own instance, and one asked by defendant; two of defendant's instructions being declined. These instructions submitted the issues raised as favorably to defendant as the law justified, and afforded the jury full latitude to reduce the amount of the notes

by such credit in favor of defendant to which they might believe him entitled under the evidence in his behalf, and their finding is conclusive upon such controverted questions.

After a full consideration of all the objections encountered in the brief and argument of defendant, including such as have not been deemed to require specific review and refutation, no reversible error of the trial court has been revealed, and the judgment is affirmed.

BLAND, P. J., and GOODE, J., concur.

STARK et al. v. ANDERSON et ux.

(Court of Appeals at St. Louis, Mo. Jan. 19, 1904.)

HOMESTEAD—INCUMBRANCE BY HUSBAND—LIEN—CONSTRUCTION—INTEREST.

1. Where a wife had not availed herself of Rev. St. 1889, § 5435, permitting her to file a claim of homestead to land occupied by herself and husband, after which he could not alienate without her consent, a husband might, prior to the act of 1895 restricting his rights, incumber the homestead with a lien, subject only to the wife's right of dower.

2. A contract by a husband to purchase fruit trees, to be paid for by their produce—the contract to constitute a lien on the homestead until the full amount should be paid—was not a contract for such improvements as would constitute a lien on the land paramount to the rights of the wife, who was not a party to the contract.

3. A contract for the purchase of trees, to be planted on the land of purchaser, provided that one-half of the gross amount of the sales from the yearly crop should be remitted, to be credited from year to year until the full amount, "together with six per cent. compound interest shall be paid, and the final payment shall be paid within ten (10) years from date regardless of the amount paid from year to year, if the amount shall not be paid prior thereto"; that "this shall be a lien upon the * * * real estate until the full amount together with interest shall be paid." Held an agreement for payment of the principal, with interest at the rate of 6 per cent., compounded annually from the date of the instrument, and not from the date of final payment.

Appeal from Circuit Court, Crawford County; L. B. Woodside, Judge.

Action by C. M. Stark and others against H. R. Anderson and wife. Judgment for defendants, and plaintiffs appeal. Reversed.

A. H. Harrison, for appellants. Clymer & Clymer, for respondents.

Statement.

REYBURN, J. This action involves the construction of legal effect of the following agreement executed by plaintiffs and defendant Anderson, namely:

"This indenture made and entered into the 21st day of October, A. D. 1891, by and between H. R. Anderson, Jakes Prairie (P. O. —, Miles —, Direction —), of the county of Crawford, and state of Missouri, party of the first part, and C. M. Stark, E. W. Stark, and W. P. Stark, doing an orchard business under the firm name of Stark Bros.

at Louisiana, in county of Pike, state of Missouri, parties of the second part.

"Witnesseth, that the said party of the first part in consideration of the second parties furnishing to him six hundred fruit trees, said trees to be furnished in the fall, 1891, as per order given by said first party, binds himself to plant in the usual and customary manner, to take good care of same and give good attention to them, said trees to be planted and set out on his farm situated in Crawford county, state of Missouri, and more particularly described as follows: to wit, lot 6 N. E. ¼ and lot 5 N. W. ¼ of section five (5) township thirty-nine (39) range five (5) west, containing 182 and 41/100 acres, for which said first party binds himself and his heirs to pay the said second parties the sum of One Hundred and Eight Dollars (\$108.00) due and payable as follows:

"One half of the gross amount of the sales from the crop each year said first party agrees to remit, which is to be credited hereon from year to year until the full amount, together with six per cent. compound interest shall be paid, and the final payment shall be made within ten (10) years from date regardless of the amount paid from year to year, if the amount shall not be paid prior thereto.

"And it is also understood and agreed by said first party, by his heirs and assigns, that this shall be a lien upon the above described premises or real estate until the full amount together with interest shall be paid, and should said first party fail to pay the amount together with the interest, said real estate shall be subjected to the payment of the above amount; and the said first party, for the purpose of obtaining this loan, states that the above property is free and clear of incumbrances and that he claims the same with a perfect title.

"In Witness Whereof we have hereunto set our hands and seals this the day and year last aforesaid. H. R. Anderson. [Seal.] Stark Bros. [Seal.]

"Witnessed by M. A. Arthur."

After acknowledgment by defendant Anderson, the instrument was filed for record and recorded in the recorder's office of Crawford county October 30, 1891. The petition averred sale and delivery to defendant H. R. Anderson of 600 fruit trees at his instance and request; his agreement to set out the trees on the land described; and the terms of payment provided by the contract, which was filed as part of the petition; that the trees were delivered according to contract, and by Anderson planted upon above land. A default in payment under the contract is averred, and the amount of \$108, with interest at rate of 6 per cent., compounded annually, is claimed as due and unpaid, for which demand and nonpayment are averred. Proceeding, the petition described two conveyances subsequent to the execution of the contract whereby the title to the realty was conveyed to his codefendant, his wife, by H. R. Ander-

son, and which conveyances are alleged to have been made subject to the lien of plaintiffs for the amount due under the contract. The petition concludes with a prayer for judgment for the amount as above computed; that such judgment be made a lien upon the land described; that all equities of redemption be foreclosed, said lien enforced, and the realty, or so much as might be necessary to satisfy the judgment and costs, be sold, and a special execution therefor issue. The joint answer of defendants was a summary general denial.

The facts established at the trial were that two shipments of trees were consigned by plaintiff to defendant H. R. Anderson after the execution of the contract, the first lot being rejected, and, upon his objection to the first, the second lot was forwarded, accepted, and planted on the realty mentioned, but no payment of the purchase price had ever been made. The defendant H. R. Anderson deposed, additional to corroborating above facts, that he lived on the tract of land at the time as his homestead. The court rendered a general judgment against him for the principal of the agreed price, with simple interest accrued from the maturity of the contract aggregating February, 1903, per judgment then entered, \$116.64, but adjudged that the contract bore no interest until maturity, and was not sufficient to impose a lien on the land as against defendant Rebecca Anderson, by reason of its being the homestead of her husband at the time of its execution, and rendered judgment in her favor.

Opinion.

1. The instrument evidencing the terms of sale of the trees, under the doctrine recognized long since in this state, constituted an equitable lien or mortgage upon the realty affected, against H. R. Anderson. *Martin v. Nixon*, 92 Mo., loc. cit. 34, 4 S. W. 503. Whatever may have been the authority, if any, existing at time of the judgment herein, upon which the trial judge relied in the conclusion reached by him, a decision of the Supreme Court, since announced, has placed a construction upon the statutory provisions then controlling homesteads antagonistic to the judgment appealed from. In the language of Judge Fox, rendering the opinion: "Under the well-settled law of this state, prior to the enactment of the statute of 1895 it is beyond dispute that the husband could sell or encumber the homestead, subject to the wife's inchoate right of dower, except where the wife had filed her claim as provided by section 5435, Rev. St. 1889." *Gladney v. Sydnor*, 72 S. W. 554, 60 L. R. A. 880. In the light of this decision, the husband's right at the time of the transaction to impose a lien upon the realty, even if it were homestead property, without the wife uniting with him, in absence of the statutory claim perfected by her, is conclusively settled. The wife, however, was neither made a party to the contract, nor did

she join in its execution; and her rights to the realty concerned, whether marital or otherwise originating, existing at the time of the contract, were not thereby impaired or disturbed. No authority in this state, statutory or otherwise, has been invoked to sustain appellant's contention that the trees were such improvements upon the land as to constitute a lien thereon paramount to such rights of Rebecca Anderson.

2. The language of the contract providing for payment of the contract price, while not free from obscurity, upon careful analysis is to be interpreted as contracting for payment of the principal, with interest at rate of 6 per cent. per annum, compounded annually, from October 21, 1891, the date of the instrument.

The judgment is accordingly reversed, and the cause remanded, with directions to enter a decree embracing a finding for \$108, and interest thereon, computed at rate of 6 per cent. per annum, from October 21, 1891, compounded annually; that this amount, with costs of this action, be a general judgment against defendant H. R. Anderson, and further be decreed a lien on the realty described in the petition; that all equities of redemption be foreclosed, and said realty, or so much thereof as may be necessary to satisfy said finding and judgment and all costs of this suit, be sold; and that a special execution or fieri facias be issued accordingly.

BLAND, P. J., and GOODE, J., concur.

RITCHIE v. HOME INS. CO.

(Court of Appeals at St. Louis, Mo., Jan. 19, 1904.)

FIRE INSURANCE—POLICIES—STATUTES—PROPERTY INSURED—VALUATION—MISREPRESENTATION—ESTOPPEL—EVIDENCE.

1. The statutes of the state relating to insurance in force at the time a policy is issued become a part of the contract by implication, with the same effect as if embodied therein.

2. Rev. St. 1890, § 7979, declares that in policies affecting real property, the value of the property, or the risk accepted and insured, as stated in the policy, shall be conclusive and incontestable in actions thereon. *Held*, that where, in an action on a policy covering "\$1,500 on the shingle-roof frame building and additions," etc., taken on an oral application, the answer alleged an overvaluation of the property, but contained no allegation that, but for the alleged false statements, the policy would not have been issued, evidence tending to prove fraudulent representations of overvaluation anterior to the issuance of the policy was properly excluded.

3. Where a policy on real property authorized its cancellation at any time by the assured or insurer, the latter was not entitled to cancel the same after loss on the ground of fraudulent overvaluation.

4. Where insurer's soliciting agent, who negotiated a policy sued on, resided near where the property was located, was familiar therewith, and knew its value, and insurer had every opportunity, before loss, to inspect the property insured, it was estopped from denying the valuation of the property as stated in the policy.

Appeal from Circuit Court, Clark County; E. R. McKee, Judge.

Action by Elitha J. Ritchie against the Home Insurance Company. From a judgment in favor of plaintiff, defendant appeals. **Affirmed.**

Fyke Bros., Snider & Richardson, and Whiteside & Yant, for appellant. W. T. Ruth-erford, for respondent.

REYBURN, J. This action is upon a policy of insurance issued December 27, 1901, covering "\$1,500 on the shingle-roof frame building and additions, including foundations, occupied as a private house." January 4, 1902, consent was indorsed on the policy for occupancy of the barn by a careful tenant, and January 22, 1902, the barn was burned. From judgment upon the verdict of the jury in favor of plaintiff, defendant has appealed; and in this court chiefly one objection to the judgment below is encountered, namely, that defendant was not permitted to introduce evidence tending to prove that the policy was obtained by fraudulent representations anterior to the issuance of the policy respecting the value of the building, which was material to the risk. There was no written application taken for the policy, and it was solicited and obtained by the local agent of appellant; and the conversations between this agent and plaintiff in the negotiations preliminary to his acceptance of the risk were sought to be elicited, and were excluded by the court upon objections thereto by plaintiff. At the threshold of the case it may be stated that the answer contained no averment that, but for the alleged false statements, the policy would not have been issued. In *Christian v. Ins. Co.*, 143 Mo. 460, 45 S. W. 268, the Supreme Court intimated that unless the answer pleads that the policy would not have been issued, had the company known the real state of the facts, no issue of misrepresentation is made; and in *Summers v. Ins. Co.*, 90 Mo. App. 691, this court, citing the above decision, held an answer insufficient, containing no allegation that defendant would not have issued the policy, had it known the real state of facts misrepresented by assured in his application. While this principle is thus invoked and made applicable in this state to accident and life insurance policies, by analogy it would apply with equal force to insurance against fire, and has been so directed in other jurisdictions. *Ætna Ins. Co. v. Simmons* (Neb.) 69 N. W. 134. Sections 7969, 7970, 7979, Rev. St. 1899, being part of the statute law of this state when this policy was issued, became part of the contract, by implication, with same effect as if embodied therein. *Christian v. Ins. Co.*, supra. Or as expressed in *Havens v. Ins. Co.*, 123 Mo. 403, 27 S. W. 718, 26 L. R. A. 107, 45 Am. St. Rep. 570, all stipulations of the policy must yield to the statute. Under the provisions of above sections—especially under the concluding clause

of the section last named—the value of the property, the risk accepted and insured, was made conclusive and incontestable in policies affecting real property. Such was the view expressed by this court in case of *Williams v. Ins. Co.*, 73 Mo. App. 607, where the presiding judge stated: "While it is not necessary to decide the point in this case, it seems to us that the question of the valuation of the house is eliminated from inquiry, for the reason that the policy is a valued one, by the force and effect of section 5897, Rev. St. 1889. An attempt to evade the statute as to the value in the application and policy should not be sanctioned by the courts. The statute is as much a part of the policy as any clause or warranty written in it, and should prevail against any warranty made in contravention of its provisions, because it is the law of the state, and declaratory of its policy as to insurance of this class of property against loss by fire." The final sentence of section 7979 was the subject of construction in *Gibson v. Ins. Co.*, 82 Mo. App. 515, where it was interpreted to limit insurance risks to three-fourths of the value of the property insured, and that the practical effect was to convert a policy upon chattels into a valued policy. This latter decision, however, appears to have escaped attention in later cases in the same court in *Millis v. Ins. Co.*, 95 Mo. App., loc. cit. 217, 68 S. W. 1066, as well as the succeeding case of *Bode v. Ins. Co.*, where the *Millis* Case is considered. 77 S. W. 116. Without any construction of the above section 7979, our conclusion, however, remains fixed, that in this case, involving a policy covering a building upon realty, and under the framing of the defense, the trial court did not err in excluding the evidence offered, tending to show that the policy was obtained by fraudulent representations of the value of the building. It may also, with plausibility and convincing force, be argued that, after a loss has ensued on a policy of insurance, the prayer of the answer herein to have the contract canceled and annulled on account of fraud exercised in obtaining it is made too late. Such is the doctrine applied to policies of life insurance, and we know of no reason why it should not apply as forcibly to policies indemnifying against loss by fire (*Kern v. Legion of Honor*, 167 Mo. 471, 67 S. W. 252; *Schureman v. Ins. Co.*, 185 Mo. 641, 65 S. W. 723), especially in view of the following provision of this policy: "This policy may be canceled at any time by the assured, or the company, by notice given to that effect."

While the defense above discussed is made the more prominent in appellant's argument, it is further urged in behalf of appellant that there was no evidence that it knew that the building was used as a warehouse, or was occupied by more than one tenant, whereby, as averred in its answer, the risk was greatly increased, and therefore the instructions given, submitting the issue of such knowledge on appellant's part, were erroneous. It is

sufficient to dismiss these contentions with the response that there was substantial testimony upon these issues introduced by plaintiff, and they were properly questions of fact for the jury, and so properly considered by the trial court, and submitted under proper instructions. The testimony at the trial further disclosed that the soliciting agent had been the defendant's representative at Kahoka, his place of residence, for many years, and was familiar with the barn insured; that he passed it frequently, and was at a short distance from and in plain view of it when negotiating the policy here concerned. Under such state of facts, the language of the Supreme Court employed in *Daggs v. Ins. Co.*, 136 Mo. 382, 38 S. W. 85, 35 L. R. A. 227, 58 Am. St. Rep. 638, in passing upon the validity of sections 5897 and 5898, is especially apt: "The manifest policy of the statute is to prevent, rather than encourage, overinsurance, and to guard, as far as possible, against carelessness, and every inducement to destroy property in order to procure the insurance upon it. It was also designed to prevent insurance companies from taking reckless risks in order to obtain large premiums, by advising them in advance that they would be held to the value agreed upon when the insurance was written. No company is bound to insure any piece of property without first making a survey and examination of the premises, and it is not compelled to insure the full value of them. But having the opportunity to inspect fully before insuring, and then fixing the amount of the risk, and receiving the premium based upon such valuation, it ought to be forever estopped, in case of a total loss, from denying the valuation agreed upon; and such was the law long before this statute was enacted."

The case was fairly tried, the instructions given correctly stated the law, and the judgment is affirmed.

BLAND, P. J., and GOODE, J., concur.

WIMP v. EARLY.

(Court of Appeals at St. Louis, Mo. Jan. 19, 1904.)

LANDLORD AND TENANT—LIEN ON CROPS—WAIVER—AUTHORITY OF AGENT—CONSIDERATION—EVIDENCE—RELEVANCY—PLEADINGS—ANSWER—DEFENSES ADMISSIBLE.

1. In an action under Rev. St. 1899, § 4123, by a landlord against a party who purchased part of a crop known by him to have been grown on the demised premises, an answer pleading a deed of trust on other property given by the tenant to the landlord to secure the rent, and alleging that it waived the statutory lien, and also averring that plaintiff gave the tenant permission to sell the crops raised on the farm, and especially the timothy seed which defendant purchased, was sufficiently broad to let in proof that plaintiff, in other ways than by the acceptance of the deed of trust, consented to the sale of the timothy seed, and waived her lien thereon.

2. A deed of trust taken by a landlord on premises belonging to the tenant to secure the

rent of the demised premises, stipulating that it should not affect the landlord's statutory lien on the crops grown on the demised premises, did not create a mortgage lien on the crops in favor of the landlord, but was merely intended to avoid any inference that in taking other security the landlord intended to relinquish the statutory security.

3. A crop of timothy seed, whether sold before or after it is gathered, is not part of the realty; and the statutory lien thereon given to the landlord by Rev. St. 1899, § 4123, may be released by the landlord without writing, or by his agent, whose authority rests merely in parol.

4. Where the agent of a landlord, with authority, actual or apparent, to waive the statutory lien on a tenant's crops, consents unconditionally to the sale of certain timothy, and to the discharge of the lien, the purchaser cannot be held liable for the value of the timothy, although the waiver was without consideration.

5. On the issue of waiver by a landlord's agent of the statutory lien on crops grown on the demised premises, it was error to exclude evidence as to whether the scope of the agency was sufficient to clothe the agent with real or apparent authority to waive the lien, for the power of the agent to lease the land did not of itself necessarily carry with it power to waive the lien.

6. On the issue as to whether a landlord's agent consented to the sale of timothy seed to defendant, and waived the landlord's lien thereon, evidence of a waiver of the lien on other crops grown by the tenant, by consent to their sale, was inadmissible.

7. In an action by a landlord under Rev. St. 1899, § 4123, to recover from a purchaser of the tenant's crops the value thereof, evidence as to the value of land on which the tenant had executed a deed of trust to secure the rent, which land had been bid in by the landlord on a sale under the deed, was improperly admitted.

Appeal from Circuit Court, Knox County; E. R. McKee, Judge.

Action by Susan Wimp against Thomas Early. From a judgment for defendant, plaintiff appeals. Reversed.

O. D. Jones, for appellant. C. D. Stewart and C. M. Smith, for respondent.

GOODE, J. Plaintiff leased to J. D. and B. Williford (father and son) 800 acres of land in Scotland county during the year 1899, for which those tenants were to pay \$403 rent. They gave two notes for the rent, and secured them by a deed of trust on 80 acres of land they owned in Adair county. That deed contained a recital that it should not affect plaintiff's statutory lien on the crops grown on the leased premises. Jet Wimp, plaintiff's son, made the lease contract with the Willifords, and took the notes, with the deed of trust that secured them; acting in those transactions as the business agent of the plaintiff, who resided in Illinois, and was in that state at the time. The defendant, Early, knowing that the rent was unpaid, purchased from the tenants some timothy seed they had raised on the premises, and this action was instituted to recover the value of said seed, under the section of the statutes which gives a landlord a right of action against a party who purchases any part of a crop known by him to have been grown on demised premises. Rev. St. 1899, § 4123.

The principal defense was that Jet Wimp

consented to the sale of the seed, and waived plaintiff's lien. As to whether he did or not, there was contradictory evidence of a competent character; but much testimony was admitted, as bearing on the issue, which was irrelevant and prejudicial.

Before designating this incompetent testimony, we will notice other points made by the plaintiff against the judgment, some of which, if sustained, would entirely defeat the same. One of them is that the answer tenders no issue as to a waiver of plaintiff's lien on the seed, by her consenting, through her agent, to the sale, but only avers a waiver of the lien on all the crops by the acceptance of the aforesaid deed of trust executed to secure the rent notes, and that the defense of waiver on that ground was overthrown by the recital of the deed that it should not work a waiver. This construction of the answer is unsound, for, besides pleading the deed of trust, and alleging that it waived the statutory lien, the answer also avers "that plaintiff gave to said J. D. Williford her consent for him to sell and dispose of, and collect all of the money for, all the crops raised by himself and son, B. Williford, for the year 1890, on her said farm, and especially the timothy seed referred to in plaintiff's petition." It is true, the answer states that plaintiff relied solely on the deed of trust and the personal obligation of the Willifords for the collection of her rent; but the above allegation was broad enough to let in proof that plaintiff in some other ways consented to the sale of the timothy seed, and waived her lien thereon. This allegation of the answer is traversed by the replication, which, besides pleading in confession and avoidance of the alleged waiver based on the acceptance of the deed of trust, contains a general denial of the other allegations of the answer.

Plaintiff argues that Jet Wimp could not waive the plaintiff's statutory lien on the crops without express authority in writing. This argument is founded on the conception that the proviso in the deed of trust given by the Willifords on their land in Adair county, that it should not discharge the plaintiff's statutory lien on the crops raised on her premises in Scotland county, operated to create a mortgage in her favor on the crops grown on the demised premises; that those crops were part of the realty, and the supposed mortgage was therefore a mortgage on real property, which could only be released or discharged by a writing, and by an agent authorized in writing. The transaction is asserted by the defendant to have fallen in some way within the statute of frauds; but the suggestions on the point are vague, and the reasoning is, we think, fallacious. The deed of trust, instead of attempting to create a mortgage lien on the crops in favor of the plaintiff, sought to preserve unimpaired her statutory lien (that is, to avoid a possible inference that in taking other security she intended to relinquish the statutory security

she already enjoyed); and the crop of timothy seed, whether sold before or after it was gathered (as to which the evidence shows nothing), was not part of the realty, so that the lien on it could not be released, except by a writing, and by an agent having written authority, as contemplated by the statute of frauds for the sale of lands or interests therein. *Swafford v. Spratt*, 93 Mo. App. 631, 67 S. W. 701. A landlord may assent orally or by conduct to his tenant selling the crops grown on the leasehold under circumstances that will release his lien on the crops. 1 Jones, Liens, § 579; *Fulkerson v. Lynn*, 64 Mo. App. 649.

The point is made against the validity of the alleged waiver of plaintiff's lien on the seed that it was unsupported by a consideration. Here the plaintiff's counsel puts his finger on one of the inconsistencies of the law. Consent for the tenants to sell the seed, and renunciation of plaintiff's lien, constituted an agreement—an agreement, however, that did not rise to the dignity of a contract, as there was no consideration for it. But by regarding the agreement as a waiver instead of a contract (that is to say, by giving it another legal name), it becomes valid, for a waiver of this kind need not be supported by a consideration to be effectual. This has been declared to be the law even if elements of estoppel are absent (*Fulkerson v. Lynn*, supra), and therein lies the inconsistency. For if the rule is put on the ground of estoppel, and not extended to cases disclosing no estoppel, it would not clash with the doctrine that contracts must have a consideration. Some juridical writers have questioned the wisdom of making a consideration indispensable in all cases to render an agreement effectual as a contract, and it is not indispensable in continental jurisprudence. The inconvenience of the requirement has led to the doctrine that slight benefit to one party or detriment to the other satisfies the law in this regard. But as it is settled in Anglo-Saxon law that a consideration is necessary, certain kinds of agreements which it is desirable to enforce, but which cannot be enforced as contracts for lack of consideration, are enforced under the name of waiver. Consent by a landlord to the sale by a tenant of growing crops is one of them. An effectual release of the lien in such instances may be made without a consideration, and the law will recognize and uphold it, according to precedents in this state. *Fulkerson v. Lynn*, supra. We are bound to determine this case according to the precedents, though they may deflect legal principles from strictly logical lines, and therefore rule that if Jet Wimp, as the agent of plaintiff, with authority to waive her lien, or with apparent authority to do so, consented unconditionally to the sale of the seed in question to the defendant, and to the discharge of her lien, the defendant cannot be held for the value of the seed, although there was no consideration for such waiver.

On an examination of the plaintiff's exceptions to the rulings on objections to the evidence, we find that some of the exceptions were well taken. Whether the scope of Jet Wimp's agency was sufficient to clothe him with real or apparent authority to waive plaintiff's lien on the seed is of the essence of the validity of the alleged waiver. Yet the court refused to permit an investigation of the scope of his agency, and took it for granted that, because he rented the land to the Willifords, he had the authority, or an appearance of it, which justified the Willifords in acting on what he said. Mere power as agent to lease land certainly does not of itself necessarily carry power to waive the principal's lien for rent. General power to deal with a tenant in regard to the payment of rent does. For aught that appears, there may have been a restriction against Jet Wimp's releasing the lien, and the restriction may have been known to the Willifords or to Early. On the other hand, if he was without authority to waive, the scope of his agency and the business he was permitted to transact may have been of a character to warrant persons who dealt with him to assume he had authority. This was a matter for investigation and testimony. The court erred in refusing to permit the plaintiff's counsel to cross-examine Jet Wimp in reference to the authority his mother had given him, though, if his conduct fell within the apparent scope of his agency, those who dealt with him in ignorance of his actual authority will be protected. But it was legitimate to inquire about his powers.

The vital issue was whether plaintiff, through her agent, consented to the sale of the timothy seed to the defendant, and waived plaintiff's lien thereon, as the testimony for the defendant tends to prove, or whether Jet Wimp agreed to the sale on the understanding that Early would see that plaintiff was made safe as to her rent, as he swore. A mass of evidence was received, over the objection of the plaintiff, going to prove a waiver of the lien on other crops raised by the tenants; as that they fed the crop to cattle with the knowledge and consent of Jet Wimp, and sold hay grown on the premises with said Wimp's knowledge and consent. These incidents had no tendency to maintain the defendant's position that the tenants were authorized to sell the seed. It was proper to receive any testimony tending to show consent to the sale of the entire crop, for that would include the seed. But proof of consent to the sale of other portions of the crop would not tend to do that, except by an unwarranted inference, for, perchance, consent was given in those instances, and not given in this one or generally. As juries are often prone to determine causes on their notion of what is fair, in view of all the facts before them, without strict regard for the legal rights of parties, it is important to keep extraneous

matters out of the evidence as far as possible.

There was considerable testimony admitted over the defendant's objection as to the value of the land on which the Willifords executed the deed of trust to secure the rent. The tendency of this evidence was to create the impression that plaintiff, when she bid in that land under the deed of trust, got a bargain, and really profited by the purchase, over and above the amount due to her for rent. But whatever the value of said land may have been (and its value, above a prior mortgage on it, seems to have been trifling), the Willifords were only entitled to a credit on their notes for the amount the land brought at the sale under the deed of trust. Plaintiff was entitled to collect the balance due on her rent notes after allowing that credit, and, inasmuch as she did not waive her statutory lien by the deed of trust, to collect it by enforcing said lien on the crops, except in so far as she had waived it by the words or conduct of her agent. The evidence relating to the value of the land covered by the deed of trust was irrelevant, and probably of harmful influence.

The judgment is reversed, and the cause remanded.

BLAND, P. J., and REYBURN, J., concur.

BRAY v. STATE.

(Court of Criminal Appeals of Texas. Jan. 20, 1904.)

CRIMINAL LAW—APPEAL—RECORD.

1. Where, on appeal from conviction for crime, there is no statement of fact in the record, the court has no option but to affirm the judgment, so far as sufficiency of evidence is concerned.

Appeal from District Court, Camp County: P. A. Turner, Judge.

Will Bray was convicted of burglary, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for burglary. This record is before us without statement of facts or bill of exceptions. Three grounds are mentioned in the motion for new trial: First, the verdict is contrary to the law and the evidence; second, the court erred in excluding the testimony of witness Wilson, as shown by bill of exceptions; third, the court erred in not permitting witness Lizzie Bell to testify as to what Robert Jones said in regard to his connection with the commission of the offense at the time he took the heels off his shoes. The bill of exceptions referred to in regard to the testimony of Wilson is not in the record, if any was taken. The testimony sought from the witness Lizzie Bell is not in the record

in any form. We cannot pass upon these matters as presented. In the absence of the statement of facts, this court has no option but to affirm the judgment, so far as the sufficiency of the evidence is concerned.

The judgment is affirmed.

PERKINS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 20, 1904.)

CRIMINAL LAW—APPEAL—RECOGNIZANCE.

1. A recognizance on appeal reading, "who has been convicted in this court of a misdemeanor," is not a sufficient compliance with Code Cr. Proc. 1895, art. 887, requiring the form, "who has been convicted in this cause of a misdemeanor."

Appeal from Grimes County Court; J. G. McDonald, Judge.

J. H. Perkins was convicted of a misdemeanor, and appeals. Dismissed.

Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. The Assistant Attorney General has filed a motion to dismiss the appeal on the ground of defective recognizance, in that it does not comply with article 887, Code Cr. Proc. 1895, reading, "* * * who has been convicted in this court of a misdemeanor," whereas the form laid down by the Legislature reads, "who has been convicted in this cause of a misdemeanor." The motion is well taken. The recognizance does not show in what cause appellant was convicted, and does not comply with article 887. *Meeks v. State* (Tex. Cr. App.) 74 S. W. 910; *Tom Holcomb v. State* (decided at the present term) 78 S. W. 231.

The appeal is accordingly dismissed.

COOPER v. STATE.

(Court of Criminal Appeals of Texas. Jan. 20, 1904.)

APPEAL—CONVICTION OF MISDEMEANOR—RECOGNIZANCE—FORM.

1. A recognizance on appeal in a misdemeanor case, among other things, required appellant "to appear from day to day and from term to term of this court until this case is finally disposed of," instead of to appear before the court of conviction "to abide the judgment of the Court of Criminal Appeals," pursuant to the form prescribed by Code Cr. Proc. 1895, art. 887; and it also required appellant to make "his personal appearance before the county court * * * and there remain from day to day and from term to term until discharged by due course of law," whereas the statute requires that he "shall not depart without leave of this court" (meaning the county court or court of conviction). *Held*, that it did not comply with the form prescribed, and the appeal should be dismissed.

Appeal from Deaf Smith County Court; W. B. Boyd, Judge.

Q. A. Cooper was convicted of gaming, and he appeals. Appeal dismissed.

Witherspoon & Gough, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of gaming, and fined \$20. Motion is made by the Assistant Attorney General to dismiss this appeal because the recognizance is not in substantial compliance with the form prescribed in article 887, Code Cr. Proc. 1895. Among other things, said recognizance requires appellant "to appear from day to day and from term to term of this court until this case is finally disposed of," instead of to appear before the court of conviction "to abide the judgment of the court of Criminal Appeals of the State of Texas in this case." This is not in compliance with the provisions of the statute. It also requires appellant to make his "personal appearance before the county court of Deaf Smith county, on the 7th day of September, 1903, and there remain from day to day and from term to term until discharged by due course of law." The statute requires, instead of this, that he "shall not depart without leave of this court" (meaning the county court or court of conviction). This recognizance is not in compliance with the form prescribed by the Legislature.

The motion is well taken. The appeal is dismissed.

Ex parte LAWRENCE.

(Court of Criminal Appeals of Texas. Jan. 20, 1904.)

HABEAS CORPUS—APPLICATION—ABSENCE OF RESTRAINT.

1. Where relator was not actually in custody, nor in any manner restrained of his liberty, he was not entitled to a writ of habeas corpus because he had offered to surrender himself to the marshal, who refused to detain him merely to avoid the habeas corpus proceedings.

Appeal from Upshur County Court; M. B. Briggs, Judge.

Application by W. A. Lawrence for writ of habeas corpus. From an order overruling the application, he appeals. Dismissed.

F. J. McCord, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. This is an appeal from the overruling of the application for writ of habeas corpus in the lower court, relator being remanded to jail. The Assistant Attorney General moves to dismiss this appeal on the ground that relator is not confined in jail, nor has he been restrained of his liberty pending this appeal. Attached to the motion is the affidavit of Ben Davis, city marshal of Gilmer, dated January 11, 1904, to the effect that relator "is not in his custody, nor is he restrained of his liberty by him as city marshal, or by any one else, either at said trial or at any time since said trial, and that he does not know where he is at this time, but

¶ 1. See Habeas Corpus, vol. 25, Cent. Dig. §§ 10, 12.

does know he is not restrained of his liberty on said charge, and his absence is without his consent or permission. And affiant further states that if the return as made out for him by defendant's attorneys on the writ of habeas corpus proceeding in the county court shows defendant, Lawrence, to be confined or restrained of his liberty at any time at or since the habeas corpus trial, said return is not true." Relator files an affidavit, dated January 13th, substantially as follows: "That on this day he presented his body and person to Ben Davis, city marshal of Gilmer, for the purpose of delivering himself into the custody of said Ben Davis, whereupon said Ben Davis wholly declined to take the said Lawrence into his official custody and keeping, with the intent and purpose of avoiding a certain habeas corpus proceeding now on appeal from Upshur county to the Court of Criminal Appeals of Texas." This affidavit is also sworn to by R. S. Wallace and B. A. Ragland. It will be observed that the affidavit of the city marshal shows relator is not restrained by him, and the affidavit of relator merely shows he offered his person to the marshal on the 13th of January in order that he might be restrained, which was refused. The transcript was filed in this court on January 8th. Relator further states that this refusal was with the intent and purpose of avoiding a certain habeas corpus proceeding. Be the purpose of the marshal what it may, until relator is illegally restrained of his liberty this court has no jurisdiction to pass upon the case.

The motion of the Assistant Attorney General is accordingly sustained, and the appeal is dismissed.

GRIFFITH v. STATE.

(Court of Criminal Appeals of Texas. Jan. 20, 1904.)

CRIMINAL LAW—INSTRUCTING ON INSANITY.

1. Charging the jury with reference to insanity is error, insanity not being raised by the evidence, though there is some evidence that defendant was weak-minded.

Appeal from District Court, Parker County; J. W. Patterson, Judge.

Alfred Griffith appeals from a conviction. Reversed.

Preston Martin, for appellant. Jas. C. Wilson, Co. Atty., and Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction is for rape, the penalty assessed being 17½ years in the penitentiary. The court charged the jury with reference to insanity. The facts do not suggest this issue. We deem it unnecessary to go into a statement of the evidence, as insanity is clearly not raised. This was error. There was some evidence introduced go-

ing to show appellant was not a strong-minded negro, but nothing to show insanity.

It is contended that the evidence is not sufficient to support the conviction for rape. We pretermitt a discussion of that question, as the case will be tried again before a jury, and the verdict may be different.

Bill of exceptions was reserved in regard to the question of venue, and the sufficiency of the proof in respect to this issue. Upon another trial the state should prove this matter clearly, and not leave it open to conjecture.

The judgment is reversed, and the cause remanded.

DOYLE v. STATE.

(Court of Criminal Appeals of Texas. Jan. 20, 1904.)

APPEAL—RECOGNIZANCE—ENTRY AFTER TERM—DISMISSAL.

1. An appeal in a criminal case will be dismissed where the recognizance was not entered into during the term at which conviction was had.

Appeal from Tarrant County Court; R. F. Milam, Judge.

Claude Doyle was convicted of an aggravated assault, and he appeals. Dismissed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Under a conviction of aggravated assault, appellant was fined \$1,000, and given two years in the county jail. The Assistant Attorney General has filed a motion to dismiss the appeal on the ground that, the recognizance having been filed after term time, this court was without jurisdiction. The term of court adjourned October 31, 1903, and the recognizance was entered into November 21, 1903—about 20 days after the adjournment. The recognizance must be entered into during term time.

The motion is sustained. The appeal is accordingly dismissed.

DOYLE v. STATE.

(Court of Criminal Appeals of Texas. Jan. 20, 1904.)

APPEAL—RECOGNIZANCE—ENTRY AFTER TERM—DISMISSAL.

1. An appeal in a criminal case will be dismissed where the recognizance was not entered into during the term at which the conviction was had.

Appeal from Tarrant County Court; R. F. Milam, Judge.

Claude Doyle was convicted of an aggravated assault, and he appeals. Dismissed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is a conviction for aggravated assault, the penalty assessed be-

¶ 1. See Criminal Law, vol. 14, Cent. Dig. § 1821.

ing a fine of \$1,000, and two years in the county jail. The term of the county court at which this conviction occurred is shown to have adjourned on October 31, 1903, and the recognizance was entered into on November 21st following—21 days after the court adjourned. The recognizance must be entered into at the term of the court at which the conviction was obtained. The motion of the Assistant Attorney General to dismiss the appeal is therefore well taken.

The appeal is dismissed.

BEARD v. STATE.

(Court of Criminal Appeals of Texas. Jan. 20, 1904.)

THEFT OF HORSE—OFFENSE COMMITTED IN OKLAHOMA—INDICTMENT—REQUISITES AND SUFFICIENCY—INSTRUCTIONS—PUNISHMENT—DEFINITION OF THEFT—STATEMENT ON APPEAL—SUFFICIENCY.

1. An indictment under Pen. Code 1895, art. 951, for the theft of a horse, charged that accused, "in the territory of Oklahoma, did unlawfully and fraudulently take," etc., which said acts by the accused "were by the laws of the territory of Oklahoma, then and there in force, the offense of theft, and which said acts, if the same had been committed in the state of Texas, would then and there have been theft," etc. *Held*, that the indictment was sufficient against an objection that it failed to allege the theft of the horse in Oklahoma Territory.

2. Theft of a horse is, in Texas, per se a felony, regardless of its value, and hence an indictment for the theft of a horse under Pen. Code 1895, art. 951, authorizing the prosecution and punishment of theft in another state or territory as if it had been committed in the state, where the stolen property is brought into the state, need not state its value.

3. A charge in a prosecution for horse theft stated the punishment as provided by Pen. Code 1895, art. 881, as amended by Acts 1897, p. 83, c. 67, relating to the punishment for stealing horses, and it was objected that it incorrectly stated the penalty under article 858, relating to theft in general. *Held*, that the latter article did not apply to horse theft, and the court's charge was correct.

4. An instruction defining theft to be "the taking of corporeal personal property," etc., instead of stating, as required by the statute, that it is the "fraudulent taking of corporeal personal property belonging to another without his consent," etc., was reversible error.

5. If, in the prosecution of a theft, committed in Oklahoma Territory, of a horse, which defendant brought into the state, the statement of facts on appeal does not contain the laws of the territory, it does not authorize a conviction under Pen. Code 1895, art. 952, declaring that, to render a person guilty in such case, it must appear that by the law of the territory the act committed would also have been theft there.

Appeal from District Court, McLennan County; Sam R. Scott, Judge.

Bud Beard was convicted of horse theft, and he appeals. Reversed.

H. M. Cammack, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. The punishment of appellant was assessed at confinement in the penitentiary for a term of eight years under an

indictment charging substantially as follows: "That on or about the 22d day of February, 1903, and before the presentment hereof, with force and arms, one Bud Beard, in the territory of Oklahoma, did unlawfully and fraudulently take from the possession of one J. W. Keyes one horse, the same then and there being the corporeal personal property of and belonging to the said J. W. Keyes, without the consent of the said J. W. Keyes, and with the intent then and there on the part of him, the said Bud Beard, to deprive the said J. W. Keyes of the value of the same, and to appropriate the said horse to the use and benefit of him, the said Bud Beard, and which said acts by the said Bud Beard were by the laws of the territory of Oklahoma then and there in force the offense of theft, and which said acts, if the same had been committed in the state of Texas, would then and there have been theft; and the said Bud Beard did afterwards unlawfully, viz., on or about the 20th day of March, 1903, bring the aforesaid horse into the state of Texas and into the county of McLennan," etc. Appellant moved to quash the indictment because it contains no allegation giving this court jurisdiction; it fails to allege the value of the property alleged to have been stolen; it fails to allege the theft of the horse in Oklahoma Territory, and the value of the horse to be \$500 or over; because said indictment charges ordinary theft, under article 858, Pen. Code 1895, and does not allege the value of the property; it does not charge the offense of theft of animals, under article 881, Id.; because it fails to allege any facts that would constitute a felony in the territory of Oklahoma, and fails to allege any facts that would constitute a felony under the laws of the state of Texas. In our opinion, the indictment is sufficient. In *Clark v. State*, 27 Tex. App. 405, 11 S. W. 374, construing articles 951 and 952, Pen. Code 1895, we announced the rule to be that, if a person commits acts in another state or territory, which, if committed in this state, would be theft, and subsequently brings the stolen property into this state, he can be prosecuted in this state, and punished as if the theft had been committed in this state.

Theft of a horse in this state is per se a felony, regardless of value; and hence it is not necessary to state the value of the animal. The motion to quash was properly overruled.

Complaint is made as to the following portion of the charge: "If any person who shall have committed an act in any foreign state or territory, which, if committed in this state, would have been theft of property, and shall bring such stolen property into this state, he shall be deemed guilty of and shall be punished as if said act had been committed in this state, to wit, by confinement in the state penitentiary for any period of time not less than two nor more than ten years." Appellant's objection to said charge

¶ 2. See Larceny, vol. 32, Cent. Dig. §§ 76, 77.

is that it incorrectly states the penalty under article 858, Pen. Code 1895. This article does not apply to horse theft, and the court's charge is correct. See article 881, Id., as amended by Acts Leg. 1897, p. 83, c. 67.

Appellant complains of the omission in the court's charge because he failed to properly define theft, in that it states theft to be "the taking of corporeal personal property," etc., omitting to state, as required by the statute, that it is the "fraudulent taking of corporeal personal property belonging to another, without his consent," etc. This omission occurs in several portions of the charge. Under the authorities this is error.

Upon an examination of the statement of facts we note that it does not contain the laws of the territory of Oklahoma. This is necessary in order to make out facts authorizing a conviction under article 952, Pen. Code 1895.

Because of the omission in the court's charge, and the omission in the facts of the laws of the territory of Oklahoma, the judgment is reversed, and the cause remanded.

Ex parte HEYMAN.

(Court of Criminal Appeals of Texas. Jan. 20, 1904.)

INTOXICATING LIQUORS — LOCAL OPTION — CREATION OF DISTRICTS — POWERS OF COMMISSIONERS' COURT — CONSTITUTIONAL AND STATUTORY PROVISIONS — CONSTRUCTION — UNCONSTITUTIONAL LEGISLATION.

1. Const. art. 16, § 20, directing the Legislature to enact a law whereby any county, justice precinct, town, city, or such subdivisions of the county as may be "designated" by the commissioners' court of said county, may determine from time to time whether the sale of intoxicants shall be prohibited within the prescribed limits, empowers the Legislature to authorize the commissioners' court to designate some other existing subdivision of the county than one of those enumerated, but does not sanction a law which, like Laws 1897, p. 235, c. 162, authorizes the commissioners' court to combine two or more political subdivisions of a county into a local option district, thus, in effect, creating a new subdivision.

2. Const. art. 16, § 20, which, after naming certain known subdivisions of counties, authorized the Legislature to empower the commissioners' court to designate such other subdivisions of a county for local option purposes as it might choose, must be construed as conferring on the commissioners' court power to name some existing subdivision, other than those enumerated, and not to create new subdivisions.

3. The mode of action prescribed by Const. art. 16, § 20, which directs the Legislature to enact a law whereby local option may be effected in any county, justice precinct, town, city, or other subdivision designated by the commissioners' court, is exclusive; and, although the Legislature may itself create new subdivisions of a county for local option purposes, it cannot, as it attempted to do by Laws 1897, p. 235, c. 162, authorize the commissioners' court to designate a different subdivision than those already in existence, even though its action in so doing results merely in accomplishing directly what it can lawfully accomplish indirectly.

4. Const. art. 16, § 20, directing the Legislature to enact a law by which the voters of any

county, justice precinct, town, city, or such subdivision of the county as may be designated by the commissioners' court, may determine from "time to time" whether intoxicating liquors shall be prohibited, contemporarily construed by the enactment of Sayles' Ann. Civ. St. 1897, arts. 3393-3395, which guarantied to voters, should they adopt local option, a right to hold another election in the territory after the expiration of a certain time, constrains the Legislature to preserve the autonomy of the localities named, in order that the right to again vote upon the question may be conserved; and Laws 1897, p. 235, c. 162, which empowers the commissioners' court to combine several justices' precincts, whether wet or dry, necessarily imperils the right to vote periodically in each district on the question of prohibition.

5. Const. art. 16, § 20, directing the Legislature to enact a law by which local option may be passed upon in any county, justice precinct, town, city, or other subdivision of the county designated by the commissioners' court, contemplated that local option districts in a county should be contiguous; and Laws 1897, p. 235, c. 162, which authorizes a commissioners' court to combine different justices' precincts into a local option district, without any requirement that the precincts should be contiguous, makes possible a result not contemplated by the Constitution.

6. Conceding that Laws 1897, p. 235, c. 162, authorizing the commissioners' court to combine county subdivisions into one local option district, is not repugnant to Const. art. 16, § 20, relative to local option, it must be construed in the light of other existing legislation (Sayles' Ann. Civ. St. 1897, arts. 3393-3395), which guaranties periodical votes at two-year intervals on the question of prohibition; and hence the action of the commissioners' court in including within one local option district precincts, the status of which as wet or dry had already been fixed upon them within a two-year period, was unauthorized.

7. Acquiescence by the courts in the exercise of power under unconstitutional legislation, though continued for any length of time, cannot legalize such exercise of power when clearly usurped.

Brooks, J., dissenting.

Original application by Edward Heyman for a writ of habeas corpus. Relator discharged.

J. T. Adams, Oulp & Giddings, and Davis & Garnett, for relator. Howard Martin, Asst. Atty. Gen., Lewis Rogers, C. L. Potter, and Cofer & Thomason, for the State.

HENDERSON, J. This is an original application to this court for the writ of habeas corpus, which was granted by the presiding judge in vacation, and made returnable before the full court, and now comes before us for determination. It appears from the record that under the orders of the commissioners' court of Cooke county, made on July 18, 1903, an election was held for local option on August 8, 1903, for all of said county, except one precinct, to wit, Burns City precinct, and that prohibition carried in said seven precincts, but the precinct in which the offense relator is charged to have committed, to wit, Precinct No. 1, anti-prohibition carried. After prohibition had been put into effect by publication, relator was arrested for selling intoxicating liquors in said

Precinct No. 1 in violation of the prohibition law as adopted in all said seven precincts; and he has invoked the power of this court by habeas corpus, insisting that said election was void, because the commissioners' court of Cooke county had no right, under section 20 of article 16 of the Constitution of 1876, as amended in 1891, to combine said seven justice precincts into one local option subdivision of said county. It further appears from the record that Justice Precinct No. 4 of Cooke county, known as "Roxton Precinct," adopted prohibition by an election held on June 27, 1884; that Precinct No. 6, known as "Valleyview Precinct," adopted prohibition at an election held on March 7, 1901; that Precinct No. 2, known as the "Dexter Precinct," adopted prohibition at an election held on March 18, 1902; that Precinct No. 7, known as the "Callisburg Precinct," adopted prohibition at an election held on October 18, 1902; that Precinct No. 5, known as the "Marysville Precinct," rejected prohibition at an election held on December 13, 1902; that Precinct No. 3, known as the "Burns City Precinct," and which was not included in this local option election, adopted prohibition at an election held on December 13, 1902; that Precinct No. 1, known as the "Gainesville Precinct," and Precinct No. 8, known as the "Muenster Precinct," have never adopted local option until this last election. It will be further seen that the entire county of Cooke refused to adopt prohibition at an election held on May 24, 1902. Thus it will be observed that the commissioners' court combined said seven justice precincts of Cooke county into one local option subdivision, with the status as to local option fixed upon them as above shown. This was done under the amendment to article 3384, Rev. St. 1895, passed by the Twenty-Fifth Legislature (Acts 1897, p. 235, c. 162), which gave to the county commissioners authority to include two or more justice precincts into a subdivision for the purpose of holding a local option election. Relator insists that this cannot be done, under a proper construction of section 20 of article 16 of the Constitution, and authorities which have interpreted the same. On the other hand, the state insists that the commissioners' court of Cooke county was authorized to do what they did in carving out and designating said subdivision, by said amendment to article 3384, Sayles' Ann. Civ. St. 1897, and that that amendment was authorized by section 20 of article 16 of the Constitution of 1891. It is insisted that this question is *res adjudicata*, under the decisions of this court, and we are referred to *Williams v. State*, 31 S. W. 654, *Ex parte Brown*, 34 S. W. 131, *Rippy v. State*, 68 S. W. 687, *Medford v. State*, 74 S. W. 768, and other cases. And it is urged that this view is also supported by the decisions of our Courts of Civil Appeals, and we are cited to *Kidd v. Truett*, 68 S. W. 310, *Martin v. Mitchell*, 74 S. W. 563, 7 Tex. Ct. Rep. 716, *Sweeney et al.*

v. Webb et al., 76 S. W. 766, 8 Tex. Ct. Rep. 397, and other cases. We have examined the authorities referred to, and are constrained to differ with counsel representing the state as to what was really decided in those cases.

In the *Williams Case*, *supra*, it was, indeed, assumed that a local option election could be held in two justice precincts; but the main question there seems to have been whether or not the same should be described by metes and bounds, and no question was made as to the status of either of said precincts as to local option at the time. Presumably they were not. Nor was the constitutional question presented there as it is here. However, the court, in passing on the case, stated, in general terms, that a subdivision may consist of a whole of the justice precinct and a part of another or others, or two or more justice precincts. This case followed *Ex parte Brown* (Tex. Cr. App.) 34 S. W. 131. Both cases were decided under the act of the Legislature of 1893, which, in terms, authorized the Legislature to carve out any territory of a county, and make a subdivision of it, regardless of the known political subdivisions of a county. In neither of these cases was the constitutional question discussed, but it appears to have been assumed that the act was constitutional, and merely the effect of the legislation on the subject was reviewed. *Rippy's Case*, *supra*, was subsequent to the act of 1897, which amended article 3384 of the local option act, repealing the power of the Legislature to authorize the commissioners' court to carve out a subdivision, and substituting in lieu thereof the authority of the commissioners' court to embrace two or more subdivisions of a county into one local option territory. It is true, in *Rippy's Case* two local option justice precincts were embraced in the same local option territory as a commissioners' precinct. One of these had gone wet within two years before the election, and the other had gone dry within the two years prior to the election in said commissioners' precinct. But this phase of the question was not discussed in the opinion, although it may have been incidentally raised. The case appears to have been decided upon the authority of *Ex parte Fields*, 39 Tex. Cr. R. 50, 46 S. W. 1127, which was authority for holding that a county election could be held, regardless of the status of the various precincts of the county as to local option; and the court appears to have treated a commissioners' precinct, which might embrace two or more justice precincts, on the same principle as a county election. As far as this case is concerned, it is not necessary here to discuss that question, as the election here complained of was not held in a commissioners' precinct. In *Medford's Case*, *supra*, the court merely said, in passing upon other questions, that the commissioners' court unquestionably has authority to create subdivisions for local option purposes; but this

was not necessary to that decision. And it may be said as to other cases that there may be expressions used and propositions stated assuming the constitutionality of the acts of the Legislature above alluded to, yet, so far as we are advised, none can be found in which the constitutional question here involved was presented and discussed.

Nor do we believe it can be asserted that, in the civil cases on local option which have gone before our supreme civil tribunals, the constitutional question as to the authority of the Legislature to authorize the commissioners' court to arbitrarily carve out local option territory, or to join together known political subdivisions of the county into local option territory, has ever been presented and decided. In *Kidd v. Truett* (Tex. Civ. App.) 68 S. W. 310, the court appears to have taken jurisdiction of the question as to the validity of a local option election in a school district which embraced a part of justice precinct where local option already prevailed, and to have held such election legal, though we note the dissent of Templeton, J. This decision was rendered prior to the case of *Norman v. Thompson et al.* (Tex. Sup.) 72 S. W. 62, in which the Supreme Court held that in a contested election case the court only had jurisdiction of matters transpiring on the day of the election, such as fraud, etc., which might render the election void. Nor did the court in *Kidd v. Truett* discuss the constitutional question as bearing on the right of the commissioners' court to order an election in territory a part of which already had local option. Under the view we entertain, as will be hereafter shown, there can be no question as to the power of the commissioners' court to order an election in either commissioner's precincts or a school district where no part of the territory is at the time under local option. Nor was the Constitution discussed in *Martin v. Mitchell*, 74 S. W. 565, 7 Tex. Ct. Rep. 716, although the court passed on the validity of the local option election in Commissioners' Precincts 1, 3, and 4 of said county. Judge Stephens remarked in that case that under *Norman v. Thompson*, supra, he did not believe the court had jurisdiction to decide the questions involved in said case. In *Sweeney v. Webb*, 76 S. W. 766, 8 Tex. Ct. Rep. 397, the able judge who rendered that opinion did not assume to construe the power of the Legislature to create subdivisions under the local option clause of the Constitution, but expressly stated that the election in the particular case was a county election, and, if the act complained of was subject to constitutional objection, it would not have the effect to make the whole act void, etc. *Oxford v. Frank*, 70 S. W. 428, 5 Tex. Ct. Rep. 941, involved a local option election in Erath county held in 1902, and involved the attempt by the commissioners' court to arbitrarily carve out territory not theretofore constituting a political subdivision of the county. The effect

of that decision was simply to hold that the prior act of 1893 had been repealed by the amendment of 1897 to article 3384. However, the court says: "The power of the people in a given section in effect to enact a law for such territory is in its nature essentially legislative, and depends upon constitutional and legislative grant. The constitutional provision operative in the instance before us does not, in express terms, contain such grant. It is not in this particular self-enacting, but it is thereby made the duty of the regularly constituted legislative body to enact a local option law for the specific purpose." The learned judge further says: "The discretion vested in the commissioners' court by this amendment was limited to the designation of the particular one or more of the political subdivisions of the county theretofore in existence, and did not extend so as to authorize said court to arbitrarily select and fix a territory, ignoring and segregating such political subdivisions." We think the court was eminently correct in holding that the act of 1897 superseded the act of 1893 and repealed it, and that was the only real question involved in the case, aside from some questions of procedure.

However, as stated before, no matter what may have been the holding of the Court of Civil Appeals and the Supreme Court upon these questions, in our opinion, since the decision in *Norman v. Thompson*, supra, none of them would be authority upon any question concerning the local option election, except what transpired on the day of the election, hindering a full and fair election. However, we may be in error in the analysis of the cases above discussed, and what they really hold; still, the question is an open one until it is decided correctly. Especially is this true when for the first time our attention is called to the legal status of justice precincts that are dry under the vote of the people thereof, and the power under the law to combine these precincts with others that are wet. Moreover, back of this is the question as to the proper construction of our Constitution on the subject of local option. In order to present the question, we quote section 20 of article 16—being the amended Constitution of 1891—as follows: "The Legislature shall at its first session enact a law, whereby the qualified voters of any county, justice precinct, town, city (or such subdivision of the county as may be designated by the commissioners' court of said county) may by a majority vote determine from time to time, whether the sale of intoxicating liquors shall be prohibited within the prescribed limits." The Constitution of 1876 was an exact counterpart of the above, except the language relating to subdivisions of a county.

Now, the question occurs, what did the framers of the Constitution mean by authorizing the commissioners' court to "designate" a subdivision of the county? Did they, by the use of this term, authorize the commis-

sioners' court to create a subdivision, or did they mean that they had authority to name other existing subdivisions of a county? Recurring to the definition of the term "designate," we find it means, "To point out, or mark with some particular token; to show or point out; to indicate by description, or by something known or determinate." Amer. & Eng. Ency. of Law, vol. 9, p. 405, and authorities there cited. "Create" means "to bring into being; to cause to exist; to produce; to make." Amer. & Eng. Ency. of Law, vol. 8, p. 228, and authorities there cited. These definitions we understand to be the ordinary and common meaning of these terms. As was said by Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. Ed. 23, "The framers of the Constitution, and the people who adopt it, must be understood to have employed words in their natural sense, and to have intended what they said."

Now, if we assume, as we must, that the Constitution builders used these terms to express accurately what they meant, then it follows inevitably, when the Legislature was given power to authorize the commissioners' court to designate such division of the county for local option purposes, or in which to hold a local option election, it was simply intended to give it (the Legislature) the power to authorize the commissioners' court to designate (that is, name) some other subdivision of the county. If, on the other hand, it was intended to confer such authority as is claimed by the state, it would have been an easy matter to have used the word "create" in the Constitution, instead of "designate." At the same time, we would not be understood as holding that there might not be conditions under which the word "designate" could be twisted from its ordinary meaning and signification, so as to make it mean "create." "However, there must be a real difficulty of construction to be solved, before we would be authorized to resort to extrinsic aid, for, where no ambiguity or doubt appears in the law, the court should confine its attention to the law, and not allow extrinsic circumstances to introduce a difficulty where the language is plain." Cooley's Const. Lim. p. 84. Looking at the clause in question, it is plain enough, and suggests no difficulties as to construction. There is nothing in the environments of the section, or in the conditions surrounding it, which to our minds creates any difficulty such as would require us to resort to extraneous help in order to give it a meaning different from its ordinary signification. Names are used in the Constitution to point out known subdivisions of a county; that is, the voters of a county, justice precinct, town, or city are authorized to vote on local option; and then the Legislature is permitted to authorize the commissioners' court to designate a subdivision of the county; using throughout, in naming the places where the right of local option could be exercised, the singular number, and not the plural. And these par-

ticular subdivisions named are authorized to vote on local option, not only once, but from time to time. Now, if the subdivisions enumerated by name in the Constitution had been the only known political subdivisions of a county, there might be some semblance of authority to give to the word "designate" a different meaning from that in which it is ordinarily accepted. But the fact is that, at the time of the adoption of both the original and subsequent amendment to the Constitution on the subject of local option, there were other known political subdivisions of a county. The Constitution itself provided for commissioners' precincts, and school districts had been created by the Legislature long before the constitutional clause in question was adopted.

The act of 1897 amending article 3384 shows that the Legislature, in authorizing a vote on local option, named the places named in the Constitution, and, under the power conferred to designate such subdivision, etc., followed this obvious interpretation of the Constitution in naming commissioners' precincts and school districts which were subdivisions of the county then existent. However, they did not stop there, but then proceeded to interpolate or ingraft a new provision on the Constitution; that is, they authorized the commissioners' court, under its power to designate, to combine any two or more of such political subdivisions of a county into a local option precinct (see Gen. Laws 1897, 25th Leg. p. 225, c. 162); thus, as we maintain, creating new subdivisions of the county for local option purposes. We believe it is a rule of universal construction, applicable to Constitutions as well as laws, where the instrument gives the Legislature the power to do a thing, and prescribes the mode of doing it, the method prescribes measures the limit of the power granted; that is, "where the means for the exercise of a granted power are given no other or different means can be implied as being more effectual or convenient." "When the Constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against the legislative interference to add to the condition, or to extend the penalty to other cases." Cooley, Const. Lim. pp. 78, 79. And see *Ex parte Brown* (Tex. Cr. App.) 42 S. W. 554, 70 Am. St. Rep. 743.

Now, in consonance with this view, it is evident that the Constitution has provided the mode in which local option can be voted upon, and, in providing this mode, it, *ex vi termini*, prohibited any other mode; and the attempt to create other localities than those named is not only without constitutional warrant, but is in direct violation of the provision in question. The Constitution locates the right to vote upon local option. It is given to the localities named, and nowhere does it authorize two or more of these localities to be combined; and such combination not only

violates the letter, but, as we understand, the very spirit, of the enactment.

Again, it is a general rule of construction that, where general words follow an enumeration of persons or things designated by words of a particular or specific meaning, such words are regarded as limited in their meaning by the former, and are held only to embrace persons or things of the same general kind or class as those specifically mentioned. And this rule can only be discarded where the legislative intent is plain to the contrary. *Am. & Eng. Ency. of Law*, vol. 17, p. 6; *Black on Inter. of Laws*, p. 141; *Endlich on Inter. of Stat.* pp. 405 to 408, inc.; *Whitfield v. Terrell Bros.* (Tex. Civ. App.) 62 S. W. 118; *Watts v. State*, 61 Tex. 187. Now, under the above rule of construction, when the Constitution named certain known subdivisions of counties, and then authorized the Legislature to empower the commissioners' court to designate such other subdivision of a county for local option purposes, obviously we would understand that the power conferred was to name some other existing subdivision, such as those already mentioned. "Such," in this connection, we think unmistakably means subdivisions of like character; political subdivisions of the county.

However, it may be contended that inasmuch as it is conceded that a commissioners' precinct or a school district may embrace two or more justice precincts, or parts thereof, or embrace towns and cities, the Legislature can do directly what it is authorized to do indirectly; that is, it can bring together originally two or more justice precincts, and thus constitute the same local option territory. We answer this by the observation that the Constitution authorizes the one, but does not authorize the other. "Ita lex scripta est." As we have seen, the Constitution undertook to locate certain territory in which the people should be authorized from time to time to vote on local option. It pointed out the mode by which the right was to be exercised, and it gave the people of these localities the right from time to time to vote upon local option. And by the rule, "*Expressio unius est exclusio alterius*," it inhibited any other mode. The attempt by the Legislature to combine two or more of such precincts was a creative act, delocalizing a right guaranteed the localities, and destructive of the constitutional provision.

Nor is this view at all antagonized by the fact that, regardless of any or all of the subdivisions of a county as to local option, the people are authorized to hold a local option election for the entire county, because the greater includes the less, and the Constitution itself guarantees the right to vote on local option in the county. This is the doctrine announced in *Ex parte Field*, 39 Tex. Cr. R. 50, 46 S. W. 1127. As we understand that decision, it holds the Constitution places the question on the same footing as to each

of the subdivisions thereof, but, inasmuch as the county is the larger, and embraces all the subdivisions, no subdivision can defeat its right to hold an election on local option. It is certainly not authority for holding that the Legislature can arbitrarily embrace two or more named subdivisions of a county into local option territory.

The views we have expressed are strengthened and re-enforced when we come to look at the local option law itself, which guarantees to voters which have adopted local option the right to hold another election in such territory after the expiration of a certain time. *Sayles' Ann. Civ. St.* 1897, arts. 3393-3395. This was a contemporary construction of the right conferred by the Constitution on the localities named to vote on the question of prohibition "from time to time." By this provision they were constrained to preserve the autonomy of the localities named, in order that they might exercise their constitutional right to again vote upon the question. This is in consonance with the decision in *Ex parte Elliott*, 72 S. W. 837, 7 Tex. Ct. Rep. 59, wherein it is said: "The fact that the Legislature may alter the provisions of a local option law cannot affect territories in which the law is then in force. The law in force in the given territory will stand as its provisions were at the time it was voted in operation, despite subsequent amendments to the law by legislative enactments. The Legislature may amend the local option law, but this ends their power. It takes the vote of the people of a given territory to put it into operation, and it takes the vote of the same people to end its operation." And see *Dawson v. State*, 25 Tex. App. 670, 8 S. W. 820. If this were not true, the statutes above referred to would be entirely nugatory. Although the Legislature has guaranteed (as was proper they should have done) to prohibitionists the right to another vote on the question in the same territory after it has been defeated, at the expiration of a certain time, and to anti-prohibitionists the right, where local option has been carried in a certain named territory, to again vote upon the question at the expiration of a certain time, yet this right would be entirely defeated if the construction contended for by the state is sound. For instance, where local option has carried in a justice precinct, and has been in force a year, the people have the right to again vote upon the question in that precinct at the expiration of another year. But if the commissioners' court can attach another justice precinct, wet or dry, to the first, and prohibition is carried in the new territory, necessarily the first precinct is absorbed, and the anti could not, after the expiration of the appointed time, exercise their right to get from under local option. If local option is defeated in the new territory, it would not avail the anti in the first precinct. This absorption process could be carried on in

definitely by either pros or antis just as the commissioners' court might be favorable to the one or the other, and thus the autonomy of local option, as provided under the Constitution, could be absolutely destroyed and set at naught.

Moreover, under the statute, as we understand it, there is no requirement that the precincts or subdivisions should constitute contiguous or adjacent territory, but remote precincts or subdivisions, if the statute is given effect, can be joined together; and thus we would be presented with the strange anomaly of remote precincts of the county, not adjacent to each other, embraced in local option territory, or distant towns could be created into local option territory, and the vote ordered. Thus one portion of the county, where the prohibition sentiment is in the ascendancy, might be made to dominate a remote portion of the county, having no community of interest with the precinct with which it is included by the commissioners' court. Such a result would be startling, and was never intended by the framers of the Constitution. Such a construction, if enforced, would be destructive of the principle of local self-government as to the question of prohibition.

However, if it could even be conceded that under the Constitution the Legislature was authorized to embrace two or more precincts, and thus create new local option territory, then the Legislature must have referred to such territory as occupied the same status as to local option. That is, all the precincts must be wet, and must have been so a sufficient length of time to authorize a vote to be taken on the question. For, when we come to consider other provisions of the statutory law on the subject, we find that, after local option is carried in a precinct, it must remain dry for two years before any vote can be again taken, at the expiration of which time the people of the territory to be affected have the right to take another vote on the issue; and, where the precinct has gone wet on a vote taken by the people of the precinct, such precinct has a right to again vote on the proposition. This is regulated by articles 3393, 3395, Sayles' Ann. Civ. St. 1897.

Now, as to two of the precincts included in the election in Cooke county, these had adopted local option within two years before the election in question. While the regularity of these elections is contested by the state, it does not occur to us that the elections were illegal. These precincts had a right at the expiration of the two years to again vote on the question. Another precinct—Marysville—had defeated local option within two years previously. The statute provides that its status as wet should be respected for at least two years after the former election. The statute provides the contingencies in which another vote embracing the same territory can be had before the

expiration of two years, as where a county election is authorized. But there is no exception in the law applicable to the territory here embraced, though the rights of the people of at least three of the precincts, without any legal authority whatever, are utterly ignored. We are aware it has been held that the law which prohibits an election in the same territory within the specified time applied only to the identical territory which had voted on local option, and not a part of the same territory less than the whole, or to a greater territory, embracing as a part thereof the territory which had previously voted on local option. *Ex parte Brown* (Tex. Cr. App.) 34 S. W. 131, and other cases which followed that. While that was a decision under the act of 1893, the principle announced may be conceded as applicable to the more recent act of 1897. We believe the doctrine announced in that case and others ignored the constitutional guaranty giving to each of the precincts or subdivisions the right from time to time to vote on the question, and is not in harmony with the case of *Ex parte Elliott*, supra, which, in our opinion, announces the correct principle. It will be observed that the Constitution guaranties to each of the localities named the right to vote on the question from time to time, and we hold that such right cannot be taken from such precincts either by direction or indirection. Accordingly we hold it was not competent in this local option election to include precincts whose status as to local option had already been fixed upon them, even if it could be conceded that under the Constitution the commissioners' court had the right to embrace said seven precincts of Cooke county in one local option territory, and order a vote therein on the question of prohibition.

As has been heretofore stated, one of the chief difficulties which has been encountered in reaching a solution of the important questions presented in this case is the adjudicated cases on questions of local option, some of which appear to hold a contrary view to that herein expressed. However, as has already been stated, we believe an examination of said cases will show that the constitutional question was either not raised, or not properly presented and discussed, in any of them. But, even if we have appeared to acquiesce in legislation that authorized the commissioners' court to arbitrarily create a subdivision not known to the Constitution, or to include two or more subdivisions, and thus create new local option territory, we hold "acquiescence for no length of time can legalize a clear usurpation of power, where the people have plainly expressed their will in the Constitution, and appointed judicial tribunals to enforce it. A power is frequently yielded to merely because it is claimed, and it may be exercised for a long period, in violation of the constitutional prohibition, without the mischief which the Constitution was designed to

guard against appearing, or without any one being sufficiently interested in the subject to raise the question; but these circumstances cannot be allowed to sanction a clear infraction of the Constitution." Cooley's Const. Law, p. 85.

We do not believe that the organic law is susceptible of any other construction than that which we have given it. Its mandate is imperative, and under it our duty is plain. We accordingly hold that the attempt of the Legislature to authorize the commissioners' court to combine two or more justice precincts, and thus create other territory than that named and provided for by the Constitution, and the attempt of the commissioners' court to do this by combining said seven precincts of Cooke county, some of which were wet and some dry at the time of the order, was in violation of the constitutional provision on the subject, and is therefore null and void. The relator is therefore entitled to be discharged, and it is so ordered.

BROOKS, J. I dissent from the opinion of the majority. It has neither parallel nor precedent in the previous decisions of this court or of any court. It is in the face of the Constitution, instead of a construction of the same. It violates the statute authorizing the election herein under consideration. It is at variance with the previous decisions of this court since the adoption of the amendment to the Constitution in 1891. It is at variance to the decision of the Court of Civil Appeals at Dallas, and is also at variance with the decision of the Court of Civil Appeals at Fort Worth.

Section 20 of article 16 of the Constitution provides, "The Legislature shall at its first session enact a law, whereby the qualified voters of any county, justice precinct, town, city (or such subdivision of the county as may be designated by the commissioners' court of said county) may by a majority vote determine from time to time, whether the sale of intoxicating liquors shall be prohibited within the prescribed limits." That portion of this section in parentheses was placed in the Constitution by the amendment of 1891. Prior to said amendment the Legislature had passed a law by which the commissioners' court, of its own motion, or upon proper petition, signed by a number of legal voters, could determine from time to time, in the respective subdivisions, whether local option should be adopted or not. Then there was an evident purpose on the part of the Legislature in submitting the amendment in question. That purpose must have been one of two: Either the amendment authorizes the commissioners' court to designate an arbitrary subdivision, or it authorizes the designation of a political subdivision. The most restricted view of the question that can possibly be taken is the latter. If the amendment merely contemplated the designation of

pre-existing political subdivisions, then, clearly, the commissioners' court could designate any pre-existing subdivision or any number of pre-existing political subdivisions. "Subdivision" means a smaller portion than the whole. "Designate" means "to mark out and make known; to point out to general knowledge; to indicate; to show; to call by distinctive title; to denominate; to name, as to designate the boundaries of a county; to point out by distinguishing from others, as to designate the more active rioters; to indicate or set apart for the purpose or duty." Then, under this provision, the commissioners' court are clearly authorized to make known, mark out, and point out at least any political subdivision. Commissioners' and justice precincts, cities, and towns are recognized by the Constitution as political subdivisions of a county. If the commissioners' court can point out any subdivision they may designate, then it is folly to say that they cannot combine one or more justice precincts as they see fit. The insistence is seriously urged that the Constitution does not say "subdivisions," but "subdivision"—in the singular. One precinct of a county is a subdivision of the county, since it is a part of the whole. Seven precincts would also be a subdivision. It is distorting instead of construing the Constitution to hold otherwise. The Constitution would be meaningless with any other construction. If, prior to the amendment of 1891, the Legislature had authorized the commissioners' court, of its own motion, to order an election for a county, a justice precinct, town, or city, to hold that the amendment merely gives them this authority is rendering meaningless and senseless the amendment to the Constitution. Why should the amendment say that they can designate any subdivision, if the Constitution intended to limit them to the designation of one subdivision? This cannot be a proper construction of our Constitution. I take it that, under any possible view, the Constitution confers upon the commissioners' court the power to order an election for six or seven justice precincts as a subdivision, or for one justice precinct, for the whole county, or for a town or city or commissioners' precinct. In other words, this amendment was clearly intended to clothe the commissioners' court with discretion in ordering the election.

Since the adoption of the amendment of 1891, the Legislature appears to have restricted the right of the commissioners' court to political subdivisions. Article 3384, Rev. St. 1895, as amended by the acts of the Twenty-Fifth Legislature (Acts 1897, p. 235, c. 162), reads: "The commissioners' court of each county in the state, whenever they deem it expedient, may order an election to be held by the qualified voters of said county, or of any commissioner's or justice's precinct, or school district, or any two or more of any such political subdivisions of a county, as may be designated by the commission-

ers' court of said county, to determine whether or not the sale of intoxicating liquors shall be prohibited in such county, or commissioners' or justice's precinct, or school district, or any two or more of any such political subdivisions of such county, or in any town or city: provided it shall be the duty of said commissioners' court to order the election as aforesaid, whenever petitioned so to do by as many as two hundred and fifty voters in any county, or fifty voters in any other political subdivision of the county or school district, as shall be designated by said court, or in any city or town, as the case may be: provided, that if the precinct or precincts designated embrace within the limits an incorporated town or city, then such election shall only be ordered when the petition for the same is signed by qualified voters, not less than one-tenth in number of the total vote cast for Governor at the next preceding general election in such incorporated town or city; and in case an election is asked for a subdivision of said county, composed of two or more complete commissioners' or justices' precincts, or school districts, such petition shall describe such subdivision by metes and bounds, as well as by the proper numbers of such precincts or school districts; and said petition and the description of such subdivision shall be recorded in full in the minutes of the commissioners' court, and such description shall be embraced in the notice given for such election: provided, that where a school district, city or town may be composed in part of two or more subdivisions of the county, named hereinbefore, the right to order and hold an election in such school district, city or town, shall not be denied: and provided further, that no city or town shall be divided in holding a local option election for any of the other subdivisions named herein; nor shall any school district which has adopted local option, be divided in a subsequent election, held for any other of such subdivisions covering a part of the territory of such school district." Waiving the question as to whether this limitation, in the light of the Constitution, is proper or not, then I believe that, clearly within the letter and spirit of the above-quoted article, the act of the commissioners' court ordering the election under consideration was entirely constitutional, though ordered for seven justices' precincts. The majority insist that the commissioners' court can order an election for one commissioners' precinct—usually it contains two and a part of a justice's precinct—yet the commissioners' court is impotent to order an election for three justices' precincts. No rational reason can be given for such a tortuous construction. By what process of reasoning it can be said that a commissioners' precinct is a political subdivision, and a justice's precinct is not, in view of the fact that the very article of the Constitution under consideration mentions justice's precincts, and does not mention com-

missioners' precincts, I am at a loss to know.

In *Oxford v. Frank*, 70 S. W. 426, 5 Tex. Ct. Rep. 941, the Court of Civil Appeals at Ft. Worth, in a very learned opinion, clearly uphold the right of the commissioners' court to order an election under the above article for as many political subdivisions of a county as the commissioners' court may see proper. However, it is insisted that this case was overruled by *Norman v. Thompson*, 72 S. W. 62, 6 Tex. Ct. Rep. 607. In the latter case the Supreme Court held that on the contest of elections the civil courts merely had the right to pass upon the accuracy of the vote, rather to count the votes and ascertain how the majority stood, and did not have the right, under the statute on the question of contesting elections, to pass upon other questions than the one stated. Be this as it may, the reasons of the learned judge in that opinion are cogently expressed, and commend themselves to any one passing upon this question.

Reverting to the constitutional provision under consideration, it is desired to ascertain what is a subdivision. Judge Davidson answers this question in *Nichols v. State*, 37 Tex. Cr. R. 546, 40 S. W. 268—at least, does so inferentially, using the following language, quoting from *Ex parte Speagle*, 34 Tex. Cr. R. 465, 31 S. W. 171: "We now hold that where the election is for the entire county, or for any justice precinct in the county in its entirety, or for any town or city therein, it is not necessary to set forth the metes and bounds thereof, either in the minutes of the commissioners' court, or in the notice to be given for the election; and only where it is some subdivision of the county, distinct and different from a justice precinct or a town or city, is such description necessary. These latter, it is true, are, in a sense, subdivisions of a county; but they are already designated, and their boundaries matters of record, and are known, and it is sufficient merely to name the justice precinct or the town or city to be affected." Here is a clear statement, I take it, of the fact that, if the commissioners' court designate any arbitrary portion of a county, it is a subdivision of the county, as contemplated by the Constitution. *Speagle's Case*, referred to, was rendered by Judge Henderson. So both members of this court rendering the majority opinion herein hold that any portion of a county is a subdivision, whenever it is so designated by the commissioners' court. And again, in *Ex parte Brown* (Tex. Cr. App.) 34 S. W. 131, this language is used: "Prohibition, in article 3236 [Sayles' Civ. St. 1888-89], applies to counties, cities, or subdivisions of a county, and an election cannot be had, whether prohibition carries or is defeated, until the expiration of two years thereafter. This means where the precise territory is to be affected, and has no reference to carving below the extent of such territory. The last act gives to the commis-

sioners' court the right to carve out such territory as they may deem proper. It may be taken from two or more adjacent precincts. When carved, it is treated as a separate and distinct subdivision of the county, for local option purposes." This opinion was rendered by Judge Hurt in 1896, and concurred in by the full court. Judge Henderson, in *Williams v. State*, supra, uses this language: "As strengthening this position, appellant urges that, if the local option election is to be held in either of said known precincts, it would require a petition signed by 50 voters, and, if the two can be embraced as are done in this case, that the petition of 50 voters can accomplish, when they are designated as subdivisions, the same object it would require 100 voters if they petition or vote singly. While this may be true, to our minds it furnishes no reason why the two precincts, or even more territory short of the whole county, cannot be embraced in the order, and authority vested in such subdivision to vote upon local option upon a petition of only fifty voters of such county, for, as we understand it, so the law is written. As we construe the law, it is only necessary that the petition be signed by fifty voters, except in two contingencies. One is where the local option election is for the county, and the other is where it is an incorporated town," etc. Here, again, we have the definition of "subdivision," and here, again, we have a declaration by this court upholding the inherent right of the people, through the commissioners' court, to hold an election for a subdivision, regardless of the fact that local option had or had not existed in part of the designated territory.

In *Kimberly et al. v. Morris et al.* (Tex. Civ. App.) 31 S. W. 809, Lightfoot, C. J.—one of the purest and ablest judges that ever adorned the bench in Texas—in passing upon this question, said: "Undoubtedly one of the objects of the Legislature in passing the statute of 1893 was to meet the construction of the old statute by a majority of the court in *Whisenbunt's Case*, 18 Tex. App. 491. In any event, the statute of 1893 did meet it, and there can be no question of the proper construction of the letter of the statute. There can be no more reason for holding a precinct has such a vested right as would prevent the entire state voting on prohibition. If such a rule would prevail, it would present the novel aspect of a very small fraction or subdivision of the state, to wit, a county, or subdivision of a county, thwarting the will of the people of the whole state. It is true that state prohibition would not come under the same section of the Constitution, but the question of vested rights would be the same. In this case, neither Precinct No. 1, nor Precinct No. 2, nor the people of such precincts, acquired any vested right to the result of an election under the law. The law itself charged them with notice that a different result might be reached by a

vote of the people of the whole county." But it may be suggested that this decision was rendered under the act of 1893, where the Legislature, in compliance with the constitutional provision under discussion, had awarded to the commissioners' court the right to make arbitrary subdivisions. But the same reasoning applies with reference to the act of 1897, since said act merely limits the power of the commissioners' court to the political subdivisions. There is not a jot or tittle in the local option law that grants or awards an anti or a pro, as is sagely suggested by the majority opinion, any rights whatever. It is not required that one should be an anti or a pro, to petition for the election. He may be either; he may be neither; but, if he is a qualified voter in the county or territory to be affected, he can petition for the election. He has no vested right to the continuance of the law, except where the law for that particular territory alone is to be affected. If the commissioners' court, upon petition or upon its own motion, deem it proper to order an election for a larger territory, it has a perfect right to do so, and the election would be valid, regardless of the fact that a portion of the territory for which the election was ordered might then have local option, and might, if the last election was not held, have a right to vote for their particular territory within a week after the last election. The majority opinion recognizes this principle as correct in relation to the county. That is, they concede that if a precinct has local option, and the two years is nearly up, if an election is ordered for the county, and it goes in favor of prohibition, this bars the precinct from holding an election. Now, if the precinct has a vested right in holding another election within the two years, there is no justice or reason or law for saying that a county can take this right away, any more than there is for saying that a larger subdivision can do so.

The majority rely with great force upon *Elliott's Case*, 72 S. W. 837, 7 Tex. Ct. Rep. 59. The construction placed upon it was never dreamed of by any member of this court at the time of its rendition, and this statement will be borne out by the presiding judge of this court. In this decision the principle laid down in *Dawson v. State*, 25 Tex. App. 670, 8 S. W. 820, to the effect that, where a certain territory adopts local option, that particular territory must vote it off, was clearly upheld. School District No. 54 attempted to hold an election in this case; part of its territory being in a dry justice precinct, and part in a wet justice precinct. The court held the law inoperative and void, on the theory that, if the election went wet, it would destroy the election in the dry precinct. This violates the very letter of the decisions cited and relied upon by the court in the rendition of the majority opinion. Under the majority opinion, I take it now that a school district has a constitutional

right to hold an election for local option purposes; and if the construction placed upon the Elliott Case, *supra*, is correct, this would depend upon the status of the respective justices' precincts in which the school district might lie as to whether the commissioners' court could order it or not. The writer says that, if the construction placed upon the Elliott Case is correct, then he did not so understand the decision at the time it was written, nor does he so understand it now. But if the majority's construction be correct, then it violates both the Constitution and the decisions cited to support it. It follows that the case of *Kidd v. Truett* (Tex. Civ. App.) 68 S. W. 310, is the correct exposition of the law on this question.

In *Rippy's Case* (Tex. Cr. App.) 68 S. W. 687, the principle here contended for was reannounced; and the decision in *Ex parte Fields*, 39 Tex. Cr. R. 50, 46 S. W. 1127, was again upheld. That is, if a precinct adopts local option, it stays local option, as far as that precinct is concerned, until voted out at the expiration of two years. But the county can order an election, or any larger subdivision of the county than that precinct can order an election including that precinct.

But it is seriously insisted that the constitutional question under consideration has never been passed upon by any of the decisions cited by the majority of the court or by the writer. No better answer need be made to this than the fact that the Constitution is so plain and simple that it needed no construction, and all of the decisions, in passing upon the validity of the statutes under consideration, conceded their constitutionality, and were merely called upon to construe the validity of the statute. In no case before this court was the question ever more thoroughly discussed, or more research and ability displayed in assailing the validity of the statute and the constitutional provision, than the *Rippy Case*, *supra*; and yet no one questioned the constitutional provision under consideration, but the sole insistence was that it did not accord to the citizens the equal protection of the law, etc., in ascertaining their wish and will about local option. But it is sagely suggested that the constitutional provision does authorize the commissioners' court to order a local option election for commissioners' precincts and school districts. If this had been the intention of the Constitution, instead of saying "or such subdivision of the county as the commissioners' court may designate," the amendment to the article under consideration would have said, "or other subdivision of the county." When met with the incongruity that two or more justices' precincts may be contained in a commissioner's precinct, the majority use the pedantic declaration, "*Ita lex scripta est.*" The only answer necessary to this is that the law is not so written. It is a well-known aphorism of the law that cannot be done indirectly which cannot be done directly. If

the Constitution did not intend to permit the commissioners' court to order an election for two or three precincts, as they might see fit, they certainly would not have been authorized to allow an election for a commissioners' precinct which contains $2\frac{1}{2}$ justices' precincts. As a court, it is not proper to say whether legislation is wise or not. The statute does not recognize, in authorizing an election, whether part of the territory to be affected is then under local option or not, but its clear mandate is that the commissioners' court may order an election for two or more political subdivisions. I think this, as indicated above, is the most restricted construction that could be given to the constitutional amendment. There might be serious argument to the effect that the Legislature had transcended its power in limiting the election, at the instance of the commissioners' court, to political subdivisions, since the Constitution authorized an election for such subdivision as the commissioners' court may designate. I agree with the majority that Judge Marshall is correct in saying "that Constitutions must be construed according to their plain signification," but I clearly disagree as to the application of this salutary rule of construction. I do not think that the provision under consideration can be tortured into a construction that would authorize any one to say that the Constitution intended to give to the commissioners' court power to "create" subdivisions. No power, save omnipotence, can "create" land; but it is a simple act, clearly within the purview and power of the commissioners' court, to point out and designate a subdivision of a county for local option purposes. So believing, I wish to enter my dissent from the majority opinion.

MASTERSON v. RIBBLE.

(Court of Civil Appeals of Texas. Jan. 16, 1904.)

BOUNDARIES—CONFLICTING CALLS—QUESTION FOR JURY—INSTRUCTIONS—APPEAL AND ERROR.

1. Where plaintiff in a boundary suit relied on established and marked lines and corners to show the true location of his line, a charge that, "where the lines of a survey have been actually run upon the grounds and the corners established and the lines marked, these, if they can be found, constitute the true boundaries of the land, and if there are a sufficient number of them shown by the evidence," so as to establish the true location of the line, they must be respected by the jury, and must not be departed from or made to yield to any other less certain matter of description, is erroneous, as imposing too great a burden on the plaintiff.

2. Where it appears in a boundary suit that there are well-known and undisputed original corners established on the ground in surrounding surveys, that fact does not control other calls which are conflicting, but such fact must be considered by the jury, together with all the other circumstances in evidence, to determine the conflicting calls.

3. Where, in a boundary suit, the intention of the surveyor in making surveys, whose lines are

uncertain, is the controlling question, the jury should consider his purpose as gathered from what he did in making the surveys, the description of the land he gave, and all the circumstances attending the transaction, but not a secret intention which found no expression in his acts.

4. An objection by appellant, in a boundary suit, that the court was not authorized to submit to the jury the question whether the surveys were actually made on the ground, will not be considered on appeal, where appellant invited a charge on that issue.

Appeal from District Court, King County; J. M. Morgan, Judge.

Action by R. B. Masterson against E. L. Ribble. From a judgment for defendant, plaintiff appeals. Reversed.

W. P. McLean and Glasgow & Kenan, for appellant. Jo. A. P. Dickson, L. W. Dalton, and Matlock, Miller & Dycus, for appellee.

SPEER, J. This was tried as a boundary suit to determine the north line of sections 163, 164, 165, 166, 167, and 168, made for R. M. Thompson in King county, which are admitted to belong to appellant. The disputed strip embraces some 1,200 acres of land. These surveys, along with a number of others, were made at an early date out of a body of vacant land between two older surveys known as block 10, A. B. & M., and sections 11, 12, 19, and 20 of another survey; these designations being sufficiently definite for the purpose of this opinion. Appellee's contention is that under the circumstances the true location of block 10 should determine the lines of the surveys in controversy, and that this true location is about one-half mile—the width of the disputed strip—south of where appellant claims it is; appellant's contention being that the position of said sections is not dependent upon the true location of block 10, but that the intention of the surveyor making them was to place them where he now contends for. The testimony shows the true location of block 10 to be in dispute.

The following paragraph of the court's charge should be condemned, for the reason that it imposes too great a burden upon appellant, who was plaintiff below, viz.: "Where the lines of a survey have been actually run upon the grounds and the corners established and the lines marked, these, if they can be found, constitute the true boundaries of the land. If there are a sufficient number of them shown by the evidence so as to establish to the satisfaction of the jury the true location of the land, these must be respected by the jury, and must not be departed from or made to yield to any other less certain matter of description." Under the facts this would undoubtedly operate to place upon appellant the duty of satisfying the jury, since he to some degree relied upon established and marked lines and corners to show the true location of his land. Moore v. Stone (Tex. Civ. App.) 36 S. W. 909; Finks v. Cox (Tex. Civ. App.) 30 S. W. 512; Missouri, K. & T. Ry. Co. v. Kemp, Id. 1117; Feist v.

Boothe (Tex. Civ. App.) 27 S. W. 33; Grigg v. Jones (Tex. Civ. App.) 26 S. W. 885; McGill v. Hall, Id. 132.

Appellant objects to the following language of the court's charge, which objection we think is well taken: "If there are any well-known and undisputed original corners established on the ground in any of said surrounding and contiguous surveys called for, they would control the other calls which are conflicting and contradicting, if there are any such." This is not correct. There may be such well-known and undisputed corners in surrounding and contiguous surveys, but it does not necessarily follow that they would control other conflicting calls. The jury could properly consider, along with such fact, all the other circumstances in evidence, to determine such conflicting calls. The real question, and practically the only one in this case for the jury to determine, is, where on the ground did the surveyor really intend to place the tier of sections from 157 to 168? and in determining this question they should consider all the circumstances attending the survey. By intention of the surveyor we mean, not a secret intention which has found no expression in his acts, but his purpose, to be gathered from what he did in making the surveys, the description of the land he gave, and all the circumstances attending the transaction. Blackwell v. Coleman County, 94 Tex. 216, 59 S. W. 530. The charge should be so framed upon another trial as to authorize a proper recovery by appellant if a part of the land in controversy should be found to be embraced within his surveys.

The complaint that the court was not authorized to submit to the jury the question of whether or not the surveys were actually made upon the ground will not be considered, because it appears that the appellant invited a charge upon such issue.

We are not prepared to hold that the court erred in excluding the testimony of the witness Glasgow as to the condition of the county maps in 1882. The character and extent of the search instituted by him at Austin is not shown to be such as to lay a proper predicate for the introduction of this secondary evidence.

Reversed and remanded.

F. GROOS & CO. v. BREWSTER.*

(Court of Civil Appeals of Texas. Dec. 23, 1903.)

FACTORS—SALE OF GOODS—BILLS OF LADING—DRAFTS—ASSIGNEES—LIABILITY—LIMITATIONS—APPEAL—RIGHTS OF APPELLEE—ADDITIONAL JUDGMENT.

1. A corporation shipped corn to plaintiff which he had not ordered, and drew drafts for the value thereof, with bills of lading attached, which were assigned to defendant company, and by it transmitted for collection. Plaintiff refused to pay the drafts or receive the corn,

*Rehearing denied February 3, 1904, and writ of error denied by Supreme Court.

whereupon defendant, with knowledge of the facts, and knowing that the corn was becoming heated and damaged, and had not been sold, wrote to the bank holding the drafts for collection, stating that, the corn having been sold at a reduced price, plaintiff, in paying the drafts, was to draw on the corporation for the difference of value of the corn, which drafts the bank was authorized to accept as part payment of the drafts attached to the bills of lading. Plaintiff and the bank treating this letter as an authority to sell the corn, plaintiff paid the drafts, sold the corn, and drew on the corporation for the difference, but it, being insolvent, refused to pay the drafts. *Held*, that plaintiff could recover such difference from defendant.

2. Such action, whether based on the drafts drawn for the difference between the amount the corn sold for and the amount of the original drafts paid by plaintiff, or on defendant's letter so written, was founded on a written obligation, and was therefore within the four-year statute of limitations.

3. Where defendant, who was assignee of drafts attached to bills of lading for corn shipped to plaintiff for sale on commission, directed him to draw drafts on the shippers for the difference between the proceeds of the sale and the original drafts, defendant could not object that such drafts were not drawn and presented until after the corn was sold and the difference definitely ascertained, in the absence of proof of prejudice by the delay.

4. After plaintiff had declined to receive corn shipped to him for sale on commission, and to pay drafts attached to bills of lading therefor, defendant wrote the holder of the drafts for collection, authorizing the sale of the corn by plaintiff, and the drawing of drafts for the difference between the proceeds and the original drafts on the shipper, to be accepted in part payment of the original drafts. Plaintiff thereupon received and sold the corn which had arrived prior to the date of the letter, and other corn which arrived thereafter, and paid the drafts drawn, and drew other drafts against the shippers for the difference, according to the letter. *Held* that, where plaintiff recovered against defendant for the difference between the amount of the original drafts and the proceeds of the corn received before the date of defendant's letter, the fact that the proof as to the corn subsequently sold was the same did not authorize the Court of Appeals, on defendant's appeal, to render judgment for plaintiff for the difference between the drafts drawn and the proceeds of the corn so subsequently received.

Appeal from District Court, Bexar County; S. J. Brooks, Judge.

Action by C. G. Brewster against F. Groos & Co. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Webb & Greth and Geo. C. Altgelt, for appellants. Chas. W. Ogden, Terrell & Terrell, and W. H. Lipscomb, for appellee.

NEILL, J. During the months of April, May, and June, 1897, the J. L. S. Hunt Company, a private corporation, shipped to appellee, at Laredo, Tex., on various days during that time, 33 car loads of corn, and drew its drafts for each car load (33 in number) on appellee, payable to the order of said company, with bills of lading attached, aggregating \$9,041.90. The drafts with bills of lading attached were then assigned and delivered by the J. L. S. Hunt Company to appellants, F. Groos & Co., partners doing a banking business in the city of San Antonio, Tex., who by virtue of such assign-

ment became the legal holders thereof. The appellee, O. G. Brewster, was then a commission merchant doing business in Laredo, Tex., and had theretofore handled corn on commission for the Hunt Company. But at the time these shipments were made, and drafts drawn, he had ceased to do business for said company. He had not purchased the corn, or any part thereof, nor authorized its shipment or consignment to him, nor accepted or in any way obligated himself to pay said drafts, or any of them, or to receive said shipments of corn. F. Groos & Co. transmitted the drafts, with bills of lading attached, to the Milmo National Bank, at Laredo, for collection. The appellee, not having purchased, ordered, or agreed to receive the corn, refused to accept or honor any of the drafts. Twenty-five car loads of the corn, having arrived at Laredo, were becoming heated and damaged; and appellee having refused to receive the shipments, which facts being made known to appellants, they on May 27, 1897, wrote to the Milmo National Bank:

"San Antonio, Texas, May 27, 1897. Milmo Natl. Bank, Laredo, Texas—Dear Sir: A number of cars of corn covered by bills of lading attached to drafts on O. G. Brewster sent you at various times, having been sold at a reduced price from original figures; and in paying for said drafts Mr. Brewster is to draw on the J. L. S. Hunt Company for the difference of value of the corn, which said drafts you are hereby authorized to accept as part payment of such collections. Respectfully, F. Groos & Co."

When this letter was written, appellants knew that none of the cars of corn had been sold for less than the amounts drawn for, or at any price. Their purpose in writing it was to authorize such sales and such returns therefor as the letter indicated. In view of these facts, their letter being shown by the Milmo Bank to appellee, it was construed by them to mean that Groos & Co. desired appellee to receive and sell the corn for them, and, when sold, that he should draw drafts on the Hunt Company, which they would accept in payment for the difference between amounts of original drafts on Brewster and what was realized from such sale. In view of the facts recited, which were known by appellants as well as by appellee and the Milmo National Bank, no other construction could have been placed upon the letter; i. e., if it was contemplated by the appellants that it should be acted upon at all. In carrying out such construction, the Milmo National Bank, acting for appellants, being unwilling to deliver the bills of lading to appellee, or allow the railroad company to deliver him the corn without his payment in full of the drafts attached thereto, arranged and agreed with him that he should first pay in full the several amounts for which the drafts were drawn; that the bills of lading should then be deliv-

ered to him, and he should receive the corn, and, after putting it in condition for sale, sell the same for the best obtainable price, and, should the proceeds of sale be less than the amounts for which the drafts were drawn, draw on the Hunt Company for the payment of the difference, it being understood from the letter that the drafts would be received by appellants for such payment. In pursuance of such arrangement and understanding, the appellee paid the original drafts drawn on him by the Hunt Company to the Milmo National Bank, who held them for appellants, in full; and, when paid, the full amount of the payments was remitted by the bank to appellants. The bills of lading were then turned over to appellee, and he received the corn from the railroad company, placed it in condition for sale, at a considerable expense, to him, and from time to time sold same for the best prices obtainable. And as soon as he received the proceeds of sale, and was able to ascertain the difference between such proceeds and the amount he paid for the drafts, he drew drafts on the Hunt Company, payable to the order of the Milmo National Bank, with statements of sales attached thereto, for such difference—the sum of \$1,772.41—being the difference between the drafts drawn on appellee for the 33 car loads (the 8 which arrived after, as well as the 25 which arrived before, the 27th of May, 1897) and the entire amount realized from their sale. The drafts drawn by appellee for such difference were sent by the Milmo National Bank to its correspondent in San Antonio for collection. The Hunt Company, upon whom they were drawn, failed and refused to pay them. This company was then, as well as at the time it drew its drafts on appellee, which were assigned to appellant as aforesaid, wholly insolvent; such insolvency being at all the times mentioned well known to appellants. The insolvency of said company continued from such times, and existed when this suit was filed, as well as when it was tried in the court below. The Hunt Company having failed to pay the drafts drawn by appellee, as before stated, they were presented to appellants for payment, and payment by them was refused; and they have never paid the amount, or any part thereof, for which said drafts were drawn.

The facts thus found are established by the uncontradicted testimony, and are not denied by appellants. They are substantially alleged by appellee in his petition as his cause of action. That these facts constitute a cause of action in favor of appellee against appellants for the difference between the aggregate amount paid by the former on the drafts drawn on him by the Hunt Company prior to May 27, 1897, and the amount realized by him for the sale of the corn for which said drafts were drawn, good against appellants' general and special exceptions, is, to our minds, too clear for argument. This

difference, as found by the verdict of the jury, is \$1,522.36, for which appellee obtained the judgment which is appealed from.

It would seem that there can be no question about this suit being founded upon an instrument or instruments of writing. Whether it be regarded as based upon the letter of May 27, 1897, or upon the drafts drawn by appellee, after the sale of the corn, on the Hunt Company, in either event it is founded upon a written obligation. The facts show a consideration inuring to appellants for the sums of money for which the drafts were drawn, and the letter referred to may be regarded as a promise by them to accept the drafts as payment for the difference between the aggregate amount paid by appellee on the drafts drawn on him prior to its date and the sum realized from the sales of the corn for which they were drawn. Therefore the four-year statute of limitations, and not the two, is the one which must govern in determining whether the action was barred when the suit was instituted; and, it being brought within that period on the facts stated, it was not barred.

It must be borne in mind that the corn was never purchased by the appellee; that he never, in fact, owed either the Hunt Company or appellants anything for it; that he was under no obligation whatever to receive it, or to accept or pay the drafts drawn on him for it; that what he did was, as a broker or commission merchant, for the benefit of appellants, and not for himself; that they received every dollar for which the drafts were drawn, paid by appellee, before a bushel of the corn was sold; and that they were never entitled to receive from appellee, or any one else, save the Hunt Company, anything more than what was realized from the sales of the corn after it had been received by appellee as their broker. Therefore the difference between what they received on the drafts from appellee and what the corn was sold for was that much more than they were entitled to. Independent of the letter, equity and good conscience would seem to require that appellants should make good to the appellee this difference. It may be true that appellants did not know of the construction by the Milmo National Bank and appellee of the letter of May 27, 1897, or of the arrangement and understanding between them in regard to it. But if, in view of the facts, any other construction could have been given or action taken in regard to the matter, such construction and action were the most advantageous to appellants.

As was said by the chief justice of this court in an opinion in a case between these parties involving the same subject-matter and facts: "The letter was more than a mere authority that the drafts on the Hunt Company might be used as part payment of the original drafts. F. Groos & Co.'s object in writing, as stated by their cashier, was to authorize the sales for less than bill prices,

and to authorize returns as therein indicated. It was therefore written to induce Brewster to take the corn, and evidenced an agreement on the part of F. Groos & Co. that only what the corn brought should be paid for by Brewster. Their evident purpose in requiring drafts to be drawn on the Hunt Company for the difference was to enable them thereby to settle with the Hunt Company on the basis of what was actually realized for the corn, and to protect themselves in respect to what they had overpaid the Hunt Company for the bills of lading and drafts bought by them. Had the Milmo National Bank retained the payments made by Brewster until the difference had been ascertained, and then undertaken to adjust matters by restoring him the amount of the difference, and taking for them drafts on the Hunt Company, and had remitted the same with the amount of the sales to F. Groos & Co., we think the latter could not have complained, nor impeached the transaction, unless it was able to show that the departure from the direction, in not taking the drafts on the Hunt Company at the time the original drafts were delivered, had prejudiced them in respect to their relations with the Hunt Company. The fact that the Milmo Bank remitted the full payment of the drafts to F. Groos & Co., as received, would not in any material respect change the situation. * * * We do not think that the letter of May 27th made the taking of Brewster's drafts on the Hunt Company a condition precedent to his being allowed to pay for the corn only what it brought, or that by paying the drafts in full, and drawing drafts for the difference afterwards, the right was lost to him to pay only what it brought."

As is before shown by the facts, it was impossible, at the time appellant paid the drafts to anticipate the difference between the amount for which they were drawn and what the corn would sell for. And the amount for which appellee might then have drawn on the Hunt Company for such difference would have been merely suppository. If drawing then on the Hunt Company for such difference did not in any respect prejudice appellants, they cannot complain of the drafts for such difference not having been drawn and presented until after the corn was sold, and the amount definitely ascertained. The question as to whether appellants were so prejudiced was, by an appropriate charge, submitted by the court to the jury; and they, upon evidence amply sufficient to sustain their verdict, found that they were in no way prejudiced.

While we have not discussed every assignment of error insisted upon by appellants in this case, we have carefully considered each of them, and are of the opinion that none is well taken.

The appellee has filed a cross-assignment of error, in which he complains of the court's limiting his recovery to the amount of the drafts drawn prior to May 27, 1897, and de-

nying his right to recover on the six drafts drawn on June 1, 1897. Under this assignment he insists that the proof as to the six cars sent after the letter of May 27, 1897, was written is identical with that as to the cars sent before that time, and that therefore the verdict of the jury is for all purposes a finding which would authorize us to render judgment here for them for the full amount of the difference in the 33 cars; and he asked that, in the event that we have such authority, we so render the judgment, but, if we have not, that the judgment, as it stands, be affirmed. We do not believe, even if we should find the facts as insisted upon by appellee, that this court has any authority to render such judgment on the facts as is requested by appellant.

Therefore the judgment of the district court is affirmed.

WESTERN UNION TEL. CO. v. TURNER.*

(Court of Civil Appeals of Texas. Jan. 2, 1904.)

TELEGRAPHS—NEGLIGENT TRANSMISSION OF MESSAGES—DAMAGES—MENTAL ANGUISH.

1. In an action against a telegraph company for negligent delay in transmitting a message apprising plaintiff's father-in-law of the death of plaintiff's child, and resulting in the failure of the father-in-law to meet plaintiff at the train with suitable conveyances for the funeral, where the complaint alleged as damages mental anguish in being obliged to hire an ordinary express wagon to convey the child's remains to the father-in-law's house, and in having to postpone the funeral until the next day, it was error to admit testimony that plaintiff was obliged to leave the corpse on the depot platform for about 10 minutes while he looked for his father-in-law.

Appeal from District Court, Tarrant County; M. E. Smith, Judge.

Action by J. E. Turner against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Reversed.

Geo. H. Fearons and Stanley, Spoonst & Thompson, for appellant. Carlock & Gillespie, for appellee.

STEPHENS, J. This appeal is from a judgment for \$700 recovered as compensation to appellee for mental suffering caused by the negligent failure of appellant to promptly transmit from its office in Ft. Worth, Tex., and deliver at Lexington, Okl., the following message: "E. J. Keller, Lexington, Oklahoma,—Notify B. L. Hammond that baby is dead and to meet me at the train this evening. Will pay you for trouble. [Signed] J. E. Turner." The consequences of the inexcusable delay complained of were thus stated in the petition: "Plaintiff avers that if said telegram had been promptly forwarded and delivered, which the defendant in the exercise of ordinary care should have done within a space of one

*Rehearing denied January 30, 1904.

hour after receiving the same, that the said Keller would have at once notified plaintiff's father-in-law, B. L. Hammond, to meet plaintiff, on the arrival of said train, with friends and carriages, and that the said B. L. Hammond would have been present with friends and relatives in carriages, and with suitable conveyances for transportation of the corpse, and would have had the grave dug, and all arrangements for the funeral to have occurred on that same afternoon. And the plaintiff fully relied upon these arrangements being carried out, and the same would have been carried out had the defendant performed its duty in the premises, but that defendant negligently failed to transmit and deliver the said telegram to the said Hammond until after the middle of the afternoon, and just a short time before the plaintiff's train arrived at its destination. That, when he arrived at Lexington with the remains of his child, he found no one there to meet him; that his father-in-law was not present, and no friends or relatives of any kind, and no conveyances provided to receive and carry away the corpse of his child. That plaintiff had to hire an ordinary express wagon or delivery wagon and put his child's remains in it, and carry them to his father-in-law's house, a distance of about two miles. That no arrangements had been made for any one to meet him at the train, and no grave had been dug, and no funeral had been announced and provided for, and same did not occur until some time about noon the next day. That, on account of the said wrongful conduct of the defendant, plaintiff was subject to great mortification and distress of mind, and his pride was touched, and he felt humiliated, and was made to suffer great and most acute mental pain and distress of mind, in all to plaintiff's damage \$2,000."

Numerous assignments of error are found in appellant's brief, but all are overruled except the eighth, which complains of the admission of testimony, as shown by the following bill of exceptions: "Be it remembered that upon the trial of this cause, and while the plaintiff was on the stand testifying in his own behalf, he was asked by his counsel to state what he did with the remains of his child while he was looking about for his father-in-law on the arrival of the train at Purcell, I. T., and to state where the corpse was left while he was looking for his said father-in-law. To the answer of this question the defendant objected, because said testimony was incompetent for any purpose, calculated to prejudice the jury, and there was no pleading which authorized any damage on account of the corpse having required to be left unattended by the plaintiff, which objections were overruled by the court, and the plaintiff permitted to answer that he put the said corpse on the platform of the depot, and left it there some 10 minutes while he was looking about for his father-in-

law, and said testimony went before the jury. The defendant thereupon excepted to the ruling of the court." The damages in this class of cases are special, and must be so alleged. What is not alleged cannot be proved. We fail to find in the language above quoted from the petition any claim for damages for mental suffering arising from the fact, thus proved over appellant's objection, that appellee had to place the corpse of his child on the depot platform, and leave it there some 10 minutes while he was looking about for his father-in-law. Mental distress caused by this circumstance was not exactly the same as that caused by the failure of friends to meet appellee at the depot as alleged. The results of appellant's negligence were definitely stated in the petition, which was therefore not subject to demurrer, and the only remedy left appellant was to object to testimony offered to prove further and special results not alleged. True, what was proved over objection was of the same nature as that alleged, but was by no means a necessary consequence of it, and was distinctly more than was alleged. This ruling appellee for some reason has not undertaken to defend, and we are unable to approve it.

The judgment is therefore reversed, and the cause remanded for a new trial.

FT. WORTH STOCKYARDS CO. v. WHITTENBURG.*

(Court of Civil Appeals of Texas. Jan. 2, 1904.)

INJURIES TO SERVANT—CAVING OF BANK—ASSUMPTION OF RISK.

1. Where a servant of mature years was directed to go to a sand bank for a load of sand, and was injured by the caving of the bank as he alighted from his wagon, and the physical condition of the bank and the probability of its caving were as obvious to the servant as to the master, the servant assumed the risk.

Appeal from District Court, Tarrant County; M. E. Smith, Judge.

Action by E. M. Whittenburg against the Ft. Worth Stockyards Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

N. H. Lassiter, C. M. Templeton, and Robert Harrison, for appellant. Wynne, McCart, Bowlin & McCart, for appellee.

CONNER, C. J. Appellee recovered a judgment against the appellant company for the sum of \$1,000 as damages for personal injuries caused by the fall of an overhanging bank of earth at a sand pit to which appellee had gone for the purpose of getting a load of sand. Among other things, appellant pleaded assumed risk on appellee's part, in

*Rehearing denied January 30, 1904, and writ of error denied by Supreme Court.

¶ 1. See Master and Servant, vol. 24, Cent. Dig. §§ 557, 611, 620.

that the danger was "as open and apparent to the appellee as to the appellant, and that the appellee, in undertaking to work in and about the sand bank, assumed the risk of its caving or falling in on him."

Error is first assigned to the action of the court in overruling appellant's motion for continuance in order to procure the testimony of H. P. Hayes, W. J. Campbell, and H. R. Upp, residents of Tarrant county. It appears that the case was first set for trial on the 10th of March, 1903. On the 7th day of that month appellant procured subpoenas for said witnesses, which were served on the 9th of March. The case was not reached for trial until on or about the 13th of March, upon which day the witnesses named were not in attendance. The case was accordingly postponed on account of the absence of these witnesses, and reset for the 1st day of April. Appellant on March 31st caused other subpoenas to be served upon said witnesses, but they were not present on April 1st, and appellant announced, "Not ready for trial," because of their absence, and the case was again postponed until 2 p. m. of that day for the purpose of procuring the attendance of the witnesses. After such postponement, appellant's attorneys telephoned to the general manager of the appellant company, and requested him to endeavor to see said witnesses, and have them appear at 2 o'clock p. m. of that day, which he promised to do if possible. At 2 o'clock p. m., however, the witnesses were not present, and formal application was accordingly made for a continuance; it being presented as an application for a first continuance, and as such was formally sufficient. We think a mere statement of the facts a sufficient demonstration of a want of diligence on appellant's part to secure the attendance of the witnesses on account of whose absence the application was made, and are of opinion that the court properly overruled the application. See Rev. St. 1895, art. 2267; Ry. Co. v. Hall, 83 Tex. 675, 19 S. W. 121; Doll v. Mundine, 7 Tex. Civ. App. 104, 26 S. W. 87.

Appellant's further contentions are to the effect that the evidence fails to show any negligence on its part authorizing a verdict in appellee's favor, and that it affirmatively appears that the accident to appellee resulted from a risk assumed by him. But three witnesses testified, all of whom were offered by appellee. The testimony is without conflict, and is substantially as follows: Appellee testified that he was 60 years of age, and had been a farmer most of his life; that in July, 1902, he was working for the appellant company under one of its foremen, a Mr. Godwin; that most of the time he hauled lumber and posts, and different things, using a two-horse wagon and team of his own; that, while so employed, Godwin directed appellee "to go down to the ravine and get a load of fine sand to set brick with." Further quoting appellee's testimony, he testified that: "I

went down the branch as I was directed to; somewhere near the place, as I thought; something near the bank; jumped out of my wagon to look for sand. When I got out of my wagon, I got crippled. When I got out of my wagon I didn't do anything—didn't get a chance to do anything. The bank caved off on me. It was a bank of earth and dirt. I suppose it was some 7 or 8 feet high. I never measured it. I drove my wagon up within 5 or 6 feet of the bank. * * * I never had hauled any sand out of this pit before this. * * * I did not notice anything unusual about this pit when I went down into it to get the sand. I viewed along the bank and in the branch to hunt for sand—the kind of sand that the gentleman wanted—and there was nothing in the bank that I wanted that I could see. * * * I did not know anything about this bank being in a dangerous condition or likely to fall. Didn't know anything about that. I did not observe anything unusual about the appearance of it to indicate danger. * * * There wasn't any pit—nothing but a piece of level ground near the bank—and I stepped off the wagon on the ground to examine for sand. I was near the bank, and the bank caved in, and I done nothing but just did get out in time to get hurt. I got out on the side next to the bank. I don't know how much of the bank caved in on me." Cross-examined, he further testified: "I suppose this gravel pit was 300 or 400 yards from the place where I was to haul the sand. Mr. Godwin just came to me and says that 'I want you to put on your dump boards and go down there, right down that branch there, wherever you can—near that bank along there, wherever you can find some sand suitable to set brick with—and bring me a load right at once.' He did not tell me to go to any particular place; just told me to go down that way and get some sand, wherever I thought I could get it; directed in the branch. I went down this branch according to his directions. At the time there were men just a short distance below me at work. I don't know what they were doing. I expect getting out gravel—I guess they was. I didn't pay much attention to them. None of my business to look after them. They were, I suppose, 75 or 80 yards from me. There was nobody at work right at the place where I got hurt. I couldn't tell whether there had been anybody at work there for several days or not. If anybody had been at work there that morning, I don't know of it. There was so many wagon tracks in there, as it was a large gravel bed, that I couldn't tell whether any one had been working there that morning before I was hurt or not. I had hauled some gravel before this time while I was working for Armour & Co., but not from this place, but never hauled any sand. * * * I don't know who this gravel bed belonged to. If I remember right, I had hauled the gravel for Armour & Co. about two weeks prior to the

time I was hurt. * * * No one cautioned me about this bank, or said anything to me about it at all. I had not heard anything about the bank being dangerous before I went to the bank. * * * I could see this bank. Had every opportunity to look at it, and did not see anything. I could glance along the bank and see, and couldn't see anything. * * * Everything was open, and nothing concealed about it."

W. J. Lattimore testified: "I had been about this bank that caved in on him [appellee]. I got about 2,000 yards of gravel out of the same place. I think the Ft. Worth Stockyards Company had control of the land where this gravel bed was situated. I know the exact point where the bank caved in on Whittenburg. Cannot say that I exactly know its condition prior to the time it caved in on him. I had abandoned this bed about a week or ten days before, in getting gravel out of it. It run out into a sand bank. The bank was just like any other sand or gravel bed. It was dangerous in one sense of the word. All pits become so, and that pit was more or less dangerous. I saw this pit every day—passed right by it. I can't say that there was anything unusual about this bank to indicate that it was dangerous the last time I saw it before this accident. Just a straight up and down embankment. I hauled some sand from this same pit, and was given permission to do so by the Ft. Worth Stockyards Company. I don't know of their refusing to give anybody permission to haul sand there." Cross-examined: "All sand banks are more or less dangerous, and I suppose one man can see the danger as well as another. The dirt is liable to cave. As to whether one man can see that and know that as well as another, I don't know about that. It is according to whether a man is used to working in the business or not. One man could see it. Whether or not any man, whether he worked about a sand bank or not, would know it was liable to cave, I can't say as to that. My best judgment—that a man who had experience in hauling out of a place like that would have kept back away from the bank. This was an open bank, and anybody could look at it. A man that is experienced, in going in a place like that—a very high bank—he keeps his wagon far off, so that, if the bank gives on him, he has got some chance to get out of the way. A man has to take his chances when he hauls sand out of a pit like that one. Any man who does work of that kind has to take his chances, more or less. There are lots of people who don't understand about gravel and sand pits—such things as that—and they are liable to run into danger."

B. K. Corson testified for appellee as follows: "I live in North Ft. Worth, and have lived there about nine years, I reckon. I know Mr. Whittenburg, the plaintiff in this case. Got acquainted with him last year, maybe the latter part of June or first of

July. I know when he worked for the Ft. Worth Stockyards Company on the North Side, hauling. At that time I was engaged in delivering gravel over there on the North Side. I was working for Mr. Lattimore. He had a contract over there, and I had a contract under him hauling gravel—delivering gravel. I remember the occasion of Mr. Whittenburg being hurt by a bank caving in on him. I was north of him, I reckon, maybe, 300 yards or 400 yards, at the time. I saw him a very few minutes after he was hurt. * * * It had not been more than ten or fifteen minutes before he was hurt that I had left that bank. I was right at that bank, or right close by it. Had a team and some men up there getting sand out from under there, and I was standing watching it while they were at work at it; hauling sand from the same point. Take a man that didn't know anything about gravel—hadn't hauled any gravel or sand—and he won't realize the danger that would be in it, that a man that had experience would; and then, a man that had no experience in hauling gravel or sand, he would know they was hauling over there, and might say it looked dangerous, 'but these other people are hauling. They don't get hurt.' I have got the same chance they have got, and there is some one watching me—to protect the others, you know. When I saw this bank the last time before Mr. Whittenburg was hurt, it was in a dangerous condition. I have worked in such places five or six years—maybe ten years. This bank was controlled by the Ft. Worth Stockyards Company." Cross-examined: "I think this bank was about twelve feet high before it fell on Whittenburg, at the point where it caved in on him. Beginning at the top, there was about six feet of dirt, and there was two or three feet of sand, and then there was gravel under that. I had had it about 14 feet face there, and the gravel was what I was after, and I think they had got the gravel pretty nearly filled up to the sand. Any man could see that a perpendicular wall 12 feet high was more or less dangerous, but one man might know it better than another. I have men working for me, that some of them will realize the danger, while others won't. I consider them careless. They don't seem to realize or know the danger—some men. They could see it, but then, other men being in there and working, you can't get them to realize what the dangers are, and I always invariably went and attended to it myself." Witness was asked: "Had or not this bank caved in any other place?" and answered: "We were continually throwing it; that is, we dig under it and drag it off out of the way. I had seen Whittenburg around there probably for a month, or maybe longer, at the time he was hurt. He was hauling there; working for the yards; hauling lumber, mostly, I think. I don't know that I had ever saw him haul in

the sand pit before this, or gravel. When a bank of dirt gets topheavy, it will fall of its own accord, and sometimes don't take but very little to fall. I got a load of sand at this bed. I don't think it was exceeding fifteen minutes before this accident, and may be not more than ten. I just had quit. And then this bank was in a dangerous condition. I put my men under there, and stayed and watched the bank. I had got about all I could get out until I threw the bank. No one had worked at that immediate point from that time I was there until Mr. Whittenburg was hurt. There was some hands—I won't be positive whether they were at work that morning or not, but just a little north of the sand pit, screening; but I won't be positive about them being at work that morning. I kind of think they were, but then I am not positive." Redirect examination: "When we throw a bank I go under as far as I think it will bear, and then get on top, and take crowbars and drive them down—bars of iron—and just drop it off. That is a precaution that is taken to keep it from falling in or caving on the men that work in there. That is necessary and proper to do that for the safety of the men working under the bank. In reference to the men, some of them not seeming to realize the danger of such bank, I do not mean to say that I think it carelessness. You couldn't call it that. They just don't seem to realize the danger. It is inexperience."

We deem extended discussion unnecessary. We have, however, been unable to avoid the conviction that the testimony is insufficient to support appellee's recovery. Aside from the meagerness of proof to show that the sand bank in question was at the time operated by appellant, or that appellant knew, or by the exercise of reasonable diligence could have known, of its dangerous condition after it had been made so by undermining as testified to by the witness Corson, we think it affirmatively appears that appellee's injury was a risk assumed by him, within the meaning of the well-established rule on the subject. The authorities undoubtedly establish the proposition that where a physical situation is open to the observation of the servant, and apparent to him, and the probability of injury is as obvious to him as to the master, he must be held to assume the risk if he engages in the work. And where the situation presents nothing more complicated than a sand bank, it must be assumed that a person of mature years and understanding understood the risk, and might have known thereof by the exercise of reasonable care and prudence on his part. It must be assumed that appellee was acquainted with the laws of gravitation, and knew that a body of earth, such as described in the testimony, unsupported, was liable to fall at any time. No peculiarity of soil, special character of weather, or unusual circumstance was shown, rendering it necessary

for appellee to have special experience or information of the existing condition. It was apparent. It was to be known and understood by the exercise of that ordinary care and circumspection which the law holds all men bound to exercise in their own protection. See *Railway v. Spellman* (Tex. Civ. App.) 34 S. W. 298; *Railway v. French* (Tex. Sup.) 23 S. W. 643; *Railway v. Lempe*, 59 Tex. 22; *Railway v. Walker* (Tex. Civ. App.) 76 S. W. 228; *Parrish v. Railway* (Tex. Civ. App.) 76 S. W. 235; *Larich v. Moles* (R. I.) 28 Atl. 661; *Horton v. Ft. Worth Packing & Provision Co.* (Tex. Civ. App.) 76 S. W. 211.

We conclude that the undisputed facts show that appellee assumed the risks resulting in his injuries, and that the judgment should be reversed, and here rendered for appellant, and it is so ordered.

CALLENDER, HOLDER & CO. v. SHORT.

(Court of Civil Appeals of Texas. Jan. 26, 1904.)

ACTION—VENUE—CONTRACT—PLACE OF PERFORMANCE—STATUTE—PLEA IN ABATEMENT.

1. Bills of lading, and drafts attached, sent by a consignor to the consignee through a bank, on payment of which drafts the consignee received the bills of lading, and, on presentation thereof to the carrier, received the consignments in H. county pursuant to the terms thereof, constitute a written contract between the consignor and consignee to deliver the consignments in H. county.

2. Where a consignee overpaid a consignor for cotton bought under written contract to be delivered in a particular county, a plea by the consignor, in an action for the overpayment, brought in the county where the cotton was delivered, of privilege to be sued in the county of his domicile, is unavailing, under Rev. St. 1895, art. 1194, providing that, where a person has contracted in writing to perform an obligation in any particular county, suit may be brought against him either in such county, or in the county where defendant has his domicile.

Appeal from District Court, Harris County; Norman G. Kittrell, Judge.

Action by Callender, Holder & Co. against T. S. Short. From a judgment for defendant, plaintiffs appeal. Reversed.

Byers & Byers, for appellants.

PLEASANTS, J. On the 15th day of December, 1902, and on several dates subsequent thereto, up to and including the 19th day of January, 1903, appellants, who were cotton buyers residing and doing business in the city of Houston, Harris county, Tex., purchased from appellee, who at that time, and at the time this suit was filed, resided in the county of Shelby, in said state, several lots of cotton, aggregating 827 bales. This cotton, under the contract of purchase and sale between the parties, was to be paid for at so much per pound, f. o. b. cars at Houston, on a basis of middling, at Houston weights and classification. The bills of lad-

ing under which the cotton was shipped show that it was consigned "to shipper's order," with direction to the carrier to notify appellants. When each of these shipments of cotton were made, appellee drew upon appellants for the amount of the purchase price of same, based on the weights and classification at the point of shipment, and attached to said draft the bill of lading for said shipment. When the draft reached Houston, the bank to which it was sent, upon payment by appellants of the amount of said draft, delivered same, and the bill of lading thereto attached, to appellants, who, upon presentation and delivery of the bill of lading to the carrier, received the cotton. All of these shipments were made in this way. Upon reweighing and reclassifying the cotton at Houston in accordance with the terms of the contract of sale, it was found that the aggregate amount of drafts paid by appellants for said cotton exceeded the purchase price of same under said contract, in the sum of \$817.26. Appellants brought this suit to recover of appellee said sum of \$817.26. The petition alleges that the defendant is a transient person, "who can be found at present in Shelby county." It then alleges the sale of the several lots of cotton to plaintiff by the defendant under a contract by the terms of which the price to be paid therefor was so much per pound f. o. b. cars at Houston, upon a basis of middling, at Houston weights and classification; that plaintiff, by way of advancement, had paid defendant upon said cotton the sum of \$31,360.29; and that after the cotton was received by plaintiff, and weighed and classed as per contract, it was ascertained that the amount so paid was \$817.26 in excess of the contract price. There is no allegation in the petition as to how the alleged advancements were made, nothing being said therein in regard to the drafts or the bills of lading under which the cotton was shipped. To this petition the defendant interposed a plea of privilege to be sued in the county of his residence. This plea was, upon the facts before stated, sustained by the trial court, and plaintiffs' suit dismissed.

We cannot agree with the learned trial judge that there are any facts in this case which distinguish it from the case of *Seley & Early v. Williams*, 20 Tex. Civ. App. 405, 50 S. W. 399. In the case cited this court held that the draft and the bills of lading, which in every essential particular were identical with the drafts and bills of lading in the instant case, taken together, constituted a written contract obligating the defendants, upon the payment of their several drafts, to deliver to plaintiff, in the county of his residence, the corn covered by the bills of lading, and that upon a breach of such contract by defendants, by failing to deliver the qual-

ity and quantity of corn called for in the bills of lading, and for the purchase price of which the drafts were drawn by defendants and paid by plaintiff, a suit by plaintiff to recover of the defendants the excess paid him over the contract price of the corn, brought in the county in which the corn was to have been delivered, could not be abated by a plea of privilege by the defendants to be sued in the county of their residence. The several telegrams which are mentioned in the opinion in that case as having passed between the parties prior to the shipment of the corn were not considered by the court as having any weight in the determination of the question of whether the contract for the breach of which the plaintiff sued was to be performed in the county in which the suit was brought. Appellee having contracted to deliver to appellants, at Houston, Harris county, so many pounds of cotton of a certain grade, and at a fixed price per pound, as evidenced by his drafts and bills of lading, his failure to deliver the quantity and grade of cotton specified in his contract entitled appellants to maintain their suit for damages for such breach in the county in which the contract was to have been performed. Article 1194, Rev. St. 1895; *Seley & Early v. Williams*, 20 Tex. Civ. App. 405, 50 S. W. 399; *Darragh v. O'Connor*, 69 S. W. 644, 5 Tex. Ct. Rep. 171.

Appellants were not required to allege in their petition that the contract was to be performed in Harris county, in order to fix the venue in that county on that ground. The defendant was required to negative in his plea of privilege every supposable state of facts which would give the court jurisdiction over his person, except such as the petition, by reasonable intendment, itself excluded. The plea filed by appellee denied that the contract was to have been performed in Harris county, but, as we have seen, the evidence in the case overcame this averment. *Cavin v. Hill*, 83 Tex. 74, 18 S. W. 323; *Boothe v. Fiest*, 80 Tex. 144, 15 S. W. 799; *Railway v. Graves*, 50 Tex. 201; *Stark v. Whitman*, 58 Tex. 376; *Carothers v. McIlhenny*, 63 Tex. 147; *Graves v. Bank*, 77 Tex. 553, 14 S. W. 163; *Hopson v. Caswell* (Tex. Civ. App.) 36 S. W. 312; 1 Am. & Eng. Ency. Law, 32; *Townes on Pleading*, 239. We think it clear, under the cases cited, that the court erred in sustaining the plea in abatement, and therefore the judgment must be reversed.

It appears from the findings of the trial court that the undisputed evidence shows that appellee is due the appellants the sum of \$817.26 by reason of his failure to comply with his contract in the sale of said cotton. Judgment will therefore be here rendered for appellants for said sum. Reversed and rendered.

GARLINGTON v. FT. WORTH & D. C. RY. CO.

(Court of Civil Appeals of Texas. Jan. 16, 1904.)

CARRIERS—DELAY IN SHIPMENT—MEASURE OF DAMAGES—MARKET VALUE—EVIDENCE.

1. In an action against a carrier for unreasonable delay in delivering potatoes, evidence of the consignee that he based the price of 60 cents per bushel, which he agreed to pay for them f. o. b. at the point of shipment, on the market value at the point of destination, and that, after separating the sound from the "off stock," he sold the former to merchants, and the latter to peddlers, for the best price that he could get, varying from 35 cents to \$1.50 per hundred pounds, and that he was getting about the same price for potatoes that he got for the best of the shipment in question, tended to show the market value of marketable potatoes.

2. In an action against a carrier for unreasonable delay in delivering potatoes, evidence as to what the consignee agreed to pay for the potatoes f. o. b. at the point of shipment was admissible on the issue of their market value at the point of destination at the date they should have arrived there, where the consignee testified that he based the contract price on such market value.

3. In an action against a carrier for unreasonable delay in delivering potatoes, on proof that the potatoes were such as were called for by the contract, and in good condition when shipped, and of negligent delay of the carrier, resulting in damage to them, the shipper was entitled to recover the difference in the market value of the potatoes in the condition in which they would have arrived but for the delay, and that in which they did arrive.

4. On the issue of such market value, the price at which the potatoes were actually sold was admissible.

Appeal from Montague County Court; W. W. Cook, Judge.

Action by J. W. Garlington against the Ft. Worth & Denver City Railway Company. From a judgment for defendant, plaintiff appeals. Reversed.

Jas. A. Graham, for appellant. Stanley, Spoons & Thompson, for appellee.

CONNER, C. J. Appellant sued for damages alleged to have been caused by unreasonable delay to a car of potatoes shipped from Bowie, Tex., over appellee's line of railway, to Denver, Colo., and has prosecuted this appeal from the judgment against him. The shipment was made under contract with the Arenz Commission Company of Denver to pay appellant 60 cents per bushel f. o. b. car at Bowie for merchantable potatoes, such as appellant testified these were. The evidence tends to show, however, that on arrival at Denver the potatoes were damaged, and said commission company refused to receive them as in compliance with the contract, but sold them on account for appellant in an aggregate sum, including cost of sale, etc., of \$171.72 less than appellant would have received had they arrived at Denver in the undamaged condition in which they were shipped. H. H. Arenz, of said commission com-

pany, testified that he "could not give definite figures as to the market value of such potatoes at Denver had they reached there on time." While no fall in the general market was alleged, the court nevertheless instructed the jury to the effect that, if they found the unreasonable delays and resultant damage as alleged, they should find for appellant "the difference between the reasonable market value at Denver, Colo., on the day the said potatoes should have reached point of destination, except for such delay, if any, and the reasonable market value on the day the potatoes did arrive at Denver," and also gave at appellee's request the following special charge, to which error is assigned, viz: "You are instructed that, in determining the question of the market value of the potatoes at Denver on the date they should have arrived there, you will not consider the evidence as to what the commission company agreed to pay for the potatoes f. o. b. at Bowie; nor will you consider the evidence that such company might have accepted the potatoes in compliance with such f. o. b. contract, had they arrived on time."

No exception has been taken to the general charge, but we think the court committed reversible error in giving the special instruction quoted, and cannot agree with appellee that such error is harmless, on the ground that there is no proof of market value, and that hence appellant in no event was entitled to recover. Among other things, the witness Arenz, from whom we have before quoted, testified that "we based the price of 60 cents per bushel for these potatoes upon the Denver market"; and, further, that after separating them he sold the sound potatoes to merchants, and the "off stock" to peddlers; that he got the best prices they could for the potatoes, receiving as high as \$1.50 per hundred pounds, and as low as 35 cents per hundred pounds; and that they were "getting about the same prices for potatoes as I got for the best of these that were shipped in this car from Bowie." The quantity and prices received for the several grades into which the potatoes had been assorted were shown, and the whole testimony, we think, tended to show market value of merchantable potatoes, and that appellant was entitled to have considered on the question of value not only this testimony, but also the fact that he had contracted to sell them for 60 cents per bushel (if the jury found that the potatoes shipped were such as called for by the contract). The evidence to which the special charge relates was objected to on the ground that it appeared that the appellee company had no notice thereof at the time of or during the shipment. It may be conceded that, as proof of special damages, it was inadmissible, and that the contract price was not recoverable, because of the want of such notice; but, regardless of this, upon proof that the potatoes were such as called for by the contract, and in good condition when shipped, and of the

¶ 3. See Carriers, vol. 9, Cent. Dig. § 451.

negligence and unreasonable delays charged, and that such negligence and unreasonable delay proximately resulted in the damages shown, appellant was entitled to receive the difference in the market value of the potatoes at Denver, Colo., in the condition in which they would have arrived but for said negligence and delay, and in which they did arrive; and on the issue of such market value the price at which the potatoes were actually sold was receivable. See 1 Sutherland on Damages (2d Ed.) § 447.

It is ordered that for the error discussed the judgment be reversed, and the cause remanded for a new trial.

SPEER, J., disqualified and not sitting.

CLEMENTS v. CARPENTER.

(Court of Civil Appeals of Texas. Jan. 16, 1904.)

JUSTICE OF THE PEACE—APPEAL—COUNTERCLAIM.

1. Where, in county court, on appeal from a justice of the peace, defendant's attorney stated in open court that he relied on the same defenses as were pleaded orally in justice court, including his plea in reconvention for damages, which statement was not controverted by plaintiff or his attorney, and afterwards, on the court's request, these defenses were noted in writing, it was not then too late for the plaintiff to move to strike out the plea in reconvention, and to offer proof that it had not been pleaded in justice court.

2. That the action of a justice of the peace in sustaining an exception to the plaintiff's pleading rendered it unnecessary for defendant to plead a counterclaim does not authorize him to plead it on appeal to the county court.

Appeal from Reeves County Court; T. J. Hefner, Judge.

Action by E. Clements against A. J. Carpenter. From a judgment in favor of defendant, plaintiff appeals. Reversed.

J. E. Starley, for appellant. George Estes, for appellee.

STEPHENS, J. This appeal is from a judgment of the county court in favor of appellee on a counterclaim pleaded for the first time in the county court, the case having arisen in the justice court. That it is inadmissible to plead such an issue in the county court where it was not made in the justice court seems to be conceded, as it must be; but appellee contends that we should treat the record as showing that the issue in this instance was made in the justice court, because, as stated in his brief, "during the proceedings had in this case, and before the filing of plaintiff's motion to strike out, defendant's attorney made the statement in open court, in the presence and hearing of plaintiff and his attorney, that the defendant relied upon the same matters of defense in this court as were pleaded and relied upon by him orally in the justice's court, including his plea in reconvention for damages,

which statement was, at the time made, in no way contradicted by either plaintiff or his attorney." It appears from the transcript sent up to the county court by the justice of the peace that the case went off on demurrer in the justice court, the justice sustaining the exceptions of the defendant (appellee here) to plaintiff's account, and dismissing the suit, with judgment for costs in favor of defendant; and consequently that no such issue was presented to that court as was raised by the plea in reconvention in the county court. In addition to this, appellant offered to show in support of his motion to strike out appellee's plea in reconvention that no such counterclaim had been set up in the justice court, but was not allowed to do so for the reasons given as follows in the judge's explanation appended to the bill of exceptions: "During the proceedings had in this case, and before the filing of plaintiff's motion to strike out, defendant's attorney had made the statement in open court, in the presence and hearing of plaintiff and his attorney, that defendant relied upon the same matters of defense in this court as were pleaded and relied upon by him orally in the justice court, including his plea in reconvention for damages, which statement was in no way, at the time made, controverted by either plaintiff or his attorney. Afterwards I requested defendant's attorney to note in writing the defenses relied upon, which he did. Then plaintiff filed his motion to strike out defendant's plea in reconvention, and offered to introduce proof tending to show that the plea in reconvention was not relied upon or pleaded in the justice court. I declined to hear proof for the following reasons: (1) The motion and proffered proof in support of the same came too late. (2) Because it appeared that the case was finally disposed of in the justice court on exception; demurrer was sustained in the justice court, judgment for costs entered against the plaintiff, and his suit dismissed. Plaintiff declined, or rather failed, to amend, but prosecuted his appeal from the order or judgment sustaining the exception and dismissing the suit. Such being the case, the defendant was not necessarily afforded an opportunity to disclose or to plead the defensive matter relied upon by him in that court, and the action of the plaintiff in prosecuting his appeal from such judgment to this court rendered it unnecessary for him (defendant) to do so; so that, if the proof in support of the motion had shown that defendant's plea in reconvention was not in fact pleaded in the justice court, the motion notwithstanding should and ought to have been overruled, as was done." In our opinion, the court was not warranted in entertaining the plea in reconvention on any of the grounds stated in this explanation.

The judgment is therefore reversed, and the cause remanded for a new trial.

ÆTNA INS. CO. v. FITZE.*

(Court of Civil Appeals of Texas. Jan. 7, 1904.)

INSURANCE—IRON-SAFE CLAUSE—CHARACTER OF ACCOUNTS—OFFER OF COMPROMISE—CORRESPONDENCE—ADMISSIBILITY—INSTRUCTIONS.

1. In an action on an insurance policy, a letter written by plaintiff's attorney to the defendant company, saying he knows no reason why the policy should not be paid in full, is not objectionable in evidence as the expression of a legal opinion.

2. In an action on an insurance policy, a letter by plaintiff's attorney to the defendant company, saying that he knows of no reason why the policy should not be paid in full, and is not willing to enter into negotiations for less than it provides for, and, if that is the attitude which necessitates litigation, he does not see how it can be avoided, is not objectionable in evidence, the reference to a compromise being in reply to a letter previously admitted without objection.

3. The attorney's statement was not objectionable as hearsay.

4. It was not objectionable as a self-serving declaration.

5. The letter constituting one of a series of four bearing on the transaction, was not objectionable as irrelevant or immaterial.

6. An iron-safe clause in a fire policy, requiring assured to keep a set of books, which shall present a complete record of business transacted, including all purchases, sales, and shipments, both for cash and credit, does not require that he shall keep an account of the goods taken out of his stock for domestic consumption.

7. While the iron-safe clause in an insurance policy is a warranty, the breach of which will avoid the policy, yet, where it is open to two constructions, that one will be given it which favors the insured.

8. In an action on an insurance policy the evidence showed that insured had taken goods from his stock for domestic consumption, of which no record had been kept, though he estimated their value at a certain sum monthly. His books did not show the freights paid, and the freight bills were burned at the time of loss. No accounts were kept of the cash used by the insured. *Held*, that an instruction that, in order to avoid payment of the policies for violation of an agreement to keep books of account showing purchases, sales, and shipments, etc., it was not sufficient for the defendant company to show an occasional clerical error of omission, but it must show the books as kept would not enable defendant with reasonable certainty to arrive at the actual loss sustained; and, if the jury found that from the books as kept the company could with reasonable certainty ascertain the actual loss, verdict should be for plaintiff—was properly given.

Error from District Court, Harris County; W. P. Hamblen, Judge.

Action by W. E. Fitze against the Ætna Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Alexander & Thompson and Ewing & Ring, for plaintiff in error. Hutcheson, Campbell & Hutcheson, for defendant in error.

GARRETT, C. J. W. E. Fitze brought this action against the Ætna Insurance Company to recover upon three policies of fire insurance amounting to \$4,500. The defense

was the failure of the assured to comply with certain stipulations of the policies known as the "iron-safe clause," requiring the taking of inventories, the keeping and preservation of a set of books showing a complete record of the business transacted, including purchases and sales and shipments and the production after the fire of the two last inventories taken and the books as required. There was a jury trial, which resulted in a judgment in favor of the plaintiff for the amount of the policies sued on.

The appeal presents questions upon the admission of evidence, the giving and refusing of charges to the jury, and whether the plaintiff's right to recover had been lost by a breach of the stipulations contained in the "iron-safe clause." The three policies sued on were issued as alleged, and there was a destruction of the goods and building by fire on August 28, 1902, within the periods stipulated therein, and the plaintiff was entitled to a judgment unless there had been a breach of the following conditions of the policy: "The following covenant and warranty is hereby made a part of this policy: (1) The assured will take a complete itemized inventory of stock on hand at least once in each calendar year, and unless such inventory has been taken within twelve calendar months prior to the date of this policy, one shall be taken in detail within thirty days of issuance of this policy, or this policy shall be null and void from such date. (2) The assured will keep a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and credit, from date of inventory, as provided for in first section of this clause, and also from date of last preceding inventory, if such has been taken, and during the continuance of this policy. (3) The assured will keep such books and inventory, and also the last preceding inventory, if such has been taken, securely locked in a fire-proof safe at night, and at all times when the building mentioned in this policy is not actually open for business, or failing in this, the assured will keep such books and inventories in some place not exposed to a fire which would destroy the aforesaid building, and unless such books and inventories are produced and delivered to this company for examination, this policy shall be null and void; and no suit or action shall be maintained hereon. It is further agreed that the receipt of such books and inventories and the examination of the same shall not be an admission of any liability under the policy, nor a waiver of any defense to the same." The assured took an inventory of his stock in January, 1902, which, together with the last preceding inventory, taken in January, 1901, and his books, was preserved in the safe, and all were produced and delivered to the company for examination. The assured was a married man, and kept house in the

*Rehearing denied, and writ of error denied by Supreme Court.

¶ 3. See Insurance, vol. 22, Cent. Dig. § 852.

town of Livingston, where he did business. During the years 1901 and 1902 he took from his stock dry goods and groceries which were used for the comfort, convenience, maintenance, and support of his family. No record was kept of the goods thus used, but their value was estimated by the plaintiff at \$30 a month. The books did not show the freights paid, and the freight bills were burned in the fire. The freight on the goods were a part of their cost. No account was kept of the cash used by the assured. He did business at only one place, but he had a warehouse near the store, upon which there was separate insurance, and which was not destroyed. The inventory of January, 1902, was \$5,915.35. Subsequent purchases amounted to \$8,874.83. The credit sales after January 1, 1902, were \$6,200.75, and the cash sales were \$3,523.75. At the time of the fire there was \$514 worth of goods in the warehouse. Each policy contained a "three-fourths loss clause"; that is, that the company should not be liable for exceeding its proportionate part of three-fourths of such loss as might occur considering the other concurrent insurance.

The first assignment of error is upon the admission in evidence of a letter written by one of plaintiff's attorneys to a representative of the defendant. For the purpose of showing that proofs of loss had been made, and if not, formally waived by absolute denial of liability, the plaintiff on cross-examination of P. P. Tucker the special agent of the defendant brought out a correspondence between plaintiff's attorneys and the witness. Four letters were read in evidence. The first was from plaintiff's attorneys to Tucker stating that proofs of loss had been sent which had been pronounced by him unsatisfactory, and proffering to meet objections. In reply to this letter it was claimed that the "iron-safe clause" had not been complied with, and it was stated that a strict compliance with all the terms and conditions of the contract would be demanded; but, if the attorneys desired to take up the settlement of the claim on a non-waiver agreement that plaintiff had given upon a compromise basis, he would be pleased to hear from them. Counsel for plaintiff then introduced and read in evidence the third letter, signed "J. C. Hutcheson," one of plaintiff's attorneys, which contained the matter objected to, as follows: "I know of no reason why the policies of Fitze should not be paid in full. I am not willing to enter into negotiations for less than they provide for, and, if this is the attitude which necessitates litigation, I do not see how it is to be avoided." Tucker replied to this letter, noting the determination not to take up the settlement on a compromise basis, and repeating his demand in his former letter for a strict compliance with the conditions of the policies. All of the letters were admitted without objection, except the contents

of the third, above set out. This letter was objected to on the ground that it was an expression of a legal opinion of counsel for plaintiff upon the legal rights of the parties in the case; that it had reference to negotiations for a compromise; and was immaterial and irrelevant to any issue in the case, and prejudicial, and was hearsay and self-serving. The correspondence was admissible to show that proofs of loss claimed to be sufficient had been furnished by the plaintiff, and that the defendant denied all liability, which made it unnecessary for the plaintiff to establish the fact that proofs of loss had been furnished. *Ins. Co. v. Lee*, 73 Tex. 647, 11 S. W. 1024; *Ins. Co. v. Mattingly*, 77 Tex. 164, 13 S. W. 1016. The letter was the only one of the four that passed between the parties that was objected to. The statement that the writer knew of no reason why the policies should not be paid in full was not the expression of a legal opinion. The reference to a compromise was in reply to a letter admitted without objection, and already in evidence, and could not have injured the defendant. It was not objectionable as hearsay or that it was self-serving, and, as one of a series of four letters bearing upon the transaction between the parties, it was not irrelevant or immaterial.

The second and third assignments of error complain of the action of the court in refusing special instructions requested by the defendant directing the jury to find a verdict in its favor because the evidence showed a breach of the contract of insurance by the failure of the plaintiff to comply with the stipulations of the policies contained in the "iron-safe clause" in failing to keep a complete record of the business transacted, including all purchases, sales, and shipments, as required by the terms of the policies sued upon; and that the taking by plaintiff from his store of merchandise for the use of his family without making a record of such merchandise was a breach of the stipulation to keep a set of books. The terms of the policy did not require the plaintiff to keep a record of the goods taken out of stock for home consumption. They only required the assured to keep a set of books including all sales, purchases, and shipments. While the "iron-safe" clause is a warranty, the breach of which will avoid the policy, forfeitures are not favored, and it will be construed in favor of indemnity if it is open to two constructions. The inventories and books and evidence as to the manner of keeping books were all before the jury, and required the submission of the question of a substantial compliance with the contract.

There was no error in the refusal of the special instruction set out in the fourth assignment of error, requiring the jury to return a verdict for the defendant if they believed that the "iron-safe clause" had not been complied with, although a loss had been sustained exceeding the amount of the pol-

icy. The charge of the court correctly submitted the issues to the jury, and the requested instruction was not demanded by any exigency of the case.

The following special instruction, given at the request of the plaintiff, is assigned as error in the fifth assignment, to wit: "The court is requested by the plaintiff to charge the jury as follows: 'In order to avoid the payment by defendant of the policies sued upon by plaintiff, it is not sufficient for defendant to show in the books of plaintiff an occasional clerical error or omission, but, in order to have the effect of avoiding the policies sued upon, the defendant must show that the books as kept by plaintiff were not kept in such way that the defendant could, with reasonable certainty, arrive at the actual loss and damage sustained by plaintiff; and if, from the books, you find, notwithstanding such clerical errors or omissions, if any were shown, that defendant could with reasonable certainty ascertain the actual loss occasioned plaintiff by the fire complained of, then you will return your verdict in favor of plaintiff on this issue.'" This instruction was properly directed to the state of the evidence as developed on the trial, and there was no error in giving it.

There can be no objection to the charges set out in the tenth and eleventh assignments of error. Evidence was received at great length, which showed the contents of the books, and the method of keeping them, and from which it could be inferred that they were kept in the customary manner of keeping books; all of which made applicable the charges complained of.

The use of the word "not" in the charge, set out in the twelfth assignment, is clearly a clerical error, which could not have misled the jury, and is corrected by the subsequent part of the charge.

The verdict of the jury is fully supported by the evidence, and, there being no error requiring a reversal of the judgment, it will be affirmed. Affirmed.

TEXAS & P. RY. CO. v. KELLY et ux.*

(Court of Civil Appeals of Texas. Jan. 6, 1904.)
RAILROADS—ACCIDENT AT STREET CROSSING—
PROXIMATE CAUSE OF INJURY.

1. Defendant's cars were obstructing a street, and plaintiffs, husband and wife, attempted by driving around the end of a car to cross the tracks at a point where there was no thoroughfare, but by reason of the darkness a hole in the track was unobserved, and the wife was thrown out and injured. *Held*, that the fact that defendant may have been negligent in obstructing the street was not the proximate cause of the injury, as plaintiffs, when they undertook to cross at a point where defendant was not bound to keep the right of way safe for travel, did so at their own peril.

Appeal from District Court, El Paso County; J. M. Goggin, Judge.

*Rehearing denied February 3, 1904.

Action by M. J. and Mary Kelly against the Texas & Pacific Railway Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Edwards & Edwards, for appellant. T. A. Falvey and Walter Davis, for appellees.

FLY, J. This is a suit instituted by M. J. Kelly and his wife, Mary Kelly, to recover damages arising from personal injuries alleged to have been inflicted by the negligence of appellant in obstructing Myrtle street, in the city of El Paso, and in having a hole or depression on its track into which the vehicle of appellees ran, precipitating Mrs. Kelly to the ground. The facts, as narrated by appellees and a witness offered by them, were that on a certain afternoon in August, 1901, between 6 and 7 o'clock, M. J. Kelly, his wife and child, and Mrs. Anna Gayton, were riding in a vehicle, and when they reached Myrtle street they found it completely blocked by the cars of appellant, which extended from one side of the street to the other, and for some distance from the street on either side. A strong wind was blowing, carrying with it sand. M. J. Kelly was driving the horse attached to the vehicle, and he could not see well because it was about dusk, and the sand was blowing into his eyes. After standing at the crossing for 10 or 15 minutes, waiting for the cars to be moved, M. J. Kelly noticed several parties passing around to the right, and one of them said, "Friend, you can drive to the right," and he drove out of the street, and endeavored to cross over the tracks of appellant. While going across, one wheel of the vehicle went into a hole or depression on one of the tracks, and Mrs. Kelly was thrown out, and sustained serious injuries. The hole was not seen on account of the late hour and the sand. Upon the foregoing testimony a verdict of \$5,000 was returned against appellant, and a judgment in accordance therewith was rendered.

In order to fix the liability of appellant for the injury inflicted upon Mrs. Kelly, its negligence in obstructing the street must have been shown to have been the proximate cause of the injuries. In other words, the injury must be such as probably would happen in consequence of the negligence of appellant. If there was an intervening cause, and its probable or reasonable consequence could have been anticipated by the original wrongdoer, then the causal connection would not be broken, and the original wrongdoer would be liable for damages resulting from the injury; but, if the intervening cause is one not to be anticipated by a reasonably prudent man, then it breaks the connection, and the injured party could not recover. Applying the law to the facts of this case, unless appellant could reasonably have anticipated that by reason of the obstruction of the street appellees would attempt to cross the railroad tracks outside of the street, where there was no

thoroughfare, and by reason of the darkness and dust would drive into a hole in its track, it cannot be held liable. Appellant had a perfect right to leave the hole where it did in its track, and we do not think the obstruction of the street was the proximate cause of the injury sustained by Mrs. Kelly. As said by this court in the case of *De La Pena v. Railway*, 74 S. W. 58: "The obstruction of the crossings was not that which, in a natural and continuous sequence, unbroken by any new, independent cause, produced the accident which resulted in plaintiff's injury, and hence not its proximate cause." In the *Pena Case* the street was blockaded by cars, and plaintiff attempted to walk around the cars outside the street, and fell into a hole on the railroad's right of way, and was injured. The facts of that case were stronger in favor of the plaintiff than in this, for he was at least in a path generally used by the public, while in this appellees were driving a vehicle over the right of way not usually used by the public, and where it would have taken prophetic vision to have anticipated that they would go in a vehicle. Because appellant may have been negligent in obstructing the street did not justify appellees in driving into a place with which they were unacquainted, upon the property of the railway company, where they had no right to be, and where the wrong in obstructing the street could not have justified them in going. The railroad company owed them no duty to keep its tracks so that they could drive over them safely except on highways and crossings, and they undertook to cross where they did at their own peril. The demurrers to the petition should have been sustained, and when that was not done the verdict should have been set aside, because it was not sustained by the evidence.

The judgment is reversed, and the cause remanded.

D. SULLIVAN & CO. v. OWENS.*

(Court of Civil Appeals of Texas. Jan. 6, 1904.)

COMPROMISE AND SETTLEMENT—OVERCHARGES—INTEREST—PLEADING—TRIAL—ISSUES—CROSS-COMPLAINT—JURISDICTION—AMOUNT IN CONTROVERSY.

1. Where defendant contracted with plaintiff to make a draft for advances, with a statement attached, and defendant made the draft without attaching the statement, plaintiff's payment of the draft did not constitute a settlement, so as to preclude him from recovering overcharges contained in the draft.

2. Where defendant made advances to plaintiff and others located at San Antonio, Tex., on shipments of goods sent to defendants, doing business in Boston, and plaintiff agreed to pay drafts therefor, which were drawn and paid in Boston on September 24th, defendant was not entitled to charge interest on the advances to a date on which it received notice of the payment of the drafts, since, by drawing the drafts payable at Boston, with exchange added, it would be presumed that the exchange constitut-

ed sufficient compensation for the time necessary for the transmission of the money.

3. Where, in an action for alleged overcharges, the only reference to interest in the petition was a cause of action to recover the difference between interest calculated from the date of certain notes given for advances, and interest from the dates of the actual advancements of the money, plaintiff was not entitled to recover a charge for interest after the payment of the advances.

4. Where, in an action for alleged overcharges, the petition alleged that plaintiff agreed to pay the usual and customary exchange, and all the witnesses testified that the charge made by defendant was the usual and customary rate, it was error for the court to submit such question to the jury on evidence of one of plaintiff's witnesses that, while the rate charged was not excessive, a lower rate would have been a reasonable charge.

5. Where, in an action in the county court for alleged overcharges, defendant, by cross-action, set up a claim against plaintiff for an amount exceeding the jurisdiction of the court, such cross-action should have been dismissed.

Appeal from Bexar County Court; Robt. B. Green, Judge.

Action by John Owens against D. Sullivan & Co. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Wm. Aubrey and J. C. Sullivan, for appellants. W. W. King and Semp Russ, for appellee.

JAMES, C. J. Plaintiff, Owens, alleged that defendants, D. Sullivan & Co., advanced for the firm of Owens & Burr at different times the total sum of \$93,221.72, in connection with the purchase and shipment to Boston, Mass., of a lot of wool, which sums so advanced, with 8 per cent. interest per annum from each advancement, Owens & Burr agreed to pay, by paying a draft drawn upon them at Boston, for same, together with the usual and customary rate of exchange alleged to be the rate of \$1 per thousand, with an itemized statement attached, showing the date of the several advancements, etc. Owens alleged that he had become the owner of the claim sued on, and alleged that on September 17, 1901, defendants drew their draft on Owens & Burr for \$95,500, but without any statement attached, which draft was paid on September 24, 1901; that, instead of drawing it for the amount actually owing, defendants, by mistake, drew it for \$95,500; that at the time defendants had possession of the notes (which had been executed by Owens & Burr at different times to cover the estimated amount required), policies, freight receipts, etc., relating to the transaction, the amount was unknown to Owens & Burr when they paid the draft, which they did under the mistaken belief that it was drawn for the true amount; and that they did not discover the mistake until some time after they had paid it. The sums sued for, and in reference to which the draft was alleged to be overdrawn, consisted in the charging of interest on the notes (taken by defendants from Owens & Burr during the wool transaction) from their dates, instead of on the sums actually

*Rehearing denied February 3, 1904.

advanced from the dates of the respective advancements, and also in an overcharge for exchange on the draft; the total aggregating \$692.31.

The first, second, and third assignments relate to demurrers to the petition. The grounds, substantially, are that the pleading shows a final accounting and settlement between the parties by the payment of the draft, that it fails to allege facts showing a case of mutual mistake in and about such settlement, and that it states nothing showing fraud, accident, or mistake by reason whereof the settlement should be opened. The contract as alleged (eliminating unnecessary allegations) was that D. Sullivan & Co. should make the draft with a statement attached, and did so without attaching one, and that Owens & Burr paid it in the absence of a statement, not knowing and not having the means of knowing at the time of its incorrectness. The payment of the draft in the manner alleged did not in any sense constitute a settlement. And it is held in this state and elsewhere that overpayment in respect to an account may be recovered at law, even though the payor may have had the means of knowing its incorrectness. *City Bank v. Nat. Bank*, 45 Tex. 217; *Alston v. Richardson*, 51 Tex. 6. And in some circumstances he may recover if he knew the fact.

The fourth assignment complains of the charge by which the court told the jury that plaintiff was entitled to recover \$137.49, overpayment of interest. From appearances, and from what is stated in the briefs, we are led to conclude that this instruction was based on the fact that D. Sullivan & Co., in making the draft, computed interest to September 30, 1901 (a fact admitted), and the draft was paid on September 24th in Boston (also admitted). Whatever the interest was for that time was certainly due plaintiff. Defendants seek to justify this charge of interest by contending that they did not get notice from their agents that the draft had been paid until September 30th, and that the money was payable in San Antonio. By drawing the draft payable at Boston, they either must be held to have consented to receive payment at Boston, or that the exchange, added to the draft, compensated them for the time necessary for transmission of the money. It seems perfectly clear to us that Owens & Burr made payment at Boston on September 24th to defendants' agents, and that defendants had no legal right to interest after that date. Therefore the charge was not, for this reason, wrong. But there is a reason, apparent of record, which we must notice—especially as the case is to be remanded for another trial, and may be appealed again—which rendered the charge improper. The action is not for the recovery of any interest after the date the draft was paid. What was alleged and sued for in the way of interest overpaid consisted of the difference between interest calculated from the date of the notes, and inter-

est from the dates of the actual advancements of money. The account, which is in the body of the petition, as well as the allegations, shows conclusively that interest after payment of the draft is not a matter upon which plaintiff's demand is based. In other words, there being nothing in the petition to support a recovery in reference to such interest, plaintiff should not have been allowed to recover it.

The fifth assignment is well taken. The petition alleged that the agreement was that plaintiff should pay "the usual and customary exchange." All the witnesses who testified on the subject stated that the rate charged by defendants (\$2.50 per thousand) was the usual and customary rate. Plaintiff's witness Mr. McIlhenny does not testify to the contrary of this, although he stated that, while \$2.50 was not excessive as to this draft, the rate of \$1.50 would have been a reasonable charge or rate for it. The court should not, upon the pleadings, nor upon this testimony, have submitted an issue of reasonable rate.

We need not consider appellee's cross-assignments.

Defendants, in addition to denying liability to plaintiff, filed a cross-action, and, in the pleading upon which they went to trial, set up a claim against plaintiff and Burr for \$1,000 for services rendered, and against plaintiff alone for the further sum of \$100 as money loaned. The cross-action against plaintiff was for a sum beyond the jurisdiction of the county court. The pleading being in this condition, the court should not have entertained it at all, so far as plaintiff was concerned. We do not consider it necessary, under these circumstances, to discuss the merits of the court's charge on this branch of the case.

Reversed and remanded.

MISSOURI, K. & T. RY. CO. OF TEXAS v. O'CONNOR et ux.*

(Court of Civil Appeals of Texas. Jan. 2, 1904.)

DEATH OF BRAKEMAN—ACTION FOR DAMAGES—INSTRUCTIONS—AMOUNT OF RECOVERY—SPECIAL JUDGES.

1. The statute providing for the election of special judges is applicable to both regular and special terms.

2. A part of a paragraph of a charge in an action for the death of a brakeman, who was killed by an engineer's failure to properly stop cars which were being run onto a coal chute, standing alone, apparently made it the engineer's absolute duty to have stopped the train after signals were given, but it was immediately followed by language which distinctly told the jury that, before they would be warranted in finding for plaintiffs, they must find that the engineer failed to use ordinary care in observing the signals and stopping the train, and in no event was the jury authorized to find for plaintiffs unless the death was the result of defendant's negligence, which was defined as a failure to use ordinary care. *Held*, that the objection to the charge was thereby obviated.

*Rehearing denied January 30, 1904, and writ of error denied by Supreme Court.

3. The court refused charges to the effect that if deceased was acquainted with the coal chute, and the tracks opposite the same, and knew the number of cars and speed of the train, or by ordinary care could have known, and his co-employees relied on him to give the signal to stop, and he failed to do so in time to avoid the accident, and such failure was contributory negligence, the jury should find for defendant. *Held*, that they were properly refused, as they imposed on defendant a greater burden, in order to establish contributory negligence, than the law required.

4. No error can be predicated on the refusal of a charge not supported by evidence in the record.

5. A brakeman killed while assisting in running cars onto a coal chute had a right to rely on the observance of the signals and stopping of the train by the engineer, and in no event did he assume any risk due to the negligence of his co-employees.

6. It is improper to single out any one fact in a case, and, by too prominently placing the same before the jury, unduly impress them with the idea of its importance.

7. In an action by parents for the death of their son, the fact that plaintiffs applied sums received from him to the support of an unmarried daughter, who lived with them, and was dependent on them for support, and reasonably expected on that account that a larger sum would be contributed to them than otherwise, should not deprive them of the right to recover to the full extent of such contemplated contribution.

Appeal from District Court, Hunt County; T. D. Montrose, Special Judge.

Action by M. and Johanna O'Connor against the Missouri, Kansas & Texas Railway Company of Texas, to recover for the death of their son. From a judgment for plaintiffs, defendant appeals. Affirmed.

T. S. Miller and Perkins, Craddock & Wall, for appellant. Yates & Carpenter, for appellees.

TALBOT, J. On and prior to the 5th day of August, 1901, appellant had and maintained at Hughes Springs, a station on its line of railroad, a coal chute and bins for storing coal, and loading the same on the tenders of its engines. This coal chute is an elevated railroad track, and connected with the main line or track about 390 feet west of said coal bins. From the connection with the main track it passes up an incline, running in an easterly direction, for about 300 feet, and continuing in said direction, on a level, about 20 feet above the ground, about 230 feet. At the eastern extremity of this coal chute there was a bumping post, to prevent cars from passing off the same. On the above date D. T. O'Connor was working for the appellant in the capacity of a brakeman upon a freight train, and while at Hughes Springs he and the others of the train crew were directed to place three cars loaded with coal upon said coal chute, in position to have the coal unloaded into the bins. The engine was attached to the three cars, in charge of the engineer, and O'Connor took a position as brakeman upon the farthest car from the engine. The front end of the engine was attached to the cars, and they

were pushed up from the west onto the incline and coal chute. It was night, and dark, and O'Connor was provided with a lantern with which to give the usual and customary signal as the circumstances required. The engineer in charge of the engine and cars ran the train up the coal chute or incline track, and on the level track thereof, at an unusually rapid and dangerous speed, and struck and broke down the bumping post, and threw the car upon which O'Connor was riding off the end of the coal chute, to the ground, carrying O'Connor with and underneath it, killing him. When O'Connor discovered that the cars were being run at such a dangerous rate of speed, he and other employees of appellant on said train gave signals to the engineer to discontinue such speed and to stop the train immediately. The engineer failed to obey the signals, but continued the speed of the train, with the result above stated. M. and Johanna O'Connor, the father and mother of the deceased, brought this suit to recover damages alleged to have been sustained by them by reason of their son's death. The appellant pleaded the general issue, contributory negligence, and assumed risk. Verdict and judgment for appellees in the sum of \$2,400.

The evidence is sufficient to justify and warrant the conclusion that appellees sustained damages on account of the death of their son, in the sum found by the jury, through the negligence of appellant's engineer in running said train up the coal chute at an unusual, rapid, and dangerous rate of speed, and in failing to obey the signals and using the means at his command to stop said train, as alleged by appellees in their petition. The evidence is also sufficient to justify the finding of the jury that D. T. O'Connor was not guilty of contributory negligence.

The case was tried at a special term of the court, and before a special judge, over the objections of appellant. It appears that Hon. H. C. Connor, the regular judge of the Eighth Judicial District, had called a special term of the district court, to begin in Hunt county on the 12th day of January, 1903, and to continue for five weeks. On the day appointed for the convening of said special term, the said Connor was holding a regular term of his court in another county of his district, and did not appear to preside at said special term. Thereupon the practicing lawyers of said court proceeded to hold an election in conformity with our statute providing for the election of a special judge at a regular term of said court in the absence of the regular judge, which resulted in the election of Hon. T. D. Montrose, one of their number, who duly qualified and presided at such special term, and upon the trial of this cause.

When the cause was reached and called for trial, appellant objected to being required to go into trial on the ground that when a special term of a district court has been ordered,

and the district judge is absent, holding a regular term of his court in another county of his district, the election of a special judge of such court for such special term by the bar is unauthorized and void. Appellant's objection was overruled, and this action of the court is made the ground of its first assignment of error. The precise question here presented was decided by this court against the contention of appellant, on a former day of the present term, in the case of Missouri, Kansas & Texas Ry. Co. v. Huff, 78 S. W. 249. The opinion in that case clearly expresses the views of this court upon the subject, and we deem it unnecessary to add anything to it. By the authority of that case, and the case of Munzeshelmer v. Fairbanks, 82 Tex. 351, 18 S. W. 697, appellant's first assignment of error will be overruled.

Complaint is urged to the following paragraph of the court's charge:

"Therefore, if you find from the evidence that the deceased, Dan O'Connor, while in the employ of the defendant as a brakeman upon one of its trains, and while using ordinary care in discharging the duty assigned him, was, on or about the date alleged in plaintiffs' petition, engaged with other servants of defendant in placing cars upon the defendant's coal chute at Hughes Springs, and while so engaged the deceased was riding upon the farthest car from the engine; and if you believe from the evidence that the engineer or person in charge of defendant's engine ran said engine and cars upon said coal chute at an unusually rapid and dangerous rate of speed; or if you find that the deceased and others of defendant's employes, in time to have avoided the accident, gave a signal or signals to the engineer or person in charge of said engine to discontinue the unusually rapid and dangerous rate of speed (if you find that such speed was unusually rapid and dangerous), and to immediately stop said train, and that the signals so given (if given) were the usual and customary signals for that purpose in use by the defendant, and you find that the person in charge of said engine failed to discontinue said unusually rapid and dangerous rate of speed (if you find that it was unusually rapid and dangerous), and to stop such engine and cars, after such signal or signals were given (if given); or if you find that the engineer in charge of such engine and cars was unfamiliar with said chute, and the defendant knew, or by the exercise of ordinary care could have known, the same (if he was unfamiliar); and if you believe the defendant or person in charge of its engine was guilty of negligence, as that term is above defined, in regard either to the rate of speed at which the cars were run, the engineer's failure to obey signals (if he did fail), or the unfamiliarity of the engineer with said coal chutes (if you believe that he was unfamiliar), in the manner and form alleged by plaintiffs, and if, by reason of the

negligence of the defendant or said engineer in any one or all of the respects above mentioned, you find that the car upon which deceased was riding was pushed against the bumping post, and broke said post down, and said car was thereby thrown off of said coal chute, and deceased, Dan O'Connor, thereby killed; and if you believe the negligence of the defendant or of said engineer, in the manner and form above submitted, caused the death of said deceased; and if you further find that the deceased was the son of plaintiffs, M. O'Connor and Johanna O'Connor; and if you believe that plaintiffs had a reasonable expectation, then and in the future, of receiving pecuniary benefits from said Dan O'Connor, had he not been killed—then you will find for the plaintiffs, unless you find for the defendant under other issues submitted to you."

The contention is that the exercise of ordinary care to discontinue the speed and stop the engine and cars after the engineer saw, or ought to have seen, the signals given for that purpose by the brakeman, was all that the law required of appellant, and that the clause of the charge quoted was erroneous, in that it made it the absolute duty of the engineer to have discontinued the speed of the train and to have stopped the same after the signals were given. We do not believe the paragraph of the court's charge, when considered and fairly construed as a whole, is subject to the criticism urged. That portion of the paragraph assailed, preceding and including the language italicized, standing alone, would probably be error prejudicial to appellant's rights. The court, in the first paragraph of the charge, however, defined "ordinary care" as being "that degree of care which an ordinarily prudent person would use under the same or similar circumstances," and further charged that "a failure to use ordinary care is negligence." It will be noted that following the language italicized, in connection therewith, and as a part of such paragraph, the jury was instructed: "And if you believe that the defendant or the person in charge of its engine was guilty of negligence, as that term is above defined, in regard either to the rate of speed at which the cars were run, the engineer's failure to obey signals (if he did fail), or the unfamiliarity of said engineer with the coal chute (if you believe he was unfamiliar), in the manner and form alleged by the plaintiffs, and if, by reason of the negligence of the defendant or of said engineer in any one or all of the respects above mentioned, * * * and said car was thereby thrown off said coal chute, and the deceased, Dan O'Connor, thereby killed; and if you believe that the negligence of the defendant or of said engineer, in the manner and form above submitted, caused the death of said deceased," etc., "then you will find for the plaintiffs." Thus it will be seen that the jury was distinctly told, in

effect—negligence having been defined—that, before they would be warranted in returning a verdict for the plaintiffs, they must believe from the evidence that the engineer in charge of defendant's engine failed to use ordinary care in respect to the rate of speed at which the cars were run, or that he failed to obey signals which involved the stopping of the train, and failed to use such care in regard thereto. In no event, under the charge, was the jury authorized to find for plaintiffs unless they believed the death of appellees' son was the result of defendant's negligence. The charge is not subject to the objection that it made it the absolute duty of appellant's engineer to have discontinued the speed of the train, and to have stopped the same. It only imposed ordinary care to observe the signals and stop the train, and this, under the circumstances, was certainly as favorable as appellant had the right to ask.

By its third assignment of error, the appellant complains of the action of the court in refusing to give in charge to the jury special requested instructions Nos. 1 and 2. These charges contain practically the same proposition of law, and are to the effect that if Dan O'Connor, the deceased, was acquainted with the construction of the coal chute, the approaches thereto, and the character and steepness of the inclined track, the length of the coal bins on the chute, and the tracks opposite same, and knew the number of cars in the train, and speed of the train, or that, in the exercise of ordinary care in the performance of his duty, he must have known of such things, and that the employes of defendant in charge of said train relied upon him to give the signal to check the speed and stop the train, and that he failed to give such signal in time for the engineer to stop the train and avoid the accident, and that such failure was negligence, and caused or contributed to cause the accident which resulted in his death, then they would find for the defendant. These special charges imposed upon the defendant a greater burden, in order to establish contributory negligence on the part of the deceased, than the law required, and, especially in view of the main charge, were correctly refused. The principle of law contained in the charges requested, in so far as applicable, was fully and fairly presented in the main charge, and no error is perceived in the refusal of the court to give the special charges in the form asked.

Complaint is made of the refusal of the court to give special charge No. 3 requested by appellant. This charge instructed the jury, in effect, that the deceased assumed the risk naturally and ordinarily incident to his employment, and if he knew the engineer was not familiar with the location and situation of the coal chute and the tracks leading thereto, and the length and height of the incline and the level track opposite

the coal bins, then he assumed such risks as were naturally and ordinarily incident to such want of knowledge on the part of the engineer. If this charge would have been proper under any state of facts, it is not believed the same was warranted by the evidence appearing in the record before us. If it be conceded that the engineer was not familiar with the character of the chute, still there is no evidence that deceased knew of such want of familiarity, or, if any, it is so meager as not to authorize the submission of the issue to the jury. The deceased had the right to rely upon the observance of the signals and stopping of the train by the engineer, and in no event did he assume any risk due to negligence of the defendant.

In our opinion, the issue of assumed risk is not clearly raised by the evidence, but, in so far as demanded, was sufficiently submitted by the main charge of the court. Furthermore, it is improper for the court to single out any one fact in a case, and, by too prominently placing the same before the jury, unduly impress them with the idea of its importance. Such course has frequently been held to be upon the weight of the evidence, and it is believed the special charge under consideration is subject to that objection.

It developed on the trial that the deceased had a sister, who resided with his mother, and that many of the contributions which he had made to his mother were sent to her in letters addressed to the sister, and used in support of the family. The evidence does not warrant the conclusion that any of the contributions were made to, and intended specially for, the sister. Under these facts, the appellant requested the court to instruct the jury, in substance, that appellees would not be entitled to recover for any contributions which they reasonably expected would have been made by the deceased in part for the use and support of the sister, and to exclude from their estimate of damages, in case they found for plaintiffs, anything that he would have so contributed. In refusing this instruction, we think, there was no error. That appellees applied the sums received from the deceased to the support, in part, of an unmarried daughter, who lived with them, and was dependent upon them for support, and reasonably expected on that account that a larger sum would be contributed to them by deceased than otherwise, should not deprive them of the right to recover to the full extent of such contemplated contributions. There was no evidence of any separate contribution to the sister, or that any was reasonably expected, and the jury could not have been misled and influenced thereby to enlarge their verdict. Besides, at the request of the appellant, the jury was instructed that they could allow plaintiffs, in estimating the damages, for the pecuniary loss, if any, which they had sustained, and no more.

By the remaining assignments of error it is contended that the verdict is excessive, and not supported by the evidence, but we do not concur in either contention.

We find no reversible error in the record, and the judgment is therefore affirmed.

CONTINENTAL FIRE INS. CO. v. CUMMINGS.*

(Court of Civil Appeals of Texas. Dec. 23, 1908.)

INSURANCE—IRON-SAFE CLAUSE—COMPLIANCE—PROOFS OF LOSS—PRODUCTION OF BOOKS—WAIVER—TITLE TO PROPERTY—ADMISSIBILITY OF EVIDENCE—ESTOPPEL.

1. Where a policy requires the insured to take an inventory of stock once a year, and keep the inventory, and also the last preceding inventory, together with his books of account, in a fire-proof safe, etc., and the last preceding inventory is left outside the safe and destroyed at the time of loss, but the account books and subsequent inventory show its contents, there is a substantial compliance with the policy.

2. Where a state agent and adjuster for an insurance company visits insured after loss, and takes his sworn statement as to all matters concerning the fire, and says he does not care for further proofs of loss, and later writes a letter offering to pay a portion of the loss, it is a waiver of proofs of loss.

3. Evidence in an action on an insurance policy held to support a finding that the company waived the production of insured's books and inventories as required by the iron-safe clause.

4. Evidence of the general reputation in the community that certain property was partnership property is admissible on the issue as to the knowledge of an insurance agent of that fact at the time of issuing a policy to one partner.

5. Where an insurance company, whose agent is aware that property covered by the policy issued to one partner is in fact partnership property, receives a premium on the policy, it is estopped to deny its validity on the ground of misrepresentation as to ownership.

6. In an action on an insurance policy, defended on the ground of misrepresentation as to title to the property, it is proper to show that after the issuance of the policy, and before the fire, the company knew the true state of the title.

Error from District Court, Brazoria County; Wells Thompson, Judge.

Action by O. S. Cummings against the Continental Fire Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Alexander & Thompson and Elmer P. Stockwell, for plaintiff in error. Bryan, Tod & McRea and H. Gross, for defendant in error.

GARRETT, C. J. O. S. Cummings, as assignee of J. R. Kimmins, brought this suit against the Continental Fire Insurance Company to recover upon three fire insurance policies, covering a stock of hardware, the building containing the same, and fixtures therein, aggregating the sum of \$1,800. The defenses were (1) that no proofs of loss had

ever been made as required by the policy; (2) violation of the warranty that the interest of the assured was the sole and unconditional ownership of the property, the policy stipulating that a less interest, not noted therein, should render it void; and (3) breach of the condition commonly known as the "iron-safe clause." The plaintiff pleaded waiver and estoppel by knowledge on the part of defendant's agent who issued the policy of the condition of the title, to which the defendant replied, denying the authority of its agent to waive any stipulation not indorsed on the policy. There was a trial to the court without a jury, which resulted in a judgment in favor of the plaintiff for the sum of \$1,600; the plaintiff having remitted the sum of \$200, the amount of the insurance upon the building.

The policies sued upon were as described in the petition, all being payable to J. R. Kimmins. The stock of merchandise, the building, and the fixtures insured belonged at the time the policies were issued, and when terminated by fire, to the Kimmins Hardware Company, a partnership composed of J. R. Kimmins and W. R. Kimmins, doing business at Alvin, in Brazoria county. The several policies contained the following stipulation:

"Iron-Safe Clause.

"The following covenant and warranty is hereby made a part of this policy:

"1st. The assured will take a complete itemized inventory of stock on hand at least once in each calendar year, and unless such inventory has been taken within twelve calendar months prior to the date of this policy, one shall be taken in detail within thirty days of issuance of this policy, or this policy shall be null and void from such date.

"2nd. The assured will keep a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and credit, from date of inventory as provided for in first section of this clause and also from date of last preceding inventory, if such has been taken, and during the continuance of this policy.

"3rd. The assured will keep such books and inventory, and also the last preceding inventory, if such has been taken, securely locked in a fireproof safe at night, and at all times when the building mentioned in this policy is not actually open for business; or, failing in this, the assured will keep such books and inventories in some secure place not exposed to a fire which would destroy the aforesaid building; and unless such books and inventories are produced and delivered to this company for examination after loss or damage by fire to the personal property insured hereunder, this policy shall be null and void and no suit or action shall be maintained hereon. It is further agreed that the receipt of such books and inven-

*Rehearing denied.

tories and the examination of the same shall not be an admission of any liability under the policy nor a waiver of any defense to same."

The policies also provided:

"This entire policy shall be void if the interest of the assured in the property be not truly stated herein.

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void if the interest of the assured shall be other than sole and unconditional ownership."

Wm. R. Stockwell was the agent of the defendant at Alvin, and issued the policies sued on. At the time he issued the policies, Stockwell knew that the property insured belonged to the Kimmins Hardware Company, and that said firm was a partnership composed of J. R. Kimmins and W. R. Kimmins, and it was the intention of both the parties to insure the property of the Kimmins Hardware Company. On August 6, 1902, the property insured, of the value sufficient to support the amount of the judgment, was totally destroyed by fire. J. R. Kimmins immediately notified the defendant of the loss; and, as stated by the trial judge in his conclusions of fact, from which he found as a fact that the defendant had waived further proofs of loss than were furnished, and the production of the books and inventories, "afterwards, on or about August 25, 1902, I. Jalonick, the state agent for Texas and adjuster for defendant, having full power and authority to settle and adjust the claim for defendant, came to Alvin; and Kimmins made a sworn statement to him of all matters concerning the fire, as required by the policy, and answered fully all questions asked by Jalonick, and offered to produce his books and inventory, etc., for the inspection of Jalonick; but Jalonick said he did not care to see them, as one Robinson, adjuster for another company, and in whom he had confidence, had already examined the books and inventory, and that he (Jalonick) was satisfied, and did not care for further proofs of loss, and also told Kimmins that he would let him hear from him later, and on September 15, 1902, wrote Kimmins a letter, in which he admitted that the loss had been sustained on the property, and offered to pay 50 per cent. of the policies. Defendant never at any time demanded the production of the books, inventories, etc., until the day before the trial, on February 24, 1902, it issued a subpoena duces tecum, demanding the production of all the books, inventories, etc., required by the policy to be kept by the insured; and the books and the inventory taken January 1, 1902, were produced in court. Kimmins thought when Jalonick was at Alvin that he (Jalonick) had received all the information and proof of loss that defendant wanted, and Kimmins was confirmed in this belief by Jalonick's letter of September

15, 1902; and Kimmins supposed that the only objection to payment of the policies was because of the fact that the policies were payable to J. R. Kimmins, when in fact W. R. Kimmins owned one-half of the property insured. The books were kept as required by the policies, and showed all the business of the Kimmins Hardware Company during the time from January 1, 1901, down to the fire, on August 6, 1902. Inventories of the stock were taken by the insured about January 1, 1901, and January 1, 1902. The last inventory was the one taken in January, 1902, and the inventory taken in January, 1901, was the next to the last. The inventory taken in January, 1901, and the original invoices of purchases made subsequent to that date were left out of the safe, and destroyed by the fire. The inventory of 1902 and the books were preserved, and were furnished to the defendant and produced in court. It was shown by the evidence that the original invoices destroyed by the fire had been journalized, and the books containing the items thereof had been produced. It also appeared that it could be ascertained, and was ascertained, with reasonable accuracy, from the books and the inventory of 1902, what the amount of profit was on the sales for the year 1901, and what the amount and character of the inventory of that year were; and, although the 1901 inventory and the original invoices for that year were destroyed, it could be determined from the books and inventory of 1902 that were preserved and produced practically what were their contents. Neither Jalonick, the adjuster of the defendant, nor Robinson, the adjuster of the Virginia Fire & Marine Insurance Company, whose examination of the books and inventory Jalonick adopted, were witnesses in the case, and there is no evidence that Jalonick was not aware of the fact when he expressed his satisfaction that the inventory of 1901 and the invoices had been lost in the fire. It was simply not shown affirmatively that he was aware of it. There was a substantial compliance by the assured with the stipulation of the policy called the "iron-safe clause." The conclusion of the trial judge that the defendant waived any further or other proofs of loss, and waived the production of the books and inventories, by its adjuster, Jalonick, is supported by the evidence, and is approved. Assignment of the policies to the plaintiff, as alleged in the petition, was shown.

The iron-safe clause in a policy of insurance may be discharged by proof of substantial compliance therewith. *Brown v. Insurance Company*, 89 Tex. 590, 35 S. W. 1000; *Insurance Company v. Kemendo*, 94 Tex. 367, 61 S. W. 1102. The purpose of the stipulation for the preservation of the next preceding inventory and the invoices was to furnish evidence by which the amount of the loss could be ascertained. If, in case of

the failure to preserve them, equivalent information is furnished from other sources, a substantial compliance with the stipulation will have been made. This was shown by the evidence. The production of the papers may have been waived, also. Neither of the adjusters was called, to show what knowledge he had concerning the loss of the inventory of 1901 and the invoices; but, putting the burden upon the plaintiff to show that the examination was made with knowledge of such loss, it appeared from the evidence that the assured furnished to the adjuster Robinson what papers he had, and that Robinson examined the papers, and must have known that the inventory of 1901 and the invoices in question were not among them, and waived their production, and that Jalonick had acted on information from Robinson. Acting upon this waiver, the assured may have relaxed his diligence in producing evidence to show a substantial compliance with the iron-safe clause, or have declined the offer to settle at 50 cents on the dollar which was made in the letter from Jalonick. But in view of the fact that a substantial compliance was shown, it is unnecessary to determine whether waiver amounted to an estoppel.

Evidence of the general reputation in the community that W. R. Kimmins and J. R. Kimmins, as the Kimmins Hardware Company, were the owners of the property insured, was admissible to corroborate the evidence of J. R. Kimmins that Stockwell knew the fact when he issued the policies in the name of J. R. Kimmins. *Berry v. House* (Tex. Civ. App.) 21 S. W. 711. As above stated, in the fact conclusions, Stockwell knew when he insured the property that it belonged to the Kimmins Hardware Company, a firm composed of J. R. Kimmins and W. R. Kimmins, and that J. R. Kimmins was not the sole and unconditional owner thereof; and, having received the premium therefor from the Kimmins Hardware Company, the defendant is estopped to deny the validity of the policy on the ground of ownership. *Insurance Co. v. Ende*, 65 Tex. 123; *Wagner v. Insurance Co.*, 92 Tex. 549, 50 S. W. 569; *Insurance Co. v. Post* (Tex. Civ. App.) 62 S. W. 142.

As there was sufficient legal evidence to support the conclusion of the trial judge that Stockwell knew the facts about the ownership of the property, it is not material to consider the question as to the admission of evidence of notice to Stockwell before his agency commenced.

The evidence complained of in the eighth and ninth assignments of error was admissible. It was competent to show that after the issuance of the policies, and before the fire occurred, the defendant knew of the true state of the title.

The judgment of the court below will be affirmed. **Affirmed.**

LONE ACRE OIL CO. v. SWAYNE et al.
(Court of Civil Appeals of Texas. Nov. 3, 1903.)

LIFE ESTATE—WIDOW'S THIRD—SUBSEQUENT DEVELOPMENT OF OIL—RIGHT IN PROCEEDS.

1. The statute governing descent and distribution provides (Rev. St. 1895, art. 1680) that a surviving spouse shall be entitled to an estate for life in the lands of an intestate leaving issue, remainder to such issue. The grantees of remaindermen, occupying in severalty by virtue of the fee title of their grantors to two-thirds, but to the entire exclusion of the life tenant, prospected for and discovered oil. *Held*, that the life tenant was entitled to an interest in the oil produced, though at the time of descent cast the lands were farm lands.

On Rehearing.

2. The life tenant's right in the oil would extend only to interest on one-third of the proceeds of its sale, the principal to go to the remaindermen.

Appeal from District Court, Jefferson County; W. H. Pope, Judge.

Action by James W. Swayne and others against the Lone Acre Oil Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Smith, Crawford & Sonfield, for appellant. Amos L. Beaty, R. R. Hazlewood, W. D. Gordon, and E. C. McLean, for appellees.

GILL, J. This suit was brought by J. W. Swayne and his associates against the Lone Acre Oil Company to establish their right to an undivided one-eighteenth interest in the lands in controversy as owners of the life estate of one Mrs. Annie E. Snow; to their proportion absolutely of certain oil extracted from the land by defendant, and to their proportion of the net product of the oil wells on the tract during the term of their estate in the land. The defendant's answer, after the general denial, presented the issue of estoppel, and asserted the right, in case the life estate should be established, to have it satisfied out of portions of the survey not devoted to the production of oil, the right of the life tenant to any interest in the oil being denied. The facts, which are agreed, except upon the issue of estoppel, are as follows: Andrew A. Veatch inherited from his father an undivided one-sixth interest in the Jno. A. Veatch survey of 3,400 acres in Jefferson county, Tex. Andrew A. Veatch died intestate in 1871, leaving surviving him his wife, Annie E., and their two children, J. Allen Veatch and Mary Veatch. At the time of his death Andrew A. Veatch was the owner of the one-sixth undivided interest in the Veatch survey, and his interest therein descended to his two children, subject to their mother's one-third life estate therein as cast by the statute. On the 25th of March, 1875, Annie E. Veatch, the surviving widow, married G. H. Snow, and they are still living together as husband and wife. The entire survey was

unoccupied, unimproved, and uninclosed prior to 1882 or 1883, when it was inclosed and used as a pasture by parties, who paid the taxes for the use of the land for pasturage purposes. It was so used until 1896, when the fences were taken down, and the land returned to its former state. In 1866 one Goodin, who claimed the land under what has since proved to be a forged deed, executed an oil and mineral lease upon the land, but nothing was done thereunder. There have always been surface indications of oil and gas on the land. No wells were drilled until 1896, and oil was not discovered until 1901. Taking the survey as a whole, there is a large portion of it suitable for agriculture and rice growing as well as for pasturage. It is practically level, and is prairie, with the exception of the northeast corner. The 200 acres which has proven to be oil-bearing land has been rendered unfit for agriculture by reason of the present use to which it is put and the fact that the soil is impregnated with petroleum which has escaped from the wells. It has a value of about \$25,000 an acre as oil land. Some of the survey near the wells is worth \$200 to \$500 per acre for tankage and storage purposes. The balance of the survey is now worth from \$25 to \$50 per acre for pasturage, agriculture, or rice growing. It is, however, under lease as oil land, and has a speculative value on that account. The value of the Veatch survey from 1871 to 1875 did not exceed from 50 cents to \$1 per acre, and its value in 1890 was from \$2 to \$2.50 per acre. The plaintiffs have purchased and are the owners of the entire interest of Mrs. Snow. The defendant, claiming through deeds from the children and grandchildren of Jno. A. Veatch, is the owner of the entire fee in the part of the survey in controversy, subject to such life estate as Mrs. Snow may be shown to have had. The defendant's immediate vendor and warrantor, the Gladys City Oil Gas & Manufacturing Company, a party hereto, owns about 2,000 acres of the survey, which is not proven oil land, but is as good for pasture or agricultural land as any on the survey, and, if it is held that the plaintiffs are entitled to no interest in the oil or its proceeds, it is agreed that their interest may be set apart to them out of the Gladys Company land. In January, 1901, oil was discovered on the Humphrey survey, a short distance from the land in question, and shortly thereafter the defendant's wells were drilled, and have since been producing large quantities of oil, for none of which has it accounted to the claimants under Mrs. Snow. The present holders of the fee in the Veatch survey bought for value, without actual notice of the rights of Mrs. Snow, but the facts charge them with constructive notice. The defendant has expended large sums of money in drilling wells and constructing other improvements on the land. Mrs. Snow's interest has never in any way been recognized by any holder of the land. They hold their separate par-

cels without reference to her claim. We have not undertaken to set out the agreed statement in full, but it is believed we have omitted nothing which is material to the determination of this appeal. In what is designated as the "agreed facts" is set out the testimony of certain witnesses and copies of certain letters. They bear upon the issue of estoppel sought to be presented by appellant. We do not set out the facts upon this point, as, in our view, the issue of estoppel is not raised by the evidence. The parties entered into the following agreement as to the scope and nature of the judgment to be rendered on the facts stated: "(1) Upon the foregoing statement of facts judgment shall be rendered by the court on the issue of title as to the land described in plaintiffs' petition. (2) In case it is held by the court that the plaintiffs have no interest in the land, then, of course, judgment shall be rendered that the plaintiffs take nothing by their suit, and pay the costs thereof. (3) In case it shall be held by the court that they are entitled to an estate for the life of said Annie E. Snow in one-eighteenth on the land in controversy, without any interest in the oil or its proceeds, then the plaintiffs must get their quantum of land from the Gladys City Oil, Gas & Manufacturing Company, and judgment shall be rendered that the plaintiffs take nothing by their suit, and pay the costs thereof. Likewise, if it shall be held that the plaintiffs must take their quantum of land out of the land owned now by the Gladys City Oil, Gas & Manufacturing Company, or out of that sold by it subsequent to the sale to the defendant. (4) If it shall be held by the court that they are entitled to an estate for the life of said Annie E. Snow in one-eighteenth of the land in controversy, and in substance or effect that they are entitled to have one-eighteenth of the net proceeds of the oil that has been extracted and marketed after deducting all expenses of producing and marketing invested or put at interest, and to receive only the interest thereon during her life, the corpus of the fund at her death to belong to the remaindermen, then judgment shall be rendered for the plaintiffs against the defendant for such life estate, and for the value of their interest in the proceeds of oil taken and marketed, to wit, \$300. (5) If it shall be held by the court that they are entitled to an estate for the life of said Annie E. Snow in one-eighteenth of the land in controversy, and also to one-eighteenth of the net proceeds of the oil extracted and marketed, after deducting all expenses of producing and marketing, judgment shall in that event be rendered for the plaintiffs against the defendant for such life estate and for their one-eighteenth of the net proceeds of the oil marketed, amounting to \$500." On a trial to the court without a jury the court rendered judgment decreeing that the claimants under Mrs. Snow are the owners of an undivided one-eighteenth of the land involved in this suit during the life of

Mrs. Snow, and as such tenants for life are entitled to judgment for one-eighteenth of the net product of the oil already marketed, agreed to be of the value of \$500, and a like interest in the subsequent product of the wells during the life of Mrs. Snow. The defendant company has appealed.

The old and oft recurring question of the right of the life tenant in the minerals underlying the land is thus presented. It is not our purpose to undertake a review of the authorities. Our statute (article 1689, Rev. St. 1895) creating the estate under which the plaintiffs claim occurs under the head of "Descent and Distribution," and is in the following language: "When any person having title to any estate or inheritance, real, personal or mixed, shall die intestate as to such estate, and shall leave a surviving husband or wife, the estate of such intestate shall descend and pass as follows: (1) If the deceased have a child or children or their descendants, the surviving husband or wife shall take one-third of the personal estate, and the balance of such personal estate shall go to the child or children of the deceased and their descendants. The surviving husband or wife shall also be entitled to an estate for life in one-third of the land of the intestate, with remainder to the child or children of the intestate and their descendants." That the estate thus cast was of greater dignity than the common-law dower it seems to us is manifest, and that, whether or not the life tenant may open mines not opened at the time the estate vested, it is certain that during his tenancy he holds the land as land in the unrestricted meaning of that term, thus including minerals, which are a part of the realty. This much was definitely held in *Higgins Oil & Fuel Co. v. Snow*, 113 Fed. 433, 51 C. C. A. 267. The opinion was also expressed that the life estate under the Texas statute was not impeachable for waste, though the holding was not necessary to the decision of the case. We are much impressed with this view, and think it more in accord with the spirit of our laws and institutions than the rule which seems to have been uniformly applied to such estates. But, as the point is not necessary to the decision of this case, we shall not enlarge upon it. We have found no Texas authority in point, and this case is further complicated by the fact that the co-tenants of the life tenant are also the remaindermen. As co-tenants they own an undivided interest of $\frac{17}{18}$ in the land in controversy. As such co-tenants they had the right doubtless to sink wells for the purpose of discovering oil. As against an ordinary co-tenant, the one thus venturing, if successful, would doubtless be held to an accounting with his co-owners. If he failed to discover oil, the one thus venturing without being joined by his co-tenants or first demanding partition would bear the cost of his unsuccessful enterprise. A failure would

have resulted thus in the case before us. But here the co-tenants of the life tenant have discovered oil; have fastened upon the land in controversy the character of oil lands, and unfitted them for any other use. That use is thus fixed as the proper and fitting way to use the land for profit. The fact that the life tenant may be awarded other lands non oil bearing out of the larger survey is no answer to her claim. She has an undivided interest in the whole. The present owners of the Veatch 3,400 acres hold it in severalty as against each other being in exclusive possession of his separate tract. So to each separate tract the life estate is still attached, and it may be enforced against each. Any other means of partition has been rendered impracticable by the present owners of the fee.

In what way, then, has the action of defendant in converting its tract into oil lands affected the rights of the life tenant? Treating the estate as one impeachable for waste, the rule is that she cannot open mines or drill oil wells unless either by actual use, or the intention to so use distinctly indicated by the former owner, the lands have been impressed with that character; the reason being that the duty of the life tenant was to hand the estate over to the remaindermen unimpaired except in so far as its accustomed use would impair it, the character of use permissible being measured by the acts or expressed intention of the creator of the life estate. Why there should be any distinction between the rights of the life tenant growing out of the acts of the decedent in designating the proper use of the land and the acts of the remaindermen as affecting it is difficult to perceive. In a carefully prepared and well-reasoned opinion in the case cited, Judge Bryant held that a life tenant under the Texas statute might share in the product of oil wells drilled by co-tenants (who were also remaindermen) on lands in which she had an undivided life interest, and this though the lands had been put to no such use until her life estate had vested. The case cited was a companion case to this, the facts presenting the question being identical except as to parties. We are not inclined to undertake to add anything to what was said in that case upon the question decided, nor to indulge in a further review of the authorities. However, in that case it was not necessary to decide, and it was not directly decided, whether the life tenant should have an absolute interest in the net product of the oil wells, or whether a sum equal to her interest should be invested, she to enjoy the income for life, the corpus to go to the remainderman at her death. That question remains to be determined by us. The point was covered by Judge Bryant in his discussion of the case, and we quote in part his language: "In the case at bar, the remaindermen, being also the owners of $\frac{17}{18}$ absolutely, have taken possession of the whole to the

exclusion of the life tenant, and have converted it into an oil field. The latter has committed no waste, and the point to be decided is not whether she might drill for oil herself, but whether she may elect to acquiesce in the changing of the mode of use. The estates were joint when the change was made, and no partition was demanded; consequently any advantage that ensues must inure to the benefit of all the co-tenants in proportion to their interests." We are of opinion it follows upon principle that the change in the mode of use was but a method of taking profits, and, the product being profits, and not corpus, the plaintiffs were entitled to an absolute interest in the product in proportion to their interest in the land, as adjudged by the trial court. The case cited contains a general review of authorities, and we cite it in support of our conclusion without undertaking a review of them here. This conclusion incidentally disposes of all the other assignments of error, except those addressed to the issue of estoppel, and we disposed of that in stating the facts.

We are of opinion the judgment should be affirmed and it is so ordered. Affirmed.

On Rehearing.

(January 18, 1904.)

We have found no reason to change our views on the question of the life tenant's interest in minerals in situ in the lands of which the life estate consists. Upon the other point we are equally certain we were wrong. In the main opinion we expressed ourselves as inclined to the view that the life estate cast by the Texas statute was not impeachable for waste, though we did not find it necessary to decide the question. We are now of opinion that such an estate must necessarily be subject to the rule forbidding waste. To hold otherwise would clothe the life tenant with the right to destroy permanent buildings situated on the lands, and otherwise to handle the property without reference to the rights of the remainderman who holds the greater estate. To so hold would also be to discard the common-law definition of the term "life estate," and, as we cannot go elsewhere for a definition, we would be left wholly at sea in our search for a meaning. We must therefore proceed, as before, on the presumption that the estate in question is impeachable for waste. We are convinced that in determining the extent of the life tenant's interest in the product of the wells in question we erred in applying the doctrine of prior use to the facts of this case. If, in satisfaction of a claim of dower, lands are assigned upon which mines have been opened, the true reason why they may be mined to exhaustion by the life tenant is that their value as such is presumed to have been taken into account in the assignment. This consideration is of weight, if at all, only in case of partition as to a life estate under the Texas statute. Such estate vests at the

death of the spouse, whereas dower vests only when assigned. If no mines are opened when the Texas estate vests, the right to mine does not accrue, for her right at such time amounts to no more than to use the lands, not abusing them, and to turn them over unimpaired to the remainderman. Snyder on Mines, § 941. An open mine is also included in the term "lands," and one open at the time of the vesting of the life estate is therefore inherited as such by the life tenant. With the inheritance goes the right to use it, and the way to use it is to operate it. This, of course, includes the right to make out of it whatever may be made by enterprise and industry, notwithstanding such a course may result in exhaustion of the mines during the term of the life tenant. Snyder on Mines, § 944. To this extent does prior use give character to the property inherited and affect the rights of the life tenant. But the use must have been prior to the vesting of the estate, for the nature and extent of the estate is fixed at that time. If, then, the condition of the property at the time of the vesting of the estate fixes his rights, it now appears to us to be difficult on principle to justify the holding that anything is disclosed in the facts of this case which would enlarge his original interest. The rule announced in the main opinion as applicable to a life estate under the Texas statute can be justified in any case only on the ground of estoppel, and we do not regard that position as tenable in this case. It cannot be doubted that in a case of ordinary co-tenancy one co-tenant may bore for and discover oil before partition, and without the consent of his co-tenant, and yet not increase the nature or extent of his co-tenant's estate. His co-tenant could at most share in the net product in proportion to his interest in the land. Snyder on Mines, § 1454. We do not think the well can, in partition, be treated as an improvement to be set aside to the one who bored it. It is rather to be regarded as a part of the cost of the discovery, the cost of which the passive co-tenant must bear in proportion if he would share in the product. Id. §§ 1444-1446, 1458. It would seem to follow logically that such an act on the part of a co-tenant as in this case ought not to increase the estate of the life tenant of an undivided interest. The life tenant occupies no better position than a co-tenant of the full fee. It seems to us the law and the common sense of the matter is this: The Lone Acre Oil Company was within its right when it bored for oil on the lands in question. The life tenant was also without fault, and, the oil venture being a wise one, she acquiesced in its production and sale, demanding her share of the product. The act of the oil company simply enables the life tenant to exercise an original right, viz., to use her share of the oil for life, as she could any other part of the realty. Let us suppose at this point that she had demanded partition, and it had

been found, and so adjudged, that the land was not susceptible of partition in kind, but must be sold, and the proceeds divided. Such a sale would have resulted in a much larger sum than the sale of her interest for any use to which she could have lawfully put it. Who could be found to contend in such a case that the life tenant's interest in the sum resulting from the sale was absolute as to any part of it? Can it be doubted that the court would have decreed to the life tenant no more than the income on her share, the corpus to be held unimpaired for the remainderman at her death? Or let us suppose that there had been partition, and that some trespasser, without the knowledge of any one at interest, had entered upon the life tenant's share, sunk oil wells, and exhausted the supply. It is certain a judgment against such a trespasser for the value of his takings would not belong wholly to her, else the wrong of the trespasser for which she might sue would nevertheless be a distinct benefit to her. Upon this phase of the case and other points counsel have quoted apt expressions from *McSwinney on Mines*. We regret that we have not had access to the work.

One of the most powerful considerations operating to effect our change of view upon this point is the hard and illogical operation of the rule announced by us if applied generally. At first glance it seems unjust to hold that the owner of the life estate may be compelled to restrict his use of the estate to the unprofitable cultivation of the surface, while at the same time he may hold an equal estate in minerals underneath of vast value. With this in mind we were deeply impressed with the argument of Judge Bryant upon the point in the case of *Higgins v. Snow*, cited in the main opinion. But the converse of the proposition may become equally repellent, for a mine or oil well may be exhausted in a lifetime, and the remainderman be thus left the poor and unprofitable surface of his otherwise rich estate, though he owned the greater title.

Take another aspect of the case before us. Before the well was bored, appellant owned $\frac{17}{18}$ of the land and oil; the other $\frac{1}{18}$ in remainder. The life tenant owned only a life interest in $\frac{1}{18}$ of the land and oil. Under appellees' contention, the appellant, by marketing its $\frac{17}{18}$ of the oil, lost all right to the other $\frac{1}{18}$. Such a result is a non sequitur, which can be justified only by an unreasonable extension of the doctrine of prior use, and, as has been shown, there was no such use in this case prior to the vesting of the life estate. A lawful act ought not to be visited with such hard consequences. The only wrong of which appellant is shown to have been guilty was the exclusion of the

life tenant from the usual enjoyment of her share of the estate, and this was done under the theory that she had no interest. If an ordinary co-tenant exclude another co-tenant on the ground that he owns no interest, may he not test the question by a lawsuit without the penalty of losing his own holdings or increasing those of his co-tenant? Would not the excluded co-tenant, if he established his right, recover his interest in the land and such damages as he suffered by the wrongful exclusion, and no more? We think this rule is applicable here. A life interest in the lands, including the minerals, the life tenants have had since the inception of the estate. They are entitled to judgment therefor. They might also have judgment for the damages they may have suffered because of this wrongful exclusion from the use of their share of the land. As for the oil, they could not have used it but for the act of appellant in converting it into personality. They must have been content with its mere ownership in situ. They have chosen to acquiesce in the act of appellant in changing the status of a part of the common holdings in which their interest was already fixed from oil in situ, which was realty, to oil, which, being severed, was personality. Their estate in the property remained the same. The application of this rule preserves the respective rights of the parties, and avoids visiting hard consequences upon the lawful act of appellant.

Again, we have found no necessity for indulging in a critical review of the many authorities cited. No case in point has been found, and not even an analogous Texas authority has been cited. The authorities are in accord on the proposition that the life tenant may not work mines not opened at the time his estate vests unless the lands have theretofore been distinctively clothed with the character of mineral lands. We content ourselves with the citation of a few representative authorities upon the point: *Billings v. Taylor*, 10 Pick. 460, 20 Am. Dec. 533; *Clift v. Clift* (Tenn.) 9 S. W. 360; *Marshall v. Mellon* (Pa.) 38 Atl. 201, 35 L. R. A. 816, 57 Am. St. Rep. 601. Our conclusion that the holders of the life-tenant right in this case are entitled to no more than a judgment for the life estate in the land and income for life on their share in the product of the wells is not without support in authorities determined upon kindred facts. *Blakely v. Marshall* (Pa.) 34 Atl. 564; *Wilson v. Hughes* (W. Va.) 28 S. E. 731, 39 L. R. A. 292.

For the reasons given, the motion is granted, our former judgment is set aside, and the judgment of the trial court reversed, and judgment here rendered in accordance with these views.

KEAS v. GORDY.

(Court of Civil Appeals of Texas. Jan. 20, 1904.)

COSTS—AMENDMENT OF PLEADINGS—OMISSION IN CHARGE—REQUESTING INSTRUCTION.

1. A successful plaintiff should not be charged with the costs up to the filing of an amended petition which does not change the cause of action.

2. A party desiring correction of the charge because of an omission which does not constitute positive error should prepare and request an instruction for that purpose.

3. Defendant will be treated as not having requested an instruction covering an omission in the charge where he withdrew it at the court's suggestion on the supposition that the charge was more in his favor than the requested instruction; it not appearing that he had not seen and did not know the contents of the charge when he withdrew the instruction.

Appeal from District Court, McLennan County; Marshall Surratt, Judge.

Action by Robert Gordy, Jr., against George W. Keas, guardian. Judgment for plaintiff. Defendant appeals. **Affirmed.**

D. A. Kelley, for appellant. Richard I. Munroe and J. R. Downs, for appellee.

KEY, J. This suit involves the title to a tract of land in McLennan county, and from a verdict and judgment in favor of the plaintiff the defendant has appealed. The land was deeded to Robert Gordy, Sr., and the contest is between two of his children. The plaintiff claims that the land is his property upon the theory that he furnished the purchase money to pay for it, and that, though deeded to his father, the latter held it in trust for the plaintiff. The defendant holds under the will of Robert Gordy, Sr.

By the first assignment of error it is contended that, as the plaintiff's original petition was in the form of trespass to try title, and as he afterwards filed an amended petition specifically pleading the facts upon which he relied for a recovery, he should have been charged with all the costs of the suit up to the time of the filing of the amended petition. We overrule this contention. The amended petition did not set up a new cause of action.

The second assignment complains of an alleged omission in the court's charge. The omission referred to did not constitute positive error, and, if appellant desired to have it corrected, he should have prepared and requested an instruction for that purpose. It is contended that this was done, but that the special instruction was withdrawn at the suggestion of the court that it was covered by the court's charge. The record does not contain any such instruction marked "Refused" by the trial judge. Such an instruction is attached to the motion for new trial, which the motion states was presented to the court, and at the court's suggestion withdrawn upon the supposition that

the charge given by the court was more in defendant's favor than the requested instruction. The motion for new trial was not verified, but, conceding the facts as therein stated, it does not appear that the defendant's counsel had not seen and did not know the contents of the court's charge at the time he withdrew the special instruction. This being the case, we think the objection to the court's charge must be disposed of upon the theory that no instruction was requested covering the omission now complained of; and it is well settled that when such is the state of the record reversible error is not shown.

Under several assignments the verdict of the jury is attacked as unsupported by the testimony, but, in view of the evidence of more than one disinterested witness to the effect that Robert Gordy, Sr., had stated to them that the plaintiff had paid for the property in controversy, and other testimony submitted by the plaintiff tending to support that theory, we have reached the conclusion that this is not one of the exceptional cases in which an appellate court should set aside the verdict of a jury.

No reversible error being shown, the judgment is affirmed. **Affirmed.**

VALENTINE v. SWEATT.*

(Court of Civil Appeals of Texas. Dec. 23, 1903.)

PUBLIC LAND—SALE—LEASE—EVIDENCE—CERTIFIED COPY—RECORD—INSTRUCTIONS—APPEAL.

1. *Sayles' Ann. Civ. St. 1897, art. 2312*, requires, as a condition to the use of a certified copy of a recorded instrument in evidence, that it be filed three days before the commencement of a trial, and an affidavit filed stating that the original is lost or cannot be procured. *Held*, that the contention that this does not apply, in an action of trespass to try title to land, to a certified copy of a deed of other land, title to which a party must prove in order to sustain his claim to the land in suit, is not well taken; the rule applying to all cases where it is sought to use the certified copy of a recorded instrument in evidence.

2. The record kept by the county clerk, as authorized by Acts 1901, pp. 294, 295, c. 125, §§ 4, 5, of the cancellation of a lease of state land, is admissible in evidence to show such cancellation.

3. Under Acts 1901, p. 295, c. 125, § 5, providing that state land is on the market for 60 days after the expiration of a lease thereof, and that, if not sold in that time, the original lessee has the preference right for 30 days to again lease it, after the 30-day period it is again on the market.

4. Under Acts 1901, p. 294, c. 125, § 4, providing that state land shall not be subject to sale till the expiration of a lease thereof, proof of applications for the purchase of the land is nullified by proof of the existence of a lease to another in force at the time.

5. The court, in its charge, has the right to assume facts shown by uncontradicted proof.

6. The correctness of the taxation of costs cannot be questioned on appeal, where the ques-

*1. See Costs, vol. 13, Cent. Dig. §§ 218, 219.

*Rehearing denied February 3, 1904, and writ of error denied by Supreme Court.

tion was not raised in any way before the trial court.

7. Where no question was raised in a motion for a new trial as to the sufficiency of the testimony to sustain the verdict, assignments attempting to raise that issue on appeal will not be considered.

Appeal from District Court, Schleicher County; T. C. Wynn, Special Judge.

Action by E. P. Sweatt against J. T. Valentine and another. From a judgment in favor of plaintiff, defendant Valentine appeals. Amended and affirmed.

E. Cartledge and Hill & Lee, for appellant. L. H. Brightman, Brown & Silliman, and W. M. Allison, for appellee.

FLY, J. This is an action of trespass to try title to lands—sections 192 and 194½, in Schleicher county—instituted by appellee against appellant and Robert Bailey. Bailey disclaimed any interest in the land, and was dismissed from the suit. Appellant answered by plea of not guilty, and set up a cross-action against appellee for the land in controversy. The cause was tried by jury, and resulted in a verdict and judgment in favor of appellee for the land sued for.

The facts are that on March 11, 1903, appellee applied to the Commissioner of the General Land Office to purchase section 192, block A; the application being in all respects as required by law, and being accompanied by an affidavit that he was a bona fide settler on the land, and was not acting in collusion with others for the purpose of buying the land for any other person or any corporation, and that no other person or corporation was interested in the purchase of the land. The application was rejected on March 16, 1903. The first payment was made on the land. Appellee settled on the land in good faith. On the same date that the above application was made, appellee applied, as required by law, for the purchase of section 194½ for a home; making the necessary oath, giving the required obligation, and making the first payment. The application was rejected on March 16, 1903. The land had been surveyed for the benefit of the public free schools of Texas, had been classified as dry grazing land, and appraised at \$2 an acre. The land had been listed with the county clerk of Schleicher county on May 10, 1902, for sale. Appellant introduced in evidence the record of applications to purchase state school lands of Schleicher county, in order to show that on May 9 and 16, 1902, he had made applications as required by law to purchase section 194½, and that on June 19, 1902, he applied to purchase section 192 as additional lands to section 162. The necessary obligations were executed, and in each application it was shown that appellant was the owner of section 162; that on June 27, 1899, section 162 had been sold to T. J. Coffman. The foregoing evidence was after-

wards excluded when appellant offered in evidence a certified copy of the record of a deed to section 162 from Coffman to appellant, and the same was rejected because it was not an original deed, and no affidavit of loss or destruction of the original had been made. Under the provisions of articles 4218f, 4218ff, Batts' Ann. Civ. St. 1895, any bona fide purchaser from the state of any land, as an actual settler, or any bona fide owner of, and resident upon, other lands within five miles, may purchase lands, not exceeding four sections, in addition thereto; and if he or his vendor has already resided on the home section for three years, or if he and his vendor together have resided for that length of time on the home section, a patent may issue for the additional lands at any time. As a basis for a purchase from the state, appellant was bound to show that he or his vendor was the bona fide purchaser of a home section. In order to do this, he introduced evidence that tended to prove that section 162, claimed by him as his home section, had been awarded and sold by the state to T. J. Coffman on June 27, 1899, and that Coffman had prior to July, 1902, occupied the land for three years. No patent was shown to have issued to Coffman. In order to connect himself with Coffman's title to section 162, appellant attempted to offer in evidence a certified copy of the record of a deed from Coffman to himself. This was rejected by the court, and the other evidence hereinbefore set forth, which was introduced by appellant, was withdrawn from the jury by the court.

To justify the introduction of the certified copy of the deed to appellant, it should have been filed among the papers of the cause, and an affidavit made, stating that the deed had been lost, or that appellant could not procure the original. Article 2312, Sayles' Ann. Civ. St. 1897. No affidavit of loss was made by appellant, although it has been held that such affidavit could have been made at any time during the trial. *Ross v. Kornrumpf*, 64 Tex. 390.

If the deed had been admitted in evidence, we doubt that it could have availed appellant, for the reason that it did not appear from the excluded testimony that the applications were ever forwarded to the Commissioner of the General Land Office, or that the required oath accompanied the applications, or that the Land Commissioner ever acted on them.

It is the contention of appellant that the title to section 162 was not in issue, but when he claimed the land in controversy on the ground that he owned section 162, and on that ground had a right to purchase it from the state, it became an issue as to whether he owned the home section or not. To prove this essential fact, he had no more right to invoke the aid of secondary evidence, without complying with the statute, than he would if the home section had been

¶ 7. See Appeal and Error, vol. 2, Cent. Dig. § 1727.

sued for. The rule of evidence enunciated in article 2312 applies to all cases where it is sought to use the certified copy of the record of any instrument of writing which is permitted or required by law to be recorded in the office of the county clerk.

Appellant introduced in evidence a lease contract between the state of Texas and Robert Bailey, which showed that section 192 had been leased to Bailey for a term of 10 years from April 19, 1898. If this lease contract was in existence at the time appellee applied for purchase of section 192 for a home, it destroyed any claim that he might have, because it is specially provided in section 4, c. 125, pp. 294, 295, Acts Leg. 1901, that lands theretofore leased in Schleicher and other counties should not be sold until the expiration of the leases. In order to meet the proof of the lease to Bailey, appellee put in evidence the original record of the memoranda of leases of Schleicher county, which showed that the lease to Bailey was canceled on June 19, 1902, and also the notice from the Commissioner of the General Land Office showing that the lease had been canceled for nonpayment of interest, and notifying the clerk to note it on his record. The record was objected to on the ground that the best evidence of the cancellation was a copy of the cancellation, in writing, given under the hand and seal of the Commissioner of the General Land Office. In section 4 of the law of 1901, above cited, it is provided that the county clerk shall record in a well-bound book a memorandum or abstract of lease, showing the number of the survey leased, the name of the lessee, the date of the lease, and the number of years it has to run; and in section 5 of the same law it is provided that, when a lessee shall fail to pay his annual rental within 60 days after it is due, the Commissioner of the General Land Office shall cancel the lease, and immediately notify the county clerk of the county in which the land, or a part thereof, is situated, of the cancellation, and date when canceled, and the clerk shall note the date of cancellation on his lease record, and the land shall be on the market for sale for 60 days after said cancellation. The record was admissible in evidence.

Bailey, the lessee, disclaimed any interest in the land, and it is clear that he had acquiesced in the cancellation, and did not claim any rights given by the lease.

It was in evidence that the lands in controversy were placed on the market in May, 1902, and, if this had not been shown when the cancellation of the lease was proved, the law above cited put the land on the market for 60 days; and, while the law of 1901 is vague and indefinite on the subject, we understand from it that after the expiration of 60 days, if the land is not purchased, the original lessee shall have the preference right for 30 days to again lease the land, but, if he does not do so, the land is on the mar-

ket for sale. It follows that there was no issue as to the land being on the market, and it was unnecessary to present such matter to the jury. It is provided in section 5 of the land law of 1901, above cited, that when land has been once classified and valued by the Land Commissioner, as the land in controversy was, on the expiration of a lease the land shall be on the market for sale, without any further notice to the clerk of the county court. The land could be classified and appraised while the lease was in existence, and the moment the lease expired by time or cancellation the land was at once on the market. If appellant had succeeded in getting his applications to purchase the lands before the jury, he would have completely nullified them by introducing in evidence a lease which was clearly in force when he applied to purchase the lands, in May, 1902.

There was not a particle of testimony tending to show collusion on the part of appellee with any one else to purchase the land, but, on the other hand, all of the testimony indicated a purchase in good faith by him, and the court had the right to assume in the charge that there was no collusion. Appellant, while complaining of such assumption of fact, does not point out wherein it was done in the charge, nor does an inspection of the charge disclose any such assumption. The same can be said of the claim that the court assumed that appellee had not purchased four sections of school or asylum lands since April, 1901, prior to making application to purchase the land in controversy. No such issue appeared in the case. Appellant swore that he had never before bought any school land.

The uncontradicted proof showed that section 192 adjoined section 194½, and was within the five-mile radius of the home section. The court had the right to assume the fact to be true in his charge.

Appellant complains that the judgment is against him for all costs incurred in the suit, and that this is error, because all costs incurred by reason of Bailey being made a party should be assessed against appellee. This may be true, but, if appellant desired a retaxing of the costs, he should have moved the trial court to retax them, or at least have raised the question in some manner in that court. *Castro v. Illies*, 11 Tex. 39; *Jones v. Ford*, 60 Tex. 132; *Wiebusch v. Taylor*, 64 Tex. 53; *Allen v. Woodson*, 60 Tex. 653; *Bridge v. Samuelson*, 73 Tex. 522, 11 S. W. 539.

Appellee showed a strict compliance with the law in his applications to purchase the land, and there was no testimony that tended to show a prior sale of the land to any one else; and, these facts having been adduced, it followed that the Commissioner of the General Land Office should not have rejected the applications of appellee.

No question was raised in the motion for

new trial as to the sufficiency of the testimony to sustain the verdict, and assignments attempting to raise that issue in this court will not be considered. *Clark v. Pearce*, 80 Tex. 151, 15 S. W. 787; *Telegraph Co. v. Mitchell*, 89 Tex. 441, 35 S. W. 4.

There being no evidence whatever that the land in controversy was ever awarded and sold to appellant, there was no basis for that part of the judgment which cancels and sets aside such imaginary award and sale, and that portion of the judgment will be stricken out by this court. With this emendation made, the judgment is affirmed.

**MISSOURI, K. & T. RY. CO. OF TEXAS
v. CRISWELL.**

(Court of Civil Appeals of Texas. Jan. 16, 1904.)

**CARRIERS—PERSONAL INJURIES—EVIDENCE—
OPINIONS—ADMISSIBILITY—WITNESS—
PREDICATE FOR IMPEACHMENT.**

1. Where a medical witness in an action against a railroad for personal injuries received by a passenger in alighting from a train has testified to facts which he has himself ascertained in treating the injured person, it is proper for him to give his opinion as to the cause of the injury, assuming as true the facts to which he had previously testified.

2. Where defendant in an action against a railroad for personal injuries received by a person in alighting from a train interrogates a medical witness as to part of the contents of a letter from him to plaintiff's counsel, referring to the cause of the injury, it is proper to admit all of the letter relating to the particular injury.

3. Though a medical witness in an action against a railroad for personal injuries received by a passenger in alighting from a train testified that he could not say positively that the coccyx of the injured person was broken by the fall, because he had not made a thorough examination; that he thought, a few months after, that it was caused by the fall, but that he would not say that the injury to the coccyx was or was not caused by childbirth—a predicate is not thereby laid for impeaching the witness in reference to statements made by him at the time of the examination of the injured person.

4. Testimony in an action against a railroad for personal injuries received by a passenger in alighting from a train, as to what a physician said after an examination of the person injured, is hearsay.

Appeal from District Court, Hunt County; T. D. Montrose, Special Judge.

Action by S. L. Criswell against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Reversed.

This was a suit by the appellee against the appellant for damages for personal injuries to his wife, Cora Criswell, alleged to have been sustained by her on November 13, 1900, caused by her fall on the depot platform at Floyd. The petition alleged that on the 13th of November, 1900, appellee and his wife were passengers on a passenger train of the Sherman, Shreveport & Southern Railway

Company from Greenville to Floyd, Tex.; that said company had constructed and used a platform in connection with its passenger depot at Floyd immediately east of it, adjoining the passenger depot, which was elevated three or four feet from the ground, and above the level of the floor of the waiting room; that it had constructed an inclined way in the northeast corner of the depot, extending from the top of the platform to the ground by the side of the depot for the accommodation of passengers and to furnish a means of access from the platform to the waiting room; that it had neglected to construct or place any handhold or railing on either side of the incline, or to place any cleats or steps on the face of the incline; that it negligently and carelessly permitted mud, water, and slippery earth to accumulate and remain on the surface of the incline, rendering it slippery, dangerous, and hazardous to passengers descending from the platform to the waiting room; that when he and his wife alighted from the train they went upon the platform at the place and by the means provided by the company for that purpose opposite or near the place where they were discharged from the train, and where passengers usually went after alighting therefrom, and when they reached the incline, and attempted to pass down the same, his wife stepped thereon, her feet slipped from under her, caused by its wet, muddy, and slippery condition and the absence of any cleats or steps thereon, and fell violently and with great force on and against the top and edge of the platform and incline, breaking, bruising, lacerating, and injuring the lower portion of her spinal column, injuring the spinal cord, lacerating and injuring the pelvic and female organs, causing prolapsus of the uterus and permanent derangement of the menstrual flow; that she was then four months advanced in pregnancy, was greatly shocked by the fall; that the laceration and injury of her female organs caused by the fall produced profuse hemorrhage from the same. It was further alleged that in May, 1901, the defendant became the owner of the Sherman, Shreveport & Southern Railway Company, subject to all its liabilities, etc. The appellant answered: (1) By a general denial. (2) That the injuries to the plaintiff's wife were contributed to and resulted from her own negligence and from risks assumed by her; that, if the incline was wet and slippery, and without railings or cleats, their condition was plain to be seen, open and obvious to common observation; that she knew it was slippery, or ought in the exercise of reasonable care to have known it; and she voluntarily and negligently went upon the same, carrying in her arms at the time and incumbered with a large child. (3) That it had made and provided an entirely safe and convenient way for debarking passengers from its trains to enter its passenger depot, consisting of a walk along its main track,

immediately north of and adjoining the track, and at the south side of the depot, extending from the entrance of the waiting room to and beyond the point where plaintiff and his wife alighted from the train; that the walkway was plain and open, and it was apparent and obvious to any one leaving the train and exercising reasonable care that it was the way provided for passengers to leave the waiting room, and it was the nearest and most direct route thereto; that the appellee and his wife were not using such way in going to the waiting room, but instead went upon the raised platform at the east end and north side of the depot, intended for and used in connection with the freight business of the appellant, and passed therefrom to the north side of the depot, and in so doing were guilty of negligence contributing to the accident. (4) That the injuries to the appellee's wife were due to and caused by the neglect of herself and the appellee to properly treat her after sustaining the fall; that the appellee wholly neglected and failed to call a physician or surgeon to attend and administer to her injuries, but suffered the same, if she sustained any injuries from the fall, to continue and become aggravated without attention, and that proper medical attention would have relieved and cured her. A trial resulted in a verdict in favor of appellee for \$4,400, and defendant appealed.

T. S. Miller and Perkins, Craddock & Wall, for appellant. Evans & Elder, for appellee.

BOOKHOUT, J. (after stating the facts).

1. Upon the trial Dr. Morrow was introduced as a witness by plaintiff, and, after testifying that he waited upon plaintiff's wife at the time she was injured at the depot at Floyd, he was asked what, in his judgment as a medical man, was the injury to her caused by. To this defendant objected, because the testimony sought to be elicited was immaterial and irrelevant, and called for the opinion and conclusion of the witness on a matter that is peculiarly for the jury to pass upon from all the facts. The objection was overruled, and the witness answered that he thought the fall must have broken the coccyx from the fact it was broken between the first and second joints; that it often happened, in sitting down too hard, or getting a fall on the buttocks, that it breaks the coccyx. The court approved the bill of exception, with the following explanation: "Just before the question was asked, Dr. Morrow testified that he reached her in a few minutes after she fell, and learned from her how she got hurt. She told him she was suffering considerable pain in the region of the coccyx. That he had examined her in October, 1902, and again to-day, and found a fracture of the lower part of the spinal column, known as the coccyx, a fracture between the first and second joints of the coccyx, or the end of the backbone. He was

also asked this question: 'Could that fall have caused the injury to the coccyx?' Ans. Yes, sir.' Neither the question nor answer was objected to. Then the question was propounded to him complained of in this bill. The doctor, having qualified as an expert, being a practicing physician for more than 25 years, being called to see her within a few minutes after she fell, being familiar with the incline on which she fell, and learning then that she was suffering with pains in the region of the coccyx, and having examined her twice since that time and finding her coccyx broken, and having testified without objections that he thought that the fall could have caused the injury to the coccyx, it was permissible for him again to state that, in his judgment as a medical man, that the injury to the coccyx was caused by the fall, and to give his reasons for his opinion that the coccyx was broken between the first and second joints." In view of the court's explanation, there was no error in admitting the testimony. Dr. Morrow was giving his opinion as to the cause of the injury, based upon facts which he himself had ascertained in treating Mrs. Criswell, and which facts he had previously stated in his testimony. In giving his opinion he assumed the facts which he had testified to as true, and based his opinion thereon. This he could legally do. *Armendal v. Stillman*, 67 Tex. 458, 8 S. W. 678; *Ry. Co. v. Eaves* (Tex. Civ. App.) 61 S. W. 550. These remarks also apply to the testimony of Dr. Spaulding, the admission of which is complained of in the sixth assignment. We find no error in admitting this evidence.

2. No reversible error is pointed out in the seventh, eighth, and ninth assignments of error. These assignments complain in different forms of the action of the court in overruling appellant's exceptions to that part of the letter dated August 20, 1902, written by Dr. Vaughan to plaintiff's counsel, in reference to the condition of Mrs. Criswell, stating, "About the only thing that struck me as being the result of the fall was the condition of her coccyx." It was a disputed point whether the injury to the coccyx of plaintiff's wife was the result of a fall or of childbirth. Dr. Vaughan waited upon her during childbirth in April, 1901, about six months after her fall at Floyd. He testified that the condition of her coccyx might result from childbirth. Dr. Vaughan was shown the letter, and testified he wrote it. The witness, on redirect examination by counsel for appellant, testified: "I stated in those letters that the position of the coccyx indicated an old dislocation of long standing. That was my diagnosis of it." The defendant's counsel then read in evidence the letter of August 20, 1902, except that portion first above quoted. On recross-examination the witness was asked by appellee's counsel the question, "You did state in that correspondence that it [referring to the injury of the

coccyx] was in all probability caused by the fall," to which he answered, "I suppose so." Thereafter the appellee's counsel read in evidence the whole of the letter, including the clause excepted to. The appellant having interrogated the witness in reference to the contents of the letter, and introduced in evidence the statement therein that the position of the coccyx indicated an old dislocation of long standing, it was proper to admit all parts of the letter relating to the particular injury.

3. During the examination of the plaintiff as a witness in his own behalf, he was asked by his counsel if Dr. Vaughan made an examination of his wife in June, 1901, to which he answered that he did, whereupon he was asked this question: "What did he say about it?" to which question and answer sought to be obtained thereby the defendant objected, for the reason that it was hearsay, and immaterial and irrelevant, and, second, if it was offered in the way of impeachment, that there had been no predicate laid for its admission. The objections were by the court overruled, and the witness answered: "He told us that he discovered that her coccyx was broken. He said her health was ruined generally. He said the fall was the cause of it. He said it had been caused by a fall; didn't say that fall." To the action of the court in overruling the exceptions to this testimony and in admitting the same defendant took a bill of exceptions, and the ruling is made the ground of its twelfth assignment as presented in the brief. The testimony was hearsay, and was not admissible as original evidence. *Railway Co. v. Dawson* (Tex. Civ. App.) 29 S. W. 1106; *Railway Co. v. Burke*, 53 Tex. 340, 40 Am. Rep. 808; *Trott v. Ry. Co. (Iowa)* 88 N. W. 33. It would have been admissible as impeaching evidence had the proper predicate been laid. A careful examination of the record fails to show that any proper predicate had been laid for the admission of testimony to impeach the witness. Appellee contends that a predicate had been laid in that the testimony was offered in rebuttal, and that Dr. Vaughan had answered on cross-examination: "I couldn't say positively that it [meaning the coccyx] was fractured, because I did not make a thorough examination. I thought, a few months after that, it was caused by the fall." He had also testified that he would not say that the injury to the coccyx was or was not caused by childbirth. This evidence does not lay the predicate for impeaching Dr. Vaughan in reference to statements made by him at the time of his examination of plaintiff's wife. The admission of the evidence was error. For the same reason it was error to admit the testimony of Mrs. Cora Criswell, wife of plaintiff, as to what was said by Dr. Vaughan at the time he examined her, the admission of which is complained of in the thirteenth assignment.

4. In assignment numbered 14 in appellant's brief complaint is made of the ruling of the court in admitting the testimony of appellee as to statements made by Dr. Cantrell, who had, at appellee's request, examined Mrs. Criswell. While testifying in his own behalf, S. L. Criswell was asked if Dr. Will Cantrell had examined his wife at his instance. He answered he had. Thereupon he was asked, "Now, what did Dr. Cantrell say he found?" Objection was made to the question, because what Dr. Cantrell said would be hearsay, and because no predicate had been laid to impeach him. The objection was overruled, and the witness answered: "He said he found the coccyx there was fractured, and also the womb was inflamed some way. I can't explain it like he said it was." This testimony was hearsay. It was not admissible for the purpose of impeaching Dr. Cantrell, for no predicate had been laid therefor.

For the errors pointed out in the twelfth, thirteenth, and fourteenth assignments, the judgment is reversed, and the cause remanded.

W. C. BELCHER LAND MORTG. CO. v. NORRIS.*

(Court of Civil Appeals of Texas. Dec. 19, 1903.)

MORTGAGE—USURY—RES JUDICATA—EVIDENCE—PLEADING.

1. A judgment, in an action by the owner of land to cancel a mortgage thereon on the ground that the mortgagee had notice that the mortgagor was not the owner, adjudging the mortgage valid, is conclusive against the owner in an action to foreclose the mortgage, in which he pleads that the loan secured was usurious; the contention that the judgment merely established the lien, and not the amount of the debt, not being well founded.

2. That the defense of usury in a loan secured by a mortgage falls short of the annulment of the mortgage lien, which was demanded in a former suit in which judgment was rendered sustaining the validity of the lien, does not affect the conclusiveness of the judgment as against the defense.

3. Where one who is not the owner of land gives a mortgage thereon, the owner is in privity with him, so that neither the mortgagee nor the owner can contradict the terms of the mortgage by parol evidence.

4. A mortgage providing for the repayment to the mortgagee of all sums paid by it on account of any outstanding title, lien, claim, or incumbrance on the premises does not secure the repayment of a sum necessarily expended in defending a suit to cancel the mortgage.

5. In an action for foreclosure of a mortgage, wherein the defense of usury was set up, a pleading showing a former judgment between the same parties, sustaining the validity of the mortgage lien, is, in the absence of a demurrer, a sufficient plea of res judicata, though general in form, and though set out in the original pleading, rather than in replication to the plea of usury.

Appeal from District Court, Tarrant County; M. E. Smith, Judge.

*Rehearing denied January 30, 1904.

Action by the W. C. Belcher Land Mortgage Company against Arch Norris and another to foreclose a mortgage. From a judgment sustaining defendant Norris' plea of usury, plaintiff appeals. Modified and affirmed.

For former opinion, see 68 S. W. 548.

W. J. Berne, for appellant. G. H. Goodson, for appellee.

SPEER, J. The appellant sued one Taylor on certain notes for borrowed money, and sought to foreclose a lien upon land belonging to appellee, to which end appellee was made a party. Taylor made no defense, and judgment was properly rendered against him. Appellee answered by interposing, among other things, the defense that the transaction between appellant and Taylor was usurious, and asked for appropriate relief. Appellant pleaded a former judgment establishing the validity of its mortgage lien as against appellee. The court found in favor of appellee upon his plea of usury, to which the first error is assigned.

The question presented is not at all free from difficulty, but we have finally decided that the court erred in not finding that the former judgment pleaded concluded appellee upon the question of usury. In the former suit, appellee sued Taylor to recover the land, and made appellant a party; seeking, as against it, the cancellation of the lien sought to be foreclosed in this suit. The only ground upon which the validity of the lien was attacked was that, in making the loan to Taylor and accepting the mortgage, the company had notice that the land in question belonged to appellee. The prayer was for "judgment cancelling and holding for naught said mortgage lien to said corporation, and canceling the same as an incumbrance to his title and use to the said premises." The company answered that suit by pleading in extenso its loan to Taylor and its mortgage upon the land, and alleged that in and by said mortgage "a lien was created and established upon said real estate to secure payment of said indebtedness, and said lien has never been released, but is still of full force and effect." The trial was upon the merits, and a judgment rendered canceling the lien; but on appeal to this court that judgment was reversed, and judgment here entered that "the mortgage lien held by the W. C. Belcher Land Mortgage Company, and executed by S. J. K. Taylor in favor of said company, * * * be, and the same is hereby, declared a valid lien against said land." A writ of error to this judgment was refused by the Supreme Court. *W. C. Belcher Land Mortgage Bank v. Norris*, 68 S. W. 548. At the threshold of the discussion, we should determine whether or not the claim or demand in this suit is the same as that in the original suit. There we take it the cause of action asserted by appellee was the invalidity

of the company's lien upon the land. The grounds of invalidity alleged was that the company had notice of his rights prior to its loan. Here, in pleading usury, it is clear the claim or demand is the invalidity of the same lien, because it secures a loan of money which embraces usury. The attack in both cases is upon the validity of the lien, though upon different grounds, and to a different extent—a total invalidity in the first instance, and a partial in the second. We think an attack upon the instrument as a whole included an attack upon all its parts. If the claim or demand then be the same in both cases, the former judgment constitutes an absolute bar to the subsequent defense. It is a finality, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. It concludes not only those grounds of recovery or defense actually presented in the action, but also every ground which might have been presented, and which would tend to support or defeat the claim or demand. "The plea of *res judicata* applies not only to points upon which the court was actually required to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of the allegation, and which the parties, exercising reasonable diligence, might have brought forward at the time." In this case it is not doubted but that appellee could, in the prior attack upon the validity of the appellant's lien, have pleaded the usury now attempted to be set up. It would have been germane to his claim or demand, namely, the invalidity of the lien, and would have been a ground of relief to him in that suit upon that demand. This being true, we think he was compelled to then present this ground of attack, or be forever barred. A plaintiff cannot plead his demand by piecemeal in different suits. If appellant's lien was invalid for any reason—as, for instance, forgery, payment, usury, notice, or the like—these were but the reasons for its invalidity, entitling appellee to the relief demanded, and should have been assigned by him in his attack. Otherwise there would be no end to litigation. It is no answer to say that the only effect of the prior judgment was to establish the validity of the lien, and not the amount of the debt which it secured. A lien is but an incident of the debt which it secures, and has no existence aside from the debt. To establish a valid lien, a valid, subsisting debt for an amount must first be established. Appellant's lien could only have been held a valid lien by first holding that it had a valid debt. It would be idle to say that the former judgment established, as against appellee, that appellant had a valid lien upon his property, except in so far as he might show that it was invalid. It was the solemn determination of the court, after trial upon the merits, that the lien was valid. This could be no

other lien than the one pleaded by appellant and attacked by appellee in both cases, and could be no other debt than the one alleged by both to constitute the basis of such lien. Besides, it may be remarked that in the pleadings of both parties the amount of the debt was pleaded; the allegations of the company being especially explicit as to the amount of the indebtedness. It cannot be doubted that the court then had the power, had the pleadings and proof justified, to decree the appellant's lien valid to the amount of the principal sum loaned only.

That the present attack would fall short of the full relief demanded in the original suit, namely, the annulment of the entire lien, argues nothing. The nature of the relief in both instances is identical. It differs only in extent. It would be as though A. sued B. to recover title and possession of land, to which B. answered, setting up title in fee simple through deed from C., but omitting to plead a leasehold from A.'s grantor. The judgment in A.'s favor in such case would bar B.'s right to again open the question of title. No case has been called to our attention, nor have we found one, in which the precise question here discussed has arisen, but we construe the following authorities as tending to support our conclusion: *Hatch v. Garza*, 22 Tex. 187; *Monks v. McGrady*, 71 Tex. 134, 8 S. W. 617; *Cromwell v. Sac Co.*, 94 U. S. 351, 24 L. Ed. 197; *Werlein v. New Orleans*, 177 U. S. 390, 20 Sup. Ct. 682, 44 L. Ed. 820; *Gould v. Railroad Co.*, 91 U. S. 533, 23 L. Ed. 416; *Franklin County v. German Sav. Bank*, 142 U. S. 99, 12 Sup. Ct. 147, 35 L. Ed. 948; *Hilbert v. Boak Fish Co.* (Minn.) 90 N. W. 767, 58 L. R. A. 735; *Hilgerson v. Hicks* (Ill.) 66 N. E. 360; *Mengert v. Brinkerhoff* (Ohio) 66 N. E. 530; *Hargrave v. Mouton* (La.) 33 South. 590; *Howcott v. Pettit* (La.) 31 South. 61; *Bode v. New England Ins. Co.* (Dak.) 42 N. W. 658; *Springer v. Darlington* (Ill.) 64 N. E. 709; *Paul v. Thorndike* (Me.) 53 Atl. 877; *Bingham v. Kearney* (Cal.) 68 Pac. 597; *Dixon v. Caster* (Kan.) 70 Pac. 871; *Howard v. Huron* (S. D.) 59 N. W. 833, 26 L. R. A. 496; *Black on Judgments*, 731; *Board v. Johnson* (Colo. Sup.) 71 Pac. 1106; *Rucker v. Langford* (Cal.) 71 Pac. 1123.

The other assignments are without merit. There was evidence to warrant the court's finding that the principal sum loaned was \$700.

The evidence tendered by appellant which tended to vary and contradict the written mortgage was properly refused. Norris occupies a relation of privity to Taylor. Since he is a privity to the contract, and cannot offer such testimony, neither can the appellant do so.

The mortgage provided for the repayment to the company of "all and every such sum or sums of money as may have been paid by said third party [the company] * * *

on account of or to extinguish or remove any prior or outstanding title, lien, claim or incumbrance on the premises hereby conveyed." Appellant necessarily expended \$422 in the defense of the suit instituted by appellee. But the money thus paid out was not "on account of or to extinguish or remove any prior or outstanding title, lien, claim or incumbrance." The claim or title was expressly determined to be subordinate to the mortgage.

It follows that, in so far as the judgment of the district court permitted appellee to recover on account of usury, the same should be reversed, and, the trial having been before the court, and the facts being undisputed, judgment is here rendered in favor of appellant for a foreclosure of its lien as to principal, interest, and attorney's fees, but in all other respects the judgment is affirmed.

On Motion for Rehearing.

(Jan. 9, 1904.)

It is insisted in the motion for rehearing herein that we were in error in finding that the appellant in the trial court pleaded as a defense the former judgment in the district court of Comanche county as a plea of res adjudicata of the question of usury in this case. This insistence was made upon the original presentation of the case, and was considered by us in consultation. We were of the opinion then, and are still, that the matter was sufficiently pleaded as such defense. The facts were pleaded showing a former judgment upon the merits between the same parties, upon what we have held to be the same claim or demand growing out of the same cause of action; and, in the absence of a demurrer, we think such pleading, though in general terms, is sufficient. It can make no difference that these facts were pleaded in the original pleadings of appellant, rather than in replication to appellee's plea setting up usury. It was not necessary to repeat the allegations.

Upon the merits of the main question, in addition to the authorities cited by us in the original opinion, we also cite *Burnett v. Com.* (Ky.) 52 S. W. 965.

Motion overruled.

BOOTH et al. v. CLARK.

(Court of Civil Appeals of Texas. Jan. 21, 1904.)

HUSBAND AND WIFE — LAND CERTIFICATE — COMMUNITY PROPERTY — TRANSFER BY WIDOW — RIGHTS OF CHILDREN — PRESUMPTION — EVIDENCE — SUFFICIENCY.

1. Evidence in action of trespass to try title examined, and held sufficient to raise a presumption of a transfer or contract between decedent's heirs, whereby one of them became the owner of one-half of a land certificate to which decedent was entitled, but which was not issued until after his death.

2. A land certificate transferred to a husband during coverture becomes community property.

3. Where a widow transfers a land certificate which was community property of herself and husband, the interest therein of their children does not pass, though the transfer was made for the purpose of obtaining necessities for herself and children.

Appeal from District Court, San Jacinto County; L. B. Hightower, Judge.

Action by S. C. Clark against William Booth and others. From a judgment for plaintiff, defendants appeal. Reversed.

P. E. McMahon and McKinney & Hill, for appellants. Robinson & Hansbro, for appellee.

PLEASANTS, J. This is an action of trespass to try title, brought by the appellee against the appellants, Wm. Booth, S. E. Green, and P. E. McMahon, to recover the title and possession of a tract of 320 acres of land in San Jacinto county, patented to the heirs of James Booth. The petition is in the usual form. The defendants answered by a plea of not guilty, and, by cross-action, set up title in themselves, and prayed for a recovery of the land. The trial in the court below was to the court, and resulted in a judgment in favor of the plaintiff for one-half of the land. From this judgment the defendants below prosecute this appeal.

The certificate under which the land was located and patented was issued by the board of land commissioners of Polk county on November 26, 1849, to James Booth, for 320 acres of land. James Booth died in 1852. He left as his heirs at law eight children. In 1862 W. S. Booth, who was a son of James Booth, sold to his brother David C. Booth a one-half interest in this certificate. This transfer is written upon the back of the certificate, and is as follows: "For and in consideration of the sum of fifty-five dollars I do assign all my right to the one-half of the written certificate that I am entitled to for obtaining it out of the land office, etc., to David C. Booth. Signed and delivered on this the 18th day of May, 1862. Wm. Booth. Attest: A. E. Carnegie." At the time this transfer was made, David C. Booth was married to Jane Booth. After the death of David C. Booth, and some time prior to 1865, his surviving wife, the said Jane Booth, sold the certificate to Wm. Lovett. This sale was made by Jane Booth in order to procure necessities for herself and minor children. The certificate of the surveyor attached to the original field notes shows that the land was surveyed for the heirs of James Booth and William Lovett. The patent was issued to the heirs of James Booth on February 20, 1879. It was delivered to Lovett, and he paid the fees therefor. There has never been any actual possession of the land. The appellee has a regular chain of title from Lovett to himself, and he and his vendors

have rendered the land for taxes, and paid all taxes assessed thereon, since 1890. The defendants Wm. Booth and S. E. Green are children of David C. and Jane Booth, and defendant McMahon has a power of attorney from the children of several of the other heirs of James Booth. Wm. Lovett and all of the children of James Booth are dead. It is not shown that any of the children of James Booth, other than the said William and David C., ever asserted any claim to the certificate, or to the land located thereunder. The appellants have never paid any taxes on the land, and have only recently asserted claim to an interest in the land. Upon these facts the trial court found that William Booth acquired a one-half interest in the certificate for his services in obtaining its issuance, and that, Jane Booth, being the wife of David C. Booth at the time he purchased said interest from William Booth, it became the community property of the said David and Jane, and her sale of same to Wm. Lovett after the death of her husband for the purpose of obtaining necessities for herself and minor children passed the title to the whole of said one-half interest to said Lovett.

Appellants' first assignment of error attacks the finding of the court below that William Booth became the owner of one-half of the certificate for his services in obtaining same, on the ground that there is no evidence to sustain such finding. The contention under this assignment is that the recital by Wm. Booth in the transfer of the certificate to David C. Booth that he was entitled to one-half of the certificate for obtaining same is not sufficient in itself to establish that fact. We agree with appellants' counsel that the recitals in this transfer, although the instrument is 40 years old, are not in themselves sufficient to sustain the finding that William Booth was the owner of one-half of the certificate at the time he transferred same to his brother, and we do not understand the trial court to have so held. We think, however, the finding of the trial court, upon all the facts in evidence, that Wm. Booth was entitled to a one-half interest in the certificate for his services in obtaining same should be sustained. The record shows that the certificate was not issued until after the death of James Booth, and, in order to obtain the certificate, it was therefore necessary for some person to procure and present to the board of land commissioners the evidence showing that said Booth was entitled to same. When the certificate was issued, it would naturally be delivered to the person who had procured its issuance. We find Wm. Booth in possession of the certificate, claiming to own a one-half interest therein as compensation for his services in obtaining it. He sells this interest to his brother, who must have known whether or not this claim was true, and presumably would not have purchased it, but for his knowledge that Wm.

† 2. See Husband and Wife, vol. 26, Cent. Dig. § 896.

Booth had performed services which, under an agreement with the heirs of James Booth, entitled him to a one-half interest in the certificate. The possession of the certificate remained in David C. Booth until his death, and then with his widow until she sold it to Lovett, who had possession of it until the land was located. Both Wm. Booth and Lovett are shown to have continuously claimed to own a half interest in the certificate after it came into their possession, and none of the other heirs of James Booth are shown to have asserted any adverse claim. The certificate was located and the patent for the land obtained by Lovett, and he and his vendees have continuously asserted claim thereto, and have paid all taxes thereon. The transfer from Wm. Booth to David C. was, as before stated, written upon the back of the certificate, and thus in the most effective manner gave notice to the other heirs of James Booth of his assertion of ownership to one-half of the certificate. This transfer has been an archive of the Land Office for a number of years. In view of all these facts, and in the absence of any fact inconsistent with the claim of Wm. Booth that he owned one-half of the certificate, we think a transfer or a contract between Wm. Booth and the other heirs of James Booth, whereby he became the owner of one-half of the certificate for his services in procuring same, should be presumed. *Davidson v. Wallingford*, 88 Tex. 624, 32 S. W. 1080; *Huff v. Crawford*, 89 Tex. 220, 34 S. W. 606; *Stafford v. Kreinhop* (Tex. Civ. App.) 63 S. W. 168.

The evidence amply supports the conclusion of the trial court that David C. Booth and Jane Booth were married to each other at the time the certificate was transferred to the husband, and it thereby became the property of said community.

The transfer by Mrs. Booth after the death of her husband for the purpose of obtaining necessities for herself and children was unauthorized, as to the interest of the children in said certificate, and their interest did not pass by such transfer.

From the conclusions above expressed, it follows that the judgment of the court below should be reversed, and judgment here rendered in favor of appellee for an undivided one-fourth of the land in controversy, and it is so ordered. Reversed and rendered.

WETZ et al. v. SCHNEIDER et al.

(Court of Civil Appeals of Texas. Jan. 6, 1904.)

WILLS—UNDUE INFLUENCE—EVIDENCE—APPEAL—REVERSAL—JUDGMENT ON APPEAL.

1. A will cannot be set aside on the ground of undue influence inducing testatrix to disinherit one of her children, unless such fraudulent conduct was exercised by the other beneficiaries.

2. Where contestant claimed that her mother's will was void on the ground of undue influence, caused by inducing testatrix to believe that contestant had sent to her an insulting

comic valentine, but the evidence failed to establish that testatrix's resentment against contestant which culminated in the will was kept alive by the suggestions of proponents in regard to the valentine, but was by reason of contestant's indifference and neglect of testatrix during her declining years, it was insufficient to justify a finding of undue influence.

On Rehearing.

3. Where the evidence in a will contest was conflicting, and a strong preponderance thereof was against the judgment setting the will aside, the court of appeals will reverse and remand the cause, but will not render a judgment probating the will.

Appeal from District Court, Guadalupe County; M. Kennon, Judge.

Will contest by Louisa Schneider and others against Jacob Wetz and others. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

F. J. Maier, H. G. Henne, and Wurzbach & Woods, for appellants. Dibrell & Mosheim and Adolph Seideman, for appellees.

FLY, J. On March 23, 1902, Henrietta Stolte departed this life, and appellants sought to probate her last will and testament in the county court of Guadalupe county. Louisa Schneider, a daughter of the testatrix, joined by her husband, W. J. Schneider, filed a protest against the probate of the will. The contest was sustained in the county court, and on appeal to the district court judgment was obtained declaring the will null and void, and that it should not be probated. There were several grounds for contest alleged by appellees, but all were practically abandoned except one, as to undue influence being exercised and fraud perpetrated on the testatrix through a certain comic valentine. The allegations necessary to be considered are as follows: "Contestant Louisa Schneider and her husband, Wm. J. Schneider, are resident citizens of Guadalupe county, Texas, and the proponents are also resident citizens of Guadalupe county, Texas, except Caroline Wetz and her husband, Henry Wetz, who reside in Comal county, Texas. The testatrix, Henrietta Stolte, deceased, was her mother, and contestant is one of the children and heirs of said Henrietta Stolte, deceased, and is entitled to an undivided one-sixth interest in her estate, or to an equal share in said estate with the proponents Wilhelmine Wetz, Caroline Wetz, Selma Ruederich, Augusta Nuhn, and Rudolph Stolte; the said Henry Stolte having conveyed all of his interest in his mother's estate prior to her death and in anticipation thereof. The testatrix, Henrietta Stolte, departed this life on the 22d day of March, 1902, leaving an estate of the probable value of \$50,000, and that the alleged will of said testatrix, which is said to have been made and published on the 9th day of August, 1901, practically disinherits this contestant, leaving her property of only nominal value, situated in the town of New

Braunfels. That the equitable interest of this contestant in the estate of her mother, Henrietta Stolte, testatrix, is of the reasonable value of \$8,333.33%. This contestant has never received out of said estate any advancement or sum of money from any of the heirs of said testatrix or from her deceased mother, and she here now protests against the admission to probate the instrument offered by proponents, which purports to have been executed and published on August 9, 1901, and her protest is based on the following objections, to wit: Because at the time of the alleged execution and publishing of said will by said Henrietta Stolte on the 9th day of August, 1901, and for several years prior thereto, the said testatrix, contestant's said mother, was laboring under a misapprehension of certain facts which rendered her incapable of viewing this contestant from an impartial standpoint. That during the year 1896 the said testatrix, plaintiff's mother, received through the mail at Marion, in Guadalupe county, Texas, a certain comic valentine, which was intended as a burlesque upon said Henrietta Stolte, the testatrix, and was calculated to incite in her a high degree of mortification and shame on account of her age and declining health. Said valentine was the picture of an old woman with a washboard, and dressed in an ugly, comical manner. That at the time said testatrix received said comic valentine, which was designed and which in fact did produce in her mind a certain degree of shame and mortification, and which said valentine held up to ridicule the said Henrietta Stolte, through the fraud and design on the part of proponents, and was made to believe that said valentine had been sent her, the said Henrietta Stolte, by this contestant, Louisa Schneider, her daughter. That as a matter of fact this contestant, nor any one for her, nor any one with her knowledge or consent, was instrumental in sending said valentine to said Henrietta Stolte, and this contestant was perfectly innocent of the offense charged against her through the willful design on the part of the proponents, or some of them, in this case. That Rudolph Stolte and the wife of Rudolph Stolte and Mrs. Selma Ruederich and Caroline Wetz and Wilhelmine Wetz and Mrs. Augusta Nuhn were instrumental in making the said Henrietta Stolte believe that contestant Louisa Schneider had sent said valentine or was instrumental in sending it. That as soon as contestant learned that she had been accused of sending said valentine she went to her mother, for whom she had great fondness and affection, and explained to her that she had not sent or been instrumental in sending said valentine, and that she had no knowledge of the same. That said proponents, and each of them, by hints, insinuations, innuendoes, and by direct charge that said contestant had sent said valentine to Henrietta Stolte for the purpose of subject-

ing her to ridicule, shame, and mortification, and ever after said year 1896 up to the time of the making of said will on the 9th day of August, 1901, made said Henrietta Stolte believe that this contestant had sent said comic valentine to her. That on the day on which said will was made Mrs. Augusta Nuhn, by a direct statement to said Henrietta Stolte, made her believe this contestant had sent said valentine to said Henrietta Stolte, and on said 9th day of August, 1901, on the morning before said Henrietta Stolte left the town of Seguin to go to her home near Marion, and on several occasions prior thereto, the said Augusta Nuhn or Mrs. F. Nuhn stated to Mrs. Henrietta Stolte that contestant should not be given any of testatrix's property, and testatrix should make a will, and leave out said Louisa Schneider, this contestant, for the reason that said Louisa Schneider had already caused so much trouble in the family, meaning thereby and conveying to the mind of Henrietta Stolte that this contestant had sent to said testatrix said comic valentine as aforesaid."

In the will executed by Mrs. Stolte she gave to her children Mrs. Wilhelmine Wetz, Mrs. Caroline Wetz, Mrs. Augusta Nuhn, Mrs. Selma Ruederich, and Rudolph Stolte 1,046 acres of land, it being provided that it should be divided among them so as to give Mrs. Wetz and Rudolph Stolte each 25 acres more than the other three. Provision was made for the division of the property with reference to improvements, etc. To the same children and Henry Stolte two lots in Marion were given in equal shares. To Mrs. Schneider, the contestant herein, were given two lots in the town of New Braunfels, with the improvements thereon. To Ermine Wetz, a grandchild, was bequeathed \$100 and two cows and calves. All the remaining property, consisting of cattle, farming implements, and money and other personal property, was bequeathed, share and share alike, to Mrs. Wilhelmine Wetz, Mrs. Caroline Wetz, Mrs. Nuhn, Mrs. Ruederich, Rudolph Stolte, and Henry Stolte. Jacob Wetz, a son-in-law, was appointed independent executor of the will.

The court properly instructed the jury that all the formal requirements of the law had been complied with in the execution of the will, and the matter went before the jury on the question of undue influence and fraud upon the part of the proponents of the will. By the charge the issues were still further narrowed by confining the inquiry to statements made in regard to a comic valentine received by the testatrix. Appellees do not complain of the issues of undue influence and fraud being confined by the court to the matter of the comic valentine, and to the discussion of that matter alone this opinion is directed. There was considerable evidence as to the impaired condition of the mind and body of the testatrix previous to and at the time of the execution of the will, but the evidence failed to show a lack of testamen-

tary capacity. It is a rule governing in ascertaining whether undue influence was exerted over the mind of a testator that the influence was such that it induced the testator to act contrary to his own wishes, and to make a different will from what he would have made if he had been left free to exercise his own wishes and desires according to his own judgment and discretion. As said in *Underhill on Wills*, § 125: "His mind must have been hindered and restrained in its actions. And it is not material whether his volition was overcome by threats or fear, or by falsehoods, importunities, or annoyances. If the influence was sufficient to constrain him to do what was against his will, so that his testament speaks the mind of another, and not his own, it is undue, and the will is void. His free agency must have been destroyed by the influence brought to bear upon him, and it is not material how this was done, so long as he was unable to resist through weakness or fear or the desire for peace and quiet." No matter how great the fraud may have been, nor how vigorous and active the influence produced upon and exerted over the testator, they would not avail to set aside the will unless they were sufficient to overcome the volition and desire of the testator. *Patterson v. Lamb* (Tex. Civ. App.) 52 S. W. 98; *Barry v. Graclette* (Tex. Civ. App.) 71 S. W. 309. As said in the last-named case: "His free agency must have been destroyed by the influence brought to bear upon him. And it is not material how this was done, so long as he was unable to resist, either through weakness or fear or desire for peace and quiet. It must also be kept in mind that the undue influence must have acted directly on the mind of the testator at the time of execution of the will." Not every influence brought to bear upon the mind of a testator by a beneficiary will be classed as undue influence. Persuasion, entreaty, cajolery, importunity, argument, intercession, and solicitation are permissible, and cannot be held to be undue influence, unless they subverted and overthrew the will of the testator, and caused him to do a thing that he did not desire to do. No more could a will made from mere persuasion, entreaty, or argument, which has been weighed and considered by the testator, and his own mind made up and voluntarily formed, be classed as undue influence, than could the arguments of counsel to a court, which are weighed and considered in arriving at a just conclusion as to the law of the case, be denominated undue influence.

The will in this case cannot be impeached on the ground of testamentary incapacity, for the facts established that Mrs. Stolte knew what she was doing and was carrying into effect an intention that had been formed for years. She had formed a prejudice against her daughter in 1896, when she received a comic valentine which she believed was sent her by her daughter, Louisa Schneid-

er. Her mind was never disabused of that belief, but on the other hand was confirmed, not by the representations of the proponents of the will, but rather by the unfilial conduct of Mrs. Schneider, and she wrote her condemnation of the course of her daughter into her last will and testament. Mrs. Stolte was shown to have been a woman of strong energy and intelligence, high temper, and violent prejudices. She was left a widow with seven children and property valued at some three thousand dollars, but by her energy, economy and business qualities, she amassed a large property and died possessed of a fortune valued at, perhaps, \$15,000. It was hers, the product of years of toil, and perhaps privation. She had the absolute right of disposal of the property. Her children had no legal right to any portion of it, and she could have bequeathed it to any one that she desired. There may have been some moral obligation resting upon her to give her fortune to her children, but such obligation could be set aside by her, or it may have been destroyed by the undutiful and unfilial conduct of the children. Whatever social or moral obligations she may have owed to her children could be destroyed by her legal right to dispose of her property as she deemed advisable and proper, and, unless she was induced by undue and improper influences or fraud to substitute the will of another for her own in executing her will, it must stand in the courts of the country. When it was established that the testatrix was in possession of a sound and disposing mind and memory, and that the formalities of the law had been complied with, the will should have been admitted to probate, unless undue influence and fraud were shown to have existed, and to have dictated the disposition of the property. The undue influence herein mentioned is often confused with fraud, as though there was no distinction between them. It has been said that mere misrepresentation rarely ever arises in a will case, but misrepresentation or fraud is nearly always accompanied with undue influence. "Undue influence upon a testator consists in substituting virtually the will of the person exercising it for that of the testator. Fraud upon the testator consists in making that which is false appear to him to be true, and so affecting his will. Undue influence need not be attended at all with deception or circumvention. Fraud need not be attended with undue influence, except in so far as the misrepresentation amounts to influence. There need be no pressure, such as is necessary to constitute influence." 1 Big. Fraud, p. 571.

The mere fact that Mrs. Stolte may have had an unjust and unreasonable prejudice against Mrs. Schneider, or may have had a wrong impression as to her connection with the insulting valentine sent to her, is no indication in itself that she was prevented from providing for Mrs. Schneider in the will by

fraud or undue influence. If, however, her prejudice against her daughter was engendered and fostered by beneficiaries under the will, a different case would be presented. In other words, if the beneficiaries under the will had stated to Mrs. Stolte that Mrs. Schneider had sent the valentine, knowing that she had not done so, and thereby created such a prejudice against Mrs. Schneider as to cause her to be disinherited, the will would be invalid. The false statements must have been made to the testatrix by the beneficiaries under the will, or through their procurement or agency. They cannot be held responsible for the unauthorized statement of any one, no matter how closely connected by ties of blood or marriage. The facts found in the record show that Mrs. Schneider testified that her mother told her on the day that the valentine was received that Mrs. Rudolph Stolte had told her that Mrs. Schneider had sent the valentine. Mrs. Rudolph Stolte, presumably, was the wife of Rudolph Stolte. Henry Stolte said his mother said Mrs. Rudolph Stolte told her the same thing, and also said that Rudolph and Mrs. Nuhn believed Mrs. Schneider sent the valentine. Mrs. Rudolph Stolte evidently believed her statement to be true, because she charged Mrs. Schneider with sending the valentine after the death of testatrix. Carl Reichart swore that the testatrix told him that she had showed the valentine to "other people," and they had said Schneider had sent it. Schneider was Mrs. Louisa Schneider's husband. She told that witness that Franz Nuhn had told her that Schneider sent it. Who Franz Nuhn was does not appear. Ed Stewart said the testatrix told him the Schneiders had sent the valentine, but did not give her means of knowledge. Mrs. Wolfe testified that testatrix wanted to see Mrs. Schneider, and Mrs. Nuhn said she did not want her, and that testatrix ought not to give Mrs. Schneider any of the property, because she had caused so much trouble to her. This is the whole of the evidence offered by the contestants as to the valentine. Not one of the beneficiaries in the will was shown to have any connection with the statements made to the testatrix in regard to the valentine, except through the evidence of Henry Stolte to the effect that his mother had said that Rudolph and Mrs. Nuhn believed Mrs. Schneider had sent it. If they believed she had sent it, it was not a fraud or the exercise of undue influence to say so. This belief seems to have been expressed long before the will was executed. Mrs. Schneider charged Mrs. Rudolph Stolte with stating that she had sent the valentine. If she did so state, it was not shown that she made the statement with the knowledge or consent of her husband or any other beneficiary. The jury were permitted to consider but one subject bearing on fraud and undue influence, and appellees contend in their brief that the charge in that respect was right, and that was the

statements in regard to the comic valentine; and to justify a finding that the proponents of the will had used undue influence, it was incumbent upon the contestants to show that the statements were false, that proponents knew they were false, and were made to the testatrix with the intent to induce her to disinherit Mrs. Schneider. The testimony, however, does not go to that extent, but, on the other hand, shows that a belief was expressed that Mrs. Schneider had sent the valentine. There is nothing to indicate whether the statements of any of the proponents or Mrs. Rudolph Stolte were made before or after the testatrix had expressed her opinion that Mrs. Schneider had sent the fatal valentine.

Let it be conceded that up to the time that the valentine was received the most amicable feelings existed between the testatrix and Mrs. Schneider, it does not follow that her opinion was not formed from her independent thought and reasoning, but from what was said by her other children. Nor is it a logical deduction that, because the testatrix was greatly incensed by the supposed improper conduct of her daughter, and that such anger was inspired or intensified by remarks made at the time of the reception of the valentine, such statements caused that daughter to be given less of the property than the other children. That may have been the beginning of her resentment against her daughter, but it cannot be said that it caused the execution of the will in the form it assumed. On the other hand, it was proved that at first Mrs. Nuhn was associated by testatrix with Mrs. Schneider in the sending of the obnoxious paper, and on the occasion of the conversation held by Mrs. Nuhn and Mrs. Schneider with their mother, the most of the anger and violence of the testatrix was directed towards Mrs. Nuhn. The latter, however, when her mother became sick about a year after the reception of the valentine went to her, and by her love and devotion obtained a reconciliation with her, which lasted to the death of the testatrix. After that conversation on the day the valentine was received, when her denial of having sent it was not accepted as true, Mrs. Schneider never entered her mother's house, nor ever spoke to her, although she met her several times. When she was sick the daughter never visited her, and she seeks to justify her unnatural conduct by saying that her mother never spoke to her. The aged woman labored under the belief that it was the duty of the younger woman to come to her for reconciliation, and that she would have become reconciled with her daughter is shown by what she said, and by her reconciliation with the other daughter. The dictates of filial love and respect, it would seem, should have prompted the daughter to have laid aside all feelings of anger, resentment, or pride, and to have sought reconciliation with her aged mother, who, according to the proof of ap-

pellets, was sick and decrepit for years before her death. But the daughter did not respond to any such peaceful and praiseworthy sentiments, if they entered her mind and heart; never sought her mother until she was importuned to do so by proponents, when she was unconscious on her deathbed, and the hour for reconciliation and forgiveness was forever gone.

The evidence fails to establish that the resentment of the testatrix, which culminated in her will, was kept alive by the suggestions of proponents in regard to the valentine, but rather that the obduracy, pride, continued hardness, indifference, neglect, and disregard of the daughter to her mother through a series of years added fuel to the fire of resentment kindled by the reception of the valentine. The example of Mrs. Nuhn shows that it could have been smothered and extinguished by kindness and attention, but the opportunity was neglected. The natural harvest of such a course of conduct was resentment by the mother and disinheritance of the daughter. Before her desires can be frustrated, and her written wishes rendered nugatory, it must clearly appear that the will was not the outcome of her volition, but was the product of the fraud or undue influence of appellants. The evidence fails to meet that demand.

It will be unnecessary to discuss the various assignments of error. The cause having been tried by jury, judgment will not be rendered in this court, but the judgment will be reversed, and the cause remanded.

On Rehearing.

(Feb. 3, 1903.)

The appellants refer this court to the case of *Henne v. Moultrie*, 77 S. W. 607, 8 Tex. Ct. Rep. 758, as sustaining their contention that judgment should be rendered in this court probating the will of Henrietta Stolte. That decision enunciates no new doctrine as to the state of the evidence justifying rendition of judgment by appellate courts, but is simply a reiteration of other decisions. When there is no evidence to sustain a judgment, the Court of Civil Appeals may render judgment for the appellant, or may reverse and remand, as it may deem best. It is a matter of discretion which course the court will pursue. If the evidence is conflicting, but a strong preponderance of it is against the judgment, the only proper disposition of the case is to reverse the judgment and remand the cause. *Patrick v. Smith*, 90 Tex. 267, 38 S. W. 17; *Stevens v. Masterson*, 90 Tex. 417, 39 S. W. 292, 921. We do not think the facts in this case bring it within the rule first above stated, and this court therefore has no authority to render judgment. It would seem from the opinion in the *Henne v. Moultrie* Case that the same rule prevails in cases tried by jury as in those tried by the court, and the concluding portion of the orig-

inal opinion of this court, which bases the refusal to render on the fact that the cause was tried by jury, will be eliminated therefrom.

The motion is overruled.

METROPOLITAN LIFE INS. CO. v. GIBBS.*

(Court of Civil Appeals of Texas. Dec. 23, 1903.)

INSURANCE—POLICIES—CONDITIONS—WAIVER—REPRESENTATIONS—APPLICATIONS—EVIDENCE—TRIAL—CONDUCT OF ATTORNEY—APPEAL—RECORD—REVIEW—PREJUDICE.

1. A remark of plaintiff's counsel, in the presence and hearing of the jury, that defendant's counsel "must not like the jury," will be presumed to have been without prejudice, where there was nothing in the record to indicate that the jury was influenced thereby.

2. *Sayles' Ann. Civ. St.* 1897, arts. 1931, 1933, authorized the appointment of a temporary administrator for the prosecution of a suit, and declared that the appointment shall cease at the succeeding term of the county court, unless continued in force by an order entered on the minutes in open court. *Held*, that where a temporary administrator was appointed to sue on a policy of insurance in December, 1902, and at the March term of the county court his appointment was continued, proof of his appointment and the continuation thereof was properly admitted in evidence in the action on the policy to establish plaintiff's capacity to sue.

3. Only the grounds set forth in the bill of exceptions for the exclusion of evidence will be noticed in the appellate court, though other grounds are embodied in the assignments of error.

4. Where, in an action on a policy, a witness stated that he paid the premium to insurer's agent, the admission of evidence that he received the money from deceased, and that deceased told him to pay the money to defendant's agents, was without prejudice.

5. In an action on an insurance policy, an objection to a card notifying deceased of the maturity of a premium as immaterial and irrelevant was properly overruled.

6. In an action on a policy, evidence that the insurer's superintendent stated that insurer would not pay the policy, and would not furnish blanks for proof of death, because the premiums had not been paid, was admissible to show a waiver of proofs of death.

7. The fact that witness, at the time he requested blanks on which to make proofs of death in order to perfect a claim on a life insurance policy, had not been appointed insured's administrator, and was not authorized to receive payment, did not prevent the refusal of insurer's agent to furnish blanks for proof of death on the ground that there was no liability on the policy from operating as a waiver of proofs of death.

8. An assignment of error to the exclusion of evidence cannot be reviewed where the grounds of the objection to the evidence are not stated in the bill of exceptions.

9. In an action on a life insurance policy by insured's special administrator, the widow of insured was not a necessary party.

10. Where a life insurance policy provided that the representations and answers made in the application, which was made a part of the policy, were warranties, and the policy provided that the contract between the parties was completely set forth in the policy and the application therefor, taken together, and the policy

*Rehearing denied February 3, 1904.

contained what purported to be a copy of the application, alleged answers to questions not shown in the application copied in the policy were immaterial.

11. A clause in a policy of life insurance exempting the insurer from liability until actual payment of premium may be waived.

Appeal from District Court, Bexar County; S. J. Brooks, Judge.

Action by A. F. Gibbs against the Metropolitan Life Insurance Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Keller & Keller and Mason Williams, for appellant. Webb & Goeth, for appellee.

FLY, J. This is a suit on a policy of insurance on the life of Ernest E. Gibbs, deceased, prosecuted by the temporary administrator against appellant. The trial resulted in a verdict and judgment for \$500, with interest at 6 per cent. per annum from May 1, 1901. Appellant, on February 13, 1901, insured Ernest E. Gibbs in the sum of \$500, and payment of the premium in advance was waived. The premium was paid in April, 1901, a short time before the death of the insured.

The first assignment of error complains of a remark made by appellees' counsel, during a preliminary discussion, in the hearing and presence of the jury, that counsel for appellant "must not like the jury." While the remark was inappropriate and ill-timed, it is of such a trivial character that it cannot be supposed that it influenced the verdict of a jury, which it must be presumed was composed of men of average honesty and intelligence. Nothing in the record indicates that the jury was influenced by it.

In December, 1902, A. F. Gibbs was appointed temporary administrator of the estate of Ernest E. Gibbs, deceased, and he was authorized to make himself a party to this suit, which was then pending in the district court of the Fifty-Seventh Judicial District. At the March term of the county court the temporary letters were continued with the same powers granted to the administrator. The proof of appointment of the temporary administrator and of his continuation in that capacity were properly admitted in evidence. The temporary administrator was appointed for the purpose of prosecuting this suit, his powers being defined as required by statute. *Sayles' Ann. Civ. St.* 1897, art. 1931. The appointment would have ceased at the succeeding term of the county court had it not been continued in force by an order entered upon the minutes in open court. That it might be so continued is contemplated by the language of the statute. Article 1933. The county court had the authority to appoint a temporary administrator to prosecute the suit, and to continue such temporary administration so long as was necessary to accomplish the ends of the original appoint-

ment. *Railway v. Hook*, 60 Tex. 403; *Callahan v. Houston*, 78 Tex. 494, 14 S. W. 1027. In speaking on this subject in *Williams v. Bank*, 91 Tex. 651, 45 S. W. 690, the Supreme Court said: "The probate court which appointed Williams temporary administrator had the authority at the next succeeding term to continue the appointment," etc.

Appellee was permitted to testify that his deceased brother, on March 23, 1901, had given him \$4.56 with which to pay the premium due on his policy, and had told the witness to pay it to Wendlandt or Mowry, who were agents of appellant. The testimony as to deceased giving the money to appellee to pay to the agent was objected to as irrelevant and immaterial, and as not being a delivery to the company. The witness was then asked, "What did your brother tell you about the money?" to which appellant objected on the ground that it was a self-serving declaration. In this court appellant seeks to have the admission of the testimony and asking of the question declared erroneous, not only on the grounds set out in the bill of exceptions, but on the additional ground that the witness should not have been permitted to testify to statements made to him by deceased. Only the grounds set forth in the bill of exceptions for the exclusion of evidence will be noticed in an appellate court, although other grounds be embodied in assignments of error. *Kimmarle v. Railway*, 76 Tex. 686, 12 S. W. 698.

In view of the fact that the witness stated that he paid the money to Wendlandt, the agent of appellant, for the premium, it was immaterial how he got it, or what deceased said to him, and the evidence complained of could not have injured it in any manner whatever.

It was not error to admit in evidence a card written by appellant, in which deceased, E. E. Gibbs, was notified that a premium was due in May, 1901. It is not claimed by appellant that its introduction caused any injury to its cause, the sole ground of objection to it being that it was irrelevant and immaterial.

Appellee, over the objection of appellant, testified that after the death of E. E. Gibbs he took the policy of insurance to Cleveland, appellant's superintendent at San Antonio, and asked him what the company intended to do about it, and he replied that it would not pay the policy, because all the premiums were not paid. He also asked Cleveland for blanks on which to make out a certificate of death. Cleveland replied that the company would not pay the policy, and that there was no use giving appellee any blanks. The evidence was objected to on the grounds that there were no pleadings to support the testimony; that Cleveland was not the proper party from whom payment or blanks should have been demanded; that appellee at that time was not temporary administrator, and had no authority to ask for money or blanks, and any

¶ 11. See *Insurance*, vol. 23, Cent. Dig. §§ 231, 254.

statement made to him would not bind the company. The objections are fallacious and untenable. There was no attempt, through the evidence in question, as contended by appellant, to vary the contract, or to show a waiver of a forfeiture or the reception of premiums in arrears, and the clause of the policy which attempted to retain the power to do any of the things mentioned exclusively in the hands of the president, vice president, or secretary was in no manner infringed by the introduction of the evidence. The evidence was introduced to show a waiver of proofs of death, and was admissible for that purpose. *Cohen v. Ins. Co.*, 87 Tex. 325, 3 S. W. 296, 60 Am. Rep. 24; *Insurance Co. v. Lee*, 73 Tex. 641, 11 S. W. 1024; *Insurance Co. v. Rivers*, 9 Tex. Civ. App. 177, 28 S. W. 453. While appellee may not have had the authority to receive the money due on the policy at the time he had the conversation with Cleveland, that did not preclude him from testifying that the agent of the company stated that the policy would not be paid, and blanks on which to make proofs of death would not be furnished. Appellee could swear to those facts, and they were just as binding on the company as though made to a temporary or any other kind of administrator. What has been said will apply as well to the declarations of Wendlandt, the assistant superintendent. Payment was not denied because appellee was not authorized to receive it, but was denied on the ground that the policy was void by reason of failure to pay the first premium.

The eleventh assignment of error is designed to present error in the court excluding the written application of E. E. Gibbs for insurance. It cannot be considered, because the grounds of objection to the introduction of the testimony are not stated in the bill of exceptions on which the assignment of error is based. *Johnson v. Crawl*, 55 Tex. 571; *Kolp v. Specht*, 11 Tex. Civ. App. 685, 33 S. W. 714; *Schoch v. San Antonio* (Tex. Civ. App.) 57 S. W. 893.

The fifteenth assignment of error, complaining of the court's action in overruling the numerous special exceptions, are without merit. The wife of the deceased was not a necessary party with the temporary administrator as a plaintiff. The petition sufficiently alleged the terms and conditions of the policy necessary to a proper prosecution of the suit.

It is provided in the policy that the representations and answers made in the application, which is made a part of the policy, are warranties, and that untrue answers will render the policy void. In that application deceased was not asked whether he was married or single, and it does not matter what may have been answered aside from the facts disclosed in the policy, for it is provided therein: "The contract between the parties hereto is completely set forth in this policy

and the application therefor, taken together." Immediately following that provision is what is denominated "Copy of Application for This Policy." If deceased made another application, the provisions of the policy have no reference to that, but to the one copied in the policy.

It is well settled that a clause in a policy exempting the insurer from liability until actual payment of the premium may be waived by the insurer or its authorized agent, and the contract of insurance will become binding. *Train v. Ins. Co.*, 62 N. Y. 598; *Bodine v. Ins. Co.*, 51 N. Y. 117, 10 Am. Rep. 536; *Assurance Soc. v. Oliver*, 22 Tex. Civ. App. 8, 53 S. W. 594. The facts and circumstances showed a waiver upon the part of appellant as to payment of the premium in advance. It was afterwards paid and accepted.

The charge presented the law applicable to the issues raised by the pleadings and evidence.

None of the assignments of error is well taken, and the judgment is affirmed.

SMALLWOOD v. LOVE.*

(Court of Civil Appeals of Texas. Jan. 9, 1904.)

JUDGMENTS—AMENDMENT—COSTS.

1. A court has no power to amend its judgment after the adjournment of the term at which it was rendered, except in the manner provided by statute.

2. On rendition of judgment the adjudging of costs against a party was a judicial act and a part of the judgment, and the judgment could not be amended as to costs after the adjournment of the term at which it was rendered, except in the manner provided by statute.

Appeal from Collin County Court; *F. E. Willcox*, Judge.

Action by Ike Smallwood against W. H. Love. After a judgment was rendered in favor of Smallwood, the court sustained a motion by Love to tax costs of the county court against Smallwood, and he appeals. The judgment as amended reversed, and the original judgment affirmed.

H. L. Davis and J. N. Grisham, for appellant. Garnett & Smith and A. S. Dickinson, for appellee.

RAINEY, C. J. This suit originated in the justice court, and after judgment an appeal was taken to the county court, where, at the December term, judgment was rendered in favor of Smallwood for actual damages in an amount in excess of the amount awarded Love, and the costs of both courts were adjudged against Love. At the succeeding February term of court Love filed a motion to amend the judgment so as to adjudge the costs of the county court against Smallwood.

*Rehearing denied January 30, 1904.

¶ 1. See Judgment, vol. 30, Cent. Dig. § 533.

which motion to amend the judgment was sustained by the court, and judgment entered accordingly. This action of the court was error.

It is well settled that a court in this state has no power to amend its judgments after the adjournment of the term at which it was rendered, except in the manner provided by the statute. The amendment in this instance is not within the provision of the statute. The principle here announced is not controverted, but it is contended that the motion herein was only to retax costs. This we do not think correct. The adjudging of the costs against Love was a judicial act, and it became as much a part of the judgment as any other part thereof. *Hedgecoxe v. Conner* (Tex. Civ. App.) 43 S. W. 322.

The court being without jurisdiction to amend the judgment at a subsequent term, the action of the court on the motion to amend is a nullity, and said action is here reversed and said motion dismissed.

As it appears from the record that the assignments of error predicated upon the action of the court in the trial of the case are without merit, the original judgment rendered at the December term, 1902, of the county court is affirmed.

PETERSON v. W. J. MARTINEZ & BROS.

(Court of Civil Appeals of Texas. Jan. 9, 1904.)

CHATTEL MORTGAGE—EXECUTION—PROOF—EVIDENCE—ADMISSIBILITY.

1. In an action to foreclose a chattel mortgage it appeared that the property was in the possession of T., with notice of the mortgage, who was made a party defendant for the purpose of foreclosure, though he was not a party to the mortgage. *Held*, that the admission of the mortgage in evidence over T.'s objection, without proof of its execution, as at common law, was error.

Appeal from Nacogdoches County Court; Robt. Berger, Judge.

Action by W. J. Martinez & Bros. against M. T. Peterson and another. From a judgment for plaintiff, defendant M. T. Peterson appeals. On rehearing. Reversed.

Mims & King, for appellant. Brewer & Hodges, for appellees.

GILL, J. At a former day of this term the judgment of the trial court in this cause was affirmed by us without written opinion. The one question which might have wrought a different result we thought was not presented in such form as to require our notice, and, being technical in its character, we were not inclined to relax the rules in order to consider it. A closer inspection of the bill of exceptions has convinced us that the point is fairly before us for decision, and this conclusion makes it necessary to state the case and the question.

The plaintiff, W. J. Martinez & Bros., sued one M. Peterson on a promissory note for

\$334.20, and alleged that the payment thereof was secured by M. Peterson's mortgage on certain railroad ties. A foreclosure of this mortgage was sought, and it was further alleged that M. T. Peterson was in possession of the ties with notice of the mortgage. For the purposes of the foreclosure he was made a party defendant. The defendants, after demurrer and exception, each answered by general denial, but neither interposed a plea of non est factum. The note and mortgage were introduced, and the ties were shown to be in possession of M. T. Peterson with notice of the mortgage. To the introduction of this mortgage as against him, and its consideration for the purpose of affecting his rights, M. T. Peterson objected on the ground that the execution of the mortgage was not shown. Though the purported witnesses to the execution of the mortgage were present in court, the objection was overruled, and the witnesses not called. Plaintiffs obtained judgment against both defendants, as prayed for, and M. T. Peterson has appealed.

The admission and consideration of this mortgage against appellant over his objection is the question referred to above, and the error which requires the granting of this motion and the reversal of the judgment. A chattel mortgage, though duly registered, is not admissible against one not a party thereto until its execution is proven as at common law. In *Betterton v. Echols*, 85 Tex. 212, 20 S. W. 63, and *Ames Iron Works v. Chinn* (Tex. Civ. App.) 38 S. W. 247, the exact point is decided.

For these reasons our former judgment is set aside, and the judgment of the trial court, in so far as it involves the rights of M. T. Peterson, is reversed, and the cause remanded for another trial.

SANGER BROS. v. COLLUM et al.*

(Court of Civil Appeals of Texas. Jan. 2, 1904.)

EXECUTION PURCHASER OF REALTY—THIRD PERSON'S POSSESSION—NOTICE OF TITLE—REFERENCE TO RECORD TITLE—RECORD TITLE OF HEIR.

1. Five heirs having inherited realty in common, two of them conveyed their interests, by unrecorded deed, to the third, and the fourth sold to the fifth. The third and fifth took possession of their respective portions, and made an oral partition, setting up stone corners and building a partition fence. A judgment creditor of the first heir levied on his supposed undivided interest, and became the purchaser at the execution sale, having no notice of the third heir's rights, except such as was derived from her possession. *Held*, that such possession would be referred to her record title as co-tenant with all of the heirs, and not to her title under the unrecorded deed and oral partition; and hence the execution purchaser acquired a good title to the interest bought.

2. The fact that the record did not disclose the co-tenancy of the heirs, but terminated with the ancestor's title, did not affect the case, as the heirs would be deemed to hold the ancestor's record title.

*Rehearing denied January 30, 1904.

3. Judgment creditors having a lien on realty, who purchase at the execution sale thereof on the faith of the legal and apparent equitable title of their debtor, stand on an equal footing with bona fide purchasers, and will not be postponed to a prior purchaser from the debtor under an unrecorded deed.

Appeal from District Court, Wise County; J. W. Patterson, Judge.

Action by Sanger Bros. against P. P. R. Collum and others. Judgment for defendants, and plaintiffs appeal. Reversed.

W. H. Bullock and J. M. Basham, for appellants. R. E. Carswell, for appellees.

SPEER, J. In 1893 Mrs. N. Cates, who owned the land in controversy, departed this life intestate, leaving, as her sole surviving heirs, C. D. Cates, R. G. Cates, D. C. Cates, Mont Cates, and Mrs. P. P. R. Collum, the appellee. Two years later C. D. and D. C. Cates sold their interest in the land to appellee, and executed to her a deed with covenants of general warranty. The heirs named were children of the intestate, and of course each inherited an undivided one-fifth interest in the land. Soon after the death of Mrs. N. Cates, R. G. Cates purchased the one-fifth interest of Mont Cates, and afterwards he and appellee made a verbal partition of the land by which two-fifths of same was set apart to R. G. Cates, and the remaining three-fifths to appellee, Mrs. Collum. They set up stone corners, and a little later built a fence between them. Appellee has at all times since been in possession of her said three-fifths of the land by tenants, though she has never herself lived thereon. R. G. Cates and his vendees have also been in possession of the remaining two-fifths of the land. The deed from C. D. and D. C. Cates was not placed of record until December 10, 1902. In 1900 appellants recovered a judgment against C. D. Cates and others in the district court of Wise county for \$800 or \$900, and in the same year an abstract of same was duly filed and recorded in Wise county, where the land in controversy lay. Executions have been duly issued upon said judgment so as to keep the same alive and preserve the judgment lien. On December 6, 1902, an execution was issued on said judgment and same was levied on the interest of said C. D. Cates in said land, and thereafter the same was sold under said execution levy, and was purchased by appellants. Appellants instituted this suit in trespass to try title and for partition, seeking to recover the undivided one-fifth interest in the land formerly belonging to C. D. Cates. The district judge before whom the case was tried held that the possession of appellee was notice to the world of her claim to the land, and that therefore her unrecorded title would prevail over the title of appellants.

We are unable to assent to this judgment. It is undeniably true that, as a general rule,

possession of land is notice, to those who subsequently deal with the title, of whatever interest the one in possession has in the fee, whether such interest be legal or equitable in its nature. *Ramirez v. Smith* (Tex. Sup.) 59 S. W. 258; *Watkins v. Edwards*, 23 Tex. 443; *Glendenning v. Bell*, 70 Tex. 633, 8 S. W. 324; *Mainwarring v. Templeman*, 51 Tex. 205; *Bounds v. Little*, 75 Tex. 316, 12 S. W. 1109; *McCamant v. Roberts*, 80 Tex. 316, 15 S. W. 580, 1054; *Harold v. Sumner*, 78 Tex. 581, 14 S. W. 995. But it is equally true that there are cases where possession will not be notice to subsequent purchasers of the full title claimed by the one in possession. Where the records show a title under which he would be entitled to possession, the possession will be referred to such record title, and will be no notice of any undisclosed title or interest which the possessor may have. *Ramirez v. Smith*, supra; *May v. Sturdivant* (Iowa) 39 N. W. 221, 9 Am. St. Rep. 463; *Freeman on Co-Tenancy*, §§ 166-7, 248-9. The facts that a parol partition was had and boundaries established, and the respective portions of the land occupied by the parties to such partition, do not operate as notice to appellants to charge them with the claim of appellee under such parol partition, because the possession of appellee was altogether consistent with the title which the records showed her to have—as co-tenant she was entitled to just such possession as she is shown to have had. *Allday v. Whitaker*, 66 Tex. 669, 1 S. W. 794. This is true, notwithstanding her rights under the partition, like resulting trusts, were not subject to the registration laws. For a much stronger reason the possession and oral partition constituted no notice of her rights under the unrecorded deed from her brother, which were subject to the registration statutes. Her only claim of exemption from the force of the registration statutes is her possession, and we have seen that this should be referred to her title as co-tenant. But the appellee insists that in this case the rule we apply has no application because the records do not disclose such co-tenancy. Upon this feature there is some diversity of opinion, but we think appellee must be treated as holding under the legal title of her mother. Her title, as well as that of the other children, upon her mother's death, "was the legal title, and was the apparent equitable title, upon which all persons might rely, in the absence of notice, against all outstanding legal titles or equities subject to the registration laws." *Lewis v. Cole*, 60 Tex. 341. "Following the record as a guide, the title seems to be in the heir at the moment of the ancestor's death." *Wade on Notice*, 222. Accordingly it was held, in the case last above cited, that a purchaser without notice, from the heir, took a superior title to a prior unrecorded bond for title from the ancestor. "If," says Mr. Wade, "the real

estate of which one dies apparently seised is to remain forever subject to unrecorded instruments affecting the title, the benefit to be derived from the registry laws is entirely lost as soon as the title is cast by descent. If one hold a deed to land which is unregistered at the death of his grantor, unless subsequent purchasers from the heir are protected, the same as subsequent purchasers from the ancestor, it need never be registered, in order to protect the grantee's title." Wade on Notice, §§ 217-222. Appellants, as lien creditors of C. D. Cates, are at least on an equal footing in this respect with bona fide purchasers, and, having acquired their lien upon the faith of the legal and apparent equitable title of their debtor, they will not be postponed in favor of appellee's equities, which are fully subject to our registration laws.

We have spoken of Mrs. Cates' title as a legal title, but, whether in fact it was legal or equitable, the reasoning and the conclusions are the same. It was just such title as she had that the heirs succeeded to, and on the faith of which appellants fixed their lien.

The judgment of the district court is therefore reversed, and judgment here rendered that appellants recover from appellee Mrs. Collum the land sued for, and that the cause be remanded to the district court for partition among the respective owners.

WILTON v. NEW YORK LIFE INS. CO. et al. (Court of Civil Appeals of Texas. Jan. 6, 1904.)

INSURANCE—INSURABLE INTEREST—ASSIGNMENT OF POLICY—PREMIUMS.

1. There can be no recovery on a life policy by one having no insurable interest in the life insured, to whom the policy was assigned after its issuance.

2. A niece, who had no expectation of pecuniary benefit from her uncle further than the probability of an occasional gift, has no insurable interest in his life.

3. Where the payee of a life policy had no insurable interest in the life insured, and in a suit for the face of the policy did not seek in the petition to recover the premiums paid, the court did not err in not rendering judgment for them.

Appeal from District Court, Harris County; Chas. E. Ashe, Judge.

Action by Edgar Freeman Wilton, by next friend, against the New York Life Insurance Company and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

L. B. Moody, for appellant. Harris & Harris, for appellee N. Y. Life Ins. Co. Wm. B. Lockhart and Geo. Q. McCracken, for other appellees.

PLEASANTS, J. Appellant brought this suit against the New York Life Insurance Company to recover the proceeds of a policy

of insurance issued by said company upon the life of Daniel F. Watson, deceased, and payable to Mrs. Lennie L. Wilton. The petition alleges that the minor, Edgar F. Wilton, in whose behalf appellant sues, is the only child and sole heir at law of Mrs. Lennie L. Wilton, deceased. The mother, widow, and minor child of Daniel F. Watson were made parties defendant. The insurance company answered, admitting its liability upon the policy, and tendered the amount due thereon into court, to be paid to the person adjudged by the court to be entitled thereto. The widow and minor child of Daniel F. Watson, by their answers, claimed the proceeds of said policy as the surviving wife and sole heir of said Watson. Mrs. Rebecca Watson, mother of Daniel F. Watson, filed an answer, in which she asserted a lien upon the proceeds of the policy to secure the payment of \$300, loaned by her to Daniel F. Watson. The case was tried in the court below without a jury, and judgment was rendered in favor of the widow and minor child of Daniel F. Watson, deceased, for the amount due upon the policy. From the judgment the plaintiff below prosecutes this appeal.

The facts disclosed by the record which bear upon the question presented on this appeal are as follows: The policy sued on was issued by the New York Life Insurance Company on December 13, 1900, on the life of Daniel F. Watson, and was delivered by said company to Mrs. Lennie L. Wilton. It provides that in consideration of the payment by said Watson of \$34.34 at the time of its issuance, and the further payment of a like sum on the 12th of June and December of every year during the continuance of said policy until such payments had been made for 20 years, the insurer would, upon the death of said Watson, pay to the beneficiary therein named the sum of \$1,007.18, together with all premiums paid upon said policy should the death of said Watson occur before December 12, 1915. The amount due upon the policy at the death of Watson, which occurred on November 1, 1902, was \$1,139.22. On June 18, 1901, Watson, by an instrument in writing, executed in accordance with the rules of the insurance company, transferred and assigned all of his interest in the policy to Mrs. Wilton. This transfer recites that it was made for a valuable consideration. Mrs. Wilton was a niece of Watson, and at the time the policy was issued both she and Watson lived in the house of the latter's mother at Brenham, Tex. She was then a feme sole, having been divorced from her husband, E. T. Wilton, and occupied, with her minor child, the appellant herein, a room in said house for which she paid rent. She did not board with the family, but cooked and ate in her room. She supported herself by taking in sewing, and also received a monthly allowance of \$15 from her divorced husband. She and Watson had been intimate from

¶ 2. See Insurance, vol. 28, Cent. Dig. § 153.

childhood, and he was very fond of her, and often expressed his willingness to assist her in any way in his power. It is not shown, however, that he ever contributed to her support, or ever gave her anything, except upon two occasions, on one of which he gave her \$6 and on the other a dress, the value of which is not shown further than that it was neither a "fine dress nor a poor one." Mrs. Wilton died on the 16th of June, 1902, leaving appellant as her sole heir. She paid all of the premiums which became due upon the policy prior to her death, including the first one, and the premium which accrued after her death and before the death of Watson was paid by E. T. Wilton for the benefit of the appellant. At the time the policy was issued, Daniel F. Watson was a single man, and, as before stated, lived with his mother at Brenham. He was somewhat intemperate, and did not save his money, and at that time did not earn more than \$1.50 per day when employed. He moved to Galveston in 1901, at which place he married and continued to live until his death on November 1, 1902. He left surviving him a wife and minor child, who are appellees herein.

Upon these facts the trial court held: First, that Mrs. Wilton had no insurable interest in the life of Daniel F. Watson, and therefore appellant acquired no interest in the policy by inheritance from his mother; and, second, that, even had the facts shown an insurable interest in Mrs. Wilton in the life of Watson, appellant, not having such interest, could not inherit from his mother, whose death preceded that of Watson, any interest in the proceeds of the policy. All of the authorities agree upon the proposition that a life insurance policy issued in favor of a person who has no interest in the life of the assured is against public policy, and void as to such person. In such case the beneficiary, having no interest in the life of the insured, can lose nothing by his death for which indemnity can be claimed, and the contract of insurance is purely a wager. It requires no argument to demonstrate the soundness of the rule of public policy which forbids the enforcement of such contracts. To uphold such policies would be to sanction that which creates a temptation to destroy human life, since the beneficiaries therein are only interested in the early death of the insured. Therefore the law wisely refuses to give its approbation to such contracts. With but slight dissent, the courts have applied this doctrine as well to a policy which had been assigned by the insured, after its issuance, to a person having no interest in his life, as to one made payable to such person at the time of its issuance. The same rule of public policy applies in the one case as in the other. This rule, of course, does not prevent the assignment of a policy for

the purpose of securing an indebtedness, such assignment being valid to the extent of the indebtedness thereby secured. As to what relationship must exist between the parties to create in one of them an insurable interest in the life of the other is a question upon which the authorities are not so definite, but it seems to be settled that, when such interest is dependent alone upon consanguinity, the parties must be related as closely as the second degree, and such interest will only be presumed in favor of the husband, wife, father, mother, child, brother, or sister of the insured. Such interest, however, may exist in one not so related by blood or affinity to the insured when the facts show that he has a reasonable expectation of pecuniary benefit or advantage from the continued life of the insured. The principles of law above announced are supported by the following authorities: *Price v. Knights of Honor*, 68 Tex. 361, 4 S. W. 633; *Ins. Co. v. Hazlewood*, 75 Tex. 349, 12 S. W. 621, 7 L. R. A. 217, 16 Am. St. Rep. 893; *Goldbaum v. Blum*, 79 Tex. 638, 15 S. W. 564; *Mayher v. Ins. Co.*, 87 Tex. 171, 27 S. W. 124; *Schonfield v. Lewis*, 75 Tex. 324, 12 S. W. 626, 7 L. R. A. 189; *Cammack v. Lewis*, 15 Wall. 643, 21 L. Ed. 244; *Ins. Co. v. France*, 94 U. S. 561, 24 L. Ed. 287; *Warnock v. Davis*, 104 U. S. 782, 26 L. Ed. 924. We think that a niece who lived with and was supported by her uncle, where there was nothing to indicate that he would not continue to support and care for her, would unquestionably have such an interest in the life of the uncle as would entitle her to become the beneficiary in a policy of insurance upon his life. The expectation of pecuniary benefit which would give one an insurable interest in the life of another must, however, be a reasonable expectation of some substantial, continued benefit, and not a mere probability that he might be the recipient of an occasional gift or bounty from the person insured. We think the trial court correctly held that the facts in this case are not sufficient to show an insurable interest in Mrs. Wilton in the life of Daniel F. Watson. Having reached this conclusion, it is unnecessary for us to determine the correctness of the second ground upon which the court below based his judgment. The petition upon which the case was tried did not seek to recover the amount of premiums upon the policy paid by Mrs. Wilton and appellant, and, there being no pleading to support a judgment for said premiums, the trial court did not err in not rendering judgment therefor.

There was no error in the judgment as to costs, and the assignment complaining of the judgment on that ground cannot be sustained.

The judgment of the court below is in all things affirmed. Affirmed.

**MONONGAHELA RIVER CONSOLIDATED
COAL & COKE CO. v. CAMPBELL.**

(Court of Appeals of Kentucky. Feb. 2, 1904.)

**MASTER AND SERVANT—APPLIANCES—INJURY
—PROXIMATE CAUSE—EVIDENCE.**

1. Evidence held to sustain findings that a platform over which employes carried coal from a barge to a steamer was changed and placed in an insecure position without an employe's knowledge, so that, as he stepped on it, it fell, and he was injured.

2. Where a platform over which employes carried coal from a barge to a steamer was placed in a sloping position without cleats to secure it at the lower end, so that, as an employe went on it, it slipped and fell, thereby causing his injury, the insecure condition of the platform was the proximate cause, though he slipped and fell on account of its sleety condition, thereby causing its fall.

Appeal from Circuit Court, Jefferson County, Common Pleas Division.

"Not to be officially reported."

Action by John A. Campbell against the Monongahela River Consolidated Coal & Coke Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Gibson, Marshall & Gibson, for appellant. Matt. O'Doherty, for appellee.

PAYNTER, J. The appellee was an employe of the appellant on its steamer known as "The Raymond Horner." On the night of February 2, 1902, a crew of about 10 persons were engaged in carrying coal in boxes from a barge to the steamer. There were handles at each end of the boxes. The man in front of a box walked with his back to it, and the man carrying the rear end walked with his face to it. A platform was provided which extended from the steamer to the barge. The men began the work of transferring the fuel in the early part of the night, some witnesses stating between 6 and 7 o'clock p. m., and they worked until after 11 o'clock, when the deck of the steamer was filled, as desired, with coal. The second mate, who had charge of the force, had the platform changed, so that the end of the platform on the steamer was about 2 or 2½ feet lower (as shown by the evidence of the appellee) than the end on the barge, so that there was a down grade of 2 or 2½ feet in a platform 12 feet long. The evidence of the plaintiff tends to show that cleats should have been nailed at the lower end of the platform to have prevented it from slipping. The evidence shows that the appellee and the man at the front end of his box were the leaders of the crew, and, as they came from the barge with a box of coal, the man at the front end stepped upon the platform and started to walk over it, and as the plaintiff stepped on the platform it fell. The box of coal fell on him, bruising his legs and seriously injuring his back, from which he had not recovered when this case was tried. One witness testified that as he stepped on the platform "it scooted from under him and dropped down."

The weight of the evidence shows that, when the platform was changed, the end on the steamer was very much lower than it was before it was so changed, and that the plaintiff was not aware of the change when he stepped upon the platform. The jury was authorized to conclude from the testimony that the appellee did not know but what suitable cleats had been placed at the foot of the platform. We do not think the evidence supports the claim of the appellant—that the appellee helped to make the change in the platform.

If the testimony of the plaintiff is true, there was gross negligence in the rearrangement of the platform for the use of the employes in carrying the coal. The appellant claims that the platform did not fall. Three witnesses testified that it did fall, and two testified that it did not. Certainly, it was not against the weight of the evidence, much less flagrantly so, for the jury to find that the platform slipped and fell.

The appellant further contends that appellee fell in consequence of the sleet upon the platform, and, if the platform fell, it was produced by the appellee's fall upon it, and that therefore the sleet was the proximate cause of the injury. It was the duty of the appellant to furnish the appellee a reasonably safe place to work. If the platform furnished was slippery, and men were likely to fall upon it, the greater reason why it should have been made secure by cleats. If the slippery condition of the platform caused the appellee to fall upon it, and it was thus caused to fall because it was not properly secured by cleats, then the defective and insecure condition of the platform was the proximate cause of the injury. Our conclusion is that the verdict of the jury is not against the weight of the evidence, much less being flagrantly against it.

The judgment is affirmed.

GOLDSMITH v. CLARK.

(Court of Appeals of Kentucky. Feb. 3, 1904.)

JUDGMENT—EFFECT AGAINST THIRD PERSON.

1. As against a purchaser of a purchase-money note for land, without notice of a prior claim, a judgment in a subsequent action against the vendor and purchaser of the land, declaring a note a lien on the land, to be credited on the purchase-money note, has no binding force or effect.

Appeal from Circuit Court, Hardin County. "Not to be officially reported."

Action by Alfred Clark against T. T. Goldsmith. Judgment for plaintiff. Defendant appeals. Affirmed.

W. A. Barry and R. L. Stith, for appellant. J. S. Sprigg, for appellee.

NUNN, J. It appears from this record: That on the 19th of December, 1899, one Catherine Pearman sold and conveyed to appellant, T. T. Goldsmith, about 45 acres of

land. That appellant paid her all the purchase money, except \$96, for which he executed two notes, payable to Pearman, due in one and two years, and on that day Catherine Pearman sold and conveyed these notes to Alfred Clark. After these notes became due, and on the 30th of October, 1902, the appellee instituted this action against the appellant to recover the amount of the two notes, with their interest, and to enforce his lien on the land for the payment thereof. Appellant answered, admitting the allegations of the petition, but alleged, in substance: That one Floyd Davis, who had sold this land to Catherine Pearman, assigned and transferred a note to the amount of \$45 to one C. W. Quiggins, executed by J. C. Bogard. That Quiggins instituted an action against Bogard, and recovered a judgment on this note, and caused an execution to be issued thereon, which was returned indorsed, "No property found." Quiggins then instituted an action in equity, alleging, in substance, that by mistake the deed to this land was made to Catherine Pearman, when it should have been made to J. C. Bogard and Catherine Pearman; that they were joint purchasers thereof, and this note was the balance of the purchase price. That to this action Quiggins made as defendants Catherine Pearson, J. C. Bogard, and this appellant. That the court in that action adjudged that Quiggins had a lien for this debt, interest, and costs, and directed the enforcement thereof by the sale of the land, but directed that if appellant, Goldsmith, should pay this judgment, then he should have a credit on the amount he owed as the balance of the purchase price. And also alleged that he had paid this judgment, interest, and costs, amounting to \$67.55, and asked that this amount be credited on the notes which appellee held against him. Appellee was not a party to the action referred to in the answer, and it appears that he was the owner of these notes long before Quiggins brought the action on his note. Appellant, in his answer, referred to the action of Quiggins v. Pearman et al., and asked that it be read in connection with his answer, and as a part thereof. On motion of appellee, this part of his answer was stricken from the record, to which appellant excepted; but he did not ask, nor did the court make, an order making that action, or any part thereof, a part of this record. The appellant filed his schedule with the clerk, without notice to the appellee, or an agreement with reference thereto, and directed the clerk to copy the whole of the record in this action, and three papers in the Quiggins action, to wit, the petition of Quiggins, the answer of J. C. Bogard, and the judgment of the court. Thus it will be seen that these papers are not properly a part of this record, but it appears from them and the appellant's brief that there was an issue as to Bogard having any part or parcel in the property purchased from

Floyd Davis. It is agreed that there was no lien reserved in the deed from Floyd Davis to Catherine Pearman, but, on the contrary, it was stated that all the purchase price was paid, and also that appellee had no notice of any claim of any pre-existing lien against this land by either Floyd Davis or Quiggins.

There is nothing in this record to show, nor can we understand, upon what principle the court adjudged Quiggins a lien upon this land. We are of the opinion that the judgment in the Quiggins case can have no binding force or effect upon the rights of appellee; he not being a party to that action, and being an innocent purchaser of these notes, without any notice of any prior claim or equity on the part of any one; his purchase of these notes being long prior to the assertion of any claim against this land. The appellant is silent as to the first time he knew of the ownership of these notes by the appellee. It is indicated in the record that he must have known it from the date of their execution, as they were sold and transferred to appellee on that day. The appellant was derelict in not causing the appellee herein to be made a party to the action of Quiggins v. Pearman, etc., that appellee might be permitted to litigate and prevent the enforcement by Quiggins of any lien on this land, and, in the event of failure, to suffer a credit of the Quiggins claim on the notes he held against the appellant. As between appellant and appellee the one most in fault should suffer the loss.

For these reasons, the judgment of the lower court is affirmed.

SUPREME COUNCIL K. E. W. v. HEINEMAN.

(Court of Appeals of Kentucky. Feb. 2, 1904.)

INSURANCE—SUICIDE—PROVISION IN POLICY.

1. Evidence *held* sufficient to sustain a finding that insured, who took his own life, did not have sufficient mind to understand that he was taking his own life by swallowing carbolic acid, so that there could be recovery on his life policy, notwithstanding a provision that it should not cover death by suicide, whether sane or insane.

Appeal from Circuit Court, Kenton County.

"Not to be officially reported."

Action by Carrie Heineman against the Supreme Council Knights of Equity of the World. From a judgment for plaintiff, defendant appeals. Affirmed.

Furber & Jackson, for appellant. Myers & Howard, for appellee.

BARKER, J. Joseph Heineman, the husband of appellee, was a member of the appellant order, and as such held an insurance policy on his life for the sum of \$1,000, payable to appellee at his death. He committed suicide in 1892, and appellee was entitled to the value of the policy unless precluded by what is commonly known as the "suicide

clause." Section "E" of the policy provides, in substance, that it shall not cover death by "suicide, whether sane or insane." It is alleged in the petition that at the time of his suicide Joseph Heineman did not have sufficient mind to understand that he was taking his life. This allegation was placed in issue by the answer, and constitutes the crucial question in this case.

In the case of the Manhattan Life Insurance Company v. Beard (Ky.) 66 S. W. 35, which was in all respects similar to the one at bar in principle, it was held, following the reasoning of the cases of Mutual Benefit Life Insurance Company v. Davless' Ex'r, 87 Ky. 541, 9 S. W. 812, and Bigelow v. Berkshire Life Insurance Company, 93 U. S. 284, 23 L. Ed. 918, that where the policy provided that "if within two years the insured die by his own act, sane or insane, this policy shall be void, and all payments made upon it shall be forfeited to the company," there could be no recovery in case of suicide, unless the mind of the insured was sufficiently gone when he took his life to render him unconscious that he was taking his life at the time he committed the act.

The pleadings in this case bring the question of law involved squarely within the opinion of the case cited. The facts show that Joseph Heineman suffered a sunstroke about a year before his death; that after this his mind appeared unsettled at times, and he was exceedingly nervous; that from time to time he suffered fainting or sinking spells, becoming unconscious, and remaining so for several minutes; that these fainting spells increased in frequency up to the time of his death. He suffered intense pains in his head, one of the witnesses testifying that he was never free from them. Two physicians gave it as their opinion, upon hypothetical questions embracing the foregoing facts, that he was insane. He committed suicide by swallowing the contents of a vial of carbolic acid. The jury, under the instructions, which embodied the law as set forth in the cases cited herein, returned a verdict for the appellee. To judge of the questions of fact involved was peculiarly within the province of the jury, and, perceiving no error in the record, the judgment is affirmed.

O'REAR v. COMMONWEALTH.

(Court of Appeals of Kentucky. Jan. 27, 1904.)

MALICIOUS STABBING—CONTINUANCE—ABSENCE OF WITNESSES—DILIGENCE.

1. Proper diligence to procure attendance of witnesses is shown, to authorize continuance for their absence, where, immediately after the case is set for trial, three days later, defendant places a subpoena for them in the sheriff's hands, with an indorsement showing that they lived not more than a mile from the courthouse.

2. One who, in striking at a person in self-defense, wounds another, is not guilty of maliciously stabbing the latter.

Appeal from Circuit Court, Fayette County.

"Not to be officially reported."

Mack O'Rear appeals from a conviction. Reversed.

Maury Kemper, for appellant. N. B. Hays, for the Commonwealth.

PAYNTER, J. The defendant was indicted for maliciously cutting and wounding one Bertie Page, with intent to kill her. He was arrested in the month of August, and confined in jail. On the 8th of September the court set the case for trial on the 11th of the same month. On the first-named date he obtained a subpoena for witnesses, and placed it in the hands of the sheriff to be executed. On the day the case was called for trial, the defendant's employed counsel was temporarily absent from the courthouse. Thereupon the court appointed counsel for the defendant, and ordered the trial to proceed, over the objection of the defendant. When it was announced that the defendant desired his witnesses to be called, the sheriff, under a mistaken belief, announced that no subpoena had been issued for his witnesses. After the jury had been sworn, defendant's employed counsel appeared, and moved the court to set aside the swearing of the jury and continue the case, and the court overruled the motion. The commonwealth's attorney, so far as the record shows, did not consent that the affidavit should be read as the deposition of the absent witnesses. The testimony of these absent witnesses would have tended to show that the defendant was attempting to use his knife on Ed. Jackson in his necessary self-defense, and that Bertie Page was stabbed accidentally by the defendant.

The court evidently overruled the motion for continuance upon the theory that the defendant did not use due diligence to procure the attendance of his witnesses. On the 8th day of September, after a day had been fixed for the trial of the case, the defendant only had three days in which to procure the attendance of his witnesses; and he promptly procured a subpoena for them, and placed it in the hands of the sheriff, with an indorsement showing that they did not live more than a mile from the courthouse. We are of the opinion that he used proper diligence to procure the attendance of his witnesses, and that the court erred in overruling his motion for continuance.

As there will be another trial of the case, the court suggests that an additional instruction should have been given. The claim of the defendant is that he was striking at Jackson in self-defense, and, in doing that, if at all, he stabbed Bertie Page. If he struck at Jackson in self-defense, and in doing so he wounded her, he could not be found guilty of maliciously stabbing her. None of the instructions embrace this view of the case.

The judgment is reversed for proceedings consistent with this opinion.

SCOTT et al. v. POWERS, LITTLE & CO.
 (Court of Appeals of Kentucky. Feb. 5, 1904.)
FRAUDULENT CONVEYANCES—HUSBAND AND WIFE—EXECUTION SALE—VALIDITY—STATUTE.

1. Where the husband has converted his wife's estate, and reduced it to his own possession, a court of equity will not interpose to provide for the wife, to the exclusion of the husband's creditors.

2. Evidence in a proceeding to obtain possession of land purchased at sheriff's sale by judgment creditors examined, and held sufficient to show that deeds made by the judgment debtor to his wife, and by the wife to others, after the commencement of the action and after the levy of executions, were made in an attempt to defraud the purchasers, or to prevent the collection of their judgments.

3. Under Ky. St. 1903, § 1689, authorizing a purchaser of land under an execution sale to obtain a writ of possession on notice "after" obtaining a conveyance therefor, a judgment granting such writ is erroneous, where the record does not disclose a conveyance to the purchaser by the sheriff.

4. Under Ky. St. 1903, § 1682, subsec. 2, requiring land sold under execution to be advertised 15 days next preceding the date of sale, a judgment granting possession to the purchasers at execution sale of land advertised but 10 days is erroneous.

5. Where it appears, in a proceeding to obtain possession of land purchased on execution sale, that the sheriff sold the land separately to several judgment creditors, and to each of them, for a certain named sum, incorrectly stating that it was the amount of each creditor's debt, and for an inadequate price—the land being worth several times the amount of the judgments—the sales are void.

Appeal from Circuit Court, Powell County.
 "Not to be officially reported."

Proceeding by Powers, Little & Co. and others against Mary Scott and others. From a judgment for plaintiffs, defendants appeal. Reversed.

J. Smith Hays and W. D. Jackson, for appellants. J. D. Atkinson and C. F. Spencer, for appellees.

NUNN, J. It appears from this record that appellees Powers, Little & Co. recovered a judgment in the Harlan circuit court against the appellant John Scott and one J. I. Forrester for the sum of \$292.15, with interest from the 1st of August, 1897, and \$2.29 costs, and the appellees Haynes, Henson & Co. recovered in the same court at the same time a judgment against the same parties for the sum of \$368.30, with interest from the 1st of August, 1897, and also \$2.29, with interest from date, and the sum of \$10.85 costs. On the 9th of April, 1898, an execution was issued on each of these judgments, and placed in the hands of the sheriff of Powell county (the place of residence of appellant John Scott) for collection. The sheriff levied these executions upon a tract of land belonging to Scott, and on the 6th of June, 1898, sold the land to satisfy these executions. It appears from the returns of the sheriff made on each of the executions that he sold the whole survey to each of the appellees at the price of \$337.93; stating that it was the amount of

each of appellee's debts, interest, and sheriff's commissions. It is shown by the judgment in each of the cases that this is incorrect; the judgment in the Haynes, Henson & Co. case being for a greater sum than \$337.93, and in the other case a much less sum. We suppose that the plaintiffs in the execution (the appellees here) must have agreed to buy the land jointly and as equal partners, and the one owning the lesser judgment agreeing to pay the other the difference between their claim and the \$337.93. On the 1st of November, 1899, the appellees, the purchasers of this land under their executions, notified the appellants, under the provisions of section 1689 of the Kentucky Statutes of 1903, that they would on the 16th of November, 1899, enter a motion on the docket of the Powell circuit court for a judgment for the possession of the land so purchased by them, and described the land by metes and bounds. The appellants answered, and stated that the levy and the sale made under the execution were void. Among the reasons for its being void was that the sheriff advertised it for only 10 days before the sale. They further alleged that this land belonged to Mary Scott, the wife of John Scott. The issues were made up, proof taken, and the lower court adjudged that the defense to the motion was insufficient, and directed a writ of possession to issue for this land to the appellees. Of this judgment, the appellants complain.

With reference to the claim of appellants that this property belongs to Mary Scott, the facts with reference to her claim and right to the land are, in substance, as follows: It appears that the appellants married about the year 1878. Soon after their marriage, her mother gave her about \$300 in money. She owned a small piece of land, which she sold for \$75. The husband, John Scott, owned a small piece of land, which he sold for \$300, which appellants claim was invested in saw logs, and was an entire loss to him. They claim: That her money was invested in a tract of land bought of one King. The purchase price agreed to be paid was \$1,500. That appellant John Scott, as the agent of his wife, sold walnut and poplar logs from this land, and paid the balance of the purchase price; and, besides this, he sold \$2,100 worth of timber off this land. He invested this money in another tract of land, purchased from one Carter for the price of \$3,500. He sold the timber off this land, with which he paid the balance of the purchase price, and then sold other timber and both tracts of land to one Eager for the price of \$3,500. With the purchase price of this land and timber, he had about \$5,000 or \$5,500 in cash, which was invested in the land in controversy herein. All these deeds were taken to and in the name of John Scott. They claim that Mary Scott did not know that these conveyances were made to John Scott. They say that in January, 1898, Mary

Scott first learned that these deeds had been made to her husband, and she demanded that the deed to the Powell tract of land be made to her; and her husband, John Scott, recognizing his obligation to her, they joined in a deed, and conveyed this Powell county land to one Roy Hoskins, and on the same day Roy Hoskins conveyed it to Mary Scott. And on the 28th of September, 1899, the appellants conveyed this land to one Green Osborne, an uncle of appellant Mary Scott. This deed to Osborne was made after the levy of the executions. The deeds from appellants to Hoskins and from Hoskins to Mary Scott were made after the institution of appellees' actions, and were not acknowledged before a clerk or official of any character.

There was no proof that appellant John Scott agreed to have any of these conveyances made to his wife, or, when he received the little estate of his wife, that he agreed, in consideration thereof, that he would have the King land, in which he claims it was invested, conveyed to her; and, even if he had, under the authority of the case of *Darnaby v. Darnaby's Assignee*, 14 Bush, 486, she could not assert her claim now to the property as against the rights of creditors of her husband, they having no notice of her equities. The evidence of the various conveyances of the different tracts of land to the husband shows a conversion of the wife's estate, if she had any, and reduction to the possession of it by the husband; and when this is done a court of equity will not interpose to provide for the wife to the exclusion of the husband's creditors. *Pryor v. Smith*, 4 Bush, 379.

Under all the facts and circumstances of this case, we are satisfied that the deeds from appellants to Hoskins, and from Hoskins to Mary Scott, and the deed from appellants to Osborne, were made in an attempt to defraud appellees, or to prevent the collection of their judgments.

We are of the opinion, however, that the lower court erred in granting to the appellees the writ of possession for this land, for several reasons—amongst others being: Section 1689 of the Statutes authorizes a purchaser of land under an execution sale to obtain a writ of possession upon notice after obtaining a conveyance therefor. It is nowhere alleged or proven that appellees had obtained a conveyance for this land, nor is there any conveyance to them by the sheriff copied in this record. The record is silent upon this question. Another: It is alleged in the pleadings of appellants that this land was sold under these executions, and was only advertised 10 days next preceding the day of sale, and this allegation is proven by the officer's returns on the executions copied in the record. Subsection 2 of section 1682 of the Kentucky Statutes of 1903 requires advertisements in such cases to be posted for 15 days next preceding the day of sale.

As stated, it appears from the sheriff's returns of the executions that he sold this land separately, and to each of the appellees, for half of both judgments; and it also appears from the record that the price for which the land was sold was greatly inadequate, and that same was worth several times the amount of both debts. For these errors, the sales made under the executions should be quashed. The appellees, by reason of their levies, have a lien upon the land; and, on the return of this cause to the lower court, they should be allowed to sell so much of the land as will pay their debts.

For these reasons, the judgment of the lower court is reversed, and the cause remanded for further proceedings consistent with this opinion.

LOUISVILLE & N. R. CO. v. LOGSDEN'S ADM'R.

(Court of Appeals of Kentucky. Feb. 5, 1904.)
RAILROADS—KILLING INFANT TRESPASSER—
NEGLIGENCE—DAMAGES.

1. A railroad company may be held liable for death of a child three years old struck by a train, though he was a trespasser on the track; there being evidence that the persons in charge of the train could have seen him, by the exercise of ordinary care, when 450 yards away, and could have stopped the train within 300 yards.

2. A verdict of \$1,200 for the negligent killing of a boy three years old is not excessive.

Appeal from Circuit Court, Hardin County.
"Not to be officially reported."

Action by William G. Logsden's administrator against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

B. D. Warfield and Poston & Moorman, for appellant. S. M. Payton, for appellee.

SETTLE, J. Appellee, S. W. Sanders, as administrator of the estate of Wm. G. Logsdan, deceased, sued the appellant, Louisville & Nashville Railroad Company, in the Hardin circuit court, for the death of his intestate, an infant less than three years of age, who was run over and killed by appellant's freight train. The appellee's damages were laid at \$10,000, and his right to recover same based upon the alleged negligence of appellant's servants in charge of the train by which the intestate was killed. The trial resulted in a verdict and judgment in appellee's favor for \$1,200, and, the lower court having refused to set aside the verdict and judgment and grant appellant a new trial, it has brought the case to this court by appeal.

The grounds for new trial were numerous, but the point more particularly urged for a reversal of the judgment is that the lower court erred in refusing to grant a peremptory instruction as asked by appellant.

The facts, as shown by the evidence, are few and simple. The father of the infant was a section hand in the employ of the ap-

¶ 2. See *Death*, vol. 15, Cent. Dig. § 128.

pellant. His house stood beside, and within 30 feet of, the railroad track. Just before the boy's death the father went across and up the railroad about 250 yards to a neighbor's spring for a bucket of water. When he left his home the boy was in the rear or shed room of the house, playing with some bricks; his mother in the yard, behind the house, at work. While the father was at the spring, or on his return, and the mother at work in the back yard, the boy wandered out of the house and upon the railroad track, where he was soon run over and killed by the train at a point 160 yards from the house. He was probably playing with a hoop at the time of his death, as one with blood on it was found near his body, which was identified as his favorite plaything. According to the testimony of all the appellee's witnesses, several of whom saw the train just before and at the time of the child's death, but none of whom saw the child struck by the train, no warning from either bell or whistle was given by the train until the stop signal was sounded, presumably when the boy was struck by the train; and this is not denied by those who were in charge of the train. The weight of the evidence conduced to show that the place of the accident could be seen from the direction of the approaching train for a distance of 450 yards, and for this reason it would seem that appellant's servants in charge of the train saw, or by the exercise of ordinary care could have seen, the boy, if he was then on or dangerously near the track, in time to have stopped the train and saved his life. From the testimony of those in charge of the train, the engineer and fireman were in their places in the cab of the locomotive. One of the brakemen, in violation of the appellant's rules, and for some reason unexplained, was with them in the cab. Another was seated on top of the car, with his feet hanging over the side, apparently not keeping a lookout in any direction. The flagman was in the caboose, where he could not see what was ahead of the train; and the conductor, in the cupola on top of the caboose. The conductor, engineer, and fireman all testified that the train, in approaching the boy, was running on a curve. The engineer stated that he was seated on the west side of his department of the cab, which placed him on the outer line of the curve; thereby, as he said, throwing the locomotive in the way of his view of the track ahead of him. The fireman had no obstruction in the way of his seeing the track the usual distance ahead of the locomotive. He claimed, however, to have been firing the locomotive as the curve was rounded, and that when he completed that work he looked ahead and saw the boy, and the train was then in 60 or 70 feet of him; that he (the fireman) at once gave the alarm to the engineer, who immediately reversed the engine, applied the brakes, and stopped the train as soon as it could be done, but too

late to save the life of the boy. The conductor testified that he was sitting on the west side of the cupola, which position threw him on the outside of the curve, and thereby prevented his seeing far enough ahead of the locomotive to discover the boy before the locomotive struck him; but he admitted that, if he had been seated on the east side of the cupola, he would have had a much better and farther view of the track ahead of the train. A printed rule of the appellant company was read in evidence, which declares that the proper place for freight-train conductors, while the train is in motion, is in the deck (or cupola) of the caboose; and, after prescribing the supervision he must exercise over those operating the train, the rule closes with this further declaration: "He must also keep a sharp lookout, especially when rounding curves." It is singular, indeed, that each of the persons composing the crew in charge of the train, in testifying in this case, put himself in such a position as that he did not or could not see the track ahead of the train at the time the boy was killed. While there was some curve in the track, it was not, according to the weight of the evidence, so pronounced but that the place of the child's death could be seen at a distance of 450 yards by one standing in the middle of the railroad track, in the direction from which the train that killed him approached. The speed of the train was from 30 to 35 miles an hour. It was stopped, according to the engineer and fireman, within a distance equal to the length of train, which was about 300 yards. It therefore follows that if appellant's servants in charge of the train had seen the boy when 450 yards away—the distance at which, according to the evidence, he might have been seen by them—they could have stopped the train in time to have saved his life.

There could be no recovery for the death of an adult under the circumstances of this case, as he would have been a mere trespasser, to whom the railroad company owed no duty to keep a lookout. But as said by Mr. Thompson in his work on Negligence, vol. 2, § 1809: "It is to the credit of American jurisprudence that the courts have, as a rule, refused to place the infantile trespasser upon a railway track under the same disadvantages at which they have placed the adult trespasser in the same situation. The general rule is believed to be that children who are sufficiently advanced in years and intelligence to care for their own safety, and to know that they have no right to be upon a railroad track, except where it crosses or is laid upon a public street or highway, occupy, in respect to the degree of care which ought to be exercised toward them by the railway company, substantially the same position as adults, but that the total or partial inability of a child to appreciate the danger and to understand the wrong of going upon a railway track at an improper place shields it

from responsibility for such conduct, on the one hand, and imposes a duty of grantor care on the part of the railway company, on the other hand, with reference to it. In the exercise of this care, the best judicial opinion is to the effect that the railway company, in running its trains, is bound, through its servants, to keep a reasonable lookout along its track, to the end of making timely discoveries of any children who may be exposing themselves to danger there, so as, by the exercise of like care in giving them audible danger signals, or in arresting the speed of the train, to save them from death or injury." In section 1818 of the same volume it is further stated: "Where this rule of law obtains, if cattle stray upon a railway track, and are run over by a train under such circumstances that the accident might have been avoided by the exercise of reasonable care upon the part of the trainmen, the company will be liable to pay damages to the owner. It is not perceived how helpless children, escaping from the custody of their parents, are not entitled to the equal protection of the law. * * * If this is a sound rule, children of tender years cannot be trespassers, within the meaning of the rule of law under consideration in this chapter; but if the children stray upon the railway track, although a place other than a public crossing, the railway company will be liable for running over them, if the catastrophe could have been avoided by the exercise of reasonable care." The doctrine as announced by Redfield is humane in principle, consonant with reason and justice, and has been repeatedly approved by this court. Thus in *C., N. O. & T. P. Ry. v. Dickerson's Adm'r* (Ky.) 44 S. W. 99, it is said: "It seems to us to be well settled by the decisions of this court that a railroad company is liable for injuries inflicted upon an infant of such tender years that it is incapable of having an intent or comprehending its rights or danger of injury, if such injury was the result of the failure upon the part of those having charge of the train to discover his peril by reason of their failure to use such ordinary care as their duty to the train and passengers require them to exercise in looking along the track of the road." *South Covington St. Ry. Co. v. Herrklotz* (Ky.) 47 S. W. 265.

The child for whose death damages were awarded in this case was of very tender years, which fact, and his consequent want of discretion, must have been realized by appellant's servants in charge of the train which ran over him, if they saw him before he was struck by the train; and it was for the jury to determine from all the evidence whether they saw, or might, by the exercise of ordinary care, have seen, his presence on the track in time to have prevented his death. Though the evidence was conflicting, we are unable to say that it was not sufficient to authorize the verdict of the jury.

The instructions given by the court fairly presented all the law of the case. Indeed, in one respect they were more favorable to the appellant than was authorized by the facts, for they submitted to the jury the question as to whether or not the parents of the deceased infant were guilty of negligence in allowing him to stray upon the track, when there was not, in our opinion, sufficient evidence upon which to base such an instruction.

The amount of the verdict is not excessive.

Regarding the record free from prejudicial error, the judgment is affirmed.

TAYLOR et al. v. RUSSELL et al.

(Court of Appeals of Kentucky. Feb. 5, 1904.)

COMMON SCHOOLS—ADOPTION OF GRADED SYSTEM—CITIES.

1. Ky. St. 1903, c. 113, art. 10, being part of the general law on the subject of common schools, placing it in the power of the people to control the question of the adoption of the graded school system, and providing that "any city of the first, second, third or fourth class may adopt the provision of this law," does not repeal Laws 1891-92-93, p. 1211, c. 241, relating to cities of the fourth class, and permitting them to adopt the graded common system.

2. Under Ky. St. 1903, § 4489, being part of the general law on the subject of common schools, placing it in the power of the people to control the question of the adoption of the graded common school system, and providing that the article shall not affect or in any way interfere with any system of graded common schools established by any city of the fourth class, a city of that class which has established the system and has it in use is exempt therefrom.

Appeal from Circuit Court, Madison County.

"To be officially reported."

Action by J. D. M. Russell and others against C. A. Taylor and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

H. O. Hazelwood and R. W. Miller, for appellants. R. H. Crooke and Jackson & Roberts, for appellees.

O'REAR, J. The city of Richmond, in Madison county, is a city of the fourth class, under the statutory classification in this state. In 1894, by ordinance duly passed, its council adopted the graded school system provided for in chapter 89, Ky. St. 1903 (the statute governing cities of the fourth class), being sections 3588 to 3605, inclusive. Section 3606 was added in 1894. Up to that time, so far as we are apprised by this record, that city had not adopted any free graded school system. A board of education, as authorized by section 3588, was regularly installed, who, as a body corporate, took charge of all the common school interests and property in that city. Bonds were voted and issued to the amount of \$23,000, with which a building for the white school children was built. Other common school funds be-

longing to the district, and derived from taxation, to the amount of \$8,000, were used in providing a building for the colored school children within the city. Both schools, under the statutes above named, are under the control of the board of education of the city. Besides the per capita derived from the state funds, the city levies and collects, and turns over to the board of education, a tax of not exceeding 50 cents on the \$100 on all taxable property within the city for school purposes, which is apportioned among the schools as the board deems necessary and just. In 1902 certain taxpayers within the city petitioned the city council, and it, through the mayor, duly ordered an election to be held under section 4489, Ky. St. 1903, to determine whether the white citizens and taxpayers would vote an annual tax of 50 cents on the \$100 of taxable property of white persons and corporations in the district to maintain a graded common school in the city for white children. The proposition received a majority of the votes cast, and was duly certified. This suit involves the validity of the last-named vote.

Other than the State A. & M. College, the Colored Normal School, the School for Deaf and Dumb Mutes, and similar institutions, the public school system of this state is divided into two classes: First, that of the common school district, which, unless the other class is installed, prevails in every part of the commonwealth; second, graded common schools. By section 4464, Ky. St. 1903, any rural district, or any city or town of the fifth or sixth class, may adopt the system of graded common schools by a vote of the citizens affected. They are not at all required to do so. It is at their option. There is no other provision by general law for graded common schools in towns of the fifth and sixth classes. Nor is there any other provision by general law for rural districts to be provided with graded common schools. But cities of the first, second, third, and fourth classes are each provided with a system of education by which they may adopt the higher or graded common school system. As to cities of the fourth class, the sections of the statute providing the system are cited above. It is not mandatory that cities of the fourth class should adopt this system. They are merely permitted to do so. Unless they adopted in some manner a system of graded common schools, there would be provided by law only the common district schools for such cities. If, however, they do adopt the graded common school system, that supersedes and absorbs the district common schools within that territory.

Section 4464, Ky. St. 1894, as was section 4489, was part of an act of the General Assembly approved July 6, 1893. Laws 1891-92-93, p. 1413, c. 260. The act for the government of the cities of the fourth class was approved June 28, 1893. Laws 1891-92-93, p. 1211, c. 241. They were each passed by

the same Legislature, and were being considered at the same time. The act of July 6, 1893, now incorporated as chapter 113, Ky. St. 1894, is the general law on the subject of common schools, passed at the first session of the Legislature after the adoption of the present Constitution. Section 4464, Ky. St. 1903, on and including section 4489, are part of article 10 of that chapter, which is devoted to "Graded Common Schools." Sections 4464 to 4488 provide a system of graded common schools not substantially different from sections 3588-3606, *supra*, except that it applies only to rural districts, and towns of fifth and sixth classes, and does not allow as expensive buildings as are allowed fourth-class and larger towns. Section 4489 reads, in part: "The provisions of this article shall not affect, or in any way interfere with, any system of graded common schools established and maintained by any city of the first, second, third or fourth class, by virtue of a general or special act of the General Assembly." If this were all the section, doubtless there would be no dispute that it excluded the cities of the fourth class, or larger, where such cities had adopted a graded school system; but the section continues: "Any city of the first, second, third or fourth class may accept the provisions of this law, and establish graded common schools, subject to all the provisions thereof, except as specially hereinafter provided in this section, by a majority vote, indorsed by the recorded action of the board of trustees, at an election held in the manner prescribed in section 4464," etc. The exceptions thereafter specially provided, and alluded to in the above quotation, have reference to the manner of holding the election, etc., not involved in, nor shedding any light on, the point under consideration.

It is thought, and appellants have proceeded upon that idea, that this section—the part last quoted—gave to any city in the commonwealth the right to adopt the graded common school provisions of article 10, c. 113, Ky. St. 1903, by pursuing the method pointed out in section 4489 for ordering and conducting the election, which was done in this instance. It can scarcely be conceived that the Legislature, in enacting the two statutes here invoked by these respective litigants, meant that one should repeal the other by implication, and without any express allusion to it. Such construction is not to be favored, and will not be adopted when any other consistent construction will allow both to stand. The legislative purpose, if any doubt arises upon the language employed in the acts, will be looked to, rather than the mere dates of enactments, as the guide in construction. The import of the acts in question, viewed in connection with the general state of the law, and the history of the legislation, and previous judicial utterances, if any, upon the subject, are all legitimate and helpful means of arriving at the legislative purpose in the enactment of statutes which may appear to

be inconsistent in terms or means provided. The first part of section 4489 shows, undoubtedly, that the Legislature contemplated that by special acts heretofore passed (none such could be under the present Constitution), and by general laws, graded common schools could be, and doubtless had been, established in cities of the fourth class and those larger. In fact, the Legislature had expressly authorized such cities to adopt such system, formulated especially with reference to their wealth, population, and needs. But the respective statutes creating those city governments provided no means of compelling the city councils to adopt a graded school system. Therefore, as the law then stood, the city councils of cities of the fourth class, and larger, could refuse to adopt a graded common school system, leaving the people provided with only the lower order of district common schools. This the Legislature knew. It then set to work to provide a method by which the people in those cities could themselves control that question, as other sections of the state were allowed to do, by providing, in the latter part of section 4489 quoted, that the provisions of that chapter should be applicable to such of the larger cities as would adopt it. Read in connection with the first part of this section, this meant such cities as had not already adopted the graded common school system. This compulsory acceptance of this system by their cities could be by vote had upon the initiative of the people by petition. The strict construction contended for by appellants would lead the Legislature to say in that section, by the first part of it, that that law did not apply to fourth class and larger cities, and, by the last part of it, that it did. What the Legislature undoubtedly had in mind was to provide a method by which these cities and their inhabitants could avail themselves of the privileges of graded common schools. If they had already done so, then, by the first part of section 4489, the provisions of the chapter of which it was a part were "not to interfere." But if they had not adopted such system, they were given another way to do it, and to compel it. It is a matter of significant remark that the whole system and scheme of providing higher or graded schools does not once provide a way of doing away with one when once adopted. As the system was the same whether adopted under article 10 of chapter 113, or under chapter 89, §§ 3588-3606, and as the tax imposed was the same, there was nothing to submit to the voters in this case. The city council had already done precisely what they proposed, and more too. There is no provision, as in the local option statutes, to resubmit that question when once adopted. The effect of the vote as contended for by appellants is merely for the white voters to "vote out" the colored graded common school already adopted by the legal authorities, and in the manner provided by law. That they had no right to do under the law as it now is,

for the right has nowhere been given them by any statute.

The judgment of the circuit court declaring the vote and election void is affirmed.

CINCINNATI TOBACCO WAREHOUSE CO.
v. LESLIE & WHITAKER'S TRUSTEE et al.

(Court of Appeals of Kentucky. Jan. 29, 1904.)

FACTORS-ADVANCES-LIENS-CHARACTER
-ASSIGNMENT OF DEBT-TRANSFER OF LIEN.

1. Where a corporation advanced money to a bankrupt with which to purchase tobacco to be shipped to the corporation for sale under an agreement that the latter was to have a lien on the tobacco so purchased, and that the debt for advances, commissions, insurance, etc., should be paid out of the proceeds of the sales when made, the lien of the corporation was not a common-law lien which was personal to it, but was an equitable lien, which attached to the claim, and therefore passed to the corporation's successor, which purchased its assets on its insolvency, including the debt for which tobacco so purchased was pledged.

Appeal from Circuit Court, Harrison County.

"To be officially reported."

Action by the Cincinnati Tobacco Warehouse Company against Leslie & Whitaker's trustee and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

J. J. Blanton, for appellant.

BARKER, J. Leslie & Whitaker resided in Harrison county, Ky., and were engaged in the business of buying and selling tobacco for speculation. The Cincinnati Leaf Tobacco Warehouse Company was a Kentucky corporation, doing business in Cincinnati, Ohio. During the years 1898, 1899, and 1900 these parties had a contract between them by which the corporation advanced money to the firm from time to time, as they required it, which was invested in the purchase of tobacco, and then consigned to the corporation at its business place in Cincinnati for sale, with the express agreement that the corporation was to have a lien upon the tobacco so purchased, and the debt for advances, commissions, insurance, etc., should be paid out of the proceeds of the sales when made. Under this agreement the corporation, from August 31, 1899, to September 12, 1900, advanced Leslie & Whitaker the sum of \$5,060.23, and during the same period of time they purchased and consigned, under the contract, 83 hogsheads of tobacco, all but 13 of which had been sold, and the proceeds applied to the extinguishment of the consignee's debt for advancements, at the time this controversy arose. Before the sale of the 13 hogsheads of tobacco above mentioned, and which are in controversy here, the Cincinnati Leaf Tobacco Warehouse Company became seriously involved financially, if not insolvent, and proper pro-

ceedings were had in the circuit court of Kenton county, by which it was placed in the hands of a receiver, and afterwards the receiver was authorized to and did sell at public auction in solido all of its assets, whether real, personal, or mixed, for the sum of \$1,500,000, the Cincinnati Tobacco Warehouse Company becoming the purchaser at the sum named. This sale was confirmed by the court, and the Cincinnati Tobacco Warehouse Company, which seems to have been organized for this express purpose, stepped into the shoes of the Cincinnati Leaf Tobacco Warehouse Company, taking up the business of the latter, and carrying it forward without commercial jar or jostle, as if no change had occurred. About this time, or shortly thereafter, Leslie & Whitaker became involved, and made a general assignment of all their property to W. T. Lafferty, of Harrison county, Ky., for the benefit of their creditors. The assignee, ascertaining that there were 13 hogsheads of tobacco belonging to his assignors, unsold, in the warehouse of the Cincinnati Tobacco Warehouse Company, ordered it sold. In accordance with this direction, the tobacco was sold, realizing the sum of \$950. Afterwards certain creditors of Leslie & Whitaker set on foot such proceedings in bankruptcy that the firm were adjudged to be bankrupt under the United States bankruptcy act, and their assets passed into the hands of appellee J. T. Webster, as trustee, for the benefit of their creditors. After qualifying, the trustee instituted this action to recover of appellant the proceeds of the sale of the 13 hogsheads of tobacco which were sold under the order of the assignee, as above stated. This sum, amounting to \$950, is the matter in controversy here. The question is one of law, there being no undisputed questions of fact.

There is no dispute or question as to the regularity of the legal proceedings by which the Cincinnati Tobacco Warehouse Company purchased all of the assets of whatever kind of the Cincinnati Leaf Tobacco Warehouse Company; as to the amount or time of the advancements made by the Cincinnati Leaf Tobacco Warehouse Company to Leslie & Whitaker; nor as to the fact that the tobacco shipped under the contract realized a sum insufficient to pay the amount of the advancements by \$350. But it is contended by appellee that the Cincinnati Tobacco Warehouse Company did not acquire, by its purchase, the benefit of the contract existing between the Cincinnati Leaf Tobacco Warehouse Company and Leslie & Whitaker, or the lien which the latter had, under the express contract, on all the tobacco shipped for the payment of all the advancements made; that the lien of the Cincinnati Leaf Tobacco Warehouse Company was a personal one, which did not pass by operation of law under the sale, and that, therefore, the 13 hogsheads of tobacco remaining unsold after the transfer by the court are to be considered as a matter sepa-

rate and apart from the old contract, and that out of the proceeds appellant was entitled only to collect and receive its commission, drayage, insurance, etc., and had no right to apply it to the extinguishment of the unpaid balance originally due the Cincinnati Leaf Tobacco Warehouse Company. On the contract appellant contends that, having purchased at the sale by the receiver of the Cincinnati Leaf Tobacco Warehouse Company all its assets, including the chose in action due from Leslie & Whitaker, consisting of the unpaid balance for the advancements made to them, it also acquired the lien under the contract, and with it the right to apply the proceeds of the sale of all the tobacco, including the 13 hogsheads, to extinguish the debt. If this can be done, there will still be a balance due appellant of \$350. Upon trial of the case in the court below the learned chancellor entered the following judgment: "It appears further from this record that the whole of the tobacco bought by Leslie & Whitaker was delivered by them to the Cincinnati Leaf Tobacco Warehouse Company prior to the appointment of a receiver, and prior to the sale by decree of court of its effects. There can therefore be no question but that the factor's lien of the Cincinnati Leaf Tobacco Warehouse Company was a complete lien, perfected by reducing the tobacco to possession. The only question in this case, then, is, does the Cincinnati Tobacco Warehouse Company, by reason of its purchase at decretal sale of the demand of the Cincinnati Leaf Tobacco Warehouse Company against Leslie & Whitaker (they being no parties to that suit, and not obtaining their consent), succeed to the rights of the Cincinnati Leaf Tobacco Warehouse Company as against them or their general creditors, they having become bankrupt before a sale of the tobacco by the defendant (appellant)? Or, stating it more succinctly, does the purchase by defendant defeat or discharge the lien? It seems from the authorities that a lien of this character is a purely personal privilege, and can only be set up by the person to whom it accrued, and that he cannot assign his claim, so as to enable the assignee to set up the lien as a ground of claim or defense to an action for the property or its value as against the general owner.' The court holds that these transactions by which defendant (appellant) obtained the debt and the property destroyed the lien, and it is not available to the defendant in this action." It will be observed that the trial judge placed some stress upon the fact that the Cincinnati Tobacco Warehouse Company obtained its legal position with reference to the assets of the Cincinnati Leaf Tobacco Warehouse Company without the knowledge or consent of Leslie & Whitaker. If this be important, we think the record shows conclusively that Leslie & Whitaker recognized the Cincinnati Tobacco Warehouse Company as the successor of the Cincinnati Leaf Tobacco Warehouse

Company, and as lawfully assuming and carrying out the latter's contract with them. Five of the hogsheads of tobacco in question were shipped to and received by the Cincinnati Tobacco Warehouse Company after it became the successor of the Cincinnati Leaf Tobacco Warehouse Company; and Leslie & Whitaker received from it, upon request, the sum of \$269 with which either to purchase tobacco or to pay for tobacco already purchased under the original contract. It seems to us that these facts, under all the circumstances of this case, would go very far towards establishing a ratification by Leslie & Whitaker of the transfer by the receiver of the insolvent corporation to appellant, if it were required to take that view in order to uphold appellant's lien in question; but we do not think this is necessary. It is true that the authorities hold that a common-law lien is a personal privilege, and not transferable by the assignment of the debt which it secures; but we think the court below erred in assuming that the lien of appellant is a common-law lien. Common-law liens arise by implication of law, and not by express contract. The lien here is an equitable one, growing out of the express contract between Leslie & Whitaker on the one part and the Cincinnati Leaf Tobacco Warehouse Company on the other, by which it was agreed that the latter should have a lien on the tobacco for all the advances made by it to the former, and which appellant claims passed to it by the assignment. Jones, in his work on Liens, very elaborately describes the difference between common-law and equitable liens, and in section 63, in describing equitable liens, says: "Where in terms the parties agree that one making advances for the purchase of merchandise to be shipped to him shall have a lien on the same, the lien arises upon the purchase of the merchandise before it is consigned to the creditor. The lien in such case attaches to the merchandise purchased and in the hands of the debtor at the time of his bankruptcy, and may be asserted against the debtor's assignee in bankruptcy. Judge Story said that the possession of the property by the debtor was not a badge of fraud, or against the policy of the law, or in any manner to be deemed inconsistent with the just rights of his general creditors; and therefore the agreement to give a lien or equitable charge was binding upon the property in the hands of the assignee." In section 982, *Id.*, it is said: "A common-law lien is not a proper subject of sale or assignment, for it is neither property nor is it a debt, but a right to retain property as security for a debt." And in section 983, still speaking of common-law liens: "A lien is a purely personal privilege, and can only be set up by the person to whom it accrued. He cannot assign his claim, so as to enable the assignee to set up the lien as a ground of claim or defense to an action for the property or its value as against the general owner." In section 991, however, the author

says: "An equitable lien reserved by express agreement passes by an assignment of the debt it was created to secure. Such a lien does not depend upon possession, as does a common-law lien." The case of *Hauseit v. Harrison*, 105 U. S. 401, 28 L. Ed. 1075, was in all respects similar in principle to the case at bar. There a merchant advanced money to a tanner with which to purchase hides to be manufactured into leather, under this agreement: "And it is further agreed that all the skins, whether green, in process of tanning, tanned, or tanned and finished, shall be considered as security for the refunding, with interest, of all the moneys advanced him by the party of the second part, and that all the skins shall be insured for their full value in good companies only." The tanner, after receiving large advances, became insolvent, and in the contest between his assignee and the merchant as to the lien of the latter on certain hides and leathers the Supreme Court said: "It was decided in *Gregory v. Morris*, 96 U. S. 619 [24 L. Ed. 740], that the legal effect of such a contract is to create a charge upon the property, not in the nature of a pledge, but of a mortgage. Such a lien is good between the parties without a change of possession, even though void as against subsequent purchasers in good faith without notice and creditors levying executions or attachments; and, if followed by a delivery of possession, before the rights of third persons have intervened, it is good absolutely. Nor can it be reasonably doubted that this equitable lien was capable of enforcement. If Bayer [the tanner] had, in disregard and violation of his agreement, undertaken to divert the skins, whether in a finished or unfinished state, to some other and unauthorized use, it would have been in fraud of the rights of Hauseit [the merchant], and a court of equity would not have hesitated by an injunction to prevent the commission or continuance of the wrong. Bayer would, under such circumstances, be treated by a court of equity as a trustee fraudulently dealing with and misappropriating trust property, and Hauseit would be protected in his right as the owner of a beneficial interest in the property entitled to the enjoyment of the specific fruits of the agreement." In *Brooks, Waterfield & Co. v. Staton's Adm'r*, 79 Ky. 174, it is said by this court: "Manifestly, there is an equity in one who advances money on the agreement and faith that certain property shall be intrusted to him as a security which does not pertain to a general creditor, or to one who extends credit without reference to any particular fund or property as security. From the moment the advances are made there is an inchoate right in or to the property on the faith of which the advance was made, and this right becomes complete if the creditor with reasonable diligence pursues his right by reducing the property to possession before any other equity has intervened. Such contracts, when the money has been advanced, and before de-

livery of possession, are partly executed and partly executory. The delivery of possession completes the contract; and if, at the time the contract was entered into and the advances made, the parties acted in good faith, and there was no insolvency, and no design to prefer one creditor to another, the act of possession, when there are no intervening equities, relates back, and the contract is a unit from the time it was entered into and the advance was made." This case was approved in a later case of *Cook's Adm'r v. Brannin, Brand & Glover*, 87 Ky. 101, 7 S. W. 877: "In the case of *Stahl v. Lowe* (Ky.) 38 S. W. 862, it was held that a transaction similar to the one involved in the case at bar created an equitable lien; and in the case of *Atchison's Assignee v. Jones & Halsey's Assignees* (Ky.) 1 S. W. 406, it was held: 'A firm to which tobacco had been consigned for the purpose of securing advances made by them thereon, having made an assignment for the benefit of creditors, their assignee had the right to hold the tobacco for the purpose of securing the advances against the assignee of the consignor, who, subsequent to the consignment, had also made an assignment for the benefit of creditors.' The *Cyclopedia of Law & Procedure*, volume 4, p. 69, tit. 'Assignments,' states the rule thus: 'In the absence of any stipulation in the contract of assignment concerning the securities or other incidents, an unqualified assignment of a chose in action carries with it, as an incident to the chose, all securities held by the assignor as collateral to the claim, and all rights incidental thereto, and vests in the assignee the equitable title to such collateral securities and incidental rights. * * * As the right to the chose and its incidents pass to the assignee thereof, so does the right to the remedies which the assignor had for the enforcement of the same.'" In the case of *Summers v. Kilgus*, 14 Bush, 449, it was said: "The assignment of a debt carries with it a vendor's or mortgage lien, by which the debt is secured. This has been so often decided by this court as to render the citation of authority unnecessary."

There is a vast difference between the narrow, rigid, personal right to merely retain possession of personal property until payment, which is known as a common-law lien, and an equitable lien arising by express contract between the parties, and which the needs of commerce render absolutely necessary in order to facilitate modern dealing between man and man. It requires no profound examination of the subject to realize how hopelessly crippled would be the industries and resources of the whole state if the farmer, the manufacturer, and the dealer could not obtain the aid of the capitalist in the advancement of their business; or that this aid very largely, if not wholly, depends on the ability of the borrower to make the lender secure by a lien on the specific product of the industry involved in the enterprise. The lien involved in this action is not the common-law

lien of the factor for advancements, but an equitable lien, created by express contract. Sometimes these liens resemble each other very closely, and sometimes both statutory and equitable liens coincide, and are identical with or declaratory of common-law liens. When this happens, the latter are superseded by the former, for, although their forms and terms may resemble, the consequences which flow from their existence, as in the case at bar, are often divergent. Appellant, as assignee of the chose in action purchased at the receiver's sale, became invested thereby with the right to enforce the equitable lien which secured its payment to the Cincinnati Leaf Tobacco Warehouse Company.

Wherefore the judgment is reversed, with directions to dismiss the petition.

EDWARD THOMPSON CO. v. FENLEY.

(Court of Appeals of Kentucky. Feb. 3, 1904.)

REFLEVIN—VALUE OF PROPERTY—DETENTION—DAMAGES—WITHDRAWAL—WAIVER—APPEAL—AMOUNT IN CONTROVERSY.

1. Where, in an action to recover law books, plaintiff claimed the value to be \$150, and also claimed \$50 damages for the detention thereof, and, on the trial, plaintiff withdrew from the consideration of the court and jury all question of damages and claims for the same, and no proof was introduced by either party on the question of damages, such claim was waived, though not entered on the order book of the court, and hence the amount involved was not sufficient to sustain an appeal to the Court of Appeals.

Appeal from Circuit Court, Kenton County.

"Not to be officially reported."

Action by the Edward Thompson Company against W. M. Fenley. From a judgment in favor of defendant, plaintiff appeals. Dismissed.

Frank V. Benton, for appellant. R. S. Holmes, for appellee.

NUNN, J. This was an action brought by appellant in the Kenton circuit court to recover from the appellee the possession of the first edition of the *American & English Encyclopedia of Law*, at \$150, and also for \$50 damages for the wrongful detention of the property. It appears from the bill of exception that, upon entering upon the trial of the cause in the lower court, the appellant, by counsel, in the presence of the court and jury, withdrew from the consideration of the court and jury all question of damages, and claims for same. This left the value of the thing in controversy at \$150. The appellee moved to dismiss this appeal for the reason that this court has not jurisdiction of the matter in controversy. The appellant contends that it is not bound by the recital in the bill of exceptions, because it is not shown by an order of court, on its record, that it dismissed its action for damages. It appears from the record that there was no proof introduced by either party on the trial

¶ 1. See Appeal and Error, vol. 2, Cent. Dig. § 296.

on the question of damages, and, as stated, the appellant waived its claim for damages, and we can see no reason why its disclaimer of same in the manner stated should not be as binding upon it as if entered upon the order book of the court.

Having arrived at this conclusion, we sustain the motion of appellee, and dismiss the appeal.

TENNENT SHOE CO. v. STOVALL & BRAND.

(Court of Appeals of Kentucky. Feb. 2, 1904.)

SALES—RESCISSION OF CONTRACT—FALSE REPRESENTATION OF CREDIT—KNOWLEDGE OF FALSITY—ESTOPPEL TO DENY.

1. A partner, who, according to his own testimony, had charge of the mercantile resources of the firm, was bound to know its resources and liabilities, and when suit based on false statements made by him to mercantile agencies was brought against the firm, he could not be heard to say that he did not know its real condition when he made the statements.

2. False representations made by a member of a firm to mercantile agencies to establish the firm's credit constitute a fraud on one who, relying on and deceived by such representations, extends credit to the firm, which he would not have done had he known the truth, which authorizes him to elect to treat a sale of goods to the firm as void, and reclaim such of his goods as remain undisposed of by the firm.

Appeal from Circuit Court, Graves County.
"Not to be officially reported."

Action by the Tennent Shoe Company against Stovall & Brand, partners. From a judgment for defendants, plaintiff appeals. Reversed.

Lee & Hester, for appellant. J. N. Crutchfield, for appellees.

BARKER, J. Stovall & Brand were merchants in Mayfield, Graves county, Ky. The appellant is a corporation organized under the laws of the state of Missouri, having its residence and place of business in St. Louis. On the 25th day of February, 1901, the appellant sold and delivered to Stovall & Brand \$1,266.23 worth of shoes on credit. In June of the same year the firm made a general assignment for the benefit of their creditors, and subsequently were adjudged to be bankrupts under the general bankruptcy act of the United States, and their property passed into the hands of J. N. Crutchfield, trustee. After the assignment appellant instituted this action in the Graves circuit court, charging that the goods in question had been purchased by the firm for the purpose and with the intent of defrauding it, well knowing that they were then insolvent, and not intending, at the time of purchase, ever to pay for the goods. That appellant elected to treat the contract of purchase as void, and reclaim its goods, for the possession of which it prayed judgment. As an ancillary remedy, an order of delivery was sued out, and about \$500 worth of the shoes seems to have been

found undisposed of and taken into the possession of the officer in charge of the writ, and this constitutes the subject-matter in controversy here. Stovall & Brand filed an answer denying the material allegations of the petition, and then J. N. Crutchfield, the trustee in bankruptcy, intervened by petition, adopted the answer of Stovall & Brand, and prayed to be adjudged the rightful possessor of the merchandise involved in the litigation. A trial was had, which resulted, after the close of appellant's (plaintiff's) testimony, in the court giving a peremptory instruction to the jury to find for appellee (defendant). To review this judgment appellant has brought the record to this court.

The representations complained of by appellant as false were not made to it direct, but consisted in reports of the firm's financial standing, made by T. L. Stovall, a member of the firm, who had active charge of the store, to certain mercantile agencies, of which appellant was a member. The evidence leaves no doubt that these reports showed the firm to be abundantly solvent, and in excellent financial condition, and that, at the time they were made, the firm was insolvent. Within a very short time after the purchase from appellant the partners drew out of the business sums aggregating \$7,500, and several of the clerks were allowed to overdraw their accounts in sums out of all proportion to their salaries. T. L. Stovall, who was placed upon the stand by appellant, while showing in his evidence that the reports made by him of the firm's standing to the various mercantile agencies as a basis of credit were untrue in fact, insisted most earnestly that he did not know at the time they were false, and that they were not made for the purpose of fraud or deceit. In the case of *Drake v. Holbrook*, 66 S. W. 512, which involved a question similar in principle to the one under discussion, this court said: "It was pleaded, and not denied, that the appellee, Holbrook, was the owner of one-half the stock, and was secretary and treasurer of the company. This being true, he cannot be heard to say he did not know the resources and liabilities of the company. It was his business, as secretary and treasurer, to know the financial condition of the corporation, and any statements made by him as to the financial condition of the corporation to the appellants would authorize them to rely thereon as the truth. Appellee being in condition to know, and it being his duty to know, will not be permitted to say he in fact did not know the truth as against his own statement to appellants." In this case Stovall was the partner, and, according to his own testimony, had charge of the mercantile interest of the firm. He was bound to know its resources and liabilities, and when he undertook to make a statement to the mercantile agencies to constitute a basis of credit for his firm he could not afterwards be heard to say

¶ 2. See *Sales*, vol. 43, Cent. Dig. § 96.

that he did not know its real condition. The representations made to the mercantile agencies as the basis of credit had the same legal effect as if made to the appellant. *Eaton, Cole & Burnam Co. v. Avery* (N. Y.) 38 Am. Rep. 389. In the case of *Dietz's Assignee v. Sutcliffe*, 80 Ky. 650, it is said: "It is well settled that, where the vendor has been defrauded by his vendee, the former may elect to treat the contract as a nullity, and bring his action for the recovery of the specific property, or trover for their value; and this doctrine proceeds upon the idea that the contract of sale having been rescinded at the election of the vendor, he is still vested with the title." To the same effect is *Longdale Iron Company v. Swifts Iron & Steel Works*, 91 Ky. 191, 15 S. W. 183, and *Reager v. Kendall* (Ky.) 89 S. W. 257. The representations made by Stovall to the mercantile agencies were false. They were made for the purpose of establishing his firm's standing for credit in the commercial world. If appellant relied upon and was deceived by them, and thereby induced to extend the firm a credit which would not have been done had the truth been known, this constituted such a fraud upon appellant as authorized it, under the authorities herein cited, to elect to treat the contract as void, and reclaim such of its goods as were undisposed of and could be identified.

The court erred in peremptorily instructing the jury to find for appellees, wherefore the judgment is reversed for proceedings consistent with this opinion.

THOMPSON v. THOMPSON et al.

(Court of Appeals of Kentucky. Feb. 3, 1904.)

ADMINISTRATION—ALLOWANCE TO WIDOW AND CHILDREN—DELAY IN APPRAISAL—ASSIGNEE OF JUDGMENT—PRIORITIES.

1. Where the only assets left by a decedent, exclusive of a judgment in his favor, are insufficient to make up the statutory exemption provided by Ky. St. 1899, § 1403, in the personality allowed to the widow and children, and the balance necessary to make up the deficiency, together with the expenses of the last sickness and of administration, will exhaust such judgment, the judgment debtor cannot offset a judgment against decedent, purchased by him, though it was bought prior to the filing of the appraisal bill of decedent's effects in which the widow's allowance was made out of the decedent's judgment.

"To be officially reported."

Action by Lula P. Thompson against J. M. Thompson and others. From a judgment granting insufficient relief, plaintiff appeals. Reversed.

For former opinion, see 66 S. W. 1007.

Sam C. Hardin, for appellant. W. L. Brown and G. G. Brock, for appellees.

NUNN, J. It appears that prior to April, 1898, W. H. Thompson, husband of appellant,

instituted an action in the Laurel circuit court against appellee, J. M. Thompson, for the recovery of several thousand dollars. During the pendency of this action, and in the month of April, 1898, W. H. Thompson died intestate. His widow, Lula, appellant herein, administered on his estate, and the action was revived in her name as administratrix, and prosecuted to judgment. From this judgment an appeal was taken by J. M. Thompson, and this court reversed that judgment (66 S. W. 1007), and directed that the lower court enter judgment in favor of Lula Thompson as such administratrix for the sum of \$400 and the cost of that action in the lower court. The judgment was entered at the March term, 1902, in conformity with the opinion of this court. Appellant caused an execution to be issued on this judgment, and placed it in the hands of the sheriff of the county of appellee's residence, which was returned by the sheriff with the indorsement, "No property found to make this *fi. fa.*, or any part thereof." She then instituted this action in equity in the nature of a bill of discovery, making the appellee and his wife, Sallie Thompson, and the Standard Coal Company, defendants, alleging that the appellee was the owner of the stock in the Standard Coal Company, and had transferred the same to his wife for the purpose of covering up, cheating, and defrauding his creditors. The defendants in that action answered, denying these allegations. The appellee, J. M. Thompson, in addition to traversing the allegations of the petition, pleaded what he termed a set-off or counterclaim, to wit, that he had purchased from one Pugh a judgment obtained in the Laurel quarterly court for the sum of \$170, with interest, and cost of \$9, against W. H. Thompson. He claimed to have purchased this judgment the 23d day of May, 1902, and on that day Pugh assigned and transferred it to him, and he asked that this judgment be set off against the judgment which the appellant held against him, and proffered to pay the difference between the two to appellant. She filed her reply, in which she denied the right of appellee to set off this claim against her judgment for the reason, as she alleged, that when her husband died in April, 1898, she was left as his widow, with three small children—Leslie, Blanche, and Mabel Thompson—who were all under the age of 10 years, and children of the decedent, W. H. Thompson, and were living with and dependent upon her for a support; that W. H. Thompson at his death did not leave the personal property on hand exempted to her and the children under section 1403 of the Kentucky Statutes of 1899. All the personal property then on hand was appraised by the appraisers and set apart to her and the children, and amounted to only \$210.15. The appraisers specified these articles in their appraisal, but did not file it in the county court until the end of the litigation hereinbefore referred to, and on the 30th of May, 1902, added in

substance to this appraise bill the following, and signed and filed it with the county court:

In lieu of ten head of sheep not on hand.....	\$ 15
" " " spun yarn and manufactured cloth....	20
" " " Family Bible.....	3
" " " loom.....	15
" " " plow and gear.....	10
" " " wagon.....	50
" " " sufficiency of provisions, including bread stuff, to sustain the widow and three infant children, there being no growing crop or live stock on hand at the death of W. H. Thompson out of which to set it apart, the sum of.....	200
" " " one horse not on hand.....	100

The appraisers set these sums apart to the widow and children, to be taken out of the judgment against appellee. The appellee filed a rejoinder to this reply, claiming that, as he became the owner of the Pugh judgment on the 23d of May, and this appraisal took place on the 30th of May, his rights in this judgment were fixed, and he was entitled to a set-off against the judgment in favor of appellant against himself before she and her children obtained any interest in the judgment against him. The lower court seems to have taken appellee's view, and adjudged that he was entitled to a set-off of the one judgment against the other, and that he be required to only pay her the difference. The appellant has appealed, and asks a reversal.

It appears from the record that this judgment against appellees, together with the articles of property named in the appraise bill, and set apart to the widow and children, constituted the whole of the personal estate left by W. H. Thompson at his death. And it also appears that the burial expenses of the decedent and the cost and charges of the administration of his estate have not been paid. The effect of the judgment of the lower court gives appellee, under his assigned Pugh judgment, which was not a lien upon any part of the decedent's estate, precedence over the statutory claim of the widow and children and other preferred claims under the statutes. At the death of W. H. Thompson the property specifically exempted by statute from distribution and sale at once ceased to be a part of his estate, and vested instantly by operation of law in the widow, for the benefit of herself and the infant children residing with her. It was not necessary that the appraisers should appraise and set it apart to make it her property. The statute fixed that. The appraising and setting apart of the property is merely for the purpose of designating the individual pieces of property and valuing them, and supplying their places with other property, and separating it from the balance of the estate, when required. But in this case there was no other property left after giving to the widow and children the amount allowed by law, except the balance of this \$400 judgment against appellee, and this balance will probably not more than pay the preferred claims. Appellee, by the assignment of this claim by Pugh, obtained no greater rights than Pugh had. If Pugh had presented this judgment in the settle-

ment of decedent's estate, it cannot be contended that he could have defeated the exemptions of the widow and children and the preferred claims. Mallory's Adm'r's v. Mallory's Adm'r, 92 Ky. 319, 17 S. W. 737.

Wherefore the judgment of the lower court is reversed, and the cause remanded for further proceedings consistent herewith.

O'REAR, J., not sitting.

WALTER et al. v. BRUGGER et al.

(Court of Appeals of Kentucky. Feb. 2, 1904.)

TRUST DEEDS—POWER OF TRUSTEE—RIGHT TO MORTGAGE—APPLICATION OF LOAN—DUTY OF MORTGAGEE—STATUTES—SALE OF PROPERTY—VACATION—NEW TRIAL.

1. Where a deed of trust required the trustee to make repairs on the property and pay claims against it, and authorized him to mortgage the same, he was authorized to mortgage the property to raise money to discharge taxes and liens thereon.

2. Ky. St. 1903, § 2356, providing that no sale of any real estate by a trustee by virtue of a deed of trust shall be valid unless the sale shall be in pursuance of a judgment of a court, or be made by an assignee under a voluntary deed of assignment, or the maker of such deed or pledge shall join in the writing evidencing the sale, did not deprive the trustee, under a power contained in the deed of trust, of the right to mortgage the property without complying with such section.

3. Where a trustee mortgaged the trust property to raise money to discharge claims against it, and the deed of trust did not expressly require the mortgagee to see to the application of the money loaned, she was not bound to do so, under Ky. St. 1903, § 4846, providing that where lands are devised to be sold on special or general trust, or are conveyed to trustees to be sold generally or for a specific purpose, the purchaser shall not be bound to look to the application of the purchase money, unless so expressly required by the conveyance.

4. Where property mortgaged was sold under a foreclosure decree of a court having jurisdiction of the parties and the subject-matter, the purchaser was not bound to determine whether the judgment under which the sale was made was erroneous or not, and hence a new trial would not be granted for the purpose of invalidating the same.

Appeal from Circuit Court, Jefferson County, Chancery Division.

"Not to be officially reported."

Action by Pauline Brugger and others against Charles A. Walter and others. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

A. H. Marret, C. A. Walter, and D. M. Rodman, for appellants. M. A., D. A. & J. G. Sachs, for appellees Pauline and Ferdinand Brugger. Edward F. W. Kaiser, for appellees Wolke and Libbert.

PAYNTER, J. This controversy arises out of a deed of trust which the appellants and others made to A. J. Speckert, trustee, and a mortgage which he executed by virtue thereof. From the recitations in the deed of trust, the Walters were indebted to Jacob Gast in the sum of \$190, and there were liens on the property for apportionment warrants and

for state and city taxes on the property conveyed by the deed of trust, and repairs were needed upon it. The deed of trust imposed upon Speckert the duty of paying the claims against the property and to make needed repairs. There was no money in Speckert's hands to discharge these assumed liabilities. The deed confers upon Speckert the right to mortgage the property, and also to sell it on a certain contingency. The contingency did not happen, and he did not sell it, but he borrowed from the appellee Pauline Brugger \$650, and to secure which he executed a mortgage, as trustee, upon the property described in the deed of trust. This action was instituted by the mortgagee to sell the property in satisfaction of the debt.

The first question is, did the petition state a cause of action? It does not set out as fully as it should have done the facts with reference to the execution of the deed of trust, and the trustee's powers under it, but we are of the opinion that this defect was cured by the answer making an issue upon these questions. The deed of trust is a very peculiar one. However, it expressly authorizes the execution of a mortgage upon the property, and we are of the opinion that it sufficiently shows that the purpose was that Speckert should execute a mortgage on the property, to raise money to discharge the claims which he, as trustee, was to pay.

It is urged that Speckert did not have the right to execute the mortgage, because of section 2356, Ky. St. 1903. It reads as follows: "No sale of any real estate by a trustee, by virtue of a deed of trust, or pledged to secure the payment of debts, shall be valid, nor shall the conveyance by such trustee pass the title of the property specified in such deed or pledge, unless the sale thereof shall be in pursuance to a judgment of court, or shall be made by an assignee under a voluntary deed of assignment, or the maker of such deed or pledge shall join in a writing evidencing the sale." The trustee did not sell the real estate, or attempt to pass the title to it. The section does not deny the power of trustees to pledge real estate to secure a debt when a deed of trust confers such authority. It denies a trustee the right to sell real estate held by virtue of a deed of trust, or where pledged to secure the payment of a debt, except in pursuance to a judgment of a court. The concluding clause of the section quoted gives exceptions to the general rule stated, but it is not necessary here to point them out. The foregoing conclusion is supported by *Abbott v. Yeager*, 98 Ky. 424, 33 S. W. 195.

It is urged that it was the duty of Mrs. Brugger to see to the application of the money which she loaned Speckert. Section 4846, Ky. St. 1903, reads as follows: "Where lands are devised to be sold on special or general trust, or are conveyed or devised to trustees or executors in trust to be sold generally or for any specific purpose, the purchaser shall not

be bound to look to the application of the purchase money, unless so expressly required by the conveyance or devise." This deed of trust was made for the purpose of raising money to discharge claims against the property in question, and did not expressly require the purchaser to look to the application of the purchase money. Mrs. Brugger, who loaned the money, was not required to look to the application of the money to the discharge of the debts. We are of the opinion that the court did not err in rendering a judgment ordering the sale of the property to satisfy the mortgage debt.

At the sale the appellee Wolke became the purchaser, which sale was confirmed, and the purchaser paid the purchase money. By an amended petition the appellants sought a new trial of the case, which was denied. Although the court might have erred in enforcing the mortgage and ordering the property sold to satisfy the mortgage debt, still the court had jurisdiction of the subject-matter and of the parties, and rendered judgment. It is not a void judgment. It is the policy of the law to uphold judicial sales. It was not the business of the purchaser to determine whether the judgment under which the sale was made was erroneous or not. The appellants sought a new trial, and to invalidate the sale, and make the purchaser lose the amount of the purchase money paid under the judgment of the court. This cannot be done.

The judgment is affirmed.

SOUTH COVINGTON DIST. et al. v. KENTON WATER CO.

(Court of Appeals of Kentucky. Jan. 29, 1904.)
CIVIL DISTRICTS—CONTRACTS FOR WATER
FOR FIRE PROTECTION—LIABILITY
FOR WATER FURNISHED.

1. Under 2 Acts 1883-84, p. 1318, c. 1494, establishing certain agricultural land as a separate justice and election district, providing for the election of two justices and a constable therein, placing the government thereof in a board of trustees, to be elected, and empowering them to pass such by-laws for the preservation of the health, good government, and police protection of the persons and property of the district as they deem proper, and to provide for their observance by penalties to be enforced before a justice, the fines collected to be used in improving the public roads, and giving them the management of such roads, and providing for a tax for keeping them in repair, but authorizing taxes for no other purpose, and providing no other means of revenue; and Act April 14, 1888 (3 Acts 1887-88, p. 170, c. 1071), amending such charter, by giving the trustees authority to require licenses for saloons, bowling alleys, billiard tables, and the like to be taken out, and to assess taxes for payment of peace officers—the district trustees have no authority to contract for water for fire protection.

2. A civil district having no power to contract for water for fire protection is not liable for water furnished for such purpose.

¶ 2. See *Municipal Corporations*, vol. 36, Cent. Dig. § 697.

Appeal from Circuit Court, Kenton County.

"To be officially reported."

Action by the Kenton Water Company against the South Covington District and another. From the judgment said district and plaintiff appeal. Reversed in part.

Tisdale & Gray, for appellants. H. D. Gregory, for appellee South Covington Dist. Orlando P. Schmidt, for appellee town of Latonia.

HOBSON, J. The South Covington District embraces about four square miles of territory. It was incorporated by an act of the Legislature approved May 12, 1884 (2 Acts 1883-84, p. 1318, c. 1494), as a magisterial district. On April 3, 1893, the trustees of the district granted to the Kenton Water Company the franchise to lay water pipes in the streets of the district, and to furnish fire hydrants thereon, and water to the citizens; also to the district in case of fire. For each fire hydrant they agreed to pay the water company \$45 a year. The fire hydrants were put in from time to time, and the rent on them up to October 12, 1899, amounted to \$2,819. Of this the trustees had paid \$1,335, leaving a balance due of \$1,484, to recover for which this suit was brought. When the contract was made a town had grown up on a part of the district near the Latonia race track, and was called "Milldale." In the classification of the towns of the state Milldale, Kenton county, was designated a town of the fifth class; but in *Stephens v. Felton* (Ky.) 35 S. W. 1116, it was held that the territory which included many farms was not incorporated as a town by the original act, but only as a civil district, and that the Legislature did not create a town or incorporate one by the act classifying the towns of the state. After this the town of Latonia was incorporated, and its limits have been since extended until something like three-fourths in value of the property in the South Covington District is now within the town of Latonia, and all the fire plugs for the rent of which the suit was brought are within the town. Both the town of Latonia and the South Covington District were made defendants to the suit, and, judgment having been rendered against the South Covington District and the action dismissed as to the town of Latonia, both the district and the water company appeal.

The first question arising is whether, under the charter, the trustees of the district had authority to make the contract sued on. The charter, so far as material, is as follows:

"That so much of the county of Kenton as may be embraced within the following boundary, to wit [here follows boundary], is hereby established as a separate justice and election district in said county; and the inhabitants thereof are created a body politic

and corporate, by the name and style of the 'South Covington District,' in Kenton county, Kentucky, for the purposes hereinafter mentioned.

"(2) Two justices of the peace and one constable shall be elected for said district by the qualified voters thereof, at the times and in the manner and having the qualifications required by the Constitution and laws of this commonwealth; and the elections for said district shall be held at a suitable place to be selected by the trustees of said district; said voting place may be chosen by the trustees and notice thereof shall be given by posting written notices in five or more public places in said district for ten days before said election is to be held.

"(3) The government of said corporation shall be confined to a board of five trustees, having the qualifications of owners of real estate and resident within said district, who shall be chosen once in two years on the first Monday in August by the qualified voters within said district, and who shall serve two years and until their successors are elected and qualified; the first election hereunder for trustees to be in August, 1886.

"(4) Said trustees may select one of their number chairman, who shall preside at all their meetings; and in case of his absence, they may select a chairman pro tem. They shall select a clerk, treasurer, and other corporation officers, and appoint policemen for the place and remove same at discretion and appoint others in their stead. They may meet at such times and places as they deem proper or as the chairman may appoint, upon petition of two of the board; and a majority of those elected shall constitute a quorum to do business; they shall keep a record of their proceedings. They may pass such by-laws, rules and regulations for the preservation of the health, good government, and police protection of the persons and property of the district as they may deem proper, not in conflict or inconsistent with the Constitution or laws of the state, and provide for their observance by adequate penalties for a violation of the same, to be enforced before a justice of the peace; and all fines or forfeitures therein collected shall be paid to the treasurer of the board, to be used in improving the public thoroughfares within the said district. They may make regulations to prevent stock of any kind from running at large in said district, provided they think it necessary; and may provide a pound for impounding stock that may be taken up, and the cost of impounding shall be a lien on the stock. They shall have the management of the public roads in said district, except turnpike roads operated by companies running through said district, and shall keep the same in good repair, and for that purpose a tax of ten cents on the one hundred dollars of all real estate in said district, which is to include the six cents road tax in said district at the valuation put thereon by the

assessor of Kenton county. They may grade and macadamize either with rock or gravel any public road passing through or into said district within the limits thereof. They may pay a collector of the tax herein levied and fix his compensation," etc.

See 2 Acts 1883-1884, p. 1318, c. 1494.

The remaining sections of the act provide that the tax referred to may be collected by suit, and when it shall be payable; that actions shall be prosecuted or defended in the name of the trustees of the corporation; that all police shall be sworn as constables, and that constables and justices of the peace in the district shall exercise like powers and receive the same fees as constables and justices in Kenton county; that at all elections the qualified voters residing in the district may vote at the voting places therein, but not elsewhere; and that the trustees may require persons residing in the district to work on the roads, and have like remedies against those falling to work as are given to surveyors of public highways. It is insisted for the water company that the power to pass such by-laws, rules, and regulations for the preservation of the health, good government, and police protection of the persons and property of the district as they deem proper empowered them to provide by contract for water for fire protection. On the other hand, it is insisted for the district that the latter part of the section shows that such by-laws, rules, and regulations are referred to as may be enforced by adequate penalties before a justice of the peace. On behalf of the water company we are referred to authorities holding that a city may contract for water under a power to pass ordinances respecting the police and to preserve health. 1 Dillon on Municipal Corporations, § 146. But this rule cannot be applied to a civil district where the trustees are given so limited power as in the act quoted. In construing the act we must bear in mind the condition of things under which it was passed. It was an agricultural district. Two justices of the peace and one constable were to be elected for it. The power conferred upon the trustees as to the levy of taxes is limited to a tax of 10 cents on the \$100 worth of real estate in the district, and this is to be applied to improving and keeping in repair the roads. They are not allowed to levy taxes for any other purpose, and no other means of revenue is provided. The powers of the trustees were apparently granted to provide police protection, prevent stock from running at large, and improve the roads of the district. The district was at that time entirely unsuited for a general system of water mains or fire plugs, and to have provided therefor at the common expense would have been unjust to the larger part of the property owners, for the fire plugs in contest are located on a small portion of the district in area. The provision of the charter that the trustees may pass such by-laws, rules, and

regulations for the preservation of the health, good government, and police protection of the persons and property of the district as they may deem proper, and provide for their observance by adequate penalties to be enforced before a justice of the peace, must be read in connection with the other provisions of the charter defining the powers of the trustees, and in the light of the circumstances to provide for which the charter was enacted. As the Legislature did not contemplate incorporating a town, but only intended to create a civil district, and conferred upon the trustees no power to raise revenue and carry out a contract for fire protection, the power to pass by-laws for the preservation of the health of the district did not warrant the contract in question, and under the original charter the trustees were not authorized to make the contract. By an act approved April 14, 1888 (see 3 Acts 1887-88, p. 170, c. 1071), the charter was amended. By the amendment the trustees were given authority to require saloons, bowling alleys, billiard tables, and the like to take out a license, and fix the cost thereof; also to have the sidewalks of the streets and roads improved at the expense of the owners of the property fronting thereon, and to assess and collect a tax of 5 cents on the \$100 on all real estate in the district not used for agricultural purposes, to be applied by the trustees in the payment of police or other peace officers in the district. In respect to the power to pass by-laws for the health and good government of the district the amendment added nothing to the powers of the trustees under the original charter. It was simply passed for the purposes named, and left the trustees with the same powers as to by-laws and ordinances as they had before, except as to the matters referred to. They had no more authority after this amendment was passed than before to make an ordinance for fire protection, for they had under their charter no other powers than those conferred by it, and the amendment did not enlarge their powers except as to the licensing of saloons, the construction of sidewalks, and the five-cent tax to pay the police officers. We therefore conclude that the district trustees were without authority to make the contract in question.

But it is insisted for the water company that, although the trustees had no authority to make the contract, still the district received the benefit of it, and must pay therefor to the extent that it has assets; and in support of this we are referred to the case of *Nicholasville Water Co. v. Town of Nicholasville* (Ky.) 36 S. W. 549, 38 S. W. 430, and the authorities therein cited. The distinction between this case and that is apparent. There the town had authority to contract for a water supply. Although the contract was not legally made, still the city was required to pay for what it had received under it on a quantum meruit. To the same

effect are the other authorities cited. But here the district was without authority to contract for a water supply. To hold it liable for what it has received would be to make it pay for something which it had no power to buy. Persons who deal with public corporations are charged with notice of their power, and the money of the people of the district cannot be misappropriated because the trustees made a contract they had no authority to make, and to apply the money of the district to a purpose not warranted by the charter would be to misapply it. In *Dillon on Municipal Corporations*, § 457, it is said: "The general principle of law is settled beyond controversy that the agents, officers, or even city council, of a municipal corporation cannot bind the corporation by any contract which is beyond the scope of its powers, or entirely foreign to the purposes of the corporation, or which (not being legislatively authorized) is against public policy. This doctrine grows out of the nature of such institutions, and rests upon reasonable and solid grounds. The inhabitants are the corporators. The officers are but the public agents of the corporation. The duties and powers of the officers or public agents of the corporation are prescribed by statute or charter, which all persons not only may know, but are bound to know. The opposite doctrine would be fraught with such danger and accompanied with such abuse that it would soon end in the ruin of municipalities, or be legislatively overthrown. * * * It results from this doctrine that contracts not authorized by the charter or by other legislative act—that is, not within the scope of the powers of the corporation under any circumstances—are void, and in actions thereon the corporation may successfully interpose the plea of ultra vires, setting up as a defense its own want of power under its charter or constituent statute to enter into the contract." Further on, in sections 459, 460, the question of the liability of the corporation upon an implied promise is discussed, and it is said that this principle applies to cases where the money or property of another is received under circumstances which impose an obligation upon the municipality to do justice with respect thereto. To same effect, see 1 *Smith on Municipal Corporations*, §§ 227, 663. In the case before us there can be no implied liability on the part of the district to pay for the water received, because it had no power under the charter to take any action in regard to a water supply, and its receiving the water was without its corporate powers. To hold it liable for water which it received would be to impose an implied liability upon it for an act which it had no power to do. This cannot be done.

Judgment reversed, and cause remanded, with directions to dismiss the petition. The judgment in favor of the town of Latonia is affirmed.

COX v. COMMONWEALTH.

(Court of Appeals of Kentucky. Feb. 4, 1904.)

LARCENY—HORSE STEALING—FELONIOUS INTENT—INSTRUCTIONS—STATUTES.

1. In a prosecution for horse stealing, defendant is entitled to a charge under Cr. Code, § 264, providing that, if an offense be charged in an indictment to have been committed with particular circumstances, the offense without the circumstances, or with part only, is included in the offense, though that charge may be a felony, and the offense without the circumstances a misdemeanor only.

2. In a prosecution for horse stealing, where it is doubtful if defendant had any felonious intent, he is entitled to a charge under St. 1903, § 1256, providing that any person unlawfully taking away any property not his own, but not with felonious intention, is guilty of a misdemeanor.

Appeal from Circuit Court, Lyon County.

"Not to be officially reported."

Joe Cox was convicted of horse stealing, and appeals. Reversed.

Max Hanberry, for appellant. N. B. Hays and Loraine Mix, for the Commonwealth.

BURNAM, C. J. The appellant, Joe Cox, was indicted by the grand jury of Lyon county, and convicted by a petit jury, of the crime of willfully and feloniously stealing and carrying away and converting to his own use a horse, the property of Hugh Wake. The commonwealth proved that Hugh Wake drove into the town of Kuttawa in a buggy drawn by a mare about 4 o'clock in the afternoon, and hitched her on the side of the street near Ashmoore's saloon, and that appellant, about dark, when considerably under the influence of liquor, unhitched the mare, got into the buggy, and drove her about $4\frac{1}{2}$ miles, to a point in the road opposite where he lived; that he then got out of the buggy and went to his home, leaving the mare and buggy in the road; and that she was found the next morning near Cumberland River Bridge, on the railroad, dead, and the buggy torn to pieces. Appellant was arrested the next morning in Kuttawa by the city marshal, and, when arrested, said: "I was in Kuttawa, and I suppose they will accuse me of taking the horse. It will keep me out of the poorhouse for a while." Appellant himself testifies that he took the mare and buggy, and drove to a point near his house, where the road forks, one branch leading to Ross Ferry, and the other towards Cumberland river; that he got out of the buggy, tied the lines, and turned the mare loose, thinking that she would go home; that he did not intend to keep her or appropriate her to his own use; and that he was drunk at the time.

The trial court properly instructed the jury as to the crime of horse stealing, but appellant contends that he was also entitled to an instruction under section 1256 of the Kentucky Statutes, for unlawfully, but without felonious intent, taking and carrying away the horse and buggy. It is doubtful whether the testimony in this case was sufficient to estab-

lish a felonious taking of the horse and buggy. On the contrary, it rather tends to establish the offense denounced by section 1256 of the Statutes. Section 264 of the Criminal Code provides that "If an offense be charged in an indictment to have been committed with particular circumstances as to time, place, person, property, value, motive, or intention, the offense without the circumstances or with part only is included in the offense, although the charge may be a felony and the offense without the circumstances only a misdemeanor." Appellant could have been convicted, under the allegation of the indictment and the testimony in the case, as well of the offense of unlawfully appropriating to his own use the property of another without felonious intent, as of the crime of which he was actually convicted; the latter being but a degree of the former. And the trial court erred in not also instructing under section 1256 of the Statutes.

Judgment reversed, and cause remanded for a new trial consistent with this opinion.

VAUGHN et al. v. JUSTICE et al.

(Court of Appeals of Kentucky. Jan. 21, 1904.)

CLAIM AND DELIVERY—WRONGFUL SEIZURE—LIABILITY OF SHERIFF—DAMAGES—INSTRUCTIONS—ATTORNEY'S FEES.

1. Civ. Code Prac. § 191, provides that, if another than defendant claims the property taken by the sheriff in claim and delivery, and delivers to the sheriff his affidavit that he is entitled to the possession thereof, the sheriff need not keep it, or deliver it to plaintiff, unless he indemnifies the sheriff against the claim by a bond, and no claim to the property by another than defendant shall be valid against the sheriff unless so made. *Held*, that where the sheriff seizes property belonging to J. on a writ against W., the fact that he surrenders it to J. without any affidavit or bond being given does not prevent recovery by J. against the sheriff for the wrongful seizure.

2. In an action for wrongful seizure by a sheriff in claim and delivery of certain poles being driven down a river there was evidence that those seized and those not seized were commingled, and that some of them were lost; but how many of each was not shown, and there was no pleading or proof showing liability of the sheriff for loss of any except those seized. *Held*, that an instruction that, if plaintiffs were the owners of the poles in controversy, and by reason of the seizure the poles were, while separated, swept into the river, and thereby some of them were lost, plaintiffs could recover for the loss, was misleading, and under it the jury might have allowed damages for loss of poles not seized.

3. Attorney's fees paid by one whose property is wrongfully seized are not part of the damages he can recover for the wrongful seizure.

Appeal from Circuit Court, Lawrence County.

"Not to be officially reported."

Action by B. H. Justice and others against J. L. Vaughn and others. Judgment for plaintiffs. Defendants appeal. Reversed.

Alex Lackey and A. J. Garred, for appellants. J. A. Scott, H. C. Sullivan, and M. S. Burns, for appellees.

PAYNTER, J. This action grew out of this state of facts: Garred & Bartram sued Ben Wilson for a lot of telephone poles. The appellant Vaughn, sheriff, supposing that the poles for which the writ was issued were in the possession of the appellees, who were then floating telephone poles down the Big Sandy river in rafts, seized them under the writ against Wilson, and held them for about 24 hours. They were being floated on a falling tide, as claimed by appellees, and that the delay caused them to incur certain expenses, an attorney's fee, and that part of the poles were lost by an unexpected freshet in the river. This action was therefore brought to recover damages for the unlawful seizure of the poles, and a trial resulted in a verdict for appellees for \$327.

We will first consider some questions raised as to the right of the appellants to have the rulings of the lower court reviewed on this appeal. In one of the briefs for the appellees it is stated that the verdict was rendered on the 23d day of April, and the grounds for a new trial were filed on the 26th of the same month; therefore more than three days had elapsed from the return of the verdict until the motion for a new trial was made. In the same brief it is stated that there was no exception saved to the giving of instructions. The first question may be disposed of by the statement that the trial began on the 23d day of April, and was adjourned until the next day, when the verdict was returned. The other contention may be disposed of by calling attention to the fact that in the closing paragraph of the bill of exceptions it is stated the defendants objected to the instructions given, and excepted to the action of the court in giving them.

Counsel urges that, before appellees could have had a cause of action against the sheriff, they should have filed the affidavit provided for by section 191, Civ. Code Prac., which reads as follows: "If another person than the defendant or his agent claim the property taken by the sheriff, and deliver to the sheriff his affidavit that he is entitled to the possession thereof, * * * the sheriff shall not be bound to keep it, or deliver it to the plaintiff, unless he shall, within two days after the delivery to him, or to his agent or attorney, by the sheriff, of a copy of the affidavit, indemnify the sheriff against the claim, by a bond executed by one or more sufficient sureties, in double the value of the property. No claim to such property by any other person than the defendant or his agent shall be valid against the sheriff, unless so made. He shall return the affidavit of the claimant, with his proceedings thereon, to the clerk's office."

¶ 3. See *Sheriffs and Constables*, vol. 43, Cent. Dig. § 298.

This section attempts to give the cause of action on the bond provided for in that section against the plaintiff and his sureties. No such bond was given, nor was there any occasion for giving it, because the sheriff surrendered the property to appellees. The mere fact the affidavit was not made and the bond not given did not relieve the sheriff of the consequences of the wrongful act in seizing the property of appellees. The poles were seized in the Big Sandy river, a short distance above the lock and dam at Louisa. After they were taken through the lock, they were lodged on a sand bar, together with some other rafts of telephone poles. The poles in all the rafts were cut apart, and an attempt was made to drift them down the river, and while so doing some of the poles were lost. The inference to be drawn from the evidence is that there was a commingling of the poles of the rafts which had been seized by the sheriff and those which had not been so seized. The evidence does not show how many of each were lost, and there is neither a plea nor proof showing any liability on the sheriff for the loss of any poles except those which he seized. For that reason instruction No. 1 is misleading. It reads as follows: "If the jury believe from the evidence that plaintiffs B. H. Justice and S. B. Blackwell were the owners of the poles in controversy, and that while they were such owners the defendant J. L. Vaughn levied the order of delivery referred to in the evidence upon said poles, and took them into his possession, and shall further believe from the evidence that by reason of said levy and seizure the plaintiffs were compelled to employ counsel to gain possession of said poles, they were to find for them such reasonable sum, not exceeding \$50, as they may believe from the evidence will compensate them therefor. And if the jury believe from the evidence that by reason of said levy and seizure the plaintiffs were put to greater expense in separating said poles to get them off of the sand, they were to find for plaintiffs such reasonable sum, not exceeding \$30, as they may believe from the evidence will compensate them for such extra expense. And if the jury shall believe from the evidence that by reason of such levy and seizure the poles were, while separated, swept by a sudden freshet or rise into the Ohio river, and thereby they or some of them were lost, and that plaintiffs were compelled to expend money in gathering up said poles, they will find for plaintiffs such reasonable sum, not exceeding \$500, as they may believe from the evidence will compensate them for such loss and expenses; but the finding for plaintiffs cannot exceed in the aggregate the sum of \$580." The jury may have allowed damages for the loss of the poles which had not been seized by the sheriff. The court erred in instructing the jury it could allow as part of the damages the attorney's fee which appel-

lees contracted with a view of asserting and defending their right to the poles. *Worthington, etc., v. Morris' Ex'x*, 98 Ky. 54, 32 S. W. 269; *Farmers' & Shippers' Tobacco Warehouse Company v. Gibbons (Ky.)* 55 S. W. 2; *Bogard v. Tyler's Adm'r* (opinion delivered January term, 1904) 78 S. W. 138.

Judgment is reversed for proceedings consistent with this opinion.

KEPHART et al. v. HIEATT.

(Court of Appeals of Kentucky. Feb. 2, 1904.)
WILLS—ESTATES CREATED—FEE SIMPLE—SUBSEQUENT LIMITING CLAUSES—EFFECT.

1. A clause in a will giving testator's children all her property, to be held in trust by their guardian until the youngest should arrive at the age of 21 years, vested in the children arriving at maturity a fee simple, which was not limited by a subsequent clause providing for a distribution of the estate in case all testator's children should die without issue, but the latter clause was intended to become operative only in case of the happening of the prescribed contingency before the maturity of the children.

Appeal from Circuit Court, Henry County.
"Not to be officially reported."

Suit between James Kephart and others and Willie Hieatt. From a judgment for the latter, the former appeal. Affirmed.

W. B. Moody, Turner, Turner & Cureton, and Barbour & List, for appellants. John D. Carroll, for appellee.

HOBSON, J. Anna M. Hieatt died a resident of Henry county in the year 1881, leaving three children surviving her. The two older children died without issue. The third, Willie Hieatt arrived at the age of 21 years several years ago. The only question to be determined here is whether he took, under his mother's will, the property devised in fee simple on his arriving at age. The material provisions of the will are as follows:

"(2) I will all my real, personal and mixed estate to my children share and share alike to be held in trust by their guardian and trustee for them until the youngest shall arrive at the age of twenty one years of age.

"(3) It is my will that should all my children die without issue, then it is my will that the remainder of the estate at that time in that event I will to my brother James Kephart's children and my sister Bettie Smith's children, Elias Kephart's child share and share alike equally between them.

"(4) I appoint my brother Thomas Kephart my executor and trustee for my children as well as guardian for them and I request that he be permitted to qualify without security and in the event of his death or failure or refusal to qualify, I then appoint my brother-in-law, A. G. Smith, executor, guardian and trustee and desire that he be permitted to qualify upon the same condition without security."

In *Thackston v. Watson*, 84 Ky. 206, 1 S. W. 398, the testator gave to his executor the

entire management and control of the estate until his son was 21 years old, and directed that the estate should be paid over to the son and be delivered up to him by the executor "when he should arrive at the age of twenty-one years if he should live that long," but that, in case his son should die without bodily heirs, all his estate should be converted into money by his executor, and equally divided between certain of his relatives. It was held that the son, upon arriving at the age of 21 years, became vested with an absolute estate in fee simple. In *Wilson v. Bryan*, 90 Ky. 482, 14 S. W. 533, the testator directed that his estate should be kept together and jointly used and enjoyed by his children until the youngest became of age, and then the land to be equally divided among his sons then living, adding this provision: "If any of my sons should die without any bodily heirs his portion of my estate to be divided amongst his brothers and sister that may then be living." It was held that when the youngest became of age the estate of the sons in the land became absolute. In *Webster's Trustee v. Webster*, 93 Ky. 632, 21 S. W. 332, the testator devised an estate to his daughters Hettie and Euphemia. The will contained this clause: "In case either of my daughters Euphemia R. and Hettie C. Cunningham, should die without children then and in that event it is my will and I so direct that the estate of the one dying shall be equally divided among all my then living children." By the will the final distribution of the estate was not to be made until five years after the death of the testator, and it was held that the limitation referred only to the death of the devisees before the period of distribution. These cases control the one before us, which is stronger for the application of the rule than any of them. The testatrix left three little children. She directed the executor and guardian to hold the entire estate until the youngest child was of age, her purpose being to provide for the children during their minority. The property is devised to the children share and share alike, subject to this trust; and, if all had survived the period of distribution, they would have been then entitled to a division of the estate. The third clause of the will, providing that, in case all the children die without issue, then the remainder of the estate is to go to certain collateral kindred, refers to the estate in the hands of the guardian and trustee, for the children before distribution. The purpose of the testator was not to place a limitation on her own children in favor of her collateral kindred, but simply to provide that the estate should go to these collateral kindred, in case her children all died before the period of distribution. She devises the estate to her children, and the third clause was not intended as a limitation on the estate devised to them after the expiration of the trust created in the second clause. There

is nothing in the case of *Dorsey's Committee v. Maddox*, 103 Ky. 253, 44 S. W. 632, inconsistent with the conclusion we have announced. In that case no period of distribution was provided for, and there was no time to which the death without issue could be properly referred. Section 2344, Ky. St. 1903, is not a new provision, but was in force when the cases above were decided, and was relied on in those cases.

Judgment affirmed.

ILLINOIS CENT. R. CO. v. JORDAN.

(Court of Appeals of Kentucky. Feb. 2, 1904.)

RAILROADS—PERSONS ON TRACK—INJURIES TO EMPLOYEES—STATUTORY DUTIES—NEGLIGENCE—QUESTION FOR JURY—CONFLICT OF LAWS—INJURY IN OTHER STATES.

1. Where an accident to a railroad employé happened in Tennessee, the law of that state must govern a recovery in an action for the injury brought in Kentucky.

2. Thompson & S. Code Tenn. §§ 1298, 1299, provides that railroads shall keep an engineer or fireman on the lookout ahead, and that, when any persons or obstructions appear on the track, the alarm whistle shall be sounded and the brakes put down, and that for failure to observe the prescribed precautions the railroad shall be liable for the injury done. In construing the sections the Supreme Court of Tennessee held that they imposed an absolute liability for failure to observe the prescribed precautions, and that contributory negligence operated only to mitigate damages. *Held*, in an action in Kentucky for injuries occurring in Tennessee to an employé who negligently attempted to remove a hand car from the track on the approach of a train, the evidence as to the failure of the fireman on the train to observe the prescribed precautions being sufficient to support a verdict, the employé could recover.

3. Where the evidence is conflicting as to whether a railroad fireman, on discovering plaintiff on the track, failed to sound the alarm whistle and put down the brakes, the question is for the jury.

Appeal from Circuit Court, Hickman County.

"To be officially reported."

Action by P. Jordan against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. M. Dickinson, Pirtle & Trabue, and N. P. Moss, for appellant. Shelbourne & Kane and R. L. Evans, for appellee.

PAYNTER, J. Appellee was a section foreman for appellant at Idlewild, Tenn. A fast train of appellant was due there at 5:51 a. m., but was four or five minutes late. It was the duty of the appellee to go to his work at 6 a. m. Under the rule of the company, well known to him, it was made his duty to have the track cleared of the hand car 20 minutes before the time any freight or passenger train was due to arrive. In violation of this rule, the appellee had the hand car upon the track, his crew with him—

¶ 1. See Master and Servant, vol. 34, Cent. Dig. § 137.

self boarded it, and started south to their work. After going about three-quarters of a mile, at the entrance of a cut about 1,500 feet long, the car was stopped, and one of the crew went back a short distance to listen for the past-due train. He reported that he did not hear it. The appellee and the crew proceeded with the hand car until they were nearly to the south end of the cut, when they discovered the approach of the belated train. The hand car was stopped, and the crew made an effort to remove it from the track, but failed to remove one corner of it, and the crew other than appellee fled to a safe place. Appellee either remained or returned—as to which the evidence is conflicting—and was making an effort to remove the car, when he was struck by the train, or the hand car was struck by it, and thrown against him, seriously injuring him. He acted in violation of the rule of the company; was guilty of the grossest kind of negligence in imperiling the lives of his crew and the persons on the approaching train by operating the hand car under the circumstances. While it was a commendable act to remain and endeavor to remove the hand car from the track, and thus possibly save the lives of the persons on the train which he had by his reckless conduct imperiled, still it was suicidal in character. The uncontradicted evidence shows that after those in charge of the train discovered the hand car on the track it was not possible to stop the train before it struck it. The disposition of the questions cannot be made under the rules of law which prevail in this jurisdiction, but must be done under the law of Tennessee, where the accident happened. In *Louisville & Nashville R. R. Co. v. Whitlow's Adm'r*, 43 S. W. 711, 41 L. R. A. 614, this court said: "The question presented to the court is whether the Kentucky or Tennessee law as to contributory negligence applies. Under the Tennessee law, if the intestate was himself guilty of negligence that contributed to his injury and death, yet, if the defendant was guilty of negligence which was the direct and proximate cause of intestate's injuries and death, then the plaintiff is entitled to recover, but the damages recoverable to be reduced or mitigated by reason of the intestate's contributory negligence. Under our law, if the intestate was guilty of such contributory negligence except for which his injuries and death would not have occurred, then there can be no recovery. Contributory negligence, under our rule, is never applied in mitigation of damages. * * * At the time the injury was inflicted, the right of action became fixed, and a legal liability was incurred. The liability which the plaintiff seeks to enforce was incurred by virtue of the law of Tennessee. The law of contributory negligence, as adjudged in this state, cannot be applied so as to alter or affect the right of action which arose in the state of Tennessee." The recovery is sought under

the Tennessee law. If the case were to be disposed of under the law of this state, the court would reach a conclusion different from the one forced upon it by the Tennessee law. So much of the statute law of Tennessee (Thompson & S. Code) as is pertinent to the inquiry reads as follows:

"Sec. 1298. In order to prevent accidents upon railroads, the following precautions shall be observed: * * * (4) Every railroad company shall keep the engineer, fireman or some other person upon the locomotive, always upon the lookout ahead; and when any person, animal or other obstruction appears upon the road, the alarm whistle shall be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident.

"Sec. 1299. Every railroad company that fails to observe these precautions, or cause them to be observed by its agents and servants, shall be responsible for all damages to persons or property occasioned by, or resulting from, any accident or collision that may occur.

"Sec. 1300. No railroad company that observes, or causes to be observed, these precautions, shall be responsible for any damages done to persons or property on its road. The proof that it has observed said precautions shall be upon the company."

In *Chesapeake, O. & S. W. R. Co., etc., v. Foster*, 13 S. W. 694, the Supreme Court of Tennessee was called upon to construe the statute, and in doing so said: "The other assignment is made on the final recital in the bill of exceptions: 'The jury, having considered the case, returned, and asked the court whether, if they found that the defendant had not strictly complied with all the statutory rules and precautions as given in the charge, yet that the defendant's (plaintiff's) own want of care and gross neglect was the direct cause of his injury and death, they could not find for the defendant; to which the court replied they could not, but should consider such contributory neglect on the part of the deceased in mitigation of damages. If they found the railroad company wanting in full performance of the statutory duties, plaintiff would be entitled to some damages in any event.' It is insisted that this action of the court was erroneous, and that he should have answered the question of the jury in the affirmative. Taking the case as stated in the question, the contention is that, inasmuch as the gross neglect of the deceased was the direct cause of his injury and death, his negligence should operate not merely in mitigation of damages, but as a bar to the action, notwithstanding the failure of the railroad employees to observe the precautions prescribed in section 1186 (now 1298) of the Code. Learned counsel make an able and forcible argument in support of this view, yet we think it contrary to the obvious meaning of the statute. The response of the trial judge

is in conformity to the construction announced by this court in numerous decisions, some of which we cite: *Railroad Co. v. Smith*, 6 Helsk. 174; *Hill v. Railroad Co.*, 9 Helsk. 823; *Railroad Co. v. Walker*, 11 Helsk. 383; *Railroad Co. v. Nowlin*, 1 Lea, 523; *Railroad Co. v. Smith*, 9 Lea, 470. Section 1166 of the Code (Thompson & S.) prescribes certain precautions to be observed by railroads for the prevention of accidents. The next two sections declare in the plainest terms the legal consequences of observance and nonobservance. By section 1167 it is declared in every case of nonobservance the railroad shall be liable for the damages done, and by section 1168 it is declared in every case of observance it shall not be liable at all. By the positive language of the statute liability flows from nonobservance, and nonliability follows observance. Neither liability nor nonliability is made to depend on the cautious or incautious conduct of the person injured. Both are to be determined by the conduct of the railroad employés. The injured person may be ever so negligent in the one case, and yet recover something; while in the other case he may be entirely without negligence, and yet recover nothing. At common law contributory negligence may bar the action, but under the statute it is to be considered only in mitigation of damages." The Tennessee statute requires every railroad company to keep some one upon the locomotive, always upon the lookout ahead. If any person, animal, or other obstacle appears upon the road, the alarm whistle must be sounded, the brakes put down, and every possible means employed to stop the train and prevent an accident. By the interpretation of the statute given by the Tennessee Supreme Court, a failure to do any of the things required by it upon the part of a railroad company makes it liable in damages, although such failure may not have been the cause of the injury. The uncontradicted evidence is that both the engineer and fireman were on the lookout when the train was within a mile of the place of the accident, and one or both of them continued to be until the accident happened. The engineer and fireman both testified that within about 300 feet of the place where the car was on the track the fireman discovered its presence, told the engineer, who put on the emergency brakes, and sounded the alarm whistle. This statement is not contradicted as to the time they discovered the hand car on the track. The issue of fact is, did the engineer, after discovering the hand car, sound the alarm whistle, and put the brakes down, and use every possible means to stop the train and prevent the accident. The evidence of appellant tended to show that it was done. The appellee's evidence tended to show that the alarm whistle was sounded. The brakes were put down about the time the engine struck the hand car. It was for the jury to determine, if it believed the testimony in-

troduced by the appellee, whether the alarm whistle was sounded and the brakes put down as soon as possible after the fireman discovered the hand car on the track. While this court would probably have reached a conclusion different from the one reached by the jury, it cannot substitute its conclusion for that of the jury, for if it did so it would be invading the province of the jury. On the issue of fact stated we are of the opinion that the case should have gone to the jury, and we cannot say the verdict is so palpably against the weight of the evidence as will justify the granting of a new trial.

The judgment is affirmed.

WALLING v. EGGERS et al.

(Court of Appeals of Kentucky. Jan. 28, 1904.)

EJECTMENT—EASEMENTS—ADVERSE POSSESSION—EVIDENCE—BURDEN OF PROOF—COMPETENCY—ACTS OF OWNERSHIP—PAYMENT OF TAXES.

1. Under Civ. Code, § 526, providing that the burden of proof in the whole case lies on the party who would be defeated if no evidence were given on either side, where plaintiff alleged ownership of a strip of land and an easement in an alley, and defendant, admitting plaintiff's paper title in the strip, pleaded adverse possession thereof, but denied the easement, while plaintiff had the burden of proving the easement, defendant had the burden of establishing adverse possession, and, as judgment would have gone against him had he introduced no evidence in support of that issue, the burden on the whole case was also on him.

2. Evidence that plaintiff's and defendant's common grantor had established an alleyway between plaintiff's and defendant's lots, had called for it in the deeds made, thereby dedicating its use to the lots, and while in possession had recognized plaintiff's ancestor's right and claim to the use thereof, and that plaintiff and his tenants had used it up to a recent date, was sufficient to sustain a verdict in favor of plaintiff's right to a passway through such alley.

3. Failure to object to a bill of exceptions when filed, or to an order extending the time for its filing, and an examination of the bill when tendered, constituted a waiver of objections.

4. In ejectment, where defendant pleaded adverse possession, evidence that plaintiff and his ancestors listed the property for taxation and paid the taxes thereon up to four or five years before action brought, and that defendant did not list it until that time, was competent as a claim of ownership.

5. On the issue of ownership of a strip of land to which defendant claimed title by adverse possession, and of an easement in an alley, it was competent for plaintiff to prove that his ancestor and agent claimed the property in dispute and denied defendant's right to use it, and that defendant did not object to the use of the strip and passway by plaintiff's tenants and servants.

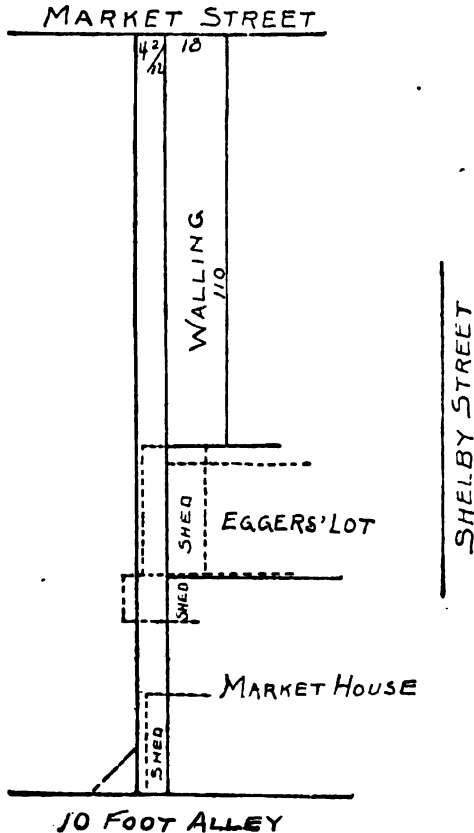
Appeal from Circuit Court, Jefferson County, Common Pleas Division.

"Not to be officially reported."

Action by Willoughby Walling against Herman Eggers and others. From a judgment for defendants, plaintiff appeals. Reversed.

E. L. McDonald, for appellant. Lieber & Lincoln, for appellees.

O'REAR, J. Appellant sued appellees, Eggers and the Shelby Street Market Company, to recover the possession of a strip of land 4 feet 2 inches wide by about 94 feet long, and to have adjudged his right to use a passway over the north side of Eggers' lot, running at right angles from the north end of the strip last mentioned to Shelby street, in Louisville. This will illustrate the situation of the property:



In the petition appellant claimed that he was the owner of two lots, which together made one connected body of land fronting 22 feet 2 inches on Market street, in Louisville, Ky., and extending south that width 110 feet, and extending further south 94 feet, 4 feet 2 inches wide, to a 20-foot alley; that the appellees had wrongfully taken possession of and obstructed certain parts of the last-named strip; that appellant also owned, as an appurtenant to his lot, an easement of the use of a 4-foot alleyway running from the back of the 18 feet of lot described, east to Shelby street. Appellees filed a joint answer. They do not deny appellant's title, except as to the easement; but they claim that they and their vendors have respectively been in the adverse, continuous possession of the strip 4 feet and 2 inches wide and 94 feet long from the 20-foot alley north for more than 15 years, claiming it as their own. The reply denied the continued adverse pos-

session of appellees for 15 years before the bringing of the suit. The effect of these pleadings was to put in issue, first, appellant's claim to the easement over the Eggers lot east to Shelby street; second, the claim of appellees that by an adverse possession and user of 15 years of the strip 94 feet by 4 feet 2 inches they had acquired the title to it. On the first issue, plaintiff had the burden of the proof; on the second, defendants had the burden; but on the whole case the burden was on the defendants.

Section 526, Civ. Code, is: "The burden of proof in the whole case lies on the party who would be defeated if no evidence were given on either side." Although plaintiff had the burden as to the easement claimed, and notwithstanding, if no evidence had been introduced by either party, he would have lost as to it, yet, under the state of the pleadings, he would have been entitled to a judgment against appellees (defendants) upon the other issue. So, upon the whole case, appellees would have lost. The court erred in adjudging the burden of proof to be upon appellant. Section 317, Civ. Code.

At the close of plaintiff's evidence the court gave a peremptory instruction to the jury to find for defendants upon the ground, so the opinion of the trial judge recites, that plaintiff had failed to show title to himself in the land sued for. As has just been held, defendants admitted the paper title, and therefore the prima facie right of possession, to be in plaintiff. Their plea was in avoidance, as relying upon the statute of limitation to bar the right of recovery. To sustain that plea the defendants should have been required to introduce proof, or suffer a judgment for plaintiff.

The evidence showed, as to the easement claimed, that a common grantor of the Walling and Eggers lots, owning them both, had established this alleyway, and called for it in the deed made, thereby dedicating its use to the lots so conveyed; furthermore, that Eggers' grantor, while in possession, recognized the right and claim of Walling's ancestor to use the passway as a matter of right, and that the Wallings and their tenants had so used it until recently. There was enough evidence to have sustained a verdict for the plaintiff, and the direction of the court requiring peremptorily the finding of the verdict for appellees was erroneous.

Whether the bill of exceptions was filed in time, appellees did not then object to it, nor did they object to the order of the court extending the time. They examined the bill when tendered, and made no objection to its being filed. They have waived any error that might have been committed in this proceeding. *Downing v. Bacon*, 7 Bush, 680.

As the case must be returned for a new trial, it is well to say that the court should have allowed appellant to prove that he and his ancestors listed the property in dispute for taxation and paid the taxes on it, and that

appellees did not list it for taxation prior to 1898. This was an act or claim of ownership to be given such weight as the jury might determine, in connection with other facts proven in the record.

It was likewise competent to prove that appellant's ancestor and agent claimed the property in dispute, and denied the right of appellees to it, and to prove that appellees did not object to appellant's tenants and servants using the strip of property and pass-way in litigation.

For the reasons indicated, the judgment is reversed, and cause remanded for a new trial under proceedings not inconsistent herewith.

DIXON et al. v. LABRY et al.

(Court of Appeals of Kentucky. Feb. 5, 1904.)

DRAINAGE DITCHES—ACTION TO ENFORCE CONTRACTOR'S LIEN—LIMITATIONS.

1. Under Ky. St. 1899, § 2400, providing that the county surveyor, on being notified by a drainage ditch contractor that his job is completed, shall inspect it, and, if he finds it completed according to specifications, he shall accept it, and give it a certificate stating the amount due from the owner of the land, which shall be a lien on the land, and due and payable immediately, the statute begins to run against an action to enforce the lien only from the time the surveyor accepts the work and gives the certificate.

"Not to be officially reported."

On rehearing. Denied.

For former report, see 69 S. W. 791.

NUNN, J. This action was instituted by appellees to enforce a lien for the sum of \$113.65 incurred in digging a ditch on appellants' land under an act of the Kentucky Statutes of 1899, § 2400, entitled "An act for the drainage of land." This action has been appealed to this court once before; the opinion being in 69 S. W. 791. After the return of the cause to the lower court, appellees filled the blanks in their petition as authorized by this court. The appellants filed an amended answer, in which they denied that the surveyor of Henderson county issued or delivered to the appellees, or to the clerk of the Henderson county court, a certificate showing the amount due them, or either of them, for the construction of the ditch, and alleged that the contract of Labry made with the clerk for the performance of this labor in digging the ditch was made on the 17th of May, 1894; that he should have completed his work under the contract in ten days thereafter, and did complete the labor in digging this ditch prior to October, 1894; and that his cause of action, if any he had, accrued more than five years before the commencement of their action; and they pleaded the statutes of limitations. Under the former opinion in this case, all the questions have been settled, except the one last mentioned.

It appears from the record herein that the surveyor of the county did accept as com-

pleted, according to the specifications, the ditch passing through the lands of the appellants, and made his report to that effect, which was recorded in the ditch book for that county on the 26th of September, 1896. And it appears that this action was brought on the 3d of August, 1901, less than five years after the recording of the certificate. Appellees had no right to bring an action on this claim, except as authorized by the statutes. They could not legally have instituted this action before this acceptance by the surveyor, and his certificate made with reference thereto, as required by section 2400 of the Kentucky Statutes. Their claim was not due until that time, their cause being wholly statutory, and, having been brought within five years from the date of the acceptance and certificate by the surveyor, their action is not barred by the statute of limitations.

Wherefore the judgment of the lower court is affirmed.

REAGAN v. DUDDY.

(Court of Appeals of Kentucky. Feb. 5, 1904.)

JUDICIAL SALES — NOTICE — PUBLICATION — NEWSPAPER OF GENERAL CIRCULATION.

1. A paper containing no news of a political, religious, commercial, or social nature, but a few advertisements and notices of conveyances of real estate, building permits, court dockets, and commissioners' sales, is not a newspaper of general circulation, in which the statute requires notices of judicial sales to be published.

Appeal from Circuit Court, Jefferson County, Chancery Division.

"Not to be officially reported."

Action by Margaret Duddy against Benjamin Harrigan and others. J. J. Reagan purchased at the sales under the judgment, and from the order confirming the report of the sale he appeals. Reversed.

Johnson & Heatt, for appellant. Leopold & Pennebaker, Lane & Harrison, and G. L. Everbach, for appellee.

BURNAM, C. J. On the 29th day of June, 1903, R. W. Herr, commissioner of the first division of the chancery branch of the Jefferson circuit court, sold under a judgment rendered in favor of the Fidelity Trust & Safety Vault Company, in the action of Margaret Duddy v. Benjamin Harrigan, etc., the following described lot, located in Louisville, Ky.: "Commencing at the northwest corner of the intersection of Slevin and 25th streets, thence west along and having a front on the north side of Slevin street forty feet, and extending back northwardly, the same width, between lines parallel with the direction of 25th street, 180 feet to an alley." The appellant, James J. Reagan, became the purchaser of the property at the price of \$1,055, and complied with the terms of the sale. The judgment directed the commissioner to advertise this sale by printed handbills post-

¶ 1. See Newspapers, vol. 37, Cent. Dig. § 16.

ed for 10 days prior to the day of sale, one at the courthouse door in the city of Louisville, and by three insertions in the Official Record, a newspaper printed and published daily in the city of Louisville, giving notice of the time, place, and terms of sale. The sale was duly reported by the commissioner, and appellant, as purchaser, filed exceptions to its confirmation on the ground that the Official Record was not a daily newspaper published and having a general circulation in the city of Louisville and county of Jefferson. In support of this exception the affidavit of C. C. Hieatt was filed, in which he states that the Official Record is not a daily newspaper published or in general circulation in Jefferson county. The appellee filed a counter affidavit of J. B. Lewman, who says that he is president of the Record Printing & Publishing Company; and that this company is a Kentucky corporation, and the owner of the newspaper called the Official Record; it is issued and published every day in the week except Sunday, and has a general circulation among the legal profession, court officials, financial institutions, real estate agents, and public generally in the city of Louisville, and is devoted to all news pertaining to matters of public interest connected with courts, real estate, and financial matters, and is used as an advertising medium by the Louisville real estate agents, and is recognized as an efficient medium for reaching the general public interested in real estate matters; and he filed copies of the Official Record with his affidavit. The exceptions having been submitted upon this evidence, the chancellor overruled them, and the report of sale was confirmed, to which the appellant, Reagan, excepted, and has appealed to this court.

It is conceded that the property was duly advertised for sale, as required by the judgment, by three insertions in the Official Record on the 25th, 26th, and 27th days of June. It was held in *Wilson v. Petzold* (decided at the present term of this court) 76 S. W. 1093, that the Louisville Times was a daily newspaper, although not published on Sunday, within the meaning of the statute. The only question, therefore, to be decided upon this appeal is whether the Official Record is a newspaper of general circulation within the spirit of the statute. There is no definite information contained in the affidavit of the president of the corporation which publishes the Official Record as to the number of copies of the paper stricken off each day, and the copies filed with his affidavit show it to be a very small publication in point of size, and that it contains no news of a political, religious, commercial, or social nature. But it does contain a few advertisements and notices of conveyances of real estate, building permits, court docket, and commissioners' sales. Our attention has been called to a number of decisions from the courts of other states in which it has been held that a paper which makes a specialty of legal notices and

information regarding courts and legal matters generally is none the less a newspaper when it contains other matters of a general interest. But numerous authorities to the contrary are also cited in the note on page 533 of the 21 A. & E. En. of Law. Our statute seems somewhat more comprehensive than any of those in which the validity of advertisements in similar sheets in other states have been upheld, in that it requires the publication not only to be in a daily paper, but also in one of general circulation. It seems to us that the purpose of the General Assembly in this addition to the statute was to require that the publication of judicial sales should be made in newspapers which reach all classes of the general public, to give it the widest circulation. The copies of the Official Record filed in this case do not appear to us to meet the requirements of the statute either as to a newspaper or as to its general circulation. The only evidence in the case is the two affidavits, one of which states that it does not have a general circulation and the other that it does. We are therefore of the opinion that the chancellor erred in overruling the exceptions to the confirmation of the sale filed by appellant. It is proper, however, for us to say that the sales of property which have been confirmed without objection on account of the insertion in the Official Record of the notice would not be invalidated. See *Greer v. Wintersmith*, 85 Ky. 516, 4 S. W. 232, 7 Am. St. Rep. 613; *Anderson v. Briscoe*, 12 Bush, 344; *Lawrence v. Speed*, 2 Bibb, 401.

But for reasons indicated, the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

HAVING v. CITY OF COVINGTON.

(Court of Appeals of Kentucky. Feb. 3, 1904.)

MUNICIPAL CORPORATIONS—GOVERNMENTAL FUNCTIONS—PRESERVATION OF HEALTH—LIABILITY TO INDIVIDUAL

1. A city, in confining a person afflicted with a contagious disease in a pesthouse, performs a governmental function, and, in the absence of an express statute, is not liable for injuries resulting to such person from the unhealthy condition of the place of confinement.

Appeal from Circuit Court, Kenton County.

"Not to be officially reported."

Action by Henry Having against the city of Covington. From a judgment for defendant, plaintiff appeals. Affirmed.

B. F. Graziani, for appellant. F. J. Hanlon, for appellee.

NUNN, J. This action was instituted by the appellant in the Kenton circuit court for the recovery of the sum of \$5,000 in damages against the appellee, the city of Covington, alleged to have been sustained by him by the acts of the appellee city, through its officers and agents, committed, in substance, as follows: That the city, through its common council, purchased real estate, and erect-

ed a pesthouse thereon; that in the month of February, 1902, appellant was afflicted with a contagious disease, known as "smallpox"; that the city, through its agents and employes, did, on the date aforesaid, go to appellant's house, and assault and beat appellant, and took him by force against his will, while he was sick and unable to protect himself, and carried him to this pesthouse; that this house was unfit for any one, well or sick, to remain in; that the roof was broken, and the sides of the house open, so that the rain, snow, and ice could come in and upon him; that he was placed in a filthy, unhealthy, and damp room, and compelled to remain there for several weeks as a prisoner against his wish and protest; that the bed, bedding, and covering and place where he was kept were unfit for any one to occupy; that, because of said cold, sleet, and snow, and other elements, and the filthy condition of the rooms and bedclothing, he suffered both mental and physical pain and anguish; that the ravages of the disease with which he was afflicted were increased by reason thereof. The petition contained two paragraphs—one for the assault and battery, and the other for his sufferings by reason of the unsanitary condition of the pesthouse. The appellee filed a motion to require the appellant to elect which cause of action he would prosecute. This motion was sustained, and the appellant elected to stand on the cause of action set out in the second paragraph, and he withdrew so much of his pleading as set out the assault and battery. The appellant does not complain of the action of the court in requiring him to elect. The court then sustained a demurrer to the petition of appellant, of which appellant complains.

It is agreed that the officials who committed the wrongs complained of are personally liable for the injuries received. The only question to be determined is, can the city be made liable therefor? Under the authority of the case of *Hengehold v. City of Covington* (Ky.) 57 S. W. 495, it was decided that it was lawful to remove an infected patient to the pesthouse, even against his will and consent. There are two general principles underlying the administration of government of municipal corporations. The one is that a municipal corporation, in the preservation of the peace, public health, maintenance of good order, and the enforcement of the laws for the safety of the public, possesses governmental functions, and represents the state. The other is where the municipal corporation exercises those powers and privileges conferred for private, local, or merely corporate purposes, peculiarly for the benefit of the corporation. Under the former the city is not liable for the malfeasance, misfeasance, or nonfeasance of its officers. Under the latter it is. With reference to the matters alleged in the petition of appellant, the city, by its officials, was acting for the preservation of the public health, and in a

governmental capacity, and as an arm of the state government, and not in its private capacity, peculiarly for the benefit of the corporation. All the authorities support this conclusion, and there is no deviation from these principles, except where the city is made liable by an express statute. *Dudley v. City of Flemingsburg* (Ky.) 72 S. W. 327, 60 L. R. A. 575; *Greenwood v. Louisville*, 13 Bush, 226, 26 Am. Rep. 263; *Patch v. Cornington*, 17 B. Mon. 728; *Jolly's Adm'r v. City of Hawesville*, 80 Ky. 279, 12 S. W. 313; 2 *Dillon on Mun. Corp.* 1200; *Nicholson v. City of Detroit* (Mich.) 88 N. W. 695, 56 L. R. A. 601; 20 *Am. & Eng. Enc.* (2d Ed.) 1193; *Kansas City v. Lemen*, 57 Fed. 905, 6 C. C. A. 627; and *Gullikson v. McDonald*, 62 Minn. 278, 64 N. W. 812.

There being no statute making the city liable, we are constrained to affirm the action of the lower court in sustaining the demurrer to appellant's petition. Wherefore the judgment is affirmed.

COMMONWEALTH v. MOREN, Sheriff, et al.
(Court of Appeals of Kentucky. Feb. 4, 1904.)
SHERIFF—BOND—LIABILITY OF SURETIES—SETTLEMENT—VALIDITY—PLEADING.

1. The sureties on a sheriff's state revenue bond, executed prior to the taking effect of the Kentucky Statutes, are not liable for the county levy.

2. A petition seeking to recover on a sheriff's county levy bond is defective where it shows that the amount of claims allowed by the fiscal court, and to be paid by the sheriff, was greater than the amount of taxes in his hands for collection.

3. In a suit on a sheriff's county levy bond, an allegation of the petition that, because of a sheriff's failure to pay claims out of the amount of taxes collected by him, the county was compelled to pay them, is defective, in not specifying the names of the creditors and the amounts paid.

4. Under Ky. St. 1903, §§ 1884, 4146, requiring the fiscal court to settle annually with the sheriff, a suit on a settlement made five years after the expiration of his term, confirmed without notice to him, cannot be maintained where there is no showing that the annual settlement was not made; it being presumed that the officers did their duty.

5. While it is a sheriff's duty to take notice of the law requiring an annual settlement (Ky. St. 1903, §§ 1884, 4146), and to be present at the term of the fiscal court at which it is required to be made, he is not bound to take notice of subsequent terms; and a settlement confirmed five years after the expiration of his term, without notice to him, is void.

Appeal from Circuit Court, Laurel County.
"Not to be officially reported."

Suits by the commonwealth, for the use of certain parties, against J. W. Moren, sheriff, and others, on his official bonds. From judgments sustaining a demurrer to each petition, an appeal is taken. Affirmed.

Jas. Sparks and D. K. Rawlings, for appellants. J. A. Craft and J. W. Alcorn, for appellees.

HOBSON, J. J. W. Moren was the sheriff of Laurel county for the years 1891, 1892, 1893, and 1894. In each of those years a coun-

ty levy was made, and placed in the hands of the sheriff for collection. In April, 1899, the fiscal court appointed Charles R. Baugh to make a settlement with Moren, as sheriff, for the county levy of each of the years referred to. Baugh filed a report, which was approved by the court, no exceptions having been filed thereto; and thereupon the above four suits were filed against Moren to recover from him and his sureties the balance found due from him by these settlements, in which Moren was given no credit, except for his commissions, or substantially none. The circuit court sustained a demurrer to the petition in each of the four cases.

The first suit, which was brought to recover for the year 1891, is based on the state revenue bond executed by Moren. It has been held by this court in several cases on sheriffs' bonds executed since the Kentucky Statutes took effect that the sureties in all the bonds are liable for the county levy. But the bond sued on was executed in the year 1890, before the statutes referred to were enacted; and under the law then in force, as construed by this court, the sureties in the sheriff's revenue bond are not liable for the county levy. *Anderson v. Thompson*, 73 Ky. 132; *Elliott County v. Kitchen*, 77 Ky. 289. No suit can, therefore, be maintained on this bond for the county levy.

The second suit is based on the county levy bond executed by Moren for the year 1892 but the petition is defective for the reason that it shows that the amount of claims allowed by the fiscal court, and to be paid by the sheriff, were for an amount greater than the amount of the taxes in the hands of Moren for collection.

It is alleged in the petition that "because of defendant Moren's failure to pay said indebtedness out of the taxes collected by him under said levy, except to the extent shown in the original petition, the plaintiff, Laurel county, was compelled to and did subsequently pay the whole of said indebtedness." In *Owens v. Ballard County Court*, 71 Ky. 611, a petition containing in substance the same averment was held insufficient. The court said: "The petition also alleges, only by implication, that the county was entitled to the money by reason of having since paid out of other moneys the claims of county creditors allowed for the year 1863. The county, if such claims have been paid, can be substituted to the rights of such creditors; but, in order to make such a pleading good, so as to protect the rights of the sheriff and his sureties, the county should make specific allegations as to the names of the creditors, and the amounts allowed and paid by the county." The petition before us is equally defective as the one held bad in that case. The same defect exists in the petitions in the third and fourth cases brought to recover on account of the county levy for the

years 1893 and 1894 on the state revenue bond executed by Moren for those years.

There is another and more substantial defect in all the petitions. It is the duty of the fiscal court annually at its October term to appoint a person to settle with the sheriff. Ky. St. 1903, §§ 1884, 4146. It is presumed that the officials did their duty, and it is not alleged that these annual settlements were not made. But the suits are all brought on the settlement made by Baugh under the orders entered at the called term in April, 1899, or nearly five years after his term had expired, which were confirmed without notice to him in any way. When the settlement is made at the time set by law, it is the duty of the sheriff to take notice of the law and be present, but he is not bound to take notice of the proceedings of the fiscal court at subsequent terms. A judgment where the court has no jurisdiction of the defendant is a nullity. Were the rule otherwise, a man might be deprived of his property with no opportunity to be heard. The orders of the fiscal court confirming the settlement made by Baugh, being entered without notice to Moren, were not binding on him, but void, and no suit can be maintained on such orders against him; he not being present when the orders were made, having no notice of them, and having at no time agreed to the settlements. We therefore conclude that the court properly sustained the demurrer to the petition in all four of the cases.

The judgments appealed from in all four cases are therefore affirmed.

KINCAID v. COMMONWEALTH.

(Court of Appeals of Kentucky. Feb. 12, 1904.)

ROBBERY—SUFFICIENCY OF EVIDENCE—REVIEW.

1. Evidence in prosecution for robbery held to sustain a conviction.

2. When there is some evidence to support a conviction, it will not be reversed for insufficiency thereof.

Appeal from Circuit Court, Fayette County.

"Not to be officially reported."

J. B. Kincaid was convicted of robbery, and appeals. Affirmed.

F. M. Dailey, for appellant. N. B. Hays and Loraine Mix, for the Commonwealth.

BURNAM, O. J. Appellant was indicted by the grand jury of Fayette county of the offense of robbing Joseph Curtis of more than \$20 in United States money, and, being put upon his trial before a petit jury, was convicted, and sentenced to the penitentiary for a term of two years. A reversal is asked upon the sole ground that there was no evidence to support the verdict. Curtis testified that on the 6th of December he went into the barroom and eating house in which

appellant was employed; that he had in his possession \$45 or more of United States currency, which was pinned under the sweat band on the inside of his derby hat, and some other moneys in his pocketbook; that, while he was eating his dinner with Lula Winkler, they drank a bottle of beer; that, after he had finished this, one Dow Green brought him a glass of beer, and insisted that he should drink it; that he did so, and immediately lost consciousness; that he awoke some time afterwards in a room over the saloon; that he found he had been robbed, and the door locked; that he rang the bell, and was let out by a colored boy; that he was sore upon regaining consciousness, and could scarcely walk; that he found a \$10 bill and about \$5 in change scattered on the mattress in the room. Lula Winkler testified that when Curtis came into the saloon he invited Dow Green, appellant, and herself to drink beer; that they drank two glasses each; that Dow Green remarked to her: "Here is a live one. Old man, you had just as well spend your money, for I am going to have some anyway;" that Curtis was deaf, and did not hear this remark; that she and Curtis then went into the winerom, and sat down at a table and began to eat dinner; that Green brought him a glass of beer, and insisted that he drink it, and that the barkeeper also brought another bottle of beer; that Curtis took a few swallows of this beer, and immediately lost consciousness; that thereupon Dow Green and the appellant, Kincaid, each took hold of Curtis, one under each arm, and carried him upstairs; that, when they came back, Green remarked, "That was a live one, sure," and Kincaid said, "That was a good one for us;" that she remained until the old man came down, and said that he had been robbed. It was also shown by other witnesses that Curtis had the money. While this evidence of appellant's guilt is not as satisfactory as it might be, we cannot say that there is no evidence to support the verdict; and, as frequently decided by this court, we have no power to reverse a criminal case upon the sole ground of insufficient evidence to support the verdict.

For reasons indicated, the judgment is affirmed.

SMITH et al. v. ISAACS et al.

(Court of Appeals of Kentucky. Feb. 12, 1904.)

PERPETUITIES—TESTAMENTARY RESTRAINT ON ALIENATION—VALIDITY—WILLS—REPUGNANT PROVISIONS—CONSTRUCTION.

1. A provision in a testamentary gift of testator's estate, to be divided amongst his children, that each child is to have possession and use of his or her share on becoming 18, but none shall have the power to sell or incumber the same until 35, and no sale or incumbrance by the daughters shall be made, so as to change the character of their estate—all property given to the daughters to be their separate property, and only to be sold under the will—is valid.

2. A provision in a will that children shall take their shares on reaching 18, but shall not sell or incumber them till 35, is not repugnant to another clause providing that, if any die without issue, his share shall revert to the others, as the reversion will be construed to expire, as to each share, when the devisee thereof reaches 35.

Appeal from Circuit Court, Henry County. "Not to be officially reported."

Suit by W. V. Smith and others, as executors of the will of T. M. Smith, deceased, against Lulle E. Isaacs and others. From the judgment, plaintiffs appeal. Affirmed.

H. K. Bourne, for appellants. W. S. Pryor and R. D. Jackson, for appellees.

BURNAM, C. J. I. M. Smith departed this life on the 20th day of July, 1902, a resident of Henry county, and his last will and testament was duly probated in the Henry county court on the 4th of August following. He was survived by a widow and seven children, who were his only heirs at law, and to whom he devised his estate after the payment of his debts, which consisted, in the main, of about 1,050 acres of land in Henry county, of the value of about \$20,000, some personal estate, and some realty in Indiana, which was applied to the payment of his indebtedness, leaving as a charge against his landed estate a debt amounting to about \$7,000. His executors instituted this suit for a settlement of his estate, making the children defendants, and asking that the third and fourth clauses of the will of testator be declared null and void, and that it should be adjudged that the children took a fee-simple title in the real estate devised by testator, subject to the rights of creditors. These sections of the will read as follows:

"(3) I desire all of my estate in Kentucky, real, personal and mixed, to be divided equally among my children and such possessions as my wife may hold at her death; also each child to have possession and use of his or her share when he or she may become eighteen years of age. But it must be expressly understood that none of my children shall have the power to sell or incumber by mortgage or otherwise any portion of my estate received under this will until he or she shall have arrived at the age of thirty-five years. And no such sale or incumbrance made by or for my daughters or any of them shall be so made or executed as to change the character of the estate vested in them. All property that my daughters received under the will shall be their separate property free from the debts and control of any husband any of them may have, and such property may only be sold under the provisions of this will.

"(4) Should any of my children die either before or after going into the possession of the property to which she or he may be entitled under this will without leaving issue alive at the time of his or her death, the share of the one so dying shall revert to my

children or their descendants share and alike."

It is insisted that these two clauses of the will of testator cannot be reconciled to each other, and that consequently both should be held null and void. It is also suggested that the limitation upon the alienation contained in the third clause of the will is ill and unenforceable.

It is a universal rule in the construction of wills that the intention of the testator, gathered from the instrument as a whole, shall be given effect, and, to do so, the chancellor will, when it can be done without violation of the plain language of the will, so construe the clauses of doubtful meaning as to give to them the manifest purpose of testator. While the weight of authority outside of the state of Kentucky appears to be against the validity of restraints upon alienation, however limited in time, that rule does not obtain in this state.

This question was fully considered in *Stewart v. Brady*, 66 Ky. 623, *Stewart v. Barrow*, 70 Ky. 369, *Wallace*, etc., 88 Ky. 131, and the validity of the restraints to that contained in the third clause upheld. We think it is quite clear that testator intended that each of his children should have the possession and use of their respective shares of his landed estate when they became 18 years of age, but they should have no power to sell or mortgage it by mortgage before they arrived at the age of 35 years, at which time they became vested with the complete fee-simple.

And, construing the third and fourth clauses together, it is manifest that the reason for his other children or their descendants, as to such of his children as might die without leaving issue at the time of their death, expires upon their arrival at 35 years of age, at which time they became invested with the fee simple under the third clause. The judgment appealed from conforms with this conclusion, it is affirmed.

CURRY v. KENTUCKY WESTERN RY. CO.

1st of Appeals of Kentucky. Feb. 3, 1904.)

ROADS—RIGHT OF WAY—DONATION—SUBSCRIPTIONS—ENFORCEMENT—EXISTENCE OF CONTRACT—EXECUTED CONTRACT—OBJECTIONS—CERTAINTY.

Where defendant's proposition to donate a railroad right of way through his farm was not accepted by any particular corporation, but was accepted by a person or corporation which would construct a line of railway from D. to a point on an existing railroad then constructed, and the property was delivered to the agent of the Southern Construction Company, a foreign corporation, which was proposing to organize the plaintiff company and to build the proposed railroad, defendant was bound to plaintiff, on its subsequent organization, to specifically perform the contract to convey to plaintiff the right of way so promised.

Where several persons promised to concede a railroad right of way in consideration of the construction thereof between certain points through or adjoining their land, the prom-

ise of each of such subscribers was a good consideration for the promise of the others.

8. Where defendant promised to contribute a railroad right of way to a railroad company thereafter to be incorporated, and building a line through his land between certain points, and the contract thereafter became executed on the part of a railroad company by its construction and operation of the line, defendant could not object that the contract was unenforceable, for uncertainty of parties, and of description of the land to be taken.

Appeal from Circuit Court, Webster County.
"Not to be officially reported."

Action by the Kentucky Western Railway Company against H. M. Curry. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

M. C. & G. D. Givens, for appellant. W. E. Bourland, J. M. Dickinson, and Pirtle & Trabue, for appellee.

BURNAM, C. J. The appellee, the Kentucky Western Railway Company, brought this action against the appellant, H. M. Curry, to enforce the specific performance of the following written contract signed by appellant: "Agreement to Give Right of Way. We the undersigned landowners in consideration of the construction of a line of standard gauge railway to run from Dixon, Kentucky, to a point on the Illinois Central Railway, agree that in case said railway is located through or over our land, we will give a right of way for same as an inducement for the construction of the railway." The petition alleges that, pursuant to the contract, plaintiff had taken possession of the right of way through defendant's farm, constructed and put in operation over it a line of standard gauge railway from Dixon, Ky., via Llanman and Clay, intersecting the Illinois Central Railway near Blackford, Ky., prior to the 19th of January, 1900; that since that date it had run two trains each way daily over its line of railroad through and over the right of way donated by the defendant, the right of way being described by metes and bounds; that the defendant had failed and refused to make them a deed to the right of way; and prayed that the court cause its commissioner to execute a deed to them, for and on behalf of the defendant, to the strip of land in controversy. The defendant, Curry, in his answer, says that early in the year 1899 he executed and delivered the paper filed with plaintiff's petition to James P. Hunt, who was acting for and in behalf of the Southern Construction Company of St. Louis, Mo., which was a different corporation than plaintiff, and alleges that the construction company had never accepted or acted upon the paper in any way, and denied that he had made or executed any other contract or paper; that the plaintiff was not incorporated until the 13th of December, 1899; and charges that plaintiff had taken possession of the strip of land through his farm against his will and without right; that, during the construction of its road, it had ex-

posed his crops to the depredation of stock, to his damages, for which he prayed judgment. The plaintiff replied that during the year 1899 the citizens of Webster county, along the line of the railroad as now located, accepted a proposition made by the Southern Construction Company of St. Louis to organize and incorporate the Kentucky Western Railway Company; that a number of citizens agreed to, and did, subscribe for \$30,000 of first mortgage bonds to be thereafter issued by the Kentucky Western Railway Company, when it was organized and incorporated, upon its line or railroad, rolling stock, and other property; that a number of landowners—among them, the defendant—agreed to donate the right of way across and over their land; that a number of other citizens, about 52 in number, signed another paper, by the terms of which they agreed and promised that they would provide a right of way 80 feet wide for the railway from the point of intersection with the Illinois Central Railroad and the town of Dixon, with suitable depot grounds, etc.; that these facts were well known to the defendant at the time of his execution and delivery of the foregoing contract; that it was made with the view and for the purpose of having plaintiff, the Kentucky Western Railway Company, organized and incorporated, and a line of railroad constructed from Dixon to Blackford; that the Kentucky Western Railway was subsequently duly organized and incorporated as contemplated by the parties to the contract; and that the right of way over defendant's land was taken possession of by the Southern Construction Company and the Kentucky Western Railway Company under the contract, and had been in the possession of the plaintiff and its successor, the Illinois Central Railroad Company, ever since; denies that this strip was taken possession of against the defendant's will or by force, or that the residue of defendant's tract of land was damaged, or any damage to his crops. The cause was by agreement submitted on the pleadings and exhibits. The trial court granted the rule prayed by plaintiff, and dismissed defendant's cross-action in so far as it sought to recover damages for the right of way, and transferred the case to the ordinary docket for trial upon the issue as to the alleged damages to crops, and the defendant has appealed.

The main ground relied on for a reversal is that appellee had not, at the date of the obligation sued on, been incorporated as required by section 763 of the Kentucky Statutes of 1903, and, having no legal existence, was incapable of making an enforceable contract. The proposition of appellant to donate the right of way through his farm is not directed to any particular corporation, but to any person or corporation who would construct a line of railway from Dixon to a point on the Illinois Central Railroad; and it was delivered to an agent of the Southern Construction Company, a corporation organized

under the laws of Missouri, who were proposing to organize the Kentucky Western Railway Company and to build the proposed railroad. In *Lackey v. Richmond & Lancaster Turnpike Road Co.*, 56 Ky. 43, it was decided that a subscriber for stock in a turnpike company prior to its incorporation, who subscribes to induce the location of the road on a particular route, was liable for the payment of the amount subscribed to a subsequently incorporated company. This doctrine was reaffirmed in *Twin Creek & Colemansville R. Co. v. Lancaster*, 79 Ky. 552; and the law is well settled that, where several persons promise to contribute to a common object desired by all, the promise by each will be held a good consideration for the promise of the others. See 2 *Parsons on Contracts*, 452, and *Cadiz R. Co. v. Roach* (Ky.) 72 S. W. 280.

Appellant's next contention is that the contract is not enforceable because of the uncertainty of the parties and of the description of the land to be taken. It is admitted by the pleadings that appellee took possession of the boundary of land described in the petition within a short time after the execution of the obligation sued on, constructed its roadbed and laid its track, and has for several years operated trains over it. The contract has been executed, and there is neither uncertainty as to the parties, nor the land sought to be conveyed. Thompson, in his *Commentaries on the Law of Corporations*, § 5279, says: "The doctrine of estoppel prevents a landowner who has encouraged, actively or passively, the appropriation of his land by a corporation for public use, from subsequently claiming an injunction against the corporation to restrain it from continuing so to occupy the land." This section was cited with approval in *Cadiz R. Co. v. Roach* (Ky.) 72 S. W. 280, and we think the facts of this case bring it within this rule, and the pleadings and exhibits filed therewith support the judgment of the trial court.

Judgment affirmed.

OBERDORFER et ux. v. WHITE

(Court of Appeals of Kentucky. Feb. 4, 1904.)
MORTGAGES—INSTRUMENTS CONSTRUED—ABSOLUTE DEEDS.

1. A deed absolute on its face may be shown to have been executed as a mortgage.

Appeal from Circuit Court, Jefferson County, Chancery Division.

"Not to be officially reported."

Action by Nina Iola Paine White against Lewis Oberdorfer and wife. From a judgment for complainant, defendants appeal. Affirmed.

Lieber & Lincoln, for appellants. Saml. Avritt, for appellee.

HOBSON, J. On May 15, 1900, Nina Iola Paine (now White) signed, acknowledged.

¶ 1. See *Mortgages*, vol. 25, Cent. Dig. § 68.

and delivered to Lewis Oberdorfer a deed by which, "in consideration of one dollar and other good and valuable consideration," she conveyed to him, in fee simple, her one-third interest in a tract of land in Jefferson county worth about \$9,000, in which her father, then 55 years old, held a life estate. On July 28, 1901, she filed this action, alleging that the deed was only intended as a mortgage, and seeking to have it so adjudged. Oberdorfer and his wife, Sophia, were made defendants to the action; he having on May 22, 1900, conveyed the land voluntarily to her. On final hearing the court set aside the deed from Oberdorfer to his wife as fraudulent, and adjudged the deed executed by Miss Paine to be good only as a mortgage for \$407.39. From this judgment, Oberdorfer and wife appeal.

The evidence fully sustains the learned chancellor. It leaves no question that the grantor understood she was only making a mortgage on the property. While there is some conflict in the evidence as to the amount paid by Oberdorfer, when we consider the circumstances, we have no doubt that the amount fixed by the chancellor is correct. A deed absolute on its face may be shown to have been executed as a mortgage. The rule on this subject is thus well stated in 8 Pomeroy's Equity, § 1196: "Any conveyance of land absolute on its face, without anything in its terms to indicate that it is otherwise than an absolute conveyance, and without any accompanying written defeasance, contract of purchase, or other agreement, may, in equity, by means of extrinsic and parol evidence, be shown to be a mortgage, as between the original parties, and as against all those deriving title from or under the grantee, who are not bona fide purchasers for value and without notice. The principle which underlies this doctrine is the fruitful source of many other equitable rules: that it would be a virtual fraud for the grantee to insist upon the deed as an absolute conveyance of the title, which had been intentionally given to him, and which he had knowingly accepted, merely as a security, and therefore in reality a mortgage. The general doctrine is fully established, and certainly prevails in a great majority of the states, that the grantor and his representatives are always allowed, in equity, to show, by parol evidence, that a deed absolute on its face was only intended to be a security for the payment of a debt, and thus to be a mortgage, although the parties deliberately and knowingly executed the instrument in its existing form, and without any allegations of fraud, mistake, or accident in its mode of execution. As in the last preceding case, the sure test and the essential requisite are the continued existence of a debt. If there is no indebtedness, the conveyance cannot be a mortgage. If there is a debt existing, and the conveyance was intended to secure its payment, equity will regard and treat the

absolute deed as a mortgage. The presumption, of course, arises that the instrument is what it purports on its face to be—an absolute conveyance of the land. To overcome this presumption, and to establish its character as a mortgage, the cases agree that the evidence must be clear, unequivocal, and convincing, for otherwise the natural presumption will prevail. Whenever a deed absolute on its face is thus treated as a mortgage, the parties are clothed with all the rights, are subject to all the liabilities, and are entitled to all the remedies of ordinary mortgagors and mortgagees." Under this rule, the proof in the record is sufficient to sustain the chancellor's judgment. Appellant did not ask the enforcement of the mortgage. This he can have in a separate suit if his debt is not paid.

Judgment affirmed.

MARION COUNTY v. LOUISVILLE & N. R. CO. et al.

(Court of Appeals of Kentucky. Feb. 2, 1904.)

RAILROADS—STOCK—SUBSCRIPTIONS BY COUNTIES—CONDITIONS—BREACH—EQUITY—STALE DEMAND.

1. Where the conditions of a subscription by a county to the stock of a railroad were that the money should be expended, "when found necessary," on work of the road within the county, in procuring the right of way, in grading, and in the necessary masonry for the roadbed, the railroad was to determine what was necessary for the purposes named, and was at liberty to use the remainder for other purposes, such as the laying of ties and rails, acting in such matters as trustee, and being bound to a reasonable judgment.

2. A claim by a county against a railroad for a breach of trust by its predecessor in interest in misappropriating funds subscribed by the county for its construction, which claim was over 20 years old, and was one of which the railroad had no notice when it obtained its rights from the stockholders of the old company, who actively participated in the arrangement by which it took charge of the property, including that purchased by the alleged misappropriated funds, was stale whether barred by limitations or not, and would not be enforced by a court of equity.

Appeal from Circuit Court, Marion County.

"Not to be officially reported."

Suit by Marion county against the Louisville & Nashville Railroad Company and others. From a judgment dismissing the petition, plaintiff appeals. Affirmed.

C. S. Hill, H. W. Rives, and W. H. Sweetney, for appellant. Helm, Bruce & Helm, Chas. N. Burch, and W. C. McChord, for appellees.

HOBSON, J. The Cumberland & Ohio Railroad Company was incorporated by an act of the Legislature of Kentucky approved February 24, 1869 (Acts 1869, p. 463, c. 1578) to construct and operate a railroad from the Ohio river to the Tennessee line. The company obtained subscriptions from Shelby and

Henry counties, and built a part of the northern portion of its line. It also obtained a subscription from Marion, Taylor, and Green counties, and partially constructed its line from Lebanon to Greensburg; but there was a considerable gap between the two pieces of road which were begun but not in running order. In this condition of things the company failed, and on March 18, 1878 (Acts 1877-78, p. 549, c. 482), an act was passed by the Kentucky Legislature reciting the fact that the company had become insolvent, and the danger of the property being lost to the stockholders. By it two corporations were created out of the old, one known as the Northern Division of the Cumberland & Ohio Railroad Company, and owning the northern end of the road, and the other known as the Southern Division of the Cumberland & Ohio Railroad Company, and owning the southern section of the road, between Lebanon and Greensburg. See *Louisville & Nashville Railroad v. Commonwealth*, 89 Ky. 531, 12 S. W. 1064. Soon after this the Louisville & Nashville Railroad leased of the southern division its incomplete line. Marion county had subscribed for \$300,000 of stock in the old company, and issued to it bonds for this amount. The county voted its stock in favor of the lease. By the arrangement a mortgage for \$300,000 was placed on the road to raise funds to complete it, and the mortgage bonds were delivered to the Louisville & Nashville Railroad Company, which then took charge of the road and completed it. About the year 1900, Phillips, the surviving trustee named in the mortgage, brought an action in the Marion circuit court asking a settlement with the Louisville & Nashville Railroad Company, and an application of the net profits to the payment of the bonds. In the circuit court the action was dismissed, but on appeal the judgment was reversed, and it was held that the trustee could maintain the action. See *Phillips v. Southern Division Cumberland & Ohio R. R. Co.*, 60 S. W. 941. On the return of the case to the circuit court, proceedings were taken to make the settlement, and a commissioner's report was filed, Marion county being a party to the action; but before final judgment was rendered in that action the county filed the suit now before us against the Louisville & Nashville Railroad Company, Phillips, trustee, and others, alleging, among other things, that about \$100,000 of the proceeds of the subscription of Marion county to the Cumberland & Ohio Railroad had been used by it in buying a lot of rails and cross-ties that were stacked or piled near Lebanon when the company failed, and were turned over to the Louisville & Nashville Railroad Company, and used by it in disregard of the condition set out in the original subscription by Marion county. On behalf of Marion county it is insisted that the fund invested in the rails and ties was a trust fund, and that it

can be followed into the hands of the Louisville & Nashville Railroad Company. The petition sought this relief. The circuit court sustained a special demurrer to the petition on the ground that there was another action pending between the same parties for the same subject-matter. He also sustained a general demurrer to the petition which was filed at the same time on the ground that it stated no facts sufficient to constitute a cause of action against the Louisville & Nashville Railroad Company. The petition of Marion county having been dismissed, it appeals.

The two suits seem to us to involve the same things, and there was certainly no reason why all the matters set up in this suit could not be presented and determined in the old suit brought by Phillips' trustee. But, aside from this, the court properly held that the petition stated no cause of action against the Louisville & Nashville Railroad Company. The conditions upon which the subscription of Marion county was made, so far as material, is in these words: "That the money so subscribed shall be expended when found necessary on the work on said road in the county of Marion, and not out of it in procuring the right of way, in grading, and in the necessary masonry therein for said roadbed." It will be observed that it was not stipulated that all the money so subscribed should be expended on the items named, but only that the money "when found necessary" should be thus expended. The items upon which the money was to be expended when found necessary are the procuring of the right of way, the grading, and the necessary masonry for the roadbed in Marion county. The railroad company who was to expend the money was to determine what was necessary for the purposes named, and was at liberty to use the remainder of the fund for other purposes as it needed it. In doing this it acted as trustee, and was bound to a reasonable judgment. But it is not averred that the railroad company failed to procure the right of way, or failed to do the grading or the necessary masonry for the roadbed in Marion county, and no facts are shown sufficient to charge it with any breach of trust in buying the ties and rails which were necessary to put the road in operation. Besides, all this was more than 20 years before this suit was brought. The rails and ties were turned over to the Louisville & Nashville Railroad under the lease which Marion county voted for and assisted in making. The Louisville & Nashville Railroad Company had no notice of any breach of trust by the old company, and obtained its rights from the stockholders in that company, who not only assented to the lease to it, but actively participated in the arrangement by which it took charge of the property, including the rails and ties now in contest. All this being more than 20 years before this suit was filed, whether the claim

was barred by limitation or not, it was undoubtedly stale, and one which the chancellor would not now enforce.

Judgment affirmed.

COE v. LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky. Feb. 5, 1904.)

CARRIERS—DUTY TO CALL STATIONS—ALIGHTING PASSENGERS—RELIANCE ON CALL—CONTRIBUTORY NEGLIGENCE.

1. Ky. St. 1899, § 784, requiring railroads to announce stations twice within each car before arrival, is for the benefit of passengers desiring to alight at the station announced, who therefore have a right to assume, on the stopping of the train after the announcement is made, that the train has arrived at the station; and, if the train has in fact stopped before reaching the station, it is the duty of the railroad to accordingly warn or caution the passengers.

2. That a passenger was himself negligent in leaving a train in reliance on the call of his station by the trainmen is a matter of defense in an action for consequent injuries.

Appeal from Circuit Court, Bell County.

"Not to be officially reported."

Action by F. H. Coe against the Louisville & Nashville Railroad Company. From a judgment sustaining a demurrer to the petition, plaintiff appeals. Reversed.

N. J. Weller, for appellant. B. D. Warfield and J. W. Alcorn, for appellee.

O'REAR, J. Section 784, Ky. St. 1899, which requires that a common carrier "shall cause to be announced twice within each passenger car of every passenger train, within a reasonable time before its arrival at a station at which, from notice given, it is to stop, the name of the station," is for the purpose of apprising passengers of the fact that the train is approaching that station, so that those who are to disembark there may be prepared to leave the train. Consequently, when the train stops after such an announcement, or when such announcement is made, merely calling the name of the station after the train has stopped, passengers destined for the station have a right to assume, without notice or knowledge to the contrary, that the train has arrived at such station. If, for any reason, after the announcement has been made, the train is compelled to stop before arriving at the station where the passengers are to leave the train, it is the duty of the carrier to warn or caution passengers to that effect, that they may govern their movements accordingly.

In this case the petition substantially alleges that, as the train was slowing up to stop at the station where appellant was a passenger, the conductor announced three times, distinctly, the name of the station. The train stopped directly. It was night and dark. The passenger attempting to leave the train was injured because it had stopped before it had reached the station, and at a

point dangerous for disembarking passengers. We are of opinion that the petition stated a cause of action. If the passenger was negligent in leaving the train under the circumstances, that is a matter of defense.

The judgment of the circuit court sustaining the demurrer is reversed, and cause remanded for proceedings not inconsistent herewith.

GREEN'S ADM'R v. MAYSVILLE & B. S. R. CO. et al.

(Court of Appeals of Kentucky. Feb. 3, 1904.)

RAILROADS—KILLING PERSONS NEAR TRACKS—CHILDREN—NEGLIGENCE—VIEW—DISCRETION.

1. Civ. Code, § 318, authorizing the court to allow a view of the place of the injury or accident by the jury, is not mandatory, but authorizes such view only in the discretion of the court.

2. Where plaintiff's intestate, an infant six years of age, was killed by a freight train while passing over a crossing, and it appeared that at the time the engine passed him he was not in a position of danger, but thereafter, as the train moved, not faster than three miles an hour, he commenced to grab at the stirrups of the cars for the purpose of swinging or climbing on the train, and in so doing he fell or was thrown under the car and killed, and, even if he had been seen by the operators of the train after he began grabbing at the stirrups the train could not have been stopped in time to have saved his life, defendant was not liable for his death.

Appeal from Circuit Court, Greenup County.

"Not to be officially reported."

Action by Walter Green's administrator against the Maysville & Big Sandy Railroad Company and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

W. T. Cole and A. D. Cole, for appellant. E. L. Worthington and W. H. Wadsworth, for appellees.

SETTLE, J. Walter Green, an infant six years of age, was run over and killed by a freight train of the appellee Chesapeake & Ohio Railroad Company, lessee of the road-bed, track, and other property of its co-appellee, Maysville & Big Sandy Railroad Company. The death of the infant occurred in Greenup county, near a public crossing a short distance from the depot at the junction of appellee's railroad and that of the Eastern Kentucky Railroad Company. The appellant, Charles Green, soon after the death of the infant, was by an order of the Greenup county court appointed and duly qualified as administrator of his estate, and as such administrator he instituted this action in the circuit court against the appellees, seeking to recover of them \$25,000 damages for the death of his intestate, upon the ground, as averred in the petition, that it was caused by the negligence of the servants of the appellee Chesapeake & Ohio Railroad Company in charge of the train which ran over and killed him. The acts of negligence complained of, as specifically set forth in the petition, are

§ 1. See Carriers, vol. 9, Cent. Dig. § 1216.

that the train was operated at an excessive and dangerous rate of speed, to wit, three miles an hour, without any signal of its approach, or lookout from the engine or cars; that appellee failed to have a watchman or device of any kind at or near the place where the intestate was killed to warn travelers or protect them from moving engines or cars; and, further, that by the exercise of reasonable diligence on the part of appellee's servants the intestate could have been seen by them in time to have prevented the injuries of which he died. The alleged acts of negligence complained of in the petition were specifically denied by the answer, and in addition it was averred therein that the intestate was not at or near the public crossing when killed, and that his death was caused by, and would not have occurred but for, his own negligence in grabbing at the steps of a car while it was in motion, which averments of the answer were denied by the reply. Upon the issues thus made a trial was had, and upon the conclusion of appellant's evidence the jury, in obedience to a peremptory instruction from the court to that effect, found for the appellees, following which judgment was entered dismissing the petition, and allowing appellees their costs. Thereupon the appellant filed grounds and entered motion for a new trial, which was refused by the lower court. Appellant complains of the refusal of the new trial by that court, and by this appeal asks a review of its rulings, and a reversal of its judgment. Four grounds were presented in support of the motion for a new trial. First, error of the trial court in refusing to permit the jury on appellant's motion to view the place of the accident; second, in refusing to permit the appellant to file an affidavit in support of his motion to have the jury view the place of the accident; third, in excluding certain evidence over the appellant's objection; fourth, in granting the peremptory instruction.

As to the first of the grounds mentioned, it may be remarked that while section 318, Civ. Code, authorizes the trial court to allow a view of the place of an injury or accident by the jury, it does not in every instance compel the court to grant such view. It is in the discretion of the court to grant or refuse it. As said by this court in *Henderson & Corydon Gravel Road Company v. Cosby*, 108 Ky. 184, 44 S. W. 639: "As to whether the jury should have been sent to view the place was a matter in the discretion of the court. The court must always determine from the peculiar facts in each case as to whether it is necessary for the jury to view the premises to enable them to get a proper understanding of the case." We have been unable to find in the record any affidavit that was offered to be filed by appellant in support of his motion that the jury be allowed to view the place where his intestate was killed. Indeed, it seems to be admitted that no such affidavit was offered, and in its absence the lower court

was doubtless unable to see that there was anything in the case that required a view by the jury of the place of the accident, which would probably have delayed the business of the court, and entailed unnecessary cost upon the parties.

The affidavit should have been prepared and tendered when the motion to file it was made, for such tender was necessary in order to get the affidavit and order rejecting it, together with appellant's exception thereto, made a part of the record, that this court might determine whether or not its rejection by the trial court was error.

But, in view of the evidence introduced by appellant upon the trial, we are clearly of opinion that he was not prejudiced by the court's refusal to permit the jury to view the place where the intestate lost his life. It appears from the evidence that the intestate was killed at a public crossing near appellee's railroad track about 100 yards from the Riverton station, and about 400 yards from the corporate limits of the town of Greenup. The freight train by which he was killed was passing over the crossing. The intestate seemed to have been playing or waiting by the side of the railroad track near the crossing. As the train was slowly moving westward, not faster than three miles an hour, and after the locomotive and several of the cars composing the train had passed him, he commenced to grab at the stirrups of one of the cars, with the evident purpose of swinging onto the train or climbing on it. In grabbing at the car he ran a few steps with it, and in doing so his foot slipped, or he stumbled on the cross-ties, and fell or was thrown under the car, and killed by the wheels passing over his body. Wm. Wurtz was the only eyewitness to the death of the intestate, and upon being introduced by the appellant he said: "He [the boy] was on the crossing. He hit three or four times at the wheels, and he started to catch onto the car, and he followed it, and finally I reckon he got hold of it. I couldn't tell. And directly I seen him pitch forward and go under the wheels. * * * The witness was on the other side of the train from the boy, but saw him between the cars and under them. He also testified that quite a number of the cars had passed him before he attempted to grab one of them, and that there were seven or eight cars behind him; that is, between him and the rear end of the train. There could have been no recovery in this case without some proof of negligence on the part of appellee's servants in charge of the train, and, if there was no proof whatever of such negligence, the court did not err in granting the peremptory instruction. We are of opinion that there was no evidence of negligence in this case. It is doubtless true that the appellant's intestate was seen by the engineer and fireman as the locomotive passed him, but, if so, the evidence did not show that he was then in such prox-

imity to the moving train as to be in any danger; consequently there was nothing in his position to excite the apprehension of the engineer or fireman as to his safety. They no doubt concluded that he was waiting for the train to pass that he might cross the railroad in going to some house on the other side. Having passed the boy and the crossing, it was not the duty of the engineer or fireman to look backward, but it was their duty to keep a lookout ahead of them. In *Pedigo's Adm'r v. L. & N. E. R. Co.*, 68 S. W. 462, which was an action to recover for the death of a person by coming in contact with some part of a moving train after the passing of the locomotive, it was said by this court that, "after the engineer had passed the crossing, it was not his business to look back to see what might be transpiring in the county road."

The fact that appellant's intestate, by reason of his tender years, was not a trespasser in being upon the ground belonging to appellee's roadbed, did not authorize a recovery, unless his peril in attempting to swing onto the train was known or might by the use of ordinary care have been discovered, by those in charge of the train in time to have prevented his death. The mere fact of his presence near the track, but not in a place of danger, did not require those in charge of the train to stop it and warn him to get further away, as they could not have anticipated his doing so reckless a thing as swinging onto the train as it passed him. It is contended, however, that those on the train saw him running with it, grabbing at one of the cars, and they might have stopped the train in time to have saved his life. We are unable to find in the record any evidence that conduces to show that the boy was seen by those in charge of the train when he attempted to grab the car. It is urged that the conductor, who was in the caboose, must have been a witness to the death of the boy, as he asked a Mr. Sparks, as the train passed Riverton station, who it was that had been killed. We do not think such an inquiry proves that the conductor saw the train run over the boy. The caboose was the rear car of the train, and, if the conductor was standing in the rear, or on top of the caboose, he doubtless saw the body of the boy on the track after the train passed over it. But if he or others on the train had seen him when he made the attempt to get on the car it is manifest that they could not have prevented the accident, for, according to the evidence, it would have been impossible to have stopped the train in time to have saved his life. The witness Wurtz, in speaking of what happened to the boy said: "It threw him under the track quicker than you could have throwed a cat. It looked to me like I never seen a fellow go under a train so quick in my life." The entire occurrence, beginning with the boy's grabbing at the car, and ending with his be-

ing thrown under the train, occupied but a moment's time, and it is manifest that nothing that might or could have been done by those in charge of the train would have availed to prevent his death. The boy, by reason of his infancy, was not chargeable with contributory negligence, but his death cannot, in our opinion, be charged to the appellees, as the evidence wholly failed to show that it was caused by negligence on the part of its servants in charge of the train. The lower court did not err, therefore, in giving the peremptory instruction.

A careful reading of the bill of evidence reveals no error to appellant's prejudice in the admission or rejection of evidence by the lower court.

Wherefore the judgment is affirmed.

STALLCUP et al. v. CRONLEY'S TRUSTEE et al.

(Court of Appeals of Kentucky. Feb. 5, 1904.)

ESTATES—PERSONAL PROPERTY—CONTINGENT REMAINDERS—ASSIGNABILITY—SUFFICIENCY OF CONSIDERATION.

1. Life estates and remainders may be created in personal property by the same language that would create similar estates in realty.

2. Ky. St. § 2341, providing that any interest in or claim to real estate may be disposed of by deed or will in writing, authorizes the conveyance of executory devises.

3. A remainder interest in personalty contingent on the death of the life tenant without issue, the death of the remainderman's mother without issue, and the survivorship of the life tenant, is not assignable either at common law or under Ky. St. § 2341, subjecting all interests in land to conveyance, as that section applies only to realty.

4. While a remainder interest in personalty contingent on the death of the life tenant without issue, the death of the remainderman's mother without issue, and the survivorship of the life tenant is assignable in equity, yet equity will not enforce the assignment against the will of the assignor, unless supported by a valuable consideration. A good consideration will not suffice.

Appeal from Circuit Court, Fayette County.

"To be officially reported."

Suit for partition by Sarah B. Cronley's trustee and others against Mary P. Stallcup and others. From a judgment for plaintiffs, defendants appeal. Reversed.

J. D. & G. R. Hunt, for appellants. Morton, Webb & Wilson, for appellees.

O'REAR, J. The will of Joseph Bruen, probated in Fayette county, this state, in 1848, gave his estate to his three daughters (after provision for his wife). He gave to each daughter her portion, to her sole and separate use during her life, and after her death to her surviving children in fee simple; but that, if any daughter died without issue, her portion was then to go to her surviving sisters, if living, but, if dead, to their

¶ 1. See Life Estates, vol. 23, Cent. Dig. § 5; Remainders, vol. 42, Cent. Dig. § 2.

issue. The children of his children were expressly made the representatives per stirpes of their parents in taking the estate in the contingencies mentioned. The testator had three daughters—Mrs. Ingles, Mrs. Sarah B. Cronley, and Mrs. Shelby. Mrs. Cronley was the last of the three to die, and she had no children. Mrs. Ingles had several children. Mrs. Shelby one. Mrs. Shelby's child is appellant Mary B. Stallcup. At her death Mrs. Cronley owned in her own right a considerable estate, derived from her deceased husband. Besides, she owned, in the hands of a trustee, from \$30,000 to \$35,000 of estate derived under the will of her father, Joseph Bruen. Of this it is claimed \$26,850 is personalty. In 1870, directly after appellant had left school and returned to the home of her aunt, Mrs. Cronley, with whom it seems she had been making her home for some years, appellant, at the instance of Edward Cronley, Mrs. Cronley's husband, executed to him a conveyance in the form of a deed of trust, conveying to him, in trust for his wife, all of said Mary P. Shelby's interest (she was then unmarried) in the trust estate of Mrs. Cronley under her father's will. The deed was in consideration of natural love and affection and \$1, and contained no warranty. At that time the great bulk of the estate so attempted to be conveyed was personal property, though some part of it was real estate. Mrs. Cronley died a year or so ago, leaving a will, the principal if not the sole effect of which was to dispose of her estate derived from her husband, Edward Cronley. In this suit to settle and partition Mrs. Cronley's estate, brought by her executor, the executor and the heirs of the Ingles branch claim that by her deed made in 1870 appellant conveyed to Mrs. Cronley the remainder interest owned by her in the Bruen trust estate, being one-half thereof, and that as to that half Mrs. Cronley died intestate. As to the other half, the Ingles family took as remaindermen under Bruen's will. Appellant contends that her attempted conveyance of her contingent interest in the trust estate held by Mrs. Cronley for life was void, especially as to the personalty. The effect of the difference is to give appellant, as heir at law of Mrs. Cronley of the personal estate, say \$8,712.50 less than she would take otherwise. Appellant contends that the deed of 1870 is invalid as an executed conveyance, because her interest then was only that of an executory limitation or devise, which was not the subject of a conveyance at law.

While the common law originally admitted of no estate in personal property, regarding its title as its possession, as inseparable, yet that distinction has long been obsolete, and now life estates and remainders may be created in personal property. Language which would create a life estate and a reversion or remainder in lands may, with

equal assurance, sever the title to personal property, giving it for a term or life to one, with the remainder to others, upon the same contingencies as land is devised, guarding always against perpetuities. How far certain remote and contingent interests thus created in personal estate are the subject of conveyance by deed or executed contract is, and from the beginning has been, a troublesome question. The same difficulty naturally existed concerning the conveyance of similar interests in real estate. And they would arise more frequently and were far more important then, because generally it was the title to real estate only that was subjected to such limitations. Not for a long while afterward were they allowed as to personalty. The early cases—and, indeed, nearly all the cases and texts—hold that such interests, as executory devises or limitations, are not alienable at common law. To obviate the difficulty of this rule, and to facilitate the transfer of titles to land, legislative enactments have been resorted to. In this state a statute of that nature has been in effect for many years. It is now section 2341, which reads: "Any interest in or claim to real estate may be disposed of by deed or will in writing. * * *" This language is so comprehensive as to include an executory devise. It is conceded by appellant, and we think it is clear that it is so, that the deed was effectual to convey appellant's interest in the real estate then held in trust for Mrs. Cronley.

An executory devise is such a limitation of a future interest in lands or personal chattels as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law. Freame, Rem. (7th Ed.) 386; 2 Bl. Com. 172. It was defined in *Paterson v. Ellis*, 11 Wend. (N. Y.) 278, as being "a devise of a future interest in lands or chattels, not to take effect at the testator's death, but limited to arise upon some future contingency." Unlike a remainder, it requires no particular estate to support it (*Burleigh v. Clough*, 52 N. H. 273, 13 Am. Rep. 23), and may be limited upon a fee. It is not called an estate. In truth it is not. It is an interest, dependent upon the happening of one or more contingencies to ripen it into an estate. It is an expectancy, something more than an heir presumptive has. The interest of the remaindermen is more tangible. It is certain and fixed, resting upon a particular estate, and to become dominant upon the happening of a contingent event. In this case the interest of Mrs. Stallcup, when first created, was thus: (1) If Mrs. Cronley should die without issue; (2) if Mrs. Shelby should die leaving no issue save appellant; (3) if appellant should survive Mrs. Cronley. So long as either Mrs. Cronley or Mrs. Shelby lived, there was the legal possibility of appellant's having absolutely no interest in the estate, or by the birth of other children to Mrs. Shelby

to have a different and varying interest. It is not so strange that such indefinite interests of such uncertain beneficiaries were not assignable at the common law. The statute quoted has made them assignable as to lands, but as to lands only. This indicates a legislative purpose to leave the common law in force as to personal estates so conditioned. The common law did not allow the conveyance or creation of such interest, except by will, and the statute has not authorized it. But equity did for many purposes treat such conveyances or contracts as equitable assignments, and as such enforced them. In *Grayson v. Tyler's Adm'x*, 80 Ky. 362, it was said: "The doctrine of the common law is that a contingent remainder cannot be passed or transferred by a conveyance at law before the contingency happens otherwise than by way of estoppel by fine, or by a common recovery; but contingent estates were assignable in equity. See *Freamo on Remainders*, p. 366." That was a case where a contingent remainderman, having such an interest in personal estate under a will, had for value assigned it, and the assignment was upheld and enforced. Chancellor Kent, in his *Commentaries* (vol. 4, 262), says: "All contingent and executory interests are assignable in equity, and will be enforced if made for a valuable consideration." Speaking of the contract to sell an executory devise, *Story's Equity Jurisprudence*, vol. 2, § 1040b, says: "Until the event has happened, the party contracting to buy has nothing but the contingency, which is a very different thing from the right immediately to recover and enjoy the property. * * * It is not an interest in the property, but a mere right under the contract. Indeed, the same effect takes place in such case if there be an actual assignment, for in the contemplation of equity it amounts not to an assignment of a present interest, but only to a contract to assign when the interest becomes vested. Therefore a contingent legacy, which is to rest upon some future event, such as the legatee's coming of age, may become the subject of an assignment or a contract of sale." When the enforcement of the contract is sought, the chancellor will look to the contract, and the circumstances under which it was executed, and the consideration, and will decree an enforcement or withhold it, as is the habit of equity; for it is not every valid contract that equity will enforce. So, if there be wanting a consideration, it seems that the contract should not be enforced against the will of the grantor. A "good consideration" will not suffice. "But, although such assignments are valid in equity, yet they will not generally be carried into effect in favor of mere volunteers; nay, not in favor of persons claiming under the consideration of love and affection (such, for instance, as a wife, or children) against the heir and personal representative of the assignee, but only in favor of persons claiming for a valuable consideration." 2 *Story's Equity*, § 1040 C c.

We do not regard the fact that the deed was made to a trustee affects the question at all. The sole purpose of making the conveyance to a trustee, instead of to Mrs. Cronley direct, was to create a separate estate in her. That fact manifestly could not have any bearing upon the transmissibility of the interest attempted to be assigned. The case of *Williamson v. Yager*, 91 Ky. 282, 15 S. W. 660, 34 Am. St. Rep. 184, is relied upon by appellee as holding a contrary doctrine. But in that case the question was not as to the effect of placing the title in a trustee as bearing upon the assignability of the subject-matter of the trust. There the owner of certain notes, by a signed indorsement upon them, created herself a trustee of the assignees, continuing to hold the notes. The court held that by making herself the trustee of a trust by an executed instrument, no other delivery of the notes assigned was either possible or necessary; and that, as the gift was executed, the matter of consideration was immaterial. But in that case the subject-matter of the assignment was a thing and estate in esse. The difficulty here is that the thing attempted to be assigned—the estate in the trust fund—was not in being, or vested in the assignor, and consequently the utmost effect that could be given to the attempted assignment was that of an equitable assignment, or an agreement to assign, to take effect in the future, when and if the estate to be assigned came into existence. When that event occurred, a court of equity will not enforce the assignment, because of a lack of equity in the claimant under the instrument.

The judgment of the circuit court denying to appellant the whole of the one-half of the personal estate owned by decedent and held by her trustee, derived under Joseph Bruen's will, is reversed, and cause remanded for proceedings not inconsistent herewith.

JEFFERSON COUNTY v. BOARD OF VALUATION AND ASSESSMENT OF KENTUCKY.

(Court of Appeals of Kentucky. Feb. 4, 1904.)

TAXATION — RAILROADS — FRANCHISE TAX — LEASED LINES—JUDGMENTS—RES JUDICATA.

1. Ky. St. 1903, § 4077, provides for the payment of a franchise tax by railroads, express companies, chair and dining car companies, etc., to the state, and also a local tax to the county, city, or taxing district. Section 4081 provides for the ascertainment of the franchise tax according to that proportion of the capital stock which the length of lines operated, owned, or leased in the state bears to the total mileage operated, owned, or leased, and the proportion of the tax to be paid in any locality is to be computed the same way. *Held*, that a traffic arrangement by which one railroad obtains the right to use the tracks of another for a certain period of time at a certain rental, in order to obtain ingress to a terminal city, is a "lease," within the meaning of the statute, for the mileage operated under which the railroad is liable to pay a franchise tax.

2. A suit to enjoin the board of valuation and assessment from certifying any part of the franchises of a railroad to various counties for the purposes of local taxation, in which the issues were decided adversely to the railroad, was not a determination adverse to the right of another county, not a party to such suit, and the rights of which are not considered therein, to also tax the franchises of such railroad.

Appeal from Circuit Court, Franklin County.

"To be officially reported."

Petition for mandamus by Jefferson county against the board of valuation and assessment of Kentucky. From a judgment dismissing the petition, plaintiff appeals. Reversed.

S. B. Kirby, Wm. Cromwell, and O. O. Marshall, for appellant. T. L. Edelen, for appellee.

BARKER, J. This action involves the right of Jefferson county to a mandamus against the board of valuation and assessment, compelling them to apportion and certify to that county its proportionate part of the franchise of the Chesapeake & Ohio Railway Company for local taxation. There are two questions raised by appellees: First, that Jefferson county is not entitled to tax any part of the franchise in question, as an original proposition; second, that that question has been adjudicated against it in the cases originating in the Franklin circuit court, and passed upon by this court in the case styled "The Southern Railway in Kentucky, etc., v. Coulter, Auditor," 68 S. W. 873. These two questions will be discussed in their order.

Section 4077, Ky. St. 1903, is as follows: "Every railway company or corporation, and every incorporated bank, trust company, guaranty or security company, gas company, water company, ferry company, bridge company, street railway company, express company, electric light company, electric power company, telegraph company, press dispatch company, telephone company, turnpike company, palace-car company, dining-car company, sleeping-car company, chair-car company, and every other like company, corporation or association, also every other corporation, company or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the state, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may be exercised. The Auditor, Treasurer, and Secretary of State are hereby constituted a board of valuation and assessment, for fixing the value of said franchise, except as to turnpike companies, which are provided for in section 4095 of this article, the place or places where such local taxes are to be paid by other corporations on their franchise, and

how apportioned, where more than one jurisdiction is entitled to a share of such tax, shall be determined by the board of valuation and assessment, and for the discharge of such other duties as may be imposed on them by this act. The Auditor shall be chairman of said board, and shall convene the same from time to time, as the business of the board may require." Sections 4078-4081, provide the manner by which the value of the franchise of the corporations, for fiscal purposes, is ascertained. Section 4081 is as follows: "If the corporation organized under the laws of this state or of some other state government be a railroad, telegraph, telephone, express, sleeping, dining, palace or chair car company, the lines of which extend beyond the limits of the state, the said board will fix the value of the capital stock, as hereinbefore provided, and that proportion of the value of the capital stock, which the length of the lines operated, owned, leased or controlled in this state, bears to the total length of the lines owned, leased or controlled in this state and elsewhere, shall be considered in fixing the value of the corporate franchise of such corporation liable for taxation in this state; and such corporate franchise shall be liable to taxation in each county, incorporated city, town or district through, or into which, such lines pass, or are operated, in the same proportion that the length of the line in such county, city, town or taxing district bears to the whole length of lines in this state."

The facts show that the Chesapeake & Ohio Railway Company on the 1st day of January, 1896, entered into a lease or agreement with the Louisville & Nashville Railroad Company by which it acquired the right to, jointly with it, use its line of railroad from Lexington to Louisville, Ky., for the term of 100 years, at an agreed rental of \$80,000 per annum. A copy of the lease or agreement is filed in the record, and, without setting it out in full, we note the following terms, as expressive of the use which the two corporations were thereafter to have in the road in question: In what may be called the preamble, it is recited that, "whereas the second party [the Chesapeake and Ohio Railway Company] wishes to use in common with the first party that part of the railway of the first party between Louisville and Lexington, Kentucky," etc. In the first part of the agreement it is said that "the first party hereby grants to the second parties, jointly and severally, the right to use jointly with the first party its line of railway," etc.; and in the sixth clause of the agreement the second parties accept the "grant of the right to jointly use the railway in question." It is contended by appellee that this is not a lease, within the meaning of the statute, and, although the Chesapeake & Ohio Railway Company operates its trains, both freight and passenger, over the line of the Louisville & Nashville Railroad

Company, from Lexington to Louisville, as freely and fully as if it owned the road, it cannot be said that it owns, operates, leases, or controls it, within the meaning of section 4081 of the Statutes, and therefore, although the line in question passes through a portion of Jefferson county, the corporation cannot be said to operate its franchise therein, within the meaning of the section of the statutes quoted; it being insisted that the agreement between the two roads for the joint use of the line is not a lease, but a "mere traffic arrangement." It will be observed that section 4077, after enumerating the various classes of public utility corporations, among which is included railroads, provides that they "shall, in addition to the other taxes imposed by law, annually pay a tax on its franchise to the state, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may be exercised." When it is remembered that Louisville is one of the termini of the railroad in question; that it is the largest city in the state, having a population of over 200,000 inhabitants; and that this agreement, whether it be a lease, or "mere traffic arrangement," by which an annual rental of \$60,000 is paid, was effected principally, if not solely, for the purpose of obtaining an entrance into the city—it is difficult to comprehend that method of reasoning which would hold that the corporation does not exercise its franchise therein. But we do not think that the language of section 4081 leaves any room for construction on this subject. Railroad corporations are not the only ones whose franchises are to be taxed under the statute. Express companies, sleeping car companies, dining car companies, palace and chair car companies, and other like corporations, are all included in the list enumerating whose franchises are to be taxed, both for state and local purposes, wherever they are operated. Now, if a railroad corporation is not to be considered as operating its franchise along and over a line which it does not own, or does not possess the exclusive right to use, but merely has a "traffic arrangement" over, then, for the same reason, the express companies, sleeping, dining, palace, and chair car companies, cannot be said to operate franchises within the state, for it is common knowledge that these corporations do not either own or lease lines of railway, but have "traffic arrangements" by which their rolling stock is operated over the lines of railroad corporations; and it would follow, therefore, that, although they are specially enumerated in the statute, they could not be assessed for a franchise tax. Could it be said that the Adams Express Company does not operate its franchise in Louisville, because it reaches that city exclusively by means of "traffic arrangements" with various railroad corporations? Suppose, instead

of having the "traffic arrangement" in question with the Louisville & Nashville Railroad Company, from Louisville to Lexington, circumstances had been such that this great corporation would have been forced to reach Louisville from the state line over the tracks of the Louisville & Nashville Railroad Company, by an agreement similar to the one it now has from Lexington; then, under the reasoning of appellee in this case, it would not operate a franchise in the state at all. Neither the letter nor the spirit of the statute in question will admit of the construction sought to be placed upon it by the appellee. We think the Chesapeake & Ohio Railway Company operates its franchise in Jefferson county, and the arrangement it has with the Louisville & Nashville Railroad Company for the joint use of its line is a lease, within the meaning of the law.

The second contention of appellee is equally untenable as the first. Several years ago various railroad corporations, among which was the Chesapeake & Ohio Railway Company, instituted actions in the Franklin circuit court, seeking to enjoin the board of valuation and assessment from certifying any part of their franchises to various counties for local taxation. These cases were consolidated, and the petitions dismissed by the circuit court. An appeal was prosecuted to this court, and that judgment affirmed, in the case of the Southern Railway in Kentucky, etc., v. Coulter, Auditor. A careful reading of the opinion shows that these various corporations contended that their franchises were not liable to local taxation, for reasons not necessary to be here set forth. All of these propositions of law were decided adversely to them, and it was held that their franchises were liable to local taxation under the statute. The question raised in this case was not involved in that. The county of Jefferson was not a party to that litigation, and the question as to whether or not it was entitled to have its proportionate part of the franchise tax of the Chesapeake & Ohio Railway Company certified for local taxation was not, and could not have been, involved therein. What the court decided was that those counties then applying were entitled to tax the franchises of the corporations, but it was nowhere held, either by express language or implication, that any county not then applying was not entitled to tax them. The court undertook to decide, and did decide, the rights of the counties then before it, but not the rights of any others. There might be room for argument that the question involved in this case was adjudicated adversely to the railroad in the case cited, but not for the position that it was settled in its favor.

For these reasons, the judgment dismissing appellant's petition is reversed for proceedings consistent with this opinion.

TWYMAN'S ADM'R v. BOARD OF COUNCILMEN OF FRANKFORT.

(Court of Appeals of Kentucky. Feb. 3, 1904.)

MUNICIPAL CORPORATIONS — GOVERNMENTAL FUNCTIONS — NEGLIGENCE — LIABILITY — PUBLIC HEALTH — CONTAGIOUS DISEASES — PESTHOUSE — REMOVAL — PATIENTS — STATUTES.

1. Where a city was authorized to establish hospitals and make all necessary regulations for the protection of the public health, and, in pursuance thereof, established a pesthouse for persons suffering from contagious diseases, acts of the city's officers in maintaining such house, and in removing thereto plaintiff's intestate, who had smallpox, and in caring for him there until he died, were acts performed by the city in its public, governmental capacity, and not in its corporate and private capacity, and hence it was not liable for negligence in the performance thereof.

2. Where a city, acting in its governmental capacity, passed ordinances for the care of persons having contagious diseases at the pesthouse, and for their removal thereto, the city could not be a participant in the negligent acts of its officers who had charge of the enforcement of such ordinances.

3. Ky. St. 1903, § 6, providing that, whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, damages may be recovered from the person or persons, corporation or corporations, causing the same, did not confer a right of action against a municipal corporation for the death of a person occurring as the result of an act done in the performance of a governmental function in removing and caring for such person, who was suffering from smallpox, at the pesthouse.

Appeal from Circuit Court, Franklin County.

"To be officially reported."

Action by James Twyman's administrator against the board of councilmen of Frankfort. From a judgment in favor of defendant, sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Jno. W. Ray and B. G. Williams, for appellant. Ira Julian, for appellee.

SETTLE, J. The appellant, Wesley Twyman, as administrator of the estate of James Twyman, deceased, sued the appellee, City of Frankfort, in the Franklin circuit court, for \$20,000 damages for the death of his intestate, alleged to have been caused by the negligence of its police officers in wrongfully exposing the intestate to inclement weather while he had smallpox, by removing him from a comfortable home to the pesthouse used for smallpox patients, which was badly crowded, poorly ventilated, and wholly unfit for the purpose for which it was used. It was averred, in substance, in the petition, that the appellee, as a city of the third class, is empowered to enact ordinances to prevent the introduction of contagious diseases in its corporate limits, to adopt quarantine laws and enforce the same within 10 miles of its limits, establish hospitals, boards of health, and make all necessary regulations for the

protection of the public health; that, in pursuance of the powers enumerated, the appellee has enacted many ordinances for the protection of the public health, and it has established a pesthouse for persons afflicted with contagious diseases, but has never appointed a board of health, for which reason it directed its mayor, other officers, and agents to enforce the ordinances, and to remove any and all persons afflicted with smallpox to its pesthouse, and such officers and agents acted under the authority thus conferred in doing the negligent acts complained of, whereby the intestate lost his life. A demurrer was filed to the petition by appellee, and, the same having been sustained by the lower court, the appellant refused to plead further. The petition was thereupon dismissed, and appellee given judgment for its costs.

The case is now before this court, and the only question presented upon the appeal is, does the petition state a good cause of action?

If the acts complained of in the petition were done by the appellee in the effort to protect the public health, which is a duty that appertains to the city in its public, and not in its corporate or private, capacity, it would seem that there can be no liability upon its part, even though such duty was negligently performed by those to whom its performance was entrusted. "The power or even duty on the part of a municipal corporation to make provision for the public health, and for the care of the sick and destitute, appertains to it in its public and not corporate, or, as it is sometimes called, private, capacity; and, therefore, where a city, under its charter, and the general law of the state, enacted to prevent the spread of contagious diseases, establishes a hospital, it is not responsible to persons injured by reason of the misconduct of its agents and employees therein. * * * "Dillon on Municipal Corporations, §§ 977, 989, 981, 982. City of Richmond v. Long's Adm'r, 17 Grat. 373, 94 Am. Dec. 481. Sherbourne v. Yuba County, 21 Cal. 113, 81 Am. Dec. 151. Perhaps no better statement of the law on this subject can be made than is found in the following quotation from 15 Am. & Eng. Ency. of Law, 1141, viz.: "While the difficulties surrounding all attempts to state a rule embracing the torts for which a private action will lie against a municipal corporation have been often deplored, yet it is believed that the following formula is both accurate and complete: So far as municipal corporations of any class, and however incorporated, exercise powers conferred upon them for purposes essentially public—purposes pertaining to the administration of general laws, made to enforce the general policy of the state—they should be deemed agencies of the state, and not subject to be sued for any act or omission occurring while in the exercise of such power, unless by statute the action be given. In reference to such matters they

¶ 1. See Municipal Corporations, vol. 26, Cent. Dig. § 1576.

should stand as does the sovereignty whose agency they are—subject to be sued only when the state, by statute, declares that they may be. In so far, however, as they exercise powers not of this character, voluntarily assumed—powers intended for the private advantage and benefit of the locality and its inhabitants—there seems to be no sufficient reason why they should be relieved from liability to suit, and measure of actual damage, to which an individual or private corporation exercising the same powers for purposes essentially private would be liable." We find the same principle announced in *Taylor v. City of Owensboro*, 98 Ky. 271, 32 S. W. 948, 56 Am. St. Rep. 861, wherein it is said by this court: " * * * The municipal corporation in all these and like causes represents the state or the public. The police officers are not the servants of the corporation, and hence the principle of respondeat superior does not apply, and the corporation is not liable unless by virtue of a statute expressly creating the liability. * * *" In the same case it is further said: "The above principle is sustained by an almost unbroken line of decisions of the courts of this country, and by this court in the cases of *Pollock's Adm'r v. Louisville*, 18 Bush, 221 [26 Am. Rep. 260]; *Jolly's Adm'r v. Hawesville*, 89 Ky. 279 [12 S. W. 813]; *Prather v. Lexington*, 18 B. Mon. 559 [56 Am. Dec. 585]."

We do not regard the cases of *Clayton v. Henderson* (Ky.) 44 S. W. 667, 44 L. R. A. 474, *Paducah v. Allen* (Ky.) 63 S. W. 981, and *McGraw v. Marion*, 98 Ky. 673, 34 S. W. 18, 47 L. R. A. 593, cited by counsel for appellant, as authorities in point. The two cases first mentioned involved the illegal action of the boards of councilmen of the cities of *Henderson* and *Paducah* in improperly locating pesthouses in violation of the statute, thereby creating nuisances, to the injury of the property rights of contiguous residents, and endangering the lives of their families; and towns and cities can always be held liable for nuisances created or maintained by them. And in the case last mentioned, though the city of *Marion* was held liable in damages for the arrest and prosecution of *McGraw* for peddling without license, the arrest was made under a void ordinance, which was enacted for municipal revenue, of which the city of *Marion* was the sole beneficiary. It is well settled that a city may be held liable for an act resulting in injury to another, where the city derives some special benefit from such act. Counsel for appellant relies upon *Aaron v. Broiles*, etc., 64 Tex. 318, 53 Am. Rep. 764; *Dallas v. Allen* (Tex. Civ. App.) 40 S. W. 324. The former was an action against the board of health, mayor, and marshal of Ft. Worth, and not against the city; and, upon the state of facts presented, it was held that the persons sued were liable. We have been unable to find or examine the case of *Dallas v. Allen*, supra; but, conceding that the Texas doctrine is as

contended by counsel for appellant, it has not been accepted in this state, and is, we think, against the weight of authority outside of it.

We are unable to see how the failure of the appellee city to appoint a board of health can affect the question under consideration. A board of health would be but an instrumentality or agency in the hands of the municipal government to be employed in protecting and maintaining the public health. Any other means to the same end that would prove as effective as a board of health might be employed by the city, and still the duties to be performed would be such as grow out of the exercise of powers purely governmental.

It is insisted for the appellant that the appellee city participated in the alleged negligent acts of its officers in the manner of removing the intestate to the pesthouse, because it directed the removal. It is not, however, contended that the city council gave any special direction to remove the intestate to the pesthouse, though it is conceded that it adopted proper ordinances under which to care for the public health. It cannot be denied that it is the duty of the city authorities to enforce these ordinances by removing those who are afflicted with contagious diseases to the place provided for them. We fail to see, therefore, how, in performing these duties, the city can become a participant in the negligent acts of those who simply have in hand the removal to the pesthouse of persons thus afflicted. At most, only the officers or agents guilty of such negligence may be held liable therefor. Taking all that is alleged in the petition to be true—and it must be so considered for the purposes of the demurrer—it shows beyond question that the acts complained of were such as appertained or were incidental to appellee's duty to the public, and were done for the protection of the public health. The power exercised was therefore solely for the public good.

Finally it is insisted for appellant that in any event this action was authorized by section 6, Ky. St. 1903, which provides that "Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then in every such case damages may be recovered for such death from the person or persons, company or companies, corporation or corporations, their agents or servants, causing the same. * * *" The statute was enacted to conform to section 241 of our present Constitution, which confers the same right. We cannot believe that the statute and provision of the Constitution supra were intended to give a right of action against a municipal corporation for the death of a person occurring as the result of an act done, as in this case, in the performance of a duty which the municipality owed to the public, and the doing of which was but the exercise of power purely governmental. It seems to us that to hold otherwise would practically do away with municipal authority in the matter

of preserving the public health, which would result in consequences disastrous to the public welfare, and ruinous to every city in the state.

For the reasons indicated, the judgment is affirmed.

SHEMWELL v. OWENSBORO & N. R. CO.

(Court of Appeals of Kentucky. Feb. 5, 1904.)

MASTER AND SERVANT—DANGEROUS PREMISES—PROMISE TO REPAIR—EFFECT—KNOWLEDGE OF SERVANT—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.

1. Where plaintiff was injured by the falling of the roof of a pumping house which had become so defective that it was unable to sustain plaintiff's weight when he went upon it to extinguish a fire, and plaintiff was the only person employed by defendant at that place, plaintiff's knowledge as to the condition of the roof was the knowledge of his employer.

2. Where defendant promised to repair a defective roof over a pumping station where plaintiff was the sole employé, such promise did not make defendant an insurer of plaintiff's safety during the time reasonably necessary to make the repairs, but only relieved plaintiff from the charge of contributory negligence in continuing at his work with knowledge of the defective conditions, unless such defects were so obviously dangerous that none but a reckless person would venture on the roof until repaired.

3. Where plaintiff, employed to operate a railroad pumping station, notified defendant of the defective condition of the roof over the same, and received a promise that it should be repaired, and plaintiff was injured by the collapse of the roof while he was walking thereon within a week after the promise to repair, the expiration of such time was not so unreasonable as to deprive plaintiff of the right to continue to work, relying on defendant's promise to make repairs.

4. Where plaintiff, who was injured by the falling of the roof of a pumping station at which he was employed while he was walking thereon in extinguishing a fire, had notified defendant's superintendent that the roof was defective, but there was no showing that such notice was to the effect that the roof was so defective as to be unsafe to go upon, it would be presumed that the notice referred only to the defects affecting its purpose as a roof, so that the promise to repair did not constitute an undertaking to make the roof safe to walk on.

5. Where plaintiff had knowledge that the roof over defendant's pumping station, in which plaintiff was the sole employé, was unsafe to go upon, defendant's promise to repair the roof could not relieve defendant of his contributory negligence in going on it before it had been repaired, in order to extinguish a fire which had been communicated to the roof.

6. Where plaintiff was injured by the falling of the roof of a pumping station in which he was employed, which he knew to be defective and dangerous to go upon, the direction of defendant that if fire occurred on the roof, which plaintiff could not reach with a hose, he must go on the roof and put out the fire, did not relieve plaintiff from contributory negligence in going on the roof, before it had been repaired, to extinguish a fire.

Appeal from Circuit Court, Logan County.
"To be officially reported."

Action by W. M. Shemwell against the Owensboro & Nashville Railroad Company.

¶ 3. See Master and Servant, vol. 24, Cent. Dig. § 444.

From a judgment in favor of defendant, plaintiff appeals. Affirmed.

E. B. Drake, for appellant. Browder & Browder and B. D. Warfield, for appellee.

O'REAR, J. Appellant was the keeper of a water tank and pumping house on appellee's railway. He was the sole agent or servant in charge of, or connected with, that place. His principal duty was to operate the engine that pumped water into a large tank from which the locomotives were supplied. He alleges that on an occasion the smoke-stack of the boiler connected with his engine became so out of repair that it deflected sparks onto the roof of the little building in which the engine was situated, setting fire to the roof; that he went upon the roof to put out the fire, when it, by reason of its rotten condition, gave way, letting him fall to the ground and injuring him. He sued the railway company for the damages which he alleges he sustained by reason of this injury. The negligence of the railway company of which he complains is that it had negligently permitted the covering of the roof, which was made of boards or plank, to be and become rotten, negligently permitted a cap of covering of the smoke-stack to be and remain so that sparks were thrown directly upon the roof, and negligently refused to furnish proper fire hose "to be there in case of fire," and negligently refused to repair or remedy the same "after notice repeatedly," though it had promised to do so; that the roof caught fire because of the negligence above set out; and that, because of the absence of proper fire hose, he was compelled to, and did, go upon the roof to put it out, as above stated. His petition sets out that while he was "putting the last water upon said burning housetop, and while he had his feet securely put in an opening in said roof, and which he thought was sound enough to hold his weight and keep him from falling, said foothold gave way," etc. A demurrer was sustained to the petition. An amended petition was filed, reiterating many of the averments of the original petition, but amplifying them in some particulars. He says that he was employed to look after and protect the buildings at that pumping station; that he believed the building was sufficiently strong to support his weight, and while upon the building, attempting to put out the fire, "he placed his foot upon a crosspiece or beam of said building, which appeared to be sound, so far as he could observe or had any way of knowing, and which he alleges that defendant had permitted to remain there so long that it had become rotten and unsafe [he does not allege that defendant was negligent in failing to learn earlier of the actual condition of this crossbeam], all of which was produced by the said act of the defendant in failing to have a proper and sound

roof, when they had agreed to do so, and when they had been informed of its rotten condition, and knew of same, and knew of its increased danger from fire." He alleges "that defendant did know that all these things existed, and promised to repair same only a few days or within a week of said fire, and he did rely upon said promise, and continued to work there," etc. In alleging more specifically the knowledge of the railway company and its promise to repair, he further says in the amendment: "The said covering of said engine house caught fire not more than a week prior to his injury, but he was enabled to put it out by the use of a hose; that he then went to the supervisor of bridges or water stations, or at least to the defendant's agent and employé who was his superior and in control of said water station, and who had supervision of all water stations, and informed him that same had been afire, and also informed him of the dangerous condition of the building, and also informed him that he had been able to put same out, and also informed him of the great danger of a recurring fire, and the possible destruction of said building and said machinery, which was worth \$500 or \$1,000; and it was then that the said defendant, by its superior officer and supervisor of water stations, then and there agreed and promised to and with this plaintiff to repair and fix same, and instructed him that if said fire occurred again, and he could not reach same with the hose, that he must go upon said building and put same out." These are the strongest allegations of the pleadings for and against appellant upon the point upon which the case was made to turn. The circuit court sustained a demurrer to this amendment also. Appellant declining to plead further, his suit was dismissed, and he has appealed.

Under our code system of practice, the object of all pleadings is to set forth the facts upon which the parties rely in seeking relief or making defense, and to join an issue thereon. Legal conclusions and circumlocutory statements will be ignored in favor of facts explicitly stated in testing the sufficiency of the pleading. The court looks alone to the well-pleaded facts, and applies the law thereto.

Negligence is the failure to do something that the doer, in the exercise of ordinary care, should have done. The employer's duty in this case, it is claimed for appellant, was primarily to furnish him a safe, or at least a reasonably safe, place in which to do his work. With certain recognized limitations, this will be accepted. The two latest cases from this court in which that matter is discussed are *Pfisterer v. Peter & Co.* (decided Feb. 2, 1904) 78 S. W. 450, and *Wilson's Administrator v. Chess & Wymond Co.* (this day handed down) 78 S. W. 453. Among these limitations are these: If the laborer knows of the defective condition of the prem-

ises, or if their condition is so obvious that he could have known of it by the exercise of ordinary care on his part, he assumes the risk of injury arising from such defect. The promise of the employer to repair will be noticed further along. But in no state of case is the employer an insurer of the safe condition of his premises. His undertaking is only an implied one. The defective condition must be such that the employer actually knew of it, or by the exercise of ordinary care on his part, or on the part of his servants in authority and in charge, could have known of it, before he is liable therefor to a servant. The law imposes neither an impossible nor an unreasonable duty upon either the employer or the employé. Applying these principles to the facts of this case as the pleadings stand, the employer did know actually of the defects complained of, because its superintendent of bridges and water stations had been told of it. So the petition alleges. It further shows by whom and when he was told, to wit, about a week before the accident, and by the plaintiff himself. As the petition as amended does not show that appellee had any other knowledge or means of knowledge as to conditions at this pump station than it acquired through appellant, the case is considered alone in that aspect. Plaintiff was the only person there, or required to be there, so far as the pleadings show, representing appellee. The eyes, ears, judgment, opinion, and experience of its employé in charge is its way of learning such things. The law therefore imputes to the corporation just what these representatives see, hear, and know in the course of their respective duties, as affecting the condition of its property and appliances. Appellant being the sole person present at the water station representing appellee, his knowledge would be its knowledge, and therefore his negligence would be its negligence, as between it and third persons. When appellant reported the conditions to his superior, with a view of shifting his responsibility to his employer, as between themselves, on account of conditions there, his recital of the conditions to his superior became the knowledge of the employer, as affecting its duty to appellant. Consequently appellee knew just what appellant told his superior about these conditions. Besides, the defective smokestack and insufficient fire hose, he says he told his superior that the roof was rotten. He does not say that he told him just how rotten it was. But presumably he told him that it was so rotten that it was inadequate for the purposes for which it was intended, namely, to turn sunshine and rain, and was more liable, by reason of its condition, to ignition from the sparks falling from the smokestack. The language of the petition indicates that this was the probable extent of appellant's information to the superintendent. But, if he in fact told the superintendent that it was so rotten as not to bear

the weight of a man, appellant had just the same information on that subject that the superintendent had, viz., what appellant had seen, and his opinion and judgment based thereon. Then, if appellant, with as much actual knowledge of the condition of the roof as his employer had, went upon the roof, and was injured by reason of its defects, the employer is not liable to him. If, on the other hand, neither of them actually knew of the real condition of the roof—the appellant, because he had not sufficiently inspected it, and the employer, because its agent in charge (appellant himself) had failed to notify it of the condition—the employer is not liable, because ordinary care on its part was to require an inspection and report on the conditions by its only servant in charge. Its failure consequently to exercise that care was because appellant had himself failed to exercise ordinary care in acquainting himself of the conditions and reporting it. The employer's knowledge is theoretical—in fact, an imputed knowledge. It was bound to come through the head of some employé; the petition does not show that it was the duty of any other employé than plaintiff himself to even examine that building. In fact, he says he was employed "to look after it" which means to care for it as the person in charge. The knowledge of the owner cannot rise above his source of information. As between the employer and third persons, it is true, there will be imputed to the former all that his servant in authority knew, or by the exercise of ordinary care could have known, about it. But as between the employer and the very servant who was solely in the custody, and whose duty it was to know and report the exact conditions to the master, their knowledge as to conditions arising while the premises are in the custody of that servant must of necessity be the same, particularly in the absence of any showing that the master had otherwise acquired knowledge on the subject.

It is insisted, however, as the master had promised to repair the defect, and had requested the servant to in the meantime continue in the use of the premises, that the risk then and thereby became the master's for a reasonable length of time. One week after such promise is not an unreasonable length of time within which the servant might properly have relied on the master to make the repairs required in this case. But the rule is not, as seems to be assumed, that the master meantime becomes an insurer to the servant of the safety of the premises. He does not. It relieves the servant of the charge of contributory negligence in the matter of continuing at his work with knowledge of the defective conditions, unless such defects are so obviously dangerous as that none but a reckless person would venture upon them. In the latter case the servant, notwithstanding the master's promise to repair, himself takes the hazard of his folly. Mel-

lott v. L. & N. R. Co., 101 Ky. 212, 40 S. W. 696; Wood on Master & Servant, § 326; Shearman & Redfield on Negligence, § 214; G., C. & S. F. R. Co. v. Brentford (Tex. Sup.) 23 Am. St. Rep. 377, 15 S. W. 561, and note p. 385, 23 Am. St. Rep. Missouri Furnace Co. v. Abend, 107 Ill. 44, 47 Am. Rep. 425; Eureka Co. v. Bass, 81 Ala. 200, 8 South. 216, 60 Am. Rep. 152.

In the instant case, appellant, as has been suggested, probably notified his superior of the defects in the roof only as affecting its purpose as a roof. If appellant had been injured by the roof falling in upon him (and that danger had not been a patent one), or by reason of its leaky condition, he would have been protected against the damages. But it is not shown or claimed that he notified his superior that the roof was so rotten as to be unsafe to get upon, and therefore there was no promise or undertaking by the superintendent to repair such a defect, or to take the consequences upon the employer meantime. The promise to repair, and the assumption of consequences during repairs for a reasonable time, necessarily are referred to the particular defects which the parties were discussing. On the other hand, if the notification by appellant was that the roof was unsafe to go upon, knowledge of that fact was with appellant, and no promise to repair could relieve him of the contributory negligence of going upon it while it was in that condition. For if it was that unsafe, it meant it would give way under the weight of a man, and, if it gave way, it was almost inevitable that he would be hurt by the fall. Nor does the direction of a master to the servant to place himself in an obviously dangerous situation—one that none but a reckless person would assume—relieve the servant of his own negligence in acting.

The judgment is affirmed.

PFISTERER v. J. H. PETER & CO.

(Court of Appeals of Kentucky. Feb. 2, 1904.)
MASTER AND SERVANT—UNSAFE PLACE TO WORK—EQUAL MEANS OF KNOWLEDGE—INSTRUCTIONS.

1. The right of an employé to recover for injuries caused by the fall of a platform on which he was standing is not affected by the fact that he had equal means with his employer of knowing that it had not been constructed in a reasonably safe manner.

2. In an action for personal injuries to an employé, wherein defendant's liability depended solely on whether he had provided plaintiff with a safe place to work, an instruction that plaintiff assumed the ordinary risks of his employment, and that, if attended with danger, it was necessary to exercise ordinary care to avoid injury, was inapplicable to the case, though unobjectionable as an abstract statement of law.

Appeal from Circuit Court, Jefferson County, Common Pleas Division.

"To be officially reported."

¶ 1. See Master and Servant, vol. 24, Cent. Dig. § 576.

Action by Henry Pfisterer against J. H. Peter & Co. From a judgment for defendants, plaintiff appeals. Reversed.

Gardner & Moxley and Caruth, Chatterson & Blitz, for appellant. O'Neal & O'Neal, for appellees.

BURNAM, C. J. This action was brought by the appellant, Henry Pfisterer, against the appellees Joseph H. Peter & Co. to recover damages for a personal injury which resulted to him from the falling of a scaffold on which he was standing while in their service, which it is alleged was caused by the negligence of the defendants in its construction. There is no dispute as to the facts, which may be stated briefly as follows: On the 30th of May, 1902, the plaintiff and Lee Balck, laborers in the employ of the defendants, were directed to assist Dietsch, their foreman, in placing a large stone sill, weighing about 1,000 pounds, in the doorway of a school building. The doorway was immediately over a similar opening into the basement of the building, which was about 3 feet deep, and the excavation extended out several feet in front of the building. Three iron lintels, 5 inches wide, had been laid side by side across the opening, the ends of which rested upon the walls of the building, and four courses of brick were laid on top of them to bring the wall up to the point where the stone doorsill was to be placed. The front lintel projected about $1\frac{1}{2}$ inches beyond the face of the brick wall, leaving about 3 or $3\frac{1}{2}$ inches on the wall which was covered by courses of brick. The brick hod carriers, who had been employed by the brick masons, had used two wooden joists, 20 feet long, $2\frac{1}{2}$ inches thick, and 12 inches wide, laid one on the top of the other, as a gangway. One end of these joists rested on the projection of the iron lintel and the other on the ground, spanning the excavation below. Dietsch, appellees' foreman, took these joists apart and laid three of them side by side, using the projection of the lintel as a rest for the end next to the building, and allowing the other end to rest on the ground. Stobs were driven at the end on the ground to prevent their slipping, and a trestle was placed under them to prevent them from swagging, and by his direction this platform was used as a place to stand on while they were engaged in lifting the stone from the ground below and placing it on the wall. About the time they got the stone sill so that they could place it in position, the iron lintel on which the platform rested turned over, and that end of the platform went down, precipitating the men, stone sill, and four courses of brick into the excavation below. The stone fell upon one of appellant's hands, crushing it very badly. Upon the trial the defendant J. H. Peter testified that he had nothing to do with the placing of the iron lintels or the brickwork; that his contract only covered the stonework

on the building; that before sending the plaintiff and his foreman to place the sill he had gone out and looked at the wall to see whether it was ready to receive the sill, when he discovered that the iron lintels had been laid with their flat side down, instead of on edge, as they were usually placed; that, if they had been properly placed by the brick-masons, a dozen men could have stood on the platform, and the lintel would not have turned over. Dietsch also testified that when he went out to place the sill he noticed that the lintels were laid flat. As the lintels were covered by four courses of brick, one standing on the platform could not see how much of the lintel rested on the wall, but by going into the basement and looking up this fact could be easily ascertained. Plaintiff testified—and his testimony is uncontradicted—that he had had no experience in building scaffolds, and that he did not discover that the lintels were laid flat, instead of being placed on edge, and that he would not have known that they were not in proper position if his attention had been called to the matter, or that they would have been stronger if placed on edge. There is proof that he assisted in driving the stobs at the end of the joists which rested on the ground by direction of Dietsch. The trial resulted in a verdict and judgment in favor of the defendants, and upon this appeal it is insisted that the court erred in instructions Nos. 1, 2, and 3 given to the jury over the objection of the plaintiff, and which read as follows: "(1) Gentlemen of the jury, the court instructs you that it was the duty of the defendants Peter & Co. to furnish a reasonably safe place for the plaintiff to do his work in. Now, if you believe from the evidence that the scaffolding on which plaintiff was working at the time complained of was not in a reasonably safe condition for plaintiff to do his work, and that that fact was known to the defendants, or any of them, or any agent of theirs, superior in authority to plaintiff, or by the exercise of ordinary care they or any of them could have known that it was not in a reasonably safe condition, if it was so; and if you further believe from the evidence that such fact, if it did exist, was not known to the plaintiff, or that he did not have equal means of knowing the same with the defendants, and that by reason of it not being in a reasonably safe condition, if it was so, plaintiff was precipitated and injured—then you should find for the plaintiff unless you believe from the evidence that the plaintiff was guilty of contributory negligence, in which event you should find for the defendants. (2) But, gentlemen, if you believe that the scaffolding was in a reasonably safe condition, or if you believe that it was not in a reasonably safe condition, that it was not known to be so, or by the exercise of ordinary care could not have been known to be so, by the defendants, or any of them, or its agents superior in authority to plaintiff, or if

you believe, even though it was not in a reasonably safe condition, that such fact was known to the plaintiff, or that he had equal means of knowing the same with the defendants, then you should find for the defendants. (3) The court further instructs you that when the plaintiff, Pfisterer, entered into the employment of the defendants J. H. Peter & Co., he undertook to assume all risks ordinarily attendant upon such employment, and, if necessarily attended with danger, it was his duty to exercise ordinary care and to avoid being injured."

These instructions are predicated upon the general proposition that if the information of the master and servant as to the place of work are equal, and if both are either without fault or in equal fault, the servant cannot recover damages of the master; or, in other words, that while the law imposes upon the master the duty of providing the servant a reasonably safe place in which to work, an equal and corresponding duty also rests upon the servant to know that the place is safe. This was undoubtedly at one time the rule in England, and in some of the American states, notably South Carolina, Maine, Massachusetts, New York, New Jersey, and Mississippi. But it found no permanent abiding place in the jurisprudence of most of the American states, and has been distinctly repudiated time and again by the federal courts and by this court. The early case of *Bogenschutz v. Smith*, 84 Ky. 330, 1 S. W. 578, seems to squint in this direction, and cites some English and American decisions which undoubtedly support the rule contended for. But the opinion in that case does not approve the doctrine in all cases, as the learned judge who wrote the opinion, in winding up the discussion of the case on this question, says: "We do not mean to decide that there may not be cases where the servant has the right to rely upon the judgment of the master as to the safety of the premises or the material to be used or that the servant is bound to inform himself as to them." And in numerous subsequent opinions the doctrine has been disaffirmed, and the rule announced that the duty of furnishing reasonably safe tools, materials, and place to work was primarily on the master, and that the servant was under no duty to discover such defects, and, unless he knew of their existence, or they were patent and obvious to a person of his experience and understanding, that he would not be precluded from recovery. In *Louisville & Nashville R. R. Co. v. Foley*, 94 Ky. 224, 21 S. W. 866, the court said: "The rule requiring an employer to provide reasonably safe and suitable machinery and appliances for the use of employes, and to keep them in reasonable repair while being used, is so just and fair that it has never been called in question by this court. But if an employer may in every case escape liability for an injury to a subordinate employe by reason of the defective

machinery or appliances provided for his use merely because the latter does not show he exercised care and diligence to discover the character and condition thereof, the rule would not amount to much as either an incentive to the employer to do his duty or protection to the employe against personal injury. The limit of inquiry in such a case as this is whether, as a matter of fact, the employe did, before exposing himself to danger, know the machinery or implements causing the injury to be defective. The rule, of course, does not apply where examination and inspection is in the line of the employe's duty." In *Ashland Coal & Iron & Ry. Co. v. Wallace*, 101 Ky. 626, 42 S. W. 744, 43 S. W. 207, the court said: "The degree of care required of the master and the servant in particular cases is generally different. While each is required to exercise that degree of care in the performance of his duty which a reasonably prudent person would use under like circumstances, the primary duty on the part of the master to use care to furnish a reasonably safe place for the servant is more important than the duty of the servant to use reasonable care to protect himself. * * * The servant has the right to presume, when directed to work in a particular place, that the master has performed this duty, and to proceed with his work relying upon this presumption." The same doctrine is announced in *Louisville & Nash. R. R. Co. v. Vestal*, 105 Ky. 461, 49 S. W. 204; *Champion, etc., Co. v. Carter* (Ky.) 51 S. W. 16; *Vandyke v. Packet Co.* (Ky.) 71 S. W. 441; *Crabtree Coal Mining Co. v. Sample's Adm'r* (Ky.) 72 S. W. 24; *Covington Sawmill & Mfg. Co. v. Clark* (Ky.) 76 S. W. 348. And in *Adams Express Company v. Smith* (Ky.) 72 S. W. 752, it was expressly held that the trial court properly refused to instruct the jury that, if the servant had equal means of knowledge with the master, it was not liable, upon the ground that it was the duty of the master to furnish a reasonably safe place to work in, and it was not the duty of the servant to get off of a platform and inspect it from underneath. In *Baltimore & Ohio Railroad Co. v. Baugh*, 149 U. S. 386, 13 Sup. Ct. 921, 37 L. Ed. 772, the court said: "A master employing a servant impliedly engages with him that the place in which he is to work and the tools or machinery with which he is to work or by which he is to be surrounded shall be reasonably safe. It is the master who is to provide the place and the tools and the machinery, and when he employs one to enter into his service he impliedly says to him that there is no other danger in the place, the tools, and the machinery than such as is obvious and necessary. Of course, some places of work and some kinds of machinery are more dangerous than others, but that is something which inheres in the thing itself, which is a matter of necessity, and cannot be obviated. But within

such limits the master who provides the place, the tools, and the machinery owes a positive duty to his employé in respect thereto. That positive duty does not go to the extent of a guaranty of safety, but it does require that reasonable precautions be taken to secure safety, and it matters not to the employé by whom that safety is secured, or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty; and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employé, or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects." The A. & E. En. of Law, vol. 20, p. 55 (2d Ed.), admirably epitomizes the law in these words: "Masters owe to their servants the duty of providing them a reasonably safe place in which to work and of maintaining it in a reasonably safe condition during the employment, having regard to the character of the services required and the dangers that a reasonably prudent man would apprehend under the circumstances of each particular case. This is a positive duty which the master owes, and is not one of the perils or risks assumed by a servant in his contract of employment, and the servant is entitled to rely on the assumption that the master has performed the work imposed on him by law of providing a reasonably safe place to work. But if the place is unsafe because of the nature of the work, and the servant suffers injury in consequence thereof, he cannot hold the master liable, providing reasonable precautions were taken by the master to avoid injury. The risk of injury from such cause is one of the risks assumed by the servant; or, if the place is obviously unsafe, so as to charge the servant with knowledge thereof, and he nevertheless enters on the work, he assumes the risk." Applying this rule, masters have been held liable for negligence in the construction of scaffolds and platforms erected as a safe place for the use of the servant. See *Maning v. Hogan*, 78 N. Y. 615; *McNamara v. MacDonough*, 102 Cal. 575, 36 Pac. 941; *Rice, etc., Malt. Co. v. Paulsen*, 51 Ill. App. 123. We are of the opinion that instructions 1 and 2 are erroneous in so far as they deny plaintiff the right to recover if he had equal means with the master of knowing that the platform had not been constructed in a reasonably safe manner.

While the third instruction is not objectionable as the abstract statement of the legal proposition, it does not fit the facts of this cause. The law imposed upon the plaintiff the duty of exercising ordinary care for his own safety, not knowingly to expose himself to unnecessary and obvious risks, when he accepted employment from the defendant; but he did not assume risks that were unknown to him, and which were not necessari-

ly incident to his employment; nor risks which the defendant, by the exercise of ordinary care, could have guarded against. It is the duty of a servant to obey the reasonable demands of his master, and he had the right to believe that he would not be required to incur risks growing out of the negligent construction by the defendant of the scaffolding upon which he was required to stand in performing the work in obeying the orders of his master.

For errors pointed out, the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

WILSON v. CHESS & WYMOND CO.

(Court of Appeals of Kentucky. Feb. 5, 1904.)
INJURY TO SERVANT—SAFE PLACE—DUTIES OF MASTER—INHERENT DANGERS—ASSUMPTION OF RISK.

1. While a master is bound to furnish a reasonably safe place for his servant to work, the master is not bound to make the place absolutely safe, nor to insure the servant against the ordinary risks incident to the nature of the employment.

2. Defendant, as a part of its cooperage plant, maintained a large vat, open at the top, filled with water heated to about the boiling point, in which kegs were soaked so that the staves could be bent into a permanent curved shape without breaking them. Ice had formed near the tub, making it dangerous for persons to stand; and plaintiff, whose duties were to place unfinished kegs in the water, was injured by falling into the tank while engaged in his work. Held, that in the absence of any evidence of defendant's assurance that the place was safe, or of any promise to provide other appliances to protect plaintiff from falling into the vat, plaintiff assumed the risk thereof, and was not entitled to recover.

Appeal from Circuit Court, Jefferson County, Law and Equity Division.

"To be officially reported."

Action by Charles Wilson, administrator, against the Chess & Wymond Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Matt O'Doherty, B. H. Young, M. W. Rippy, and E. C. Wade, for appellant. Pirtle, Trabue & Cox, for appellee.

O'REAR, J. This appeal is from a judgment rendered upon a verdict returned in favor of appellee under a peremptory instruction. The action was brought by Wilson, a minor about 18 years old, by his guardian, for damages sustained by Wilson about November 21, 1898, in falling into a tank of boiling water at appellee's stove factory. In his petition, plaintiff complained that, alongside of the tank where he was working, ice had formed, making it dangerous for him to stand. His duties were to place unfinished kegs in the water in the tank, where they were boiled or soaked so that the staves could be bent into permanent curved shape without breaking them. The

¶ 1. See *Master and Servant*, vol. 34, Cent. Dig. §§ 172, 550.

negligence alleged against appellee is that it, as master and employer, did not furnish suitable and proper covering or protection for the tank, to guard plaintiff against falling into the water, and in permitting the ice to be and remain where plaintiff had to stand in doing his work. It is claimed that the duty of the master was to furnish the laborer a safe place in which to work. The tank in question was about 10 feet long by 6 feet wide by $3\frac{1}{2}$ feet deep. It was built of wood, and its top was entirely open. The water, which mostly filled it, was heated with steam to about a boiling heat. By nailing wooden slats across the top of the tank, leaving space enough to put in and take out the kegs, it would have made the situation much safer for the workman.

The duty of the master to furnish a safe, or reasonably safe, place in which the laborer may do his work, is frequently either misunderstood or misapplied. In the first place, the master is not required to furnish an absolutely safe place. If the work is in and of itself dangerous, the master does not insure against such danger. On the contrary, there is nothing better settled than that the servant assumes the ordinary risks and hazards incident to the character of his work. Whatever may be the moral obligation resting upon those who employ people in hazardous work to furnish them the safest possible means to protect them from injury, the law does not forbid a laborer's undertaking a hazardous employment with full knowledge of its dangers, if he wants to. If he does, the law leaves the risk upon him, for he has assumed it. There is no feature of the law of negligence better settled than this. The contrivance in use in this case was of the simplest kind. It was merely a large vat or tub, plainly open at the top. The lowest order of intelligence of a rational man would have comprehended that boiling water would scald the flesh if it came in contact with it, and that ice was slippery. The conditions were openly visible to the laborer. He had only to use his eyes, and his most common experience, and his earliest instincts, to fully appreciate the danger of his position. There was no assurance by the master of the safety of the place, even if such assurance, under the circumstances, could have shifted the liability. There was no promise by the master to provide other appliances of greater safety—no promise to repair. Under these circumstances, the servant assumed the dangers of his employment. He cannot, therefore, recover from the employer damages growing out of them. *Kelley v. Barker Asphalt Co. (Ky.)* 20 S. W. 271; *C. & O. & S. W. R. Co. v. McDowell (Ky.)* 24 S. W. 607; *Mellott v. L. & N. R. Co.,* 101 Ky. 212, 40 S. W. 696; *McGhee, Rec., v. Bell (Ky.)* 39 S. W. 823; *McCormick H. M. Co. v. Litter (Ky.)* 66 S. W. 761; *Plasterer v. Peter & Co. (decided Feb. 2, 1904)* 73 S. W. 450.

Judgment affirmed.

LYON'S EX'X et al. v. LOGAN COUNTY BANK'S ASSIGNEE.

(Court of Appeals of Kentucky. Feb. 5, 1904.)

EVIDENCE—TESTIMONY AGAINST DECEDENT—AFFIDAVIT PURGING CLAIM—WAIVER—VOID JUDGMENT—REVERSAL—CLERICAL MISPRISION—DEMAND AGAINST PERSONAL REPRESENTATIVE.

1. Though, under Civ. Code Prac. § 606, subsec. 2, a party cannot testify for himself concerning transactions had by him with one who is dead, the cashier of a bank, who has no personal interest in it, but is merely its agent, may testify in an action by its assignee against a decedent's estate.

2. In an action on a claim against a decedent's estate, the failure to object thereto, before answer, on the ground that the demand and affidavit purging the claim, required by Ky. St. 1903, §§ 3870-3872, had not been made, was a waiver of such demand and affidavit.

3. Under Civ. Code Prac. § 763, providing that a void judgment shall not be reversed on appeal till a motion to set it aside shall have been made and overruled by the trial court, where such a motion has been made, but not acted on, the judgment cannot be reversed.

4. The rendering of judgment against infant defendants for whom no defense was made being, under the express provision of Civ. Code Prac. § 517, a clerical misprision, is not, under the express provisions of section 516, a ground for appeal till it is presented and acted on in the circuit court.

5. Though Ky. St. 1903, § 3884, prohibits the recovery of any interest accruing after the death of a debtor unless the claim be verified and demanded of his personal representative within a year after his appointment, in a suit begun on a note several years after the maker's death this question cannot be raised for the first time on appeal, where the record simply fails to show affirmatively, without plea calling it out, that a demand was made within the year.

Appeal from Circuit Court, Logan County.
"Not to be officially reported."

Action by the Logan County Bank's assignee against T. J. Lyon's executrix and others on a note. From a judgment for the plaintiff, defendants appeal. Affirmed.

E. B. Drake, for appellants. J. C. Browder, W. P. Standidge, and W. F. Browder, for appellee.

O'REAR, J. In this suit by the bank's assignee against the estate of its deceased debtor the cashier of the bank is a competent witness against the decedent's estate. It was not shown that the cashier had any personal interest in the bank. He was merely its agent. Although a party, subject to certain exceptions, cannot testify for himself concerning transactions had by him with one who is dead when the testimony is offered to be used, the agent of such party is under no such disability. Section 606, subsec. 2, Civ. Code Prac.; *Cobb's Adm'r v. Wolf*, 96 Ky. 418, 29 S. W. 303. In addition, the testimony of the cashier, so far as it was material, related to original book entries made by him contemporaneously with the transactions about which he was testifying.

2. There does not appear in the record the statutory affidavit purging the claim. Sections 3870-3872, Ky. St. 1903. An issue was formed as to the merits of the defense, with

out objection having been made because the affidavit and demand had not been made. No objection seems to have been made on this account till after the judgment. That was too late. The failure to make the objection before answer filed was a waiver of the demand and affidavit required by those sections. Usher's Ex'r's v. Flood (Ky.) 17 S. W. 132; Tipton's Adm'r v. Richardson (Ky.) 54 S. W. 738; Lyttle v. Davidson (Ky.) 67 S. W. 34; Stix v. Eversole's Adm'r, 106 Ky. 516, 50 S. W. 832; Thomas' Ex'r v. Thomas, 15 B. Mon. 178.

3. A nonresident infant defendant does not appear to have been brought before the court. If the allegations of the petition are true (and they are not denied by the appellants, whom they directly affect on this point), she has no interest in the case. But, of course, without her presence her interest could not be conclusively adjudged. The judgment was rendered notwithstanding. While there was a motion to set aside the judgment, the record does not show that the motion has been acted upon. The judgment, in so far as it affects the interests of the nonresident infant, is probably void. Section 763, Civ. Code Prac., provides that such void judgments shall not be reversed on appeal until a motion to set aside or modify it should have been made in the inferior court and overruled. The failure of the circuit court to act on the motion deprives this court of any jurisdiction to reverse the judgment for the reason stated.

4. There were two infant defendants before the court for whom no defense was made. The rendering of the judgment against them before defense was a clerical misprision. Section 517, Civ. Code Prac. But by section 516, Id., it is provided: "A misprision of the clerk shall not be a ground for an appeal until the same shall have been presented and acted upon in the circuit court."

5. The suit upon the note was begun several years after the death of the maker and of the qualification of his personal representative. Section 3884, Ky. St. 1903, prohibits the recovery of any interest accruing after the death of the debtor, unless the claim be verified and demanded of his personal representative within one year after his appointment. If the personal representative is the only person to be affected by it, he may waive such demand. Croninger v. Marthen, 83 Ky. 662. However, in this case there is neither pleading nor proof that the verified demand was not made as required by the statute. Merely failing to find evidence in the record that it was made is not sufficient to condemn the claim for interest. Usually evidences of demand of payment, with the statutory affidavit, are not pleaded, for they form no part of the original cause of action. Nor, for that reason, unless the answer made some such defense, are they pertinent, or necessary to be filed. It is too late to

make that question for the first time in this court upon a record which simply fails to show affirmatively—without plea calling it out—that a demand was made within the year.

Finding no reversible error in the record, the judgment is affirmed.

SCOTTISH SECURITY CO.'S RECEIVER v. STARKS.

(Court of Appeals of Kentucky. Feb. 11, 1904.)
CORPORATION—SUBSCRIPTION FOR STOCK—RELEASE—WHAT LAW GOVERNS—VARYING WRITTEN AGREEMENT BY PAROL.

1. Where one subscribed for stock merely to enable the other subscribers to incorporate, and after such incorporation he was released from the subscription by the unanimous consent of the other subscribers, and while the corporation had no outstanding debts, the release is valid, and subsequent creditors cannot complain.

2. The validity of the cancellation of a subscription to the stock of a corporation whose chief office is in the state is governed by the law of the state, though the incorporation was under the laws of another state.

3. It is immaterial whether a release of all liability under a written subscription for stock was in parol or otherwise.

Appeal from Circuit Court, Jefferson County, Common Pleas Division.

"To be officially reported."

Action by W. T. Newman, Jr., receiver of the Scottish Security Company, against John P. Starks. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Bingham & Davis and W. M. Thum, for appellant. A. J. Carroll, for appellee.

SETTLE, J. The appellant, W. T. Newman, Jr., as receiver of the Scottish Security Company, sued the appellee, John P. Starks, in the lower court, upon an alleged unpaid subscription for 20 shares of the capital stock of the company named, the amount claimed being \$1,800. The trial was by jury, and a verdict was found for the defendant, upon which judgment was entered dismissing the petition and allowing appellee his costs. The appellant's motion for a new trial was overruled, and the case is here by appeal.

The defense interposed by the answer was in substance that the appellee was never in fact a subscriber to the capital stock of the Scottish Security Company, although his signature appeared to its articles of incorporation as a holder of 20 shares of its stock, but that the only purpose of his so appearing, as distinctly understood between himself and the incorporators, who were then the only stockholders, was to enable the company to become incorporated under the laws of West Virginia, and to effect an organization; and, further, that no stock was ever issued to or paid for by him, nor was it so intended, and that he had no connection with the officers or business of the company after its organization, and was, by consent of all the stockholders, released from his subscription to the

capital stock of the company. The matters of defense averred in the answer were denied by reply.

The facts presented by the record appear to be as follows: D. H. Wilson, W. C. Cowper, Alex Stewart, and Nathan Wolf, desiring to organize the Scottish Security Company, requested the appellee to join with them in the enterprise, which he at first seemed willing to do, but later he attended a meeting held by them, at which he informed them that upon full consideration of the matter he had made up his mind not to take stock in the company, or part in its organization, but, in view of the representations of the persons named that the articles of incorporation had been already prepared containing his name as one of the incorporators, appellee was induced to sign the paper that it might be forwarded to West Virginia, and the incorporation effected under the laws of that state, without delay; but this act upon his part was with the distinct understanding and agreement that he did not thereby become a stockholder in the company, or liable for the stock, or any part thereof, set opposite his name, and in fact that he was then released from its payment. As stated, the real parties in interest were D. H. Wilson, W. C. Cowper, Alex Stewart, and Nathan Wolf. The names of Stewart and Wolf do not, however, appear in the articles of incorporation, for the reason that under the laws of West Virginia it was necessary that two of the incorporators be residents of that state; therefore the names of Edward Carder and D. S. Guthrie, residents of that state, and clerks in the office of its Secretary of State, were put in the articles of incorporation with those of Wilson, Cowper, and Starks, in the place of Alex Stewart and Nathan Wolf, each of the incorporators being represented in the articles of incorporation as having taken 20 shares of stock. Upon being incorporated, the company was organized at a meeting held in Charleston, W. Va., at which meeting appellee, to effect the organization of the company, was elected a member of its board of directors. He was not at that meeting, but gave his proxy to another to represent him. The chief office of the company was to be and was kept in Louisville, Ky., and at the first meeting there held the appellee was present and tendered his written resignation as a director of the company, according to the previous understanding and agreement, though the resignation does not seem to have been formally acted on until the following meeting, when it was duly accepted. In the meantime Carder and Guthrie had, at the meeting in West Virginia, transferred to Stewart and Wolf the stock set opposite their names in the articles of incorporation, and the stock over against the name of appellee in that instrument was never issued to him, but was divided among and issued to Wilson, Cowper, Stewart, and Wolf, as they had agreed with appellee should be done, and

they paid to the company 10 per cent. of the face value thereof, viz., \$200. Later, one share each was issued to Stewart's wife and a relative of Wolf. But at the time appellee signed the articles of incorporation the only real stockholders of the company were Wilson, Cowper, Stewart, and Wolf, the stock of the latter two having been subscribed in the names of Carder and Guthrie, and the same persons were in fact the only stockholders of the company when the release of appellee, if he ever was a stockholder, was consummated, when the 20 shares of stock supposed to have been subscribed by him were divided among the other stockholders named. It was never contemplated by the parties that any of the stock should be issued to or paid for by appellee. It also appears that, at the time of the distribution among the real stockholders of the 20 shares that had been placed opposite his name in the articles of incorporation, the company had not done any business beyond effecting an organization, nor had it contracted any debts.

Upon the facts thus presented the question arises, was the release of the appellee from the payment of the 20 shares of stock legal? Or, in other words, is he liable for the 20 shares of stock, or any part thereof? There can be no question under the evidence but that all the stockholders of the company consented to the cancellation of the appellee's subscription, and had the 20 shares of stock intended for him issued to themselves. In 1 Cook on Corporations, § 169, it is said: "A subscriber for stock in a corporation cannot obtain a cancellation of his subscription except by the unanimous consent of the other subscribers. Even a majority of the stockholders cannot withdraw and refuse to proceed. These rules are just, and based upon a sound public policy. By unanimous consent of the stockholders a subscription may be canceled, and a subsequent creditor of the corporation cannot complain." The doctrine *supra* seems to be recognized in *Gathright, etc., v. Oil City Land Co.'s Receiver* (Ky.) 56 S. W. 163, though the facts in that case were unlike those of the case at bar.

The lower court gave but one instruction in this case, which was as follows: "The court instructs the jury that when the defendant, John P. Starks, signed the articles of incorporation of the Scottish Security Company, he became a subscriber for 20 shares of the capital stock of said company, and they should find for the plaintiff in the sum of \$1,800, with interest from the 12th day of November, 1901, unless they shall believe from the evidence that after the said company was incorporated all of the persons then holding or owning stock in said company agreed or consented that the defendant should not be held upon his said subscription, and that the 20 shares of stock subscribed for by him was by reason of the said agreement or consent, if such there was, issued to other persons, and that the com-

pany did not then have any outstanding debts. If such is the fact, then they should find for the defendant." We think this instruction submitted to the jury in explicit terms the only question of fact necessary to be decided by them, consequently no other instructions were necessary.

The fact that the cancellation of appellee's subscription was not effected according to the laws of West Virginia is, in our opinion, entitled to no weight. The chief office of the company seemed to be in Louisville, this state; at any rate, the meetings of its board of directors, with one exception, were held in that city, and, if the release of the appellee was effected according to the laws of this state, we think it legal and binding.

The case here is not one in which the appellee is seeking to avoid the execution of a contract by relying upon a contemporaneous parol agreement contradictory of a writing, but he is relying upon the fact that the contract was executed and his release effected, whereby all liability under the contract, if any existed, was discharged. It seems to us, therefore, to be immaterial whether the agreement resulting in his release was in parol or otherwise. The fact remains that the release resulted, and that the company by reason thereof issued to others stock which, but for the release, appellee would have been entitled to. How can appellant compel the payment by appellee of the subscription to its capital stock when it is not in his power to issue to him the certificate of stock to which he would have been entitled in the event of such payment?

Being of the opinion that the record discloses no error that is prejudicial to the rights of the appellant, the judgment is affirmed.

PULLINS v. BOARD OF EDUCATION OF METHODIST CHURCH.

(Court of Appeals of Kentucky. Feb. 11, 1904.)

WILL—TRUST FOR EDUCATIONAL PURPOSES—PERPETUITY—VALIDITY.

1. A will giving real and personal property to a trustee, to be invested for educational purposes, but the principal to be kept invested and only the interest used, does not suspend the power of alienation, within Ky. St. 1903, § 2360, prohibiting such suspension, there being no requirement that the identical property be preserved by the trustee.

2. Under Ky. St. 1903, § 317, providing that all devises for the benefit of educational institutions shall be valid if they point out with reasonable certainty the purpose of the charity and the beneficiaries thereof, a trust for educational purposes is not void as being a perpetuity.

Appeal from Circuit Court, Boyd County.
"Not to be officially reported."

Proceedings by James Pullins against the Board of Education of the Kentucky Annual Conference of the Methodist Episcopal Church to have the will of R. D. Callihan, deceased, declared void. From a judgment sustaining

the validity of the will, Pullins appeals. Affirmed.

D. W. Steele, Jr., for appellant. Proctor & Malen, for appellee.

BURNAM, C. J. We are asked by the appellants, heirs at law of R. D. Callihan, deceased, to hold the bequest made by him to appellee, the Board of Education of the Kentucky Annual Conference of the Methodist Episcopal Church, in codicil No. 1 of his will, void as a perpetuity, under section 2360 of the Kentucky Statutes of 1903. The codicil is as follows: "I, R. D. Callihan, being of sound and disposing mind, do hereby ratify and confirm the above will executed by me on the 3rd day of July, 1894, excepting the third item thereto, which I do hereby revoke and cancel, and substitute this codicil number one in place of said third item, viz. after the payment of all my just debts and all the costs of executing this will, it is my will and desire, and I do hereby give, devise and bequeath all the residue of my estate both real and personal unto the Board of Education of the Kentucky Annual Conference of the Methodist Episcopal Church, the same to be held, invested and managed by said Board as other funds constituting the Educational fund of said Conference are held, invested and managed, except that the principal sum derived by said Board under the provisions of this will shall be kept invested and the interest, used from year to year only to help pay the current expenses of the Ashland Collegiate Institute, now owned and managed by said Board at Ashland, Kentucky, or to help pay the current expenses of some school established by said Board at Ashland, Kentucky, or Louisa, Kentucky, or at some point intermediate between Ashland and Louisa, Kentucky, instead of the Ashland Collegiate Institute, but in no event shall either the principal sum or the interest thereof be invested or used to pay the expenses of any school established by said Board at any other point than those named in the codicil, and in case said Board fails, neglects, or refused to maintain said Ashland Collegiate Institute, or some like school in its stead at the points named in this codicil, after a period of ten consecutive years, then said trust shall be declared void and the principal sum and interest legally distributed as provided by law." The will of which this codicil forms a part was duly probated by the Boyd county court in July, 1902. There is therefore no question of a failure by appellee to maintain the school provided for by testator. The sole basis for the relief prayed is that the bequest is prohibited by section 2360 of the Kentucky Statutes of 1903, because the power to alienate the bequest is suspended beyond the period limited by the statute, if not denied altogether.

We are unable to discover any suspension of the power of alienation in the codicil quot-

¶ 2. See Perpetuities, vol. 39, Cent. Dig. § 57.

ed supra. The title to the property devised, both real and personal, passes to the board of education, to be held, invested, and managed by said board as other funds constituting the educational fund of said conference are held, invested, and managed. The restriction that only the interest should be used, and the principal kept invested, does not show any purpose or intention of testator that the identical property should be preserved by the board. And, even if the will were susceptible of the construction contended for, it would not be invalid, as the first section of the chapter on charitable uses and religious societies (section 317 of the Kentucky Statutes of 1903) expressly provides that "all grants, conveyances, devises, and gifts for the benefit of schools of learning, seminaries, colleges, universities, etc., shall be valid if the grant, conveyance, devise, gift * * * pointed out with reasonable certainty the purpose of the charity and the beneficiaries thereof, except as hereinafter restricted." Under this provision of the statute a trust for educational purposes is not void as being in perpetuity. See *Gass v. Wilhite*, 32 Ky. 170, 26 Am. Dec. 446.

For reasons indicated, the judgment appealed from is affirmed.

CARPENTER et al. v. RICE'S ADM'X.

(Court of Appeals of Kentucky. Feb. 11, 1904.)

DECEDENT'S ESTATES—ACTION ON NOTE—UN-
INDORSED CREDITS—INTEREST—EVI-
DENCE—STATUTE.

1. In an action on a note by the payee's administratrix, where defendant claims unindorsed credits evidenced by a check, testimony by a daughter and heir of decedent that at the time the check was received by decedent he held two notes of defendant, renders testimony of defendant denying that decedent held two notes against him at the time admissible, but not testimony as to cash payments, under Code, § 606, providing that a person may testify for himself concerning a transaction with a decedent where one interested in the estate of the decedent has testified as to the same transaction.

2. In an action on a note by the payee's administratrix, where defendant claims a change in the rate of interest stipulated for in the note by parol agreement with decedent, testimony of defendant to prove the agreement is inadmissible under Code, § 606, there being no testimony for plaintiff relating to the agreement.

3. A note containing an obligation to pay the interest annually at 8 per cent. until paid, and interest on interest at 6 per cent. until the maturity of the note, does not draw interest on interest after the maturity of the note.

Appeal from Circuit Court, Boone County.

"Not to be officially reported."

Action by the administratrix of the estate of Lewis Rice, deceased, against W. J. Carpenter and others. From a judgment for plaintiff, defendants appeal. Reversed.

Hall & McLean, W. M. Fenley, and W. O. Hall, for appellants. B. F. Menifee and J. G. Tomlin, for appellee.

NUNN, J. This action was brought by appellee to recover a judgment and to enforce

a mortgage lien on real estate upon a note dated March 7, 1878, for the sum of \$1,450. The note bore 8 per cent. interest from date until paid, and was executed at the time when 8 per cent. was legal when provided for in the contract. Several credits were indorsed on the note, and the appellant answered, claiming additional credits—one of \$175, another of about \$300. These two credits he claimed were the first credits to which he was entitled. On the note was indorsed a credit of \$497 as of date April 27, 1893. He claimed, in his answer, that at that date he paid in a check on the note the sum of \$997 and \$3 in silver, and that he was entitled by reason thereof to an additional credit as of that date, \$503. He also claimed that by an arrangement between himself and the appellee's intestate he was to only pay 6 per cent. interest after the maturity of the note; that decedent had agreed, if he would keep the money, that he would exact of him only 6 per cent. interest after that date. Appellee controverted this answer. On the trial of the case the appellant produced the check for \$997, showing the indorsement of Lewis Rice, and that he had received the money thereon. The appellee introduced a daughter and heir of the decedent, who testified that at the time of this payment, April 27, 1893, decedent held two notes of appellant, creating the impression that a part of this payment went to the credit of this second note. Appellant was then introduced as a witness, and was properly permitted to testify as to this particular transaction, and he denied that at that time the decedent held two notes against him, or any other note than the one sued on in this action. Then appellant's counsel offered to prove by him the payment of the \$3 in connection with this check, and the other two credits claimed by him of \$175 and \$300. Upon objection the court refused to permit him to testify about these other transactions. The appellant complains of this. The court was correct in its ruling. Under section 606 of the Code a person may testify for himself concerning a transaction with a decedent where one interested in the estate of the decedent has testified as to the same transaction. The court properly allowed him the additional credit of \$500 of date April 27, 1903, and refused the other claimed credits of \$175, \$300, and the \$3, as there was failure of proof on the part of appellant concerning them. The court also properly refused to reduce the interest on the note from 8 per cent. to 6 per cent. from the maturity of the note for a like reason. We are of the opinion that the court erred in its judgment in the manner in which the interest on the note should be calculated against the appellant. The court misconstrued the effect and intent of these words contained in the note, to wit, "and to pay the interest annually for value received of him." The court adjudged not only that the appellant should pay 8 per cent.

interest per annum from the date of the note until paid, and interest upon interest at 6 per cent. until the maturity of the note, but also adjudged that appellant should pay interest upon interest as it accrued annually after the maturity of the note at the rate of 6 per cent. per annum until the note was paid. The court erred in allowing this interest upon interest after the maturity of the note. The proper judgment should have been for 8 per cent. interest from date until paid, and interest upon interest at 6 per cent. per annum until maturity, and after maturity the interest should have been calculated in the ordinary way. *Hall v. Scott's Adm'r*, 90 Ky. 340, 13 S. W. 249, and *Magruder v. De Haven* (Ky.) 52 S. W. 795.

For these reasons the judgment of the lower court is reversed, and the cause remanded for further proceedings consistent herewith.

RHODES et al. v. LOWRY & GOEBEL.
(Court of Appeals of Kentucky. Feb. 11, 1904.)

PARTNERSHIP—EVIDENCE—SUFFICIENCY.

1. Evidence examined, and *held* to show that a defendant was a member of a firm at the time an indebtedness sued on was created.

Appeal from Circuit Court, Henderson County.

"Not to be officially reported."

Action by Lowry & Goebel against Rosalie Rhodes and others. From a judgment for plaintiffs, defendant Rosalie Rhodes appeals. *Affirmed*.

Thos. E. Ward, for appellant. R. H. Cunningham, for appellees.

NUNN, J. This action was brought on two promissory notes amounting to something over the sum of \$500 in favor of appellees against Moses Rhodes, James Kitchens, and Rosalie Rhodes, partners, doing business under the firm name of Kitchens & Rhodes. Rosalie Rhodes denied that she was a partner, or that she had any interest in the firm. The issues were completed on this question, and the lower court on the evidence decided that she was a member of the firm, and rendered judgment for the appellees against all the defendants.

The only question on this appeal is one of fact, and is whether or not appellant, Rosalie Rhodes, was a member of the firm of Kitchens & Rhodes at the time the indebtedness was incurred. The record in substance shows that some years prior to the formation of the firm of Kitchens & Rhodes Moses Rhodes became involved, and transferred considerable real estate in Henderson county to his wife, the appellant herein; that some time prior to the creation of the indebtedness sued on he went to East St. Louis, and purchased from one Dates his one-half interest in a furniture store owned by Kitchens & Dates;

that Dates made a bill of sale of his interest to one R. L. Rhodes, and from that time the firm was known as Kitchens & Rhodes. That Dates was given a sight draft for \$100, drawn on one R. L. Rhodes, of Henderson, Ky., and the balance of the purchase price was a note signed by "R. L. Rhodes, per Moses Rhodes." At that time appellant resided in Henderson, Ky. It also appears that appellees, before making a sale of the goods to the firm, wrote the appellant a letter in effect stating that, if appellant was a member of the firm of Kitchens & Rhodes, they would sell them the goods, but, if she was not a member of the firm, they would not. In reply they received a letter, signed with appellant's name, stating that she was a member of the firm. It also appears that, after Dates' interest in the stock was purchased, the firm had letter and bill heads printed, and used them in their business, showing that James Kitchens and R. L. Rhodes were the members composing the firm. A witness by the name of John L. Jones testified that while this firm was in business in East St. Louis he had a conversation, at her house in the city of Henderson, with her, in which she asked him how the firm of Kitchens & Rhodes were getting along with their business (the witness having recently been in East St. Louis), and he told her that he did not think the firm would make money, and then she said that she was going to have the management of the firm taken away from Kitchens. It was also shown that in the year 1900, but after the execution of the notes to the appellees, the appellant executed a bill of sale selling her interest to the Rhodes Furniture Company for the price of \$1,200, which bill of sale was acknowledged and recorded in the office of the county clerk of St. Claire county, Ill. Appellant denied that she ever was a member of the firm, or that she wrote the letter to appellees stating that she was a member of the firm, and also stated that she supposed she did execute the bill of sale to the Rhodes Furniture Company, but stated that, if she did, she did not know what she was signing or acknowledging. Kitchens stated that he did not know whether or not she was a partner, and stated that he did not know who R. L. Rhodes was. There was proof showing what Kitchens and Moses Rhodes said about the interest of appellant in the concern, which was incompetent.

Many things might be said with reference to the conduct of Moses Rhodes and his wife, Rosalie Rhodes, concerning this transaction, but it is sufficient to say that there was sufficient competent and relevant testimony to show that appellant had an interest in the firm of Kitchens & Rhodes, and that the judgment of the lower court was proper.

Wherefore the judgment is affirmed.

HODGES v. METCALFE COUNTY COURT.

(Court of Appeals of Kentucky. Feb. 11, 1904.)

INTOXICATING LIQUORS—TAX—RIGHT TO LICENSE.

1. Ky. St. 1903, § 4224, fixing the amount of tax to be collected for licenses to sell liquor, does not authorize the granting of such licenses where not otherwise allowed by law.

"To be officially reported."

On petition for rehearing. Petition overruled.

For former opinion, see 78 S. W. 177.

O'REAR, J. Upon a re-examination of this case upon a petition for rehearing, the court adheres to the original opinion. The petition assumes that this decision is in conflict with *Hodges v. Metcalfe County Court* (decided Oct. 22, 1903) 76 S. W. 881. The result may be, but the opinions are not, inconsistent. In the last-named case the only questions passed upon were: (1) Where an applicant to retail liquors has made out a prima facie case under the statute and there is no remonstrance from the neighborhood affected, it is the duty of the county court to grant the license; (2) where an appeal is taken to the circuit court from the action of the county court, it must be tried on a bill of exceptions; and (3) upon a reversal of the judgment of the county court to the circuit court, the latter is not authorized to enter a judgment granting or refusing license, but must remand the application to the county court, where the judgment must be entered as directed. We adhere to what was there said. In that case it was assumed, and, so far as the opinion shows, it was a fact, that the applicant had made out his prima facie case in every particular. Our attention was not then directed to sections 4205 to 4214, Ky. St. 1903; nor were those sections, or the facts of that case calling them into consideration, passed upon or considered at all. If these sections had been relied on, and the facts appearing the same as in this record, our conclusions would have been as in the original opinion in this case. The opinions are in no sense conflicting. In the original opinion a part only of section 4205, Ky. St. 1903, is quoted. The next sentence after the quoted part reads: "And such license shall only authorize the person to sell the liquor named in the license in quantities not less than a quart." (Druggists who sell for medicinal purposes on the prescription of a physician are excepted.) Appellant contends that section 4214 applies only to licenses for selling in quantities less than a quart. That is true. But the whole chapter together shows that liquor sellers who may be licensed are thus classified: (1) Distillers. (2) Wholesalers (which two include rectifiers as a branch of these classes). (3) Retailers. This class is particularized by section 4205, as shown in the quotation in the original opinion. It includes druggists. (4) Tavern keepers. Appellant does not show himself to

belong to any of the classes above named. Consequently he did not show himself entitled to a license to sell liquor in any quantity, or for any purpose. Appellant cites section 4224, Ky. St. 1903, as conferring authority to grant the license. It does not. It merely fixes the tax to be collected of those to whom licenses may be granted according to law. The license tax imposed for retailing spirituous and vinous liquors is \$100, whether conducted in a city or elsewhere. Only if conducted not in a city the license will not authorize any person (except a druggist or licensed tavern keeper) to sell in quantities less than a quart. Nor can the license be granted to any person to sell by retail not in an incorporated town or city, unless such person is a distiller, druggist, merchant, or licensed tavern keeper. All licenses are granted by the county court clerk, except to retail liquor dealers and tavern keepers. These are granted by the county court. Section 4203. Section 4224 must be read and applied in connection with the preceding sections on the subject.

The petition is overruled.

LOUISVILLE & N. R. CO. v. EWING'S ADM'X.

(Court of Appeals of Kentucky. Feb. 11, 1904.)

MASTER AND SERVANT—INJURY—PROXIMATE CAUSE—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY.

1. Where several cars were left on a siding on a down grade, and on the uncoupling of two cars by the brakeman of a later train the rest of the cars started of their own weight and injured him, it was a question for the jury whether the negligence of the crew of the earlier train in not properly setting the brakes of cars left on the siding was the proximate cause of the injury.

2. Whether a brakeman, in the exercise of reasonable care, before uncoupling two cars on a siding on a down grade, should have examined the cars to which they were attached to see if the brakes were properly set, was a question for the jury.

Appeal from Circuit Court, Oldham County.

"To be officially reported."

Action by J. A. Ewing's administratrix against the Louisville & Nashville Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Benj. D. Warfield, Edward W. Hines, Helm, Bruce & Helm, and D. H. French, for appellant. B. F. Procter, Morris & Morris, G. H. Herdman, and Robt. L. Greene, for appellee.

O'REAR, J. John A. Ewing, a brakeman on one of appellant's freight trains, was fatally injured in the following manner: A previous train had some 15 hours before cut off and left 10 or 12 cars on a siding at Lagrange. Of these, three were to be taken out by Ewing's train and put into it, to be carried on. Ewing, as was his duty as

brakeman, shifted the switch for the siding, and preceded the engine—which was pushing three cars ahead of it—to the string of cars first mentioned, where he uncoupled the two to be taken out, coupled them to the front of the cars attached to his engine, and gave the signal to back out, which was obeyed. He rode the cars out to the switch, where he dismounted, and threw the switch so as to run the engine and cars forward on the right track. As the cars came forward, being pushed by the engine, he mounted the side ladder on the corner of the front car, signaling to the fireman to "come ahead." It was then dark. As these cars were being pushed forward they were met, before they had cleared the siding, by the other cars which had been left there, the remainder of the 10 or 12 first mentioned. In the collision Ewing was crushed, from which he died. The tracks all had a down grade from the point where the dead cars had been left toward the point where the collision occurred.

The negligence complained of, and because of which it is charged that Ewing was injured, was in leaving the cars on the siding without their brakes being set so as to prevent their rolling out by gravity and of their own momentum. It is charged, first, that this negligence occurred when the conductor and crew of the train who set those cars in there failed to properly set the brakes on them so as to prevent their rolling out; and, second, that Ewing's conductor was negligent in not seeing personally that the brakes were set on the remaining cars so as to keep them stationary. The defenses are that the injury was caused by Ewing's contributory negligence, and by the negligence of a fellow servant, another brakeman of his crew, named Sexton, who it was charged should have set the brakes, but failed to do it. The court's instructions clearly and in unobjectionable terms submitted to the jury those defenses. It is furthermore contended—and this is the main point made on this appeal—that the negligence, if any, of the crew or conductor who set the cars on the siding, without putting on sufficient brakes, was not the proximate and efficient cause of the injury. Whether Ewing's conductor was negligent in failing to see that the other cars were properly braked, was submitted to the jury, as was the negligence of any other servant of the company in that matter, other than the brakeman Sexton. (It was not claimed that any other fellow brakeman had omitted to do anything which in duty he should have done.) But the court told the jury, in addition: "It was the duty of the conductor who left cars on the side track in the yards to see that sufficient brakes were set to hold such cars. He is not required to personally set or test the brakes, but must use ordinary care in supervising the performance of such duty." This instruction was based upon a certain

rule of the company's shown in evidence. The form of this instruction is not questioned in the briefs.

It is urged by appellant that no instruction should have been given submitting the question of the first conductor's negligence. This contention is based solely upon the ground that that negligence, even if found to exist, was not the proximate cause of the injury. So the question is at last, was the negligence of the conductor of the other train so remote as that, as a matter of law, the court should have instructed the jury that they could not consider it? If there be doubt as to whether the injury was the result of a particular act or of another closer connected, or if there be doubt whether there was or was not an intervening and independent agency between the original act and the injury, that is, where different minds may draw different conclusions from the fact, the question whether the injury is the proximate result of the causes complained of, we say unhesitatingly, should be submitted to the jury for determination. On the other hand, if the facts be admitted or not in dispute, and if they show so clearly that reasonable minds could not well disagree about it, that but for the intervening independent agency the injury would not have happened, the question is one of law. That there must be a casual connection between the negligence complained of and the injury, a natural and continuous sequence, not dependent upon any new and independent cause, before a recovery could be allowed, is too well settled to admit of discussion. For appellant it is claimed that although appellant's conductor in charge of the first train, who set in the dead cars, was guilty of negligence in not sufficiently scotching them to prevent their subsequent escape, yet that negligence alone did not and could not have hurt Ewing; that something else was necessary to, and which in fact did, occur, but for which the injury could not have happened. This new agency is said to have been the act of letting off the brakes on the two cars taken out by Ewing, which had doubtless been the sole stay of the whole lot, and of the jar or jolt given the remaining cars by the engine in coupling onto the two, thus disturbing their poise and giving them a momentum. Sometimes it is a very difficult thing to say just what was the proximate cause of a result. It is therefore the rule, in determining such fact, to leave it to the jury, who from experience and observation in such matters are thought to be best able to satisfactorily solve it.

As to whether the injury to Ewing was the result proximately of the acts of negligence sued for was expressly submitted to the jury in this case. But it is insisted that, on this particular issue, there is no dispute as to the facts; that taking appellee's theory of the cause of the injury, so far as the acts

of the first train's crew are concerned, it is a demonstrable proposition, to which the conclusion is irresistibly drawn, that, but for the intervening and independent agency of the action of the engine in jolting the cars (which is not claimed to have been negligent) and of Ewing's loosening the brakes on the two front ones, the original act of negligence in not braking all the cars would have been barren. Aside from Ewing's letting off the brakes, we are not at all satisfied that the above proposition of fact is made out. It was not made to appear that the disturbing of the cars by the act of coupling the engine to the front two either did in fact, or necessarily would, put the others in motion when the engine detached and took away the two cars. That may or may not have been so. We are satisfied from the facts shown that none of the remaining cars were braked, or at least not sufficiently, and that it was the removal of the restraint imposed by the two cars that caused the others to start. Was the act of Ewing a new and independent cause in the sequence of events from the original negligence of leaving the cars unchocked to the injury? The negligence was in leaving the cars in that unsafe condition. It was continuous. When Ewing came to handle them, their condition, the passive negligence, became active, and proximately and inevitably produced the result, Ewing being situated as he was at the precise moment of collision. If the brakes on the dead cars had been negligently not set, that fact would not and could not of itself have injured the brakeman. But when he, in ignorance of their condition, but relying upon its being all right, came to handle them, his handling, while in one sense a new agency, was nevertheless a natural sequence in the probable order of events, and such as should have been anticipated by the person guilty of the original omission. This necessarily must be true in all passive negligence, where the party in the wrong has omitted to do something that he ought to have done. Generally his omission, alone, will be harmless. It is only when others come in contact with the event, relying upon the existence of the thing omitted, that injury will result. To hold that for such acts the negligent person is not responsible, because of the intervention of another agency but for which the injury would not have happened, would be to strip the law governing negligence of half its application and value.

Whether Ewing should have examined the remaining cars before leaving them, so as to know whether they were safely secured, or whether he had the right to rely upon the presumption that those who placed them there had discharged that duty, was involved necessarily in the question of his contributory negligence submitted to the jury—whether he had acted with that caution which an ordinarily prudent person simi-

larly situated would have observed for his own safety. We cannot say as a matter of law that he had not the right to assume that the other servants who had gone before him had done their duties. If every operative in railroad service should be compelled to personally verify the proper discharge of all duties of all other servants and officers who had acted before him, it would be impossible to continue the business with any degree of dispatch. While he must use ordinary care and observation and judgment in keeping himself informed as to conditions of his train and service, he has the right to assume that things not obviously insecure have been properly arranged by those whose duty it was to put them in proper condition.

We see no error in the record. Judgment affirmed, with damages.

HARTFORD FIRE INS. CO. v. TRIMBLE
(Court of Appeals of Kentucky. Feb. 10, 1904.)
INSURANCE—PAROL CONTRACT—IDENTITY OF PARTIES—AGENT—LIMITATIONS OF AUTHORITY—NOTICE.

1. A parol contract of insurance made with an insurance agent representing two companies—the company to take the risk not being specified—is not enforceable.

2. Where an insurance agent had previously attempted to secure insurance for an applicant on a house tenanted by negroes, and failed to induce his company to take such risk, it is notice to the applicant of the limitation of the agent's authority in that regard, so that a subsequent parol contract of insurance made with him, and covering other property so inhabited, does not bind the company.

Appeal from Circuit Court, Logan County
"To be officially reported."

Action by S. Y. Trimble against the Hartford Fire Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed.

Wilbur F. Browder, Browder & Browder, J. C. Browder, and Barger & Hicks, for appellant. W. P. Standidge and Perkins & Trimble, for appellee.

BURNAM, C. J. The appellee, S. Y. Trimble, brought this action on the 2d of March, 1901, in the Logan circuit court, against the Hartford Fire Insurance Company, of Hartford, Conn., the Commercial Union Assurance Company, of London, England, and H. B. Caldwell, alleging that the defendant Caldwell was the agent of both of the defendant insurance companies at Russellville, Ky., during the year 1898; that during the latter part of August or the first part of September, 1898, he made, through his agent, H. L. Trimble, a verbal contract with the defendant Caldwell, as agent of his codefendants, to issue to him a policy of insurance on a brick dwelling house owned by him, which was located on Morgantown street, for \$400; that the policy was to be issued at the expiration of a policy which he then held on the same property for the same amount in

another insurance company, which expired on the 21st of July, 1899, but he alleges the defendant Caldwell, who was at that time the cashier of the Logan County Bank at Russellville, Ky., in which he kept an account, failed to comply with the alleged verbal contract, or to execute, issue, or deliver the policy of insurance contracted for; that on the 4th of March, 1900, during the period which was to have been covered by the policy, the house burned up; and he alleges that he is entitled to recover, under the parol contract made with Caldwell, the stipulated insurance, \$400, with interest from the 4th day of March, 1900. On motion of defendants, plaintiff was required to elect against which of the defendants he would prosecute his alleged action. This he declined to do. Thereupon the court, electing for him, dismissed the petition against H. B. Caldwell and the Commercial Union Assurance Company, and permitted the action to proceed against the Hartford Fire Insurance Company. The plaintiff thereupon filed an amended petition, in which he made the same allegations against the Hartford Fire Insurance Company as were made in the original petition against each of the defendants therein, and alleged that the amount of the premium contracted to be paid for the insurance policy was to be charged by Caldwell to the account of H. L. Trimble in the bank when the policy was to be issued, in July, 1899. The defendant interposed a general demurrer to the petition as amended, and filed an answer denying every allegation of the amended petition. The case was subsequently transferred by consent to the equity docket, and was decided by a special judge in May, 1902, who gave judgment against the Hartford Fire Insurance Company for \$400, with interest from March 2, 1901, until paid; and the defendant prosecutes an appeal from that judgment, and asks a reversal.

The facts in the record relied on to establish the alleged verbal contract of insurance are, in substance, as follows: Plaintiff, Trimble, was the owner of four dwelling houses in Russellville, which were covered by insurance policies issued by Edward Sinclair. He also owned a house in connection with J. S. Stanley, which was insured by John Long, agent. The house which burned was located on Morgantown street, and was one of those insured through the agency of Sinclair. The policy on this house expired on the 21st of July, 1899, and was for \$400. Sinclair also held policies on a dwelling house on Center street occupied by Mr. Lyne, a brother-in-law of the plaintiff, on another on Nashville street, and on another on Spring street. Another house on Spring street was insured in the Long agency for \$800. The plaintiff resided in Elkton, Ky., and the alleged parol contract with defendant was made for him by his brother H. L. Trimble, who at that time resided in Russellville, but who shortly afterwards moved to Elkton. To

support his contention, plaintiff introduced H. L. Trimble, who testified, in substance, that, in the latter part of the summer or the early part of the fall of 1898, he made a parol contract with H. B. Caldwell to insure in companies represented by him every house belonging to his brother or himself in Russellville; that the insurance on these houses was at that time carried by other agencies, but that Caldwell agreed to ascertain the dates of the expiration of the existing policies from these agencies, and at their expiration to renew them in companies represented by him, and to charge the premium to the joint account of S. Y. and H. L. Trimble, carried in the name of H. L. Trimble in the bank of which he was cashier, and that he was to keep the policies in his vault; that he supposed these policies had been regularly issued under the contract; that on the morning after the fire he called up Caldwell over the telephone, and asked him in regard to the policy on the house which had burned, and for the first time learned from him that he did not have that house insured in either of his companies. S. Y. Trimble testified that he had a conversation with Caldwell in May, 1899, about the insurance upon these houses, in which he informed him that he had understood from his brother that he had made a trade with him to renew all the policies of insurance upon the houses owned by him at the date of their expiration in the companies represented by Sinclair and Long, and that Caldwell admitted that he had made such a contract. Neither of the Trimbles, however, testified that Caldwell stated to them that the insurance was to be placed with the Hartford Insurance Company. S. Y. Trimble filed with his deposition a letter dated on the 26th of November, 1898, addressed to him at Elkton by Mrs. C. E. Sinclair, from Russellville, in which she informed him that she had furnished H. B. Caldwell with a list of the property insured in their agency for him, with the date of the expiration of the policies, and the amount of insurance and rate of insurance, which included the house which burned. Selden Lyne, a brother-in-law of appellee, testified that some time in the fall of 1898 or spring of 1899 he had a conversation with H. B. Caldwell, in which Caldwell informed him that he had been employed to insure these houses, and made inquiries as to their location, by whom they were occupied, etc.; that he had a list of these houses, which had been furnished to him by Mrs. Sinclair, and that the house which burned was included in the number; that he told him that this house was occupied by different families of negroes; that after the fire, at the instance of appellee, he had called upon Caldwell, and procured from him all the policies belonging to the plaintiff which had been previously issued on the property. H. B. Caldwell testified that he was the agent of the companies originally sued by plaintiff, and that he was cashier of the Logan Coun-

ty Bank, in which H. L. Trimble kept an account, and in which the rents accruing upon the real estate owned by himself and S. Y. Trimble were deposited; that in August, 1898, H. L. Trimble, as agent for S. Y. Trimble, asked him to insure a house in Russellville occupied by a negro, Elvira Angel, as tenant; that he informed him that it was not his custom, or that of the insurance companies represented by him, to insure property owned or occupied by negroes, but that he had issued a policy in favor of the negro janitor of the bank on a house which was located in a white settlement, and that, as a personal favor to him, he would take the risk, with the understanding that, if the company declined to write it, he would immediately cancel it, and get Cap Morton to write it in a company represented by him which would take such risks; that, when he reported this risk to the company, he wrote them, asking that as a personal favor it be accepted, but that the company immediately declined the policy, and directed that it should be canceled, which he did; that he informed H. L. Trimble of this action of the company, and took out a policy, as he agreed, in the Aetna Insurance Company, which was represented by Mr. Morton. He admits that it was agreed with H. L. Trimble and himself that he was to issue policies of insurance upon the houses owned by him and his brother as the policies then in existence held by other agents expired, occupied by white people; that H. L. Trimble shortly afterwards removed to Elkton, and that on October 12, 1898, he addressed him the following communication: "Russellville, Ky., Oct. 12, 1898. Prof. H. L. Trimble, Elkton, Ky.—Dear Henry: I trust that you will not forget you promise to allow me to renew the insurance on the various houses owned by you and Selden. Would it not be best for you to send me a list of the amounts, locations, companies, and expirations, so that I may place same on my 'tickler,' and in this way none of them will be overlooked by me or renewed by the other fellow. Yours truly, H. B. C." That H. L. Trimble responded to this letter as follows: "Elkton, Ky., 10/25/98. Dear Barclay: Please go to see John Long and ask him when my policy expires on brick cottage in which Withers lives, and renew for the same amount; also ask McCuddy to look on Sinclair's books and see when policies expire on house, frame, rear of Saddler's shop, Mrs. Connelly occupying; frame on Center street and frame rear of T. C. Clark occupied by Vomberg. Write me about them. Remember, no policy fees on all this. Yours, H. L. Trimble. H. B. Caldwell, Russellville." That after the receipt of this letter he procured from Sinclair the list of the insurance held by him, and also from Long; that he had a conversation with Lyne, the brother-in-law of Trimble, who occupied one of the cottages, and that after this conversation he made a memoranda that the houses which

he was to insure were those occupied by Connelly, Withers, Lyne, and Vomberg; that the letter of H. L. Trimble contained no reference to the Morgantown house, occupied by the negroes; that he issued policies of insurance on such of these four houses as the policies held by other agents expired; that after the Morgantown house was burned, on March 4th, he delivered to the plaintiff all of his policies of insurance in his custody, and all business relations between them were broken off; that no demand was ever made upon him to pay the damages on the property, and it was never reported to the company. H. L. Trimble does not controvert this statement of Caldwell as to the refusal of the appellant company to take the policy of insurance on the Angel house in August, 1898, on the ground that it was their policy not to take insurance upon property occupied by negroes. The testimony also shows that the house on Morgantown street was in a very dilapidated condition, and had been rented exclusively to negroes for some years.

It is well settled law in this state that a parol contract of insurance is valid and enforceable. See *Baldwin v. Phoenix Insurance Co.* (Ky.) 54 S. W. 18. "But to entitle one to the specific performance of a verbal agreement to insure, or to issue a policy, he must prove an oral contract possessing all the essentials of a written contract of insurance, namely, the subject-matter, the risk insured against, the amount of insurance, the rate of premium, the duration of the risk, and the identity of the parties. If the application be made to an agent representing several companies, the particular company or companies to carry the risk must be designated, with the amount each is to carry, and each must, by its agent or otherwise, agree to assume liability upon the terms and conditions proposed and acceded to by the applicant. Until this is done, there can be no binding contract. And it must also appear that the agent had authority to bind the company sought to be held to the payment of the risk." See *Kerr on Insurance*, pp. 57, 46, and 60. This principle is well stated in *Pomeroy's Equity Jurisprudence*, § 1405, as follows: "Assuming that a contract has been completely concluded, and that it belongs to a class capable of being enforced, it must still possess certain essential elements and incidents, in order that a court of equity may exercise the jurisdiction to compel its performance. Some of these elements affect its validity; others, its equitable character. It must be upon a valuable consideration. It must be reasonably certain as to its subject-matter, its stipulations, its purpose, its parties, and the circumstances under which it was made." And this court has uniformly held that specific performance can only be decreed in cases where the contract is complete in all its parts, and nothing for construction is left to the chancellor. See *Banta's Heirs v. Clay*, 9 Ky. 409; *Fowler v. Lewis*, 10 Ky. 445; *Gray*

v. Davis, 28 Ky. 381; and Ray v. Talbott (Ky.) 64 S. W. 834.

Tested by the above authorities, the evidence of appellee falls to establish an enforceable contract of insurance against appellant, the Hartford Insurance Company, for several reasons: First, there is no proof or claim that at the date of the application for insurance there was any agreement on the part of their agent that it was to be placed with the Hartford Fire Insurance Company. The contract therefore falls, under all the rules of construction, for lack of identity in the parties to the contract. But even if Caldwell had actually agreed with H. L. Trimble to insure the house which burned in the appellant company, it would have been unenforceable, because the uncontradicted evidence shows that Trimble had actual notice that Caldwell had no authority from the company to insure houses owned or occupied by negroes. No principle is better settled than, where a third person has actual notice of the limitation upon the power of the agent, that the principal is not bound by any act of the agent done in contravention of his authority, or in violation of his instructions in dealing with such persons.

We recognize the difference between parol contracts of insurance in present and in future, but deem it unnecessary to consider this question in the decision of this appeal.

But for reasons indicated, the judgment is reversed, and cause remanded, with instructions to dismiss plaintiff's petition.

MONTGOMERY v. MONTGOMERY.

(Court of Appeals of Kentucky. Feb. 9, 1904.)

TAXATION—EQUITABLE TITLE—PAYMENT BY HOLDER OF LEGAL TITLE—SET-OFF—APPEAL—JURISDICTION.

1. Under Ky. St. 1903, § 4023, making the holders of both the legal and equitable title of land liable for the taxes, but providing that, as between themselves, it is the duty of the holder of the equitable title to pay them; section 4033, providing that, whenever the occupant of land pays taxes, he may recover the amount from the owner; and section 4035, giving a right of action to a joint owner who pays all the taxes, assessed conjointly—the holder of the equitable title of an undivided interest in land is liable for his share to the holder of the entire legal title, who paid all the taxes.

2. In an action in the nature of express assumpsit, the claim of the holder of the legal title of land against the holder of the equitable title for taxes paid, being purely a statutory claim, is not a proper subject of set-off under Civ. Code Prac. § 96, subsec. 2, defining a set-off as a cause of action arising on a contract, judgment, or award in favor of a defendant.

3. Where the plaintiff sued for \$170, and the defendant pleaded a claim for \$95, which was not a proper set-off, the Court of Appeals has no jurisdiction of an appeal from a judgment dismissing the set-off, and in favor of the plaintiff for the amount claimed, under Ky. St. 1903, § 950, providing that no appeal shall be taken to that court if the value in controversy is less than \$200.

Appeal from Circuit Court, Scott County.
"Not to be officially reported."

78 S.W.—30

Action by Daisy Montgomery against H. P. Montgomery. From a judgment in favor of plaintiff, defendant appeals. Dismissed.

Jas. Bradley and B. M. Lee, for appellant.
Victor F. Bradley, for appellee.

O'REAR, J. Appellee sued appellant, in an action in the nature of express assumpsit, to recover \$170. The answer denied the alleged agreement, and pleaded as a set-off that appellant had paid for appellee certain taxes on lands owned by them jointly, in a given proportion, when the legal title was in appellant to the whole tract, while appellee owned the equitable title to the proportion named. The sum claimed by appellant on this account was \$95.24. The circuit court struck out so much of his pleading as claimed the taxes. The verdict and judgment on appellee's claim was in her favor.

The first question is, has this court jurisdiction of the appeal? To give this court jurisdiction of an appeal, the amount in controversy must be \$200, exclusive of interest and costs. Section 950, Ky. St. 1903. As to the defendant, it is said that the amount in controversy is the amount of the judgment from which he appeals. *L. & N. R. Co. v. Wade*, 89 Ky. 255, 12 S. W. 279; *American Accident Co. v. Slaughter*, 101 Ky. 269, 40 S. W. 675. But when the defendant has presented a counterclaim or set-off against the plaintiff, which is germane to the original cause of action, and which is denied entirely, then the amount in controversy will be the sum recovered against him by the plaintiff on the original action, plus the amount claimed by the defendant, and which he was denied. *Walter A. Wood Co. v. Taylor*, 104 Ky. 217, 46 S. W. 720. This brings us to consider appellant's claim as a set-off.

A set-off is a cause of action arising upon a contract, judgment, or award in favor of a defendant against a plaintiff. Subsection 2 of section 96, Civ. Code Prac. It is a suit within a suit. Defendant alleged by way of set-off, and therefore as constituting a cause of action against the plaintiff, that he and the plaintiff owned jointly, in unequal proportions, a farm in Scott county; that he held the legal title to the whole of it, but that for certain years the plaintiff was the owner by title bond from appellant of the equitable title to the portion named, being something less than one-half; that the tax had been assessed against him, and that he had paid all of it; and that plaintiff's proportion was \$95.24, in the aggregate, which she had not paid. Section 4023, Ky. St. 1903, makes the holder of the legal title to land, and the holder of the equitable title also, liable for the taxes thereon; "but as between themselves, it shall be the duty of the holder of the equitable title to list the property and pay the taxes thereon, whether the property be in possession or not at the time of the payment." Section 4033 provides that "whenever the occupant of any

land, * * * shall pay the tax thereon which the owner ought to pay, the person paying the taxes shall be entitled to recover of the owner the amount of the tax so paid and interest." Section 4035 gives a right of action to a joint owner who pays all the tax where the property has been assessed conjointly." These sections were intended to fix the liability for the tax as between the persons *prima facie* liable therefor, and from any of whom the state may have exacted its payment. The payment of taxes is generally involuntary. Its assessment, and the means of collection, are necessarily more or less summary. That a mere volunteer, who pays the taxes of the owner of property, will not be given either a lien on the property, or a right of action to recover the amount paid from the owner, is well settled; but, where one who can be made to pay it, does so, the statutes fix the ultimate liability as between the persons liable, and give a right of action against such one in favor of the other who pays. We are of opinion that the answer presented a good cause of action in favor of defendant against plaintiff.

But a set-off must be based upon a contract, judgment, or award. There is no claim that defendant paid the tax for plaintiff under a contract, or under a request that would imply a promise to repay. No statute would be needed to allow a recovery in such state of case. This is purely and simply a statutory liability. Penalties or forfeitures fixed or allowed by statute, and torts, and unliquidated demands, have not been allowed as matters of set-off. The language of the Code, no less than the practice before, exclude such as matters of set-off. We think to this class belong pure statutory liabilities—involuntary liabilities. The action of the circuit court was therefore proper, in striking out that matter as a set-off, although it may have constituted a good cause of action by defendant against plaintiff. This leaves the amount in controversy less than \$200. *O. & O. Ry. Co. v. Roe* (Ky.) 54 S. W. 1; *Arthurs v. Thompson*, 97 Ky. 218, 30 S. W. 628.

Appeal dismissed.

MUIR v. THIXTON, MILLETT & CO.

(Kentucky Court of Appeals. Feb. 9, 1904.)

ANIMALS—RESTRAINT—UNINCLOSED LANDS—STRAYS—INJURIES—ATTRACTIVE NUISANCE—LIABILITY OF LANDOWNER.

1. An owner of domestic animals is not bound to restrain them, but may lawfully permit them to run at large on the public highways and on uninclosed lands without regard to the ownership of such lands.

2. An owner of uninclosed lands is not liable for injuries to animals straying upon the land from a highway, unless he maintains or permits to remain thereon a nuisance liable to attract such animals to their injury.

3. Defendants maintained a cistern on their premises in connection with their distillery, near-

ly 100 feet from a turnpike. When plaintiff's horse, which had strayed from the turnpike, and had been drowned in the cistern, was found, the covering of the cistern had been displaced, and some of the pieces had fallen into it. Grain was sometimes spilled on the ground near the distillery. One witness, who was uncontradicted, testified that he had never seen stock eat the malt that was thrown on the ground, but at the time the horse was drowned the distillery had not been operating for several days. *Held*, that such evidence was insufficient to establish that defendants maintained an "attractive nuisance" on the premises, by which the horse was invited thereon, and that defendants were therefore not liable for his death.

Appeal from Circuit Court, Nelson County.

"To be officially reported."

Action by Joseph Muir against Thixton, Millett & Co. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

C. T. Atkinson and J. Smith Barlow, for appellant. John S. Kelly, for appellees.

SETTLE, J. This action was instituted by the appellant against the appellees to recover damages for the death of a horse, which, in straying upon the distillery premises of the appellees, fell into a cistern and was drowned. The distillery grounds front on the Bardstown and Loretto turnpike in Nelson county, and are uninclosed. The cistern in which appellant's horse was drowned is situated in the rear of the distillery buildings, and nearly 100 feet from the pike, and is used for supplying the distillery with water when in operation. The water with which the cistern is filled is conducted into it by a pipe connecting with a nearby spring. According to the evidence the appellant's horse escaped from his lot or field, on the night of June 27, 1903, and went upon the appellees' premises, where it was found on the following morning in the cistern, dead. Whether the animal fell into the cistern while grazing near it or in trying to drink therefrom does not appear. It is, however, averred in the petition that it was induced to enter the premises of appellees, as was common with other stock in the neighborhood, to eat corn or malt which appellees' servants negligently permitted to fall and remain upon the ground in and about the premises, and that by reason thereof, and appellees' further negligence in permitting the cistern to remain uncovered, the horse met its death. The answer denied the alleged acts of negligence set forth in the petition, or that the horse was thereby led to enter the distillery premises, and averred that at the time of its death the horse was trespassing upon appellees' lands, and had been either driven thereon by its owner, or by the negligence of the latter had been turned out upon the highway and allowed to stray wheresoever it would. The affirmative matter of the answer was controverted by reply, and upon the trial which followed the making up of the issues the lower court at the conclusion of all the evidence peremptorily instructed the jury to find for the appellees,

¶ 1. See *Animals*, vol. 2, Cent. Dig. §§ 142, 144.

and they thereupon returned a verdict as instructed, upon which judgment was entered dismissing the petition and allowing appellees their costs. Of the action of the trial court in giving the peremptory instruction and in overruling his motion for a new trial the appellant complains.

The question presented by the appeal is interesting because of its novelty and the zeal with which counsel have urged their respective contentions. We find in Thompson's *Negligence*, vol. 1, § 938, this statement of the law on this subject: "In most of the states of the American Union, with the exception of some of the Eastern states, the common law of England, which requires the owner of cattle to restrain them, is not in force; but they may lawfully run at large upon the public highway and upon uninclosed lands without regard to the ownership of such lands. The difference is that by the common law of England the owner of cattle must fence them in, whereas by the general law of America the owner of the land must fence them out." In section 969 we are also told by the learned author that: "Where domestic animals are allowed to run at large, and they stray upon uninclosed lands and are injured, the owner of the lands cannot be held liable therefor. A landowner is no more obliged to prepare his land in any particular way for the protection of his neighbor's cattle, not invited or tempted to come upon it, than for the protection of his neighbor himself. For example, a landowner is under no obligation to fence his land bordering on the highway, or to keep such fences or the gates in them, so as to prevent the animals of another, which are allowed to run at large upon the highway, from getting through the land upon a railroad track, and there being killed." The English law rests the rule upon the proposition that the owner of domestic animals has no right to allow them to stray upon open grounds, and that, if he does so, it is at his peril. Upon the other hand, the doctrine in most of the American states is that cattle may run at large upon the highway and upon uninclosed lands without regard to the ownership of such lands. Under the doctrine last stated the owner or occupant of land, as we have already observed, is under no obligation to make it safe for the benefit of the owners of domestic animals which are permitted to run at large. But, while this is true, an exception to the rule exists, as we are told by Mr. Thompson, in what are sometimes called "attractive nuisances," so that, if the owner or occupant of real property erects and leaves upon his premises anything which is especially attractive to young children, or to domestic animals, and children or animals are attracted to it to their hurt, he must pay damages. *Bransom's Adm'r v. Labrot, etc.*, 81 Ky. 642, 50 Am. Rep. 193; *Jones v. Nichols*, 46 Ark. 207, 55 Am. Rep. 575; *Haughey v. Hart*, 62 Iowa, 96, 17 N. W. 189, 49 Am.

Rep. 138; *Young v. Harvey*, 16 Ind. 314. We regard the rule last mentioned as the law in this state, and, though some of the authorities relied on by counsel for the appellees seem to support the contrary view, upon examination it will be found that they apply to those states wherein the common law is in force or statutes have been enacted which require the owners of stock to keep them within their own inclosures. The case of *L. & F. R. R. Co. v. Ballard*, 2 Metc. 180, cited for appellees, is not in point. It only holds that a railroad company is not bound to fence its track, and that, as its trains have the right of way on and over the track, owners of cattle are under peculiar obligations to keep them off the track. This rule does not, however, apply to other owners of uninclosed lands. We have in Kentucky no statute preventing the running at large of stock, though there is what may be called a "local option" stock statute, which may be put in force in a given territory by a majority vote of the citizens thereof, in which event the owners of stock in such territory will be required to keep them upon their own lands. But applying the law as we have announced it to the facts of this case, we are nevertheless of opinion that appellant was not entitled to recover. Several of the witnesses testified that in unloading grain at the distillery it was often the case that some of it was spilled on the ground, and that stock were frequently attracted by the grain thus left upon the ground, and at such times would go upon the premises and eat it. But no witness testified that there was any grain or other provender attractive to stock on the distillery grounds at or just before the time the appellant's horse was killed. Upon the contrary, the evidence showed that the distillery was "closed down"—that is, it ceased to be operated—June 22d, and the horse was not killed until June 27th, five days thereafter. And if, as stated by some of the witnesses, hogs and other stock were so frequently lured to the premises by the spilled corn, it is to be presumed that they would in five days have eaten and removed what grain was left on the ground, if any, at the time the distillery ceased to be operated. Some of the witnesses also testified that appellees' servants sometimes threw malt on the ground from the distillery, but the proof is silent as to there being any malt on the ground at the time the appellant's horse was killed; and one witness, an employé of the appellees, testified that he had never seen stock eat the malt that was thrown on the ground, which statement was not contradicted by any other witness.

In our opinion, the cistern was not dangerous per se. It was in the rear of the distillery building, from 80 to 100 feet from the pike. It will be found that only one witness said the water in the cistern could be seen from the pike; others said it was not visible from the pike. Several witnesses tes-

tified that planks were kept upon the cistern. One witness (N. R. Boon) says it was covered with not less than nine pieces of timber. J. C. McKelvey was the revenue officer in charge of the distillery at the time appellant's horse was killed. He first discovered it in the cistern, and from his testimony it is evident that the timber or covering of the cistern was displaced by the horse when he fell into it, for he stated that some of the pieces had fallen into the cistern and others were projecting over it, and others still were lying by it on the ground. It is manifest, therefore, that some precautions had been taken by appellees or their employes in covering the cistern. It should be borne in mind that, if appellees can be held liable at all, it must be upon the ground that they maintained upon the premises an "attractive nuisance" by which the horse of appellant was invited thereon. As to the care required of them in such a state of case we find the rule thus stated in section 595 of Thompson's Negligence: "The same rule, subject to qualifications, applies to the case of injuries to domestic animals through pitfalls or other dangers upon uninclosed grounds. That rule is that the owner or occupier of land is under no legal obligation to take special care or pains to the end of keeping it safe for the protection of the animals of others which may be allowed to run at large; and this without reference to the question whether the rule of the English common law prevails, which requires the owners of domestic animals to restrain them at their peril, or whether the rule of most of the American states prevails, which allows domestic animals to run at large, and requires the owners of cultivated fields to fence them." As the appellees' liability, if any, must rest upon the ground that they maintained upon the distillery premises an "attractive nuisance," whereby appellant's horse was induced to enter the same, it necessarily follows that, if no such attraction existed, no cause of action arose against appellees in appellant's behalf for the death of the horse, though caused by its fall into the cistern. Under the facts of this case, the cistern was not necessarily dangerous, or per se a nuisance, nor was there at the time of the death of the appellant's horse anything on or about the distillery premises that could have been called an attractive nuisance by which it was invited to go upon appellees' land.

We are therefore of opinion that the trial court did not err in granting the peremptory instruction. Wherefore the judgment is affirmed.

FELLOWS et al. v. KING.

(Court of Appeals of Kentucky. Feb. 5, 1904.)

SALE OF LAND—CONSIDERATION.

1. R. & G. jointly owned land, against which were two purchase-money notes, for \$300 each, owned by K., called the "T. notes." G. had paid none of the consideration. Pursuant to an

order given by R., "You buy G. out and sell to me, and I will pay the two T. lien notes given for the land." K. bought the interest of G. in the land, a half interest being worth about \$2,000, for a consideration not exceeding \$2,000, if, as contended by R. and G., but denied by K., the two \$300 notes were part of the consideration, and decided it to R. for a recited consideration of \$2,500, represented by five notes, of \$500 each. Held, that R. purchased the interest free of the \$300 lien notes.

Appeal from Circuit Court, Henderson County.

"Not to be officially reported."

Action by Richard Fellows and another against Charles L. King. Judgment for defendant. Plaintiffs appeal. Reversed.

R. H. Cunningham and W. P. McClain, for appellants. Brown & Vance, for appellee.

O'REAR, J. Richard and Godfrey Fellows owned jointly a tract of 100 acres of land in Henderson county, upon which they owed \$1,200 represented by four notes, of \$300 each, bearing 8 per cent. per annum interest. The notes were assigned to appellee. Appellant Richard Fellows had paid all of the original purchase money (some \$1,400), leaving the amount of these notes as the balance. He continued to pay on the notes for several years, till two of them, with accruing interest at 8 per cent., had been discharged. He then proposed to appellee, who was a merchant and trader, to buy out his brother Godfrey Fellows' interest in the land, and he (appellant) would buy it from appellee. Appellant is an illiterate man, unable to read, or to write his name. The reason he proposed to appellee to buy the land and sell it to him was that he was unable to buy and pay cash for it, he says. At any rate, appellee prepared, and appellant signed, this paper:

"C. L. King: You buy Godfrey out and sell to me, and I will pay the two Trigg lien notes given for the land. Feb. 1, 1889.

his
"Richard X Fellows.
mark.

"Attest: J. D. Dickey."

Appellant was then owing, as joint maker with Godfrey Fellows, the two Trigg notes referred to, being the last two of the \$300 notes above alluded to. It is not clear just what consideration appellee really paid to Godfrey Fellows for his interest in the land. But all that is accounted for with any satisfaction is not exceeding \$2,000, if the two Trigg notes just mentioned are included. Appellant and Godfrey Fellows claim they were included. Appellee denies that they were. Then appellee sold the same one-half interest to appellant, and made him a general warranty deed for it, for the recited consideration of \$2,500, evidenced by five notes, of \$500 each, bearing interest from date. No allusion was made in the deed to the two Trigg notes. The one-half interest in the land is shown to have been worth then probably not exceeding \$2,000—certainly not as much as \$2,500. Appellant continued to

make payments on this purchase price till he had paid enough to extinguish it, with its interest, in 1899. Then appellee asserted that appellant owed him the two Trigg notes and interest, which then amounted, according to the judgment of the circuit court, to something over \$1,300; that these two notes were a balance of the consideration for the Godfrey Fellows half of the land, making it cost, not counting the interest, over \$3,100, instead of \$2,500.

We construe the written memorandum copied above as a direction to appellee to buy the land, and as an agreement by appellant to repurchase it from him; paying the Trigg notes, as part of the consideration. Godfrey Fellows had no interest in the land to sell, as he had paid none of the consideration, unless the Trigg notes were canceled or paid off by Godfrey. It therefore must have been that it was the intention of the parties that that debt was to be extinguished in that way. Then, when appellee resold to appellant for \$2,500, that paid to appellee a handsome profit for his part in the transaction. The interest sold was thus clear of previous debt. There was no reason shown why the deed from appellee to appellant did not show the true consideration, if the Trigg notes were part of it. We conclude that they were not. And as appellant has paid appellee's debt in full, he was entitled to have the liens canceled of record, and his title cleared of that cloud.

Judgment reversed and remanded, with directions that a judgment be entered in accordance herewith.

NUNN, J., not sitting.

KNUCKLES v. COMMONWEALTH.

(Court of Appeals of Kentucky. Feb. 9, 1904.)
HOMICIDE—ASSAULT WITH INTENT TO KILL—
EVIDENCE—SUFFICIENCY.

1. In a prosecution for willfully and maliciously shooting at and wounding another, with an intention of killing him, evidence held sufficient to sustain a conviction.

Appeal from Circuit Court, Leslie County.
"Not to be officially reported."

Adkins D. Knuckles was convicted of maliciously shooting at and wounding another, and appeals. Affirmed.

Lewis & Hansford and H. F. Farmer, Jr., for appellant. N. B. Hays and Loraine Mix, for the Commonwealth.

NUNN, J. The appellant was indicted by the grand jury of Leslie county at the March term of the Leslie circuit court, 1903, charged with the statutory offense of willfully and maliciously shooting at and wounding one John Helton, with an intention of killing him. At the June term of the court he was tried and convicted, and sentenced to serve a two-year term in the penitentiary. He appealed to this court for a reversal, and the

case was submitted on the 2d of this month without a brief being filed by either the commonwealth or the appellant.

We have examined the record carefully, and find, in substance, the following facts: Helton, the person wounded, after supper one evening visited a widow lady—Mrs. Bally—at the instance of her son Lee Bally. On starting to leave for his home, about 200 yards distant, and just as he was about to step out of the door, he was fired upon by some one, and shot through the breast and lung. On the next day, when he thought he would not live, he made a statement that he thought he recognized, from the flash or light made by the firing of the gun, Jonah Helton, a cousin of his, as the person who fired the shot. It appears that very soon thereafter he became convinced that he was mistaken in this. Early the next morning after the shooting, persons visited the house where the shooting occurred, and followed some tracks of persons who were in their sock feet. These persons were tracked across the valley and up Pine Mountain, and there it appears that they put on their shoes. They were then tracked a part of the way down the other side of the mountain, going in the direction of Ann Howard's store and Berry Howard's home. This was about 10 or 12 miles from the place of the shooting. The appellant was seen passing a house on this route about daylight the next morning, carrying a gun. There he related the fact of Helton's being shot, and made some statements which tended to incriminate him. He arrived at Ann Howard's store at about 8 or 9 o'clock in the morning, and there related the circumstance of the shooting of Helton. One witness (Jeff Saylor) stated that appellant told him that he had shot Helton; that he had been promised \$25 to kill him, and had only been paid \$5, and he was afraid he was not going to get the balance. Many witnesses were introduced, and many facts and circumstances were presented, which tended to connect appellant with the crime; the court gave to the jury proper and the usual instructions in such cases; and we are of the opinion that the appellant had a fair and impartial trial, and that the jury was very lenient with him.

Wherefore the judgment of the lower court is affirmed.

PRENTICE v. OLIVER.

(Court of Appeals of Kentucky. Feb. 2, 1904.)

NEW TRIAL—SHOWING OF MERITS.

1. Defendant in an action for land is not entitled to a new trial merely because he was prevented by illness from attending the trial; his petition therefor not averring that plaintiff did not own the land or was not entitled to its possession, or that he had filed an answer denying such ownership or right to possession, or that he had a good defense.

Appeal from Circuit Court, Marshall County.

"Not to be officially reported."

Action by Geo. A. Prentice against W. Mike Oliver for a new trial. From an adverse judgment, plaintiff appeals. Affirmed.

Geo. A. Prentice, in pro. per. Reed & Berry and Oliver & Reed, for appellee.

PAYNTER, J. This action was instituted for a new trial in an action which had been pending in the Marshall circuit court by the appellee against the appellant to recover the possession of 70 $\frac{1}{4}$ acres of land. The grounds upon which a new trial is sought are as follows: (1) Unavoidable casualty and misfortune; (2) fraud practiced by appellee in obtaining the judgment. The petition does not aver that the appellee did not own the land, or that he was not entitled to the possession of it; neither does it aver that plaintiff had filed an answer denying appellee's ownership and right to the possession of it. There is not even an averment that he had a good defense to the action, although such averment might be held to be a conclusion of the pleader and insufficient. The record of the case in which a new trial is sought is not filed with the petition.

Under the pleadings, the appellant did not manifest a right to a new trial. Steel, etc., v. Seale, 4 Ky. Law Rep. 42; Overstreet, etc., v. Brown, etc. (Ky.) 62 S. W. 885. Although the appellant was prevented from attending the trial by illness (the petition does not show whether the case was pending in equity or ordinary), he has not shown himself to be prejudiced by the judgment, or that his pleadings and proof in the action would have supported a judgment in his favor. It may be proper to add that the evidence did not show that the appellee practiced any fraud in obtaining the judgment against appellant.

The judgment is affirmed.

LOUISVILLE RY. CO. v. TEEKIN.

(Court of Appeals of Kentucky. Feb. 9, 1904.)
STREET RAILWAYS — INJURIES TO TEAMS —
PUNITIVE DAMAGES — GROSS NEGLIGENCE —
EVIDENCE — SUFFICIENCY.

1. Evidence that a street car was running through a narrow city street, after dark, at a rate of from 12 to 20 miles an hour; that it failed to sound its gong at the crossing; and that the motorman was looking back, and not ahead—was sufficient to show gross neglect and authorize punitive damages in an action for injuries by a driver of a team.

Appeal from Circuit Court, Jefferson County, Common Pleas Division.

"Not to be officially reported."

Action by Joseph Teekin against the Louisville Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Farleigh, Straus & Farleigh, for appellant. Chatterson & Blitz, for appellee.

O'REAR, J. The decisive question in this case is whether an instruction allowing punitive

damages should have been given. Appellee was driving his delivery wagon over one of the streets of Louisville after dark, about 8 o'clock at night. The street was so narrow that appellant's double-track street railway took up the most of it. Appellee's wagon was being driven on one of the tracks, when, being warned by a car coming up in his rear, he drew off to the other track (there being not enough room to the side of the track next to the curbing), when another car, coming in the opposite direction, struck his horse, killing it, demolishing the wagon, and injuring appellee. This last-named car, according to the evidence for appellee, was being run at a high rate of speed—from 12 to 20 miles an hour. It failed to sound its gong at the street crossing near which the accident occurred. The motorman was looking back, and not ahead. We are of opinion that this evidence was enough to base an instruction on for punitive damages, allowable for gross neglect.

Judgment affirmed, with damages.

NUTTER v. SOUTHERN RY. IN KENTUCKY.

(Court of Appeals of Kentucky. Feb. 10, 1904.)

CARRIERS—PASSENGERS—FARE—NONPAYMENT—EJECTION.

1. Before plaintiff boarded defendant's railway train she handed her ticket to L., her companion, for safe-keeping. L., being unable to secure a seat in the car with plaintiff, left it to go into another car, and was left at the station, still having plaintiff's ticket in her possession. When plaintiff was called on for her fare, she, having neither ticket nor money, was ejected at the next station. Held, that such ejection was justifiable.

Appeal from Circuit Court, Scott County.
"Not to be officially reported."

Action by Bettie Nutter against the Southern Railway Company in Kentucky. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

L. F. Sinclair and V. F. Bradley, for appellant. Humphrey, Burnett & Humphrey and R. E. Roberts, for appellee.

BARKER, J. Appellant and a friend, Mrs. Logan, boarded appellee's train at its Seventh Street Station in Louisville, Ky., for the purpose of going to their home—Georgetown, Ky. Before entering the train, appellant handed her ticket to her companion, Mrs. Logan, for safe-keeping. The latter, not being able to secure a seat in the car with appellant, left it for the purpose of going into another car, and by accident was left at the station, keeping with her appellant's ticket. When the conductor made his rounds to collect fares from the passengers, appellant had neither ticket nor money, where-

¶ 1. See Carriers, vol. 9, Cent. Dig. § 1421.

upon, at the Fourth Street Station in Louisville, she was required to and did leave the train. She took a street car, rode down to the Seventh Street Station, found her friend and ticket, and that afternoon they went to Georgetown. To recover damages of appellee for being required to leave the train under these circumstances, this action was instituted.

It was decided in the case of *Brown's Adm'r v. L. & N. R. R. Co.*, 103 Ky. 211, 44 S. W. 648, that a common carrier of passengers had the right to eject a passenger who refused, upon demand, either to produce a ticket or pay fare. To the same effect is the opinion of the superior court in the case of *C. & T. P. R. R. Co. v. Barkley*, 13 Ky. Law Rep. 331; *Commonwealth v. Power*, 41 Am. Dec. 465, and the note thereto, in which it is said: "It is a universal rule among railway companies to eject passengers who refuse, upon proper demand, to show or surrender their tickets or pay fare, and its reasonableness is beyond question, for by such refusal a passenger becomes a mere trespasser. Ohio, etc., *R. R. Co. v. Muhling*, 30 Ill. 9 [81 Am. Dec. 336]; Chicago, etc., *R. R. Co. v. Roberts*, 40 Ill. 503; *State v. Overton*, 24 N. J. Law, 435 [61 Am. Dec. 671]." In the 6th Cyc. 551, the rule is thus stated: "For refusing to pay the required fare for transportation, the reasonable and usual remedy is expulsion." In *Am. & Eng. Encycl. of Law* (1st Ed.) 1076, it is said: "It may be stated, as a general rule, that the ticket is the only evidence, as between the conductor and passenger, of the latter's right to transportation, and he must exhibit it when demanded. If he fails to do this, and refuses to pay fare, he may be expelled from the train; and the rule is not altered by the fact that the passenger had a ticket, but lost it." In the case of *Downs v. New York & New Haven R. R. Co.*, 4 Am. Rep. 77, a passenger was the owner of a commutation ticket, which he was required, under the rules of the company, to exhibit whenever he rode on its train. On the particular day in question he forgot his ticket, and, refusing to pay fare, was ejected. The court held that this was a proper exercise of a reasonable regulation. To the same effect is the opinion in the case of *McClure v. Philadelphia, Wilmington & Baltimore R. R. Co.*, 6 Am. Rep. 345.

There was no evidence to uphold the allegation of appellant's petition that the conductor knew she had a ticket; but this would have made no difference, as the fact that she once had a ticket would not have been evidence that she had not sold it or given it away. The evidence developed the facts as herein stated, and the trial court upon motion, at the conclusion of appellant's testimony, instructed the jury to find for the defendant, which was done. This ruling was a correct exposition of the law applicable to the case.

Judgment affirmed.

LEAK'S HEIRS v. LEAK'S EX'R.

(Court of Appeals of Kentucky. Feb. 10, 1904.)
WILL — CHARITY — BENEFICIARIES — DESIGNATION WITH REASONABLE CERTAINTY.

1. A will authorizing an executor to dispose of an estate in such proportions as he may deem wise for the aid of a Bible training and missionary school for Christian workers, for the support of a missionary in the foreign field, to aid the cause of Bible holiness, including Fire Baptized holiness work, and to aid in the support of needy and destitute ministers of the gospel, points out with reasonable certainty the purposes of the charity, and the beneficiaries thereof, as Ky. St. 1903, § 317, requires.

Appeal from Circuit Court, Pulaski County.

"Not to be officially reported."

Proceedings by Victoria A. Leak's heirs against her executor to have her will declared invalid. From a judgment sustaining the validity of the will, the heirs appeal. Affirmed.

O. H. Waddle and T. B. Stinchomb, for appellants. Virgil P. Smith, for appellee.

BURNAM, C. J. The appellants, heirs at law of Victoria Anna Leak, seek on this appeal to have her will declared invalid because it does not point out with reasonable certainty the purposes of the charity and the beneficiaries thereof, as required by section 317 of the Kentucky Statutes of 1903. The clauses of the will which are assailed in this action are as follows:

"Second. I authorize and empower my executor hereinafter named to sell and dispose of my estate, real and personal, * * * for the following purposes, in the order enumerated, and in such proportions, and manner, as may be deemed wise and best by my executor.

"1. For the aid of a Bible Training and Missionary School for Christian workers.

"2. For the support of a missionary or missionaries in the Foreign Field.

"3. To aid in carrying on the cause of Bible Holiness, including Fire Baptized Holiness work, and evangelism.

"4. To aid in the support of needy and destitute ministers of the Gospel."

H. G. Scudday, the testamentary executor of the will of decedent, testifies to the existence of a number of Bible training and missionary schools for Christian workers in the United States, the purpose of such schools being to specially fit persons for missionary and church work; and that Mrs. Leak during her lifetime paid the expenses of a missionary engaged in church work in a foreign field, and was greatly interested in the success of these schools. He also testifies to the existence of a national association for the promotion of Bible holiness, of which the Rev. C. J. Fowler is the president, and to another distinct association known as the "Fire Baptized Holiness Association," in which decedent was an active evangelist, commissioned by the chief officers of the association during her lifetime.

When asked the difference between Bible holiness and fire baptized holiness, the witness answered: "Ordinary Bible holiness means the second blessing, and fire baptized holiness the third blessing, which gives the Christian greater unction and enthusiasm"; that these distinctive associations find authority for their existence in the eleventh and twelfth verses of the third chapter of St. Matthew, which read as follows:

"11. I indeed baptize you with water unto repentance; but he that cometh after me is mightier than I, whose shoes I am not worthy to bear: he shall baptize you with the Holy Ghost, and with fire.

"12. Whose fan is in his hand, and he will thoroughly purge his floor, and gather his wheat into the garner; but he will burn up the chaff with unquenchable fire."

He also testifies to the existence of large numbers of needy and destitute ministers of the gospel in all denominations.

The general doctrine as to charitable bequests as announced in a large number of adjudicated cases by this court is that the beneficiaries may be designated as a class only, leaving the particular object of the testator's benefaction to be determined by the trustee appointed to administer it. In the light of the testimony of the executor, we are of the opinion that the will in this case indicates with reasonable certainty the purposes in the mind of testatrix in the disposition of her estate, and the classes to which she desired her benefactions to be appropriated; the selection of the special beneficiaries being left to the discretion of her executor. The amendment to section 317 of the Kentucky Statutes of 1903, enacted by the General Assembly in 1893 (Acts 1891-93, p. 909, c. 205) has been so thoroughly considered in a number of very recent cases that we deem it unnecessary to again enter into an elaborate argument to sustain our conclusion that the trial court did not err in the judgment appealed from. See *Crawford's Heirs v. Thomas* (Ky.) 54 S. W. 197, and *Thompson's Executors v. Brown* (Ky.) 75 S. W. 210, 62 L. R. A. 398.

Judgment affirmed.

GERMAN WASHINGTON MUT. FIRE INS. CO. v. CITY OF LOUISVILLE.

(Court of Appeals of Kentucky. Feb. 10, 1904.)

TAXATION—CO-OPERATIVE INSURANCE COMPANIES—DOUBLE TAXATION—LICENSES—MUNICIPAL CORPORATIONS—POWERS—PAYMENT OF LICENSE TAX—CREDITOR.

1. Where a co-operative insurance company was organized without stock, as authorized by Ky. St. 1903, c. 32, subd. 5, and its personal property consisted of money contributed by its members for the payment of losses, the fact that the members paid taxes on the property insured did not exempt the company from taxation on its personality on the ground of double taxation.

2. Under Ky. St. 1903, § 3011, authorizing the general council of cities of the first class to provide for licenses to be paid by insurance companies doing business within the city, the

city of Louisville was authorized to pass an ordinance imposing a license tax payable to the city sinking fund, on insurance companies doing business within the city, in addition to the ad valorem tax otherwise levied thereon.

3. Where a city ordinance levied a license tax on insurance companies doing business within the city, and provided that such tax should be in addition to the ad valorem tax otherwise assessed against the companies, an insurance company paying such license tax was not entitled to credit therefor on the ad valorem tax levied against it.

Appeal from Circuit Court, Jefferson County, Chancery Division.

"To be officially reported."

Action by the city of Louisville against the German Washington Mutual Fire Insurance Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

G. S. Everbach, I. T. Woodson, and Lane & Harrison, for appellant. Henry L. Stone, for appellee.

BARKER, J. The appellant is an assessment or co-operative fire insurance company, organized under subdivision 5, c. 32, Ky. St.; having its chief office and principal place of business in Louisville, Ky. The corporation having refused to list its personal property for taxation as by law required, the city of Louisville arbitrarily assessed it with the sum of \$50,000 for the years 1899, 1900, 1901, and 1902. Appellant having refused to pay the tax so assessed, this action was instituted for the purpose of enforcing payment.

No claim is made by appellant that it did not own the personality with which it was assessed. It claims, however, that, being a co-operative insurance company, without stock, inasmuch as its various members pay taxes upon the property insured, therefore to tax the personality of the corporation would be double taxation. It is difficult to understand the reasoning upon which this claim is predicated. Section 171 of the Constitution provides that "taxes shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax." Section 172: "All property not exempt from taxation by this Constitution shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale. * * * And section 174: "All property, whether owned by natural persons, or by corporations, shall be taxed in proportion to its value, unless exempt by this Constitution, and all corporation property shall pay the same rate of taxation paid by individual property. Nothing in this Constitution shall be construed to prevent the General Assembly from providing for taxation based on income, licenses or franchises." Section 181 provides that the Legislature "may, by general laws, delegate the power to county, town, city and other municipal corporations, to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations and professions." It will thus be seen that the Constitution

provides a general system for the taxation of all real and personal property by an ad valorem tax, and also delegates power to the Legislature to authorize the various municipalities to collect franchise and occupation taxes. Because the members pay an ad valorem tax upon the property insured, it does not follow that the imposition of an ad valorem tax on the personality of the corporation is double taxation. If the personality of the corporation was in the hands of the individual members, it would still be taxable in addition to their other property. The money sought to be taxed in this case is contributed by the various members for the purpose of indemnifying any member for the loss of his property by fire. This money, as well as the insured property, is subject to taxation. The money in the hands of the corporation being taxed once, and the property in the hands of the individual members being taxed once, this is not double taxation. It is simply the enforcement of the constitutional rule that all property, whether real or personal, shall pay a uniform rate of ad valorem taxation.

It is further contended by appellant that, inasmuch as it was required by an ordinance of the city of Louisville to pay a license for carrying on the business of a fire insurance company for the years wherein the ad valorem tax is sought to be collected, that fact makes the collection of the ad valorem tax double taxation. After the passage of the act for the government of cities of the first class in 1893, the municipality sought to tax certain business by means of a license, which was to be in lieu of the ad valorem tax prescribed by the Constitution. In the case of *Levi v. City of Louisville*, 97 Ky. 394, 30 S. W. 973, 28 L. R. A. 480, it was held that this could not be done, that the ad valorem tax must be enforced uniformly, and that the license or occupation tax must be in addition to the ad valorem tax. The court, in thus overturning the system by which the municipality sought to substitute a system of licenses in lieu of the ad valorem tax, after directing that the ad valorem tax should be retrospectively imposed, said that inasmuch as the license fees, as indicated by their amount, approximated the value of the ad valorem tax, the former might be deducted from or credited on the latter for the given years. But this was done only because the licenses had been imposed as a substitute for the ad valorem system, and the language of the court has no application where the license is an occupation tax, and is imposed in addition to the ad valorem system. Section 3011, Ky. St., provides: "The general council [of cities of the first class] may, by ordinance, provide for the following licenses to be paid into the sinking fund with added penalties for doing business, for following the calling, occupation, profession, or the using or hold-

ing or exhibiting of the articles herein named, without the required license." Then follows the general list, including specifically the name of every business which the Legislature could call to mind, among which were the following: "Every life, fire, or accident, casualty and indemnity insurance company * * * doing business in this city, shall, on or before the first day of February of each year pay to the sinking fund not less than two nor more than three dollars on every one hundred dollars of premiums received on business done in the city during the previous year." In pursuance of this authority, the general council on April 1, 1896, enacted an ordinance entitled "An ordinance providing for certain licenses for the sinking fund of the City of Louisville," which is as follows: "Be it ordered by the general council of the City of Louisville: Section 1. That hereafter the following licenses shall be paid into the sinking fund of the city of Louisville, for the purpose of the sinking fund, for doing the business, following the calling, occupation and profession, or using, or holding, or exhibiting the articles hereinafter named in the city of Louisville, in addition to the ad valorem tax heretofore levied, or hereafter to be levied on any species of property in the city of Louisville. * * *" Among the occupations required to be taxed by the provisions of this ordinance were the following: "Every life, fire, accident, casualty and indemnity insurance company doing business in this city shall, on or before the first day of February of each year, pay to the sinking fund the sum of two dollars and fifty cents on every one hundred dollars of premiums on business done in the city during the previous year. * * *" It will be observed that this ordinance specifically provides that the license shall be in addition to the ad valorem tax required by the Constitution and the charter to be paid on all property within the city limits. That the general council had the right thus to require the payment of the occupation tax in question, in addition to the ad valorem tax, was clearly settled in the cases of *Levi v. City of Louisville*, supra, *Commonwealth v. Pearl Laundry Company*, etc., 105 Ky. 259, 49 S. W. 26, and *Fidelity Casualty Company v. City of Louisville* (Ky.) 50 S. W. 35. The opinions in these three cases are conclusive of the right of the municipality to levy the occupation tax provided for by the ordinance, in addition to the ad valorem tax required by the Constitution and the charter. They are so exhaustive of the subject, and so plain in their meaning, that it is unnecessary to further attempt to elucidate the proposition. It follows that appellant is not entitled to a credit of the amount of the license tax paid under the ordinance on the ad valorem bills sued on.

The judgment of the chancellor is affirmed.

GUTHRIE v. GUTHRIE.

(Court of Appeals of Kentucky. Feb. 10, 1904.)

TENANTS IN COMMON—ADVERSE POSSESSION—TENANT AT WILL—IMPROVEMENTS—PLEADING—AMENDMENT—DISCRETION.

1. Where a will devised testator's real estate to his wife for life, remainder to his children, and during the wife's widowhood she permitted defendant, who was one of the children, to occupy a portion of the premises, defendant could not acquire any title to such property by limitation, as against his co-tenants in remainder, until after the widow's death.

2. Where land was devised to testator's widow for life, remainder to his children, and the widow permitted defendant, who was one of the remaindermen, to occupy a part of the property as her tenant at will, without any contract with reference to improvements, defendant, on the widow's election to terminate the tenancy, was not entitled to recover the value of improvements which he placed on the property.

3. An application to file an amended rejoinder is within the discretion of the trial judge.

Appeal from Circuit Court, Daviess County.

"Not to be officially reported."

Action by Bettie L. Guthrie against G. C. Guthrie. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

W. Scott Morrison, for appellant. Miller & Todd and R. G. Hill, for appellee.

BARKER, J. G. C. Guthrie, Sr., died, domiciled in Daviess county, Ky., in 1881, leaving a last will and testament, which was duly admitted to probate. By the third clause of his will he provides as follows: "I give to my beloved wife, Bettie L. Guthrie, during her life or widowhood, all my real and personal estate of every kind, to have, hold and manage, for her own use and support, and for the use and support and education of my four children until they are grown; also my wife will, in her discretion upon her judgment, assist my son Granville C. Guthrie, now of age, in such way as may be deemed proper and right, charging him with such sums as she may advance to him. My wife is directed, especially, to properly educate the four young children, making no charge therefor. She will, also, when they are of proper age, or married, make to them such advances as may by her be deemed proper." The property left by the decedent, in the main, consisted of a farm of 180 acres of land situated near the city of Owensboro, Daviess county, Ky. By another clause of the will it was provided that, after the death of the mother, all of the property of the decedent should go to appellant and his four brothers and sisters, equally. After the death of his father, G. C. Guthrie lived in the mansion house with his mother for several years. About 1883 appellee built a small house on 15 acres of the farm left by her husband, which she permitted appellant to occupy and use, together with the land upon which it was sit-

uated. Appellant took possession of the property, planted some fruit trees, fenced it, added an addition to the dwelling house, and resided thereon for 20 years, when his mother demanded of him possession, and, upon his refusing, instituted this action to recover it; alleging in her petition that she was the owner and entitled to the possession of the land, and that appellant had possession without right, and wrongfully withheld it from her. Appellant's answer denied the title of appellee, and pleaded the fact that his mother had given him the use of the property as an advance, under the third clause of his father's will, and pleaded title by adverse possession for more than 15 years. The issues were made up on these lines, and a trial resulted in judgment in favor of appellee.

As said before, appellant claimed that his mother had given him the property under the third clause of his father's will, to possess as his own. This she denied, claiming that she had simply given him the right to the use of the land during her will, and that he was therefore a tenant at will, and, after proper notice to surrender, was wrongfully in possession. Appellant could only plead the statute of limitations as against his mother. He could not acquire by lapse of time a title as against his co-tenants in remainder. They have no cause of action against him until after the termination of the life estate, and, having no cause of action, time does not run against them.

The questions as to whether or not appellee gave appellant the use of the land during her life estate, or whether or not she gave him the use during her pleasure, and whether or not he had acquired title against her by adverse possession, were fairly submitted to the jury under the instructions of the court, and these issues were found against him. We think, upon the whole, the court gave the law as favorably to appellant as he was entitled.

It having been determined by the jury that appellant was only a tenant at will by the verbal contract between him and his mother, he was not entitled to recover the value of the improvements placed upon the property by him, in the absence of a contract on that subject. In Am. & Eng. Encycl. of Law, volume 16 (2d Ed.) p. 110, it is said: "It is well settled that one who has occupied land merely as the tenant or lessee of another is not entitled, as against his lessor, to any compensation for improvements which he may have placed on the demised premises, in the absence of some express or implied covenant or agreement on the part of the lessor to pay therefor." In the case of Gray v. Oyler, 2 Bush, 256, on a question similar to the one at bar, this court said: "If one without claim or contract voluntarily erects a building on another's land, the law would doubtless withhold compensation, and also prevent his re-

¶ 2. See Landlord and Tenant, vol. 22, Cent. Dig. § 592.

removal of the fixtures; and so with the lessee, who shall, without contract, express or implied, voluntarily erect fixtures, as contradistinguished from chattels, on the lessee's premises." In *Gudgell v. Duvall*, 4 J. J. Marsh. 229, the court held, where one took possession of land under a verbal lease, and made improvements, he was not entitled to compensation for the value of the improvements, in the absence of a contract to that effect. The court, in denying the right to recovery for the improvements, said: "No express contract to pay for the improvements has been proved, and no fact from which a contract to pay for them can be implied."

The court did not err in rejecting the amended rejoinder of appellant. We do not think the facts set up therein had any tendency to elucidate the issues involved in this case, and, even had it been material, it would have been within the discretion of the trial judge to admit it or not.

Perceiving no error in the record, the judgment is affirmed.

BARLOW'S ADM'R et al. v. COMSTOCK'S ADM'R.

(Court of Appeals of Kentucky. Feb. 9, 1904.)

HUSBAND AND WIFE — ANTENUPTIAL CONTRACT — CONSTRUCTION — CONSIDERATION — PERFORMANCE.

1. Where an antenuptial contract provided that, whereas a marriage was about to take place between the parties, the prospective husband agreed to give to his prospective wife \$500, to be paid at his death, for which payment he bound himself, his administrators, etc., and that the wife bound herself to make no claim to dower or other right in the husband's estate, such contract was based not only on the wife's release of dower, as a consideration, but on the prospective marriage, so that the wife's death before the husband did not relieve his administrator from liability to her personal representative for the payment of the amount specified.

Appeal from Circuit Court, Washington County.

"To be officially reported."

Action by Lucinda Comstock's administrator against P. G. Barlow's administrator and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

John W. Lewis, for appellants. J. H. Thurman and J. W. S. Clements, for appellee.

BURNAM, C. J. On the — of July, 1881, Peter G. Barlow and Lucinda Comstock executed the following antenuptial contract with each other:

"Whereas marriage is about to take place between Peter G. Barlow and Mrs. Lucinda Comstock, all of Washington County, State of Kentucky: This marriage contract between the parties whose names are hereunto subscribed, witnesseth: The said Peter G.

Barlow agrees to give to said Mrs. Comstock five hundred dollars to be paid at his death, and to the payment of the same hereby binds himself, his administrators, executors, heirs and assigns as stipulated. The said Lucinda Comstock agrees and binds herself to make no claim to dower or homestead or other distributable right, interest, or share in the real or personal property of said Barlow, and hereby releases, relinquishes, and waives all claim to dower, homestead, or to other distributable right or share in the property, real or personal, of said Barlow. Said Barlow agrees that said Mrs. Lucinda Comstock shall have the exclusive right to the use and control and dispose of what personal effect she has, before, during or after the marriage, free from all claims of said Barlow, his heirs, administrators, executors and assigns. The said Barlow is to furnish a decent support during his natural life. Witness our hand this — of July, 1881.

"Peter G. Barlow.

her

"Lucinda X Comstock.

mark.

"Attest: Palmer Grundy, Isaac L. Janes."

Shortly after the execution of this written agreement, the marriage between the parties was legally solemnized, and the parties lived together as husband and wife until the death of Mrs. Barlow, on the — day of —. Peter Barlow survived his wife, and died intestate on the 19th of April, 1900; leaving surviving him, as heirs at law, a number of children by a previous marriage. Suit was instituted in the Washington circuit court for a settlement of his estate, and W. T. Comstock, as administrator of the estate of Lucinda Barlow, was made a party defendant. He filed his answer, which he made a cross-petition against the administrator and heirs of Peter G. Barlow, setting up the antenuptial contract of July, 1881, and prayed judgment against the administrator for \$500, with interest. The administrator of Peter G. Barlow filed a general demurrer to the answer and cross-petition of Mrs. Barlow, which was overruled, and, declining to plead further, judgment was awarded to appellee for \$500, with interest from the 1st day of June, 1900, until paid; and the administrator of Peter G. Barlow has appealed, and insists that the sole consideration for the payment of the \$500 provided for in the antenuptial contract between the parties was the release by Mrs. Comstock of all claim to dower, homestead, or other distributable right in the estate of her prospective husband in the event she should survive him. Or, in other words, that it was a stipulated sum to be paid to her in lieu of all rights which she might have, growing out of the marriage, in her prospective husband's estate, as surviving widow, and that, as she died several years prior to her husband, she never became invested with any estate of the character sought to be released, and in

¶ 1. See *Husband and Wife*, vol. 26, Cent. Dig. § 129.

consequence the written obligation sued on was not enforceable. We cannot concur in this contention. There were two considerations which entered into the execution of the antenuptial contract by Mrs. Comstock—one, the prospective marriage, which was alone an adequate consideration therefor; the other, the release of all claim by her of her inchoate rights as surviving widow. The obligation assumed by Peter Barlow in the contract of July, 1881, to pay Mrs. Comstock \$500 at his death, is unconditional. It contains no such qualification as appellant seeks to inject into it. Nothing is said about her death, or that the contract sued on was to be enforceable only in case she survived her prospective husband, and, we think, is in no wise dependent upon such a contingency. In an unbroken line, the authorities favor a liberal construction of these contracts, for their purpose is to prevent strife, secure peace, and adjust and settle the question of marital rights in property.

For reasons indicated, the judgment is affirmed.

ILLINOIS CENT. R. CO. v. JOLLY.

(Court of Appeals of Kentucky. Feb. 12, 1904.)
CARRIERS—INJURY TO PASSENGERS—JOLTS OF TRAIN—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

1. Whether a passenger is wanting in reasonable care in leaving her seat and standing in the aisle on approach to the end of her journey is a question for the jury, if, while so standing, she is injured by some jerk or bump of the train not incident to its proper management.

2. A passenger, who, on approaching her destination, leaves her seat and stands by the door before the train stops at the station, cannot recover for injuries sustained in a fall caused by the stopping of a train with no more jerk than was incident to its stoppage in the exercise of proper care.

3. In an action against a railroad for injuries to a passenger caused by a fall resulting from her leaving her seat and standing at the door before the stopping of the train, the jury should have been instructed that, even if defendant was negligent in the manner of stopping the train, if the passenger failed to exercise ordinary care for her own safety, considering her age (78 years) and condition, but for which want of care she would not have been injured, she could not recover.

Appeal from Circuit Court, Ohio County.

"To be officially reported."

Action by Elizabeth Jolly against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

H. P. Taylor and Pirtle & Trabue, for appellant. Glenn & Ringo, Jno. B. Wilson, and E. E. Kelley, for appellee.

HOBSON, J. Elizabeth Jolly, who was then 78 years old, took the passenger train of the Illinois Central Railroad Company at Caneyville, Ky., for Owensboro; intending to change cars at Horse Branch, and there

take the train on the road running to Owensboro. She was accompanied by her son, and they had two telescopes. She and her son state that when the train reached Horse Branch, and had stopped for the station, after two other passengers had gotten off, she said to her son that they had better get off; that he picked up the two telescopes, and, she walking in front, they went to the door; that as she got to the door the train started to back, and by the lurch or jerk of the train she was thrown down, her head falling on the platform of the car, and her ankle being twisted under her and severely sprained. She was unable to walk on the foot. The ankle swelled up and turned black. For two or three weeks she could not walk a step, and had to remain in bed. She suffered a great deal, and it was two months before she could put a shoe on. At the trial, in March, 1903, she was still unable to walk on the foot, or to do anything except such things as she could do sitting in a chair, such as knitting and sewing. Previous to that time she had done all her housework, including washing. On the other hand, the defendant proved by W. D. Stith, a drummer who was on the train, that as it approached the station he was in the smoker, and came to the door facing the door of the car in which Mrs. Jolly was; that he saw her coming toward the door before the train had come to a stop; that she reached it while the train was yet moving, and when the train stopped she was in the door, and fell forward on the platform; that there was no jerk or lurch of the train, but it stopped in the usual and customary manner, without any backing; and that she simply fell forward when the train stopped. The defendant also proved by W. P. Miller, who lived at Horse Branch, that he was standing on the platform, and saw the train as it pulled into the station; that, as the train came up, he saw the lady standing in the door, and, as it stopped, she fell. He also stated that there was no jerk or bump of the cars, and no backing of the train. The conductor of the train, who was standing on the platform in front of the car, testifies to the same facts; and all the other employees on the train testify that the train stopped in the usual way, without jolt or jar, and that it was not backed after it stopped. The brakeman on the Owensboro train said she told him that her son was at the time rushing her off the train, and she thought that, if he had not rushed her off, she would not have gotten hurt. The porter on the train testified that when he called out the station the old lady started to get up, and he said, "Lady, wait until the train stops," and went to the smoker door and called out the station again, and then went out and took out the baggage, but did not see her any more, because he had his baggage up to the platform, and stepped off as soon as the train got still enough. A witness at the hotel at

¶ 2. See Carriers, vol. 9, Cent. Dig. § 1384.

Horse Branch, to which the old lady went after she left the train, testified that she said that, if her grandson had been along, she would not have gotten hurt. And another witness at the hotel says that she added that her son had her to get up before the train stopped, and he was the cause of her getting up so quick. By several of the witnesses it was also proved that she said her ankle had been hurt before, and was weak.

On these facts, the court instructed the jury as follows:

"(1) The court instructs the jury that if they believe from the evidence that while the plaintiff was a passenger on one of the defendant's passenger trains and cars, and after said train had reached Horse Branch, a station on its railroad, at which point she was to get off of said car, and after she had been notified by the conductor, or other servants of defendant in charge of said train and car, to get off, and after the train had stopped she started to get off the train, and, while herself in the observance of ordinary care, the servants and agents of the defendant in charge of its said train carelessly and negligently started said train backward, causing a sudden and violent jerk, by which the plaintiff was thrown down and her ankle sprained, and she thereby damaged as the direct or proximate result of the negligence of the defendant's servants in charge of its said train, they should find for the plaintiff the damages sustained by her as a consequence of her injuries, not exceeding the amount claimed, \$1,999."

"(7) If the jury do not believe from the evidence that the train on which plaintiff was a passenger had stopped for Horse Branch Station, and she had been notified by the conductor or other servant in charge of the train to get off, and, after stopping, while plaintiff was starting to get off, said train was, by the negligence of the agents and servants of defendant, caused to move with a violent jerk, by which plaintiff was caused to fall, and was injured, and she was not so caused to be injured by the negligence of the defendant's servants, they should find for the defendant. Or if they believe from the evidence that before reaching the station, and before being notified to get off the train, plaintiff voluntarily left her seat, and negligently stood up in the door, and was caused to fall by the ordinary stopping of the train, and, but for her own negligence, if they believe from the evidence she was negligent, she would not have been hurt, they should find for the defendant."

The other instructions of the court give the measure of damages, define negligence and ordinary care, and state correctly the degree of care required of the defendant in the operation of its train. The first instruction sets out the state of facts on which the plaintiff was entitled to recover, if the jury accepted as true the version of the transaction given by her and her son. The only

question we deem it necessary to decide is whether the seventh instruction fairly submitted to the jury the state of facts shown by the evidence for the defendant, on which it sought exoneration from liability. We have had great difficulty to determine just what the jury were authorized to understand the court meant by the instruction. If the first clause of it was meant as the converse of No. 1, then there was no necessity for the second clause. The instruction cannot mean that the plaintiff could not recover unless she was thrown down by a sudden jerk from the backward movement of the train after it had stopped, for, by the last clause, if the plaintiff left her seat before the train reached the station, and stood in the door, and was caused to fall by the ordinary stopping of the train, yet she could recover, unless she did this negligently. and but for her own negligence she would not have been hurt. Taking the entire instruction together, we conclude its fair meaning to the jury was that if the plaintiff left her seat and went to the door while the train was still moving, and, while standing there, was caused to fall by the ordinary stopping of the train, the jury was still warranted to find for her, unless they believed that in so doing she failed to exercise such care as might be ordinarily expected of a person of usual prudence, situated as she was, and, but for this, would not have been injured. The question then arises, is this the law of the case?

It is a matter of common knowledge that, as a rapidly rolling passenger train stops at a station, there is a forward movement of persons even sitting in the car. This movement is much more pronounced when one is standing up, and there is greater danger of an old person falling than in the case of one younger, or who is on the lookout, from experience, for the forward surge of the body just as the train abruptly stops. The railroad company is not responsible for this. No amount of care can avoid it. It is not due to any jolt or jar of the train, but simply to the fact that the body of the person standing up continues to move forward when the feet, resting on the floor of the car, have stopped. It is safest for passengers on railway trains to keep their seats until the train stops. If they leave their seats when the train is approaching the station, they take the risk of those things which are incidental to the stopping of the train in the usual way, and with proper care. In *Hughlett v. L. & N. R. Co.* (Ky.) 22 S. W. 551, the court said: "All who board trains as passengers know that the announcement is usually made as the train approaches to a depot before it actually reaches it, to enable passengers to prepare for leaving." A passenger is not required to keep his seat during his whole journey. He may move from one part of the car to another. When the train approaches his station, and it is announced, he may prepare to leave the train. Whether he is wanting in

reasonable care in leaving his seat then, and standing in the aisle, is a question for the jury, if while so standing he is injured by some jerk or bump of the train not incidental to its proper management. *New Jersey Railroad Co. v. Pollard*, 22 Wall 341, 22 L. Ed. 877; *Treat v. Boston, etc.*, R. R., 131 Mass. 371; 5 Am. & Eng. Ency. of Law, 682; 6 Cyc. 650, and cases cited. A passenger who rides in a place more dangerous than that intended for passengers, and is there hurt by the usual and proper operation of the train, when he would not have been hurt, had he remained in his seat, cannot be said to have been injured by the negligence of the carrier. In the case at bar, if the evidence for the defendant is true, there was no negligence on its part, and the proximate cause of the accident was the old lady's placing herself at the car door before the train stopped. In lieu of instruction 7, the court should have instructed the jury that if they believed from the evidence that, before the train stopped at the station, the plaintiff left her seat, and stood up at the door of the car, and while standing there was caused to fall by the stopping of the train in the usual manner, with no more jerk than was incidental to the stopping of the train in the exercise of proper care, as defined in instruction 3, they should find for the defendant. The court gave no distinct instruction on contributory negligence, and, in addition to the instruction indicated, the jury should have been instructed, in effect, that, although the defendant was negligent, as above defined, still it was incumbent on the plaintiff to exercise such care for her own safety as might be ordinarily expected of a person of usual prudence, of her age and condition, situated as she was, and, if she failed to exercise such care, and, but for this, would not have been injured, she could not recover.

Judgment reversed, and cause remanded for a new trial.

CHAMBERS et al. v. HASKELL et al.

(Court of Appeals of Kentucky. Feb. 11, 1904.)

TRESPASS—INJUNCTION—WHEN GRANTED.

1. Injunction lies to restrain a trespass to real estate where the trespass is so vexatiously persisted in that a multiplicity of suits must result or is committed by one who is insolvent, under Ky. St. 1899, § 2361, providing that the owner of land may maintain the appropriate action to prevent or restrain any trespass or other injury thereto.

2. Where it appears from the petition of an owner of land that the continuance of an act of trespass thereon would produce great or irreparable injury to plaintiff, a temporary injunction may be granted under Civ. Code, § 272.

Appeal from Circuit Court, Boyd County.
"Not to be officially reported."

Action by Otis J. Chambers and others against James A. Haskell and others. From

a judgment for defendants, plaintiffs appeal reversed.

D. K. Weis, for appellants. D. W. Steele, Jr., for appellees.

BURNAM, C. J. The appellant brought this action against the appellees, asking that they be enjoined and restrained from trespassing upon certain lots owned by them in the town of Ashland, or interfering with their erection of a screen or fence thereon. They allege that the appellant Susan E. Chambers is the owner and in possession of lots Nos. 11 and 12 on the north side of Winchester avenue, between Fifteenth and Sixteenth streets, in Ashland, Ky., and that Otis J. Chambers is her husband; that the defendants have frequently, unlawfully, and without right entered upon these lots, and interfered with the peaceable enjoyment by their tenants thereon; that on the — day of July, while the plaintiff O. J. Chambers was at work erecting a screen on lot No. 11, which was necessary for the comfortable enjoyment of the residence thereon, the defendant Haskell entered upon the lot, abused, insulted, and threatened to inflict upon him personal violence, and to tear down the screen he was then erecting; that subsequently, in the nighttime, the defendants, in connection with others unknown to plaintiffs, entered upon lot No. 11, and forcibly took down the screen, and carried away the lumber used in its construction, and threatened that they would continue to enter upon the plaintiffs' premises and interfere with them and their tenants in the peaceable enjoyment of their property; that both of the defendants are insolvent; and that they have no adequate remedy at law for the protection of their property or its comfortable use and enjoyment, and ask that an injunction should issue restraining the defendant from trespassing upon the premises, or tearing away the screens or fences, or from inflicting further injury thereon. The defendants filed a general demurrer to the plaintiffs' petition, which was sustained, and, plaintiffs refusing to plead further, their petition was dismissed, and they have appealed.

Section 2361 of the Kentucky Statutes of 1899 provides that "the owner of any land may maintain the appropriate action to recover damages for any trespass or injury committed thereon, or to prevent or restrain injury committed thereon, or to prevent or restrain any trespass or other injury thereto, notwithstanding such owner may not have the actual possession of the land at the time of the commission of the trespass." Section 272 of the Civil Code provides that: "If it appear from the petition that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of an act which would produce great or irreparable injury to plaintiff, * * * a temporary injunction may be granted to restrain such

¶ 1. See *Injunction*, vol. 27, Cent. Dig. §§ 98, 99, 101.

act." The law is well settled that an injunction will lie to restrain a trespass to real estate if the threatened trespass is so vexatiously persisted in that a multiplicity of suits must result, or is made by one who is insolvent, and against whom a verdict would be valueless. See *Hillman v. Hurley*, 82 Ky. 626; *Preston v. Preston*, 85 Ky. 16, 2 S. W. 501; *Ellis v. Wren*, 84 Ky. 254, 1 S. W. 440. The demurrer in this case admits that the defendants have repeatedly, without right, trespassed upon the plaintiffs' property, and interfered with the peaceable enjoyment thereof; that they have unlawfully torn down and carried away a screen erected thereon by plaintiffs for their comfort and convenience, and threaten that they will continue to do so in future, if plaintiffs, against their objection, should erect structures of similar character. It also admits that the defendants are insolvent, and that a judgment against them for damages would be valueless. The mere fact that the criminal law provides adequate punishment for the offense committed by defendants against the plaintiffs affords no compensation to them for past or future trespasses upon their property.

We are of the opinion that the averments of the petition set out state a case which authorized at the hands of the chancellor the injunction restraining trespass to the real estate. The judgment is therefore reversed, and cause remanded for proceedings consistent herewith.

BOHANNON v. CLARK et al.

(Court of Appeals of Kentucky. Feb. 11, 1904.)

BANKRUPTCY—PROPERTY SUBJECT TO DEBTS—WIFE'S SEPARATE ESTATE—PRIORITIES BETWEEN CLAIMS—PLEADING—PETITION—AMENDMENT AFTER JUDGMENT.

1. A husband purchased a farm in his own name in part with money belonging to his wife. The land was sold, and the notes made payable to his wife. Thereafter the wife and the husband bought other land, which was conveyed to them jointly; the wife furnishing all the money that was paid on the land. Held that, as the husband acquired the first property before any of the debts filed against his estate in bankruptcy were created, he was entitled to a homestead in such land, and the proceeds of the sale of the land were exempt from his debts, and he had a right to give them to his wife, and she had a right to invest that sum in other land, and take title to herself, as against her husband's creditors.

2. Where a wife used the proceeds of the sale of a homestead to pay for land purchased in her name and that of her husband, on the subsequent bankruptcy of the husband half of the proceeds must be applied to the payment of the husband's debts, but should be first used to pay the ratable part of the unpaid purchase price of the land, and to reimburse the wife for money paid by her for her husband in the purchase of the land.

3. After judgment has been entered fixing the rights of the parties, an amendment to the petition presenting a new issue, which, if proper at all, should have been presented with the other issues in the case, comes too late.

Appeal from Circuit Court, Barren County. "Not to be officially reported."

Action by G. M. Bohannon, trustee in bankruptcy of the estate of W. H. Clark, against W. H. Clark and others. The trustee appeals from the judgment, and defendant Lillian Clark files a cross-appeal. Affirmed.

C. H. Hackett and Luther James, for appellant. Baird & Richardson, for appellees.

SETTLE, J. W. H. Clark, of Barren county, upon his own petition, was declared a bankrupt in the year 1902, and the appellant, G. M. Bohannon, was elected trustee of his estate. Thereafter this action was instituted by the appellant, as such trustee, in the Barren circuit court, to discover and subject to the payment of the debts of the bankrupt certain personal property alleged to have been transferred by him to his wife, the appellee Lillian Clark, and to set aside a deed which he made to her shortly before the filing of his petition in bankruptcy, whereby he conveyed to her his undivided interest of one-half in a certain tract of land. The wife was made a defendant in the action, and she and her husband filed separate answers. The answer of the latter contained specific denial of the averments of the petition, and answers to certain questions annexed to the petition. That of the wife, in addition to a traverse of the averments of the petition, alleged that the land sought to be subjected to the payment of the debts of the bankrupt was purchased by her alone, but that, by mistake of the vendor, the same had been conveyed to her and her husband jointly; that she had furnished all of the purchase money that had been paid thereon with the proceeds of a farm in Green county, which she sold before the purchase of the Barren county land. Both answers were controverted by reply, and after the taking of depositions by the parties the case was submitted for trial, and the chancellor rendered a judgment setting aside the deed made to the appellee Lillian Clark by her husband, and vesting in the appellant trustee the title to the land thereby conveyed for the benefit of the husband's creditors; but as it appeared that Lillian Clark had paid, of the purchase money due the vendor of herself and her husband, \$1,100, one-half of which should have been paid by her husband, the judgment gave her a lien on that part of the land adjudged the latter's trustee for \$550—one-half of the sum so paid by her. It further appearing from the answer and cross-petition of Lizzie Anderson that she was the owner, by assignment, of two of the notes, aggregating \$680, executed by Lillian and W. H. Clark in part payment of the purchase money on the land as a whole, a supplemental judgment was rendered by the chancellor, directing a sale of all the land, or enough thereof to pay the two notes mentioned. After the entering of the orig-

inal and supplemental judgments, the appellant filed an amended petition, seeking to recover of the appellee Lillian Clark rents for certain years upon the half of the land attempted to be conveyed her by her husband, but the deed to which was set aside by the judgment of the lower court; it being claimed that she had had possession of and cultivation of the same during these years. But the claim to such rents was disallowed by the court. From this judgment, and so much of the first judgment as allowed the appellee a lien upon the half of the land attempted to be conveyed her by her husband, the trustee has appealed; and from so much of the first judgment as set aside the deed to her from her husband, the appellee Lillian Clark prosecutes a cross-appeal.

The evidence found in the record discloses the following facts: The appellee Lillian Clark first married one Sims, in Tennessee, who died, leaving some landed and personal estate and two children. Appellee, after the death of Sims, bought of one of his children his interest in the land left by the father. The other child died after becoming of age, and, under the laws of Tennessee, appellee inherited his interest in the land. Thereafter she sold the land, and after her marriage to her present husband they removed from Tennessee to Green county, Ky., where they purchased a small farm, the title of which was conveyed to the husband. Whether or not the conveyance of the Green county land to the husband was made with the wife's consent, we are unable to determine from the evidence; nor is it material in this case, for the title was acquired by the husband long before the creation of any of the debts from which he seeks a discharge in bankruptcy. The Green county land was sold in 1893 for \$1,050, and notes for the purchase money were made payable to the appellee Lillian Clark. In 1894, and subsequent to the creation of the bankrupt's debts mentioned in the petition, she and her husband bought the land in Barren county, which was conveyed to them jointly. She and the husband claim that this was a mistake; that she alone was the purchaser. We are of opinion, however, that the proof does not sustain the claim, but, upon the contrary, tends to show that her claim of sole ownership is untrue. But it is satisfactorily established by the evidence that she furnished all the money that was paid on the land that was conveyed to them jointly. She secured the \$1,100 which she paid on the Barren county land by a sale to her brother of the notes received by her for the Green county land. As already stated, it does not matter that her husband owned the Green county land. As he acquired it before any of the debts that have been filed against his estate as a bankrupt were created, as against those debts he was entitled to a homestead in the land. Therefore \$1,000 of the proceeds of the land

after its sale were exempt from his debts. He had the right to give the proceeds of the land, to the amount of \$1,000, to his wife; and she had the right to invest that sum in other land, and take the title to herself. So, in applying the proceeds of the Green county farm to the purchase of the Barren county land, no wrong was done the husband's creditors, as has been repeatedly held by this court. *Lee v. Campbell* (Ky.) 1 S. W. 873; *Cravens v. Shippen* (Ky.) 77 S. W. 929. As she sold the Green county land notes to her brother for \$1,100, and paid that amount on her husband's half of the land, as well as her own, and his half must, under the judgment of the chancellor, go into the hands of his trustee, to be sold and applied to the payment of his debts, it is but just that its proceeds should first be used to pay its ratable part of the \$680 of unpaid purchase money going to Mrs. Anderson, holder of two of the original lien notes, and then to reimburse the appellee Lillian Clark for the \$550 paid by her thereon for her husband—the remainder, if any, to be distributed among his general creditors; and, as the judgment of the chancellor seems to have determined the rights of the parties upon this basis, it should not be disturbed.

We do not think it was error for the chancellor to refuse appellant the rents claimed in the last amended petition. If for no other reason, it was right to reject the claim because the amendment came too late. The case had been tried, and judgment entered fixing the rights of the parties before the amendment was filed. It would have been improper to reopen the case to litigate new issues, which, if proper at all, should have been presented with the other issues involved.

The only error committed by the chancellor was in permitting the amendment in question to be filed.

Finding no error in the record prejudicial to the rights of the parties, the judgment is affirmed on both the original and the cross appeal.

SOUTHERN RY. CO. IN KENTUCKY v. OTIS' ADM'R.

(Court of Appeals of Kentucky. Feb. 9, 1904.)

MASTER AND SERVANT—INJURY—NEGLIGENCE—DEGREE—WARNING—ORDINARY CARE—INSTRUCTION—HARMLESS ERROR.

1. The backing of a freight train upon a siding against cars standing there, without warning by bell or whistle, was negligence, as to a brakeman between such cars.

2. Where a conductor, who was in a position to see a brakeman standing at work between cars on a siding, did not attempt to prevent another train from backing on the siding, or to warn the brakeman of his danger, he was guilty of negligence.

3. Where a brakeman was working between cars on a siding, where there were several tracks, the noise of the train approaching on the siding was not sufficient warning of his danger from it to justify the failure to give other warning.

4. Under Ky. St. 1903, § 6, providing that, when a death is caused by negligence, damages may be recovered, and, when the negligence is gross, punitive damages may be recovered, there may be a recovery for death caused by ordinary negligence.

5. Any error in an instruction that ordinary care is that degree of care which ordinarily prudent and "skillful" men usually exercise was merely technical, and was harmless, especially where the party complaining of it objected to a proper instruction, and did not offer any instruction on the point.

Appeal from Circuit Court, Anderson County.

"Not to be officially reported."

Action by the administrator of E. V. Otis, deceased, against the Southern Railway Company in Kentucky. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

L. C. Willis, Willis & Todd, and Humphrey, Burnett & Humphrey, for appellant. Gordon & Gordon, for appellee.

NUNN, J. This is an appeal from the judgment of the Anderson circuit court in favor of appellee against appellant for damages in the sum of \$5,000 for the death of appellee's intestate as a result of the alleged negligence of appellant's employes. The deceased, E. V. Otis, was a brakeman or flagman on one of appellant's freight trains in charge of Conductor Clifford. Clifford's train had recently been in a wreck, and the cars of his train were on the sidings at Lawrenceburg, and they were preparing to get them together to start on the trip to Louisville. About this time another train of appellant, known as the "Local Freight," in charge of Conductor Hampton, came in from Louisville on its way to Lexington. There were some dead cars, on what is known as the "Long Siding," coupled together, but the air connections had not been made. Conductor Clifford directed Otis to make these connections, and, while Otis was performing this work, those in charge of the Hampton train had uncoupled it, and backed a portion of that train in on this long siding, and struck these dead cars, between which Otis was situated, knocked him down, and the wheels passed over his head, killing him instantly. The proof shows that those in charge of the Hampton train did not give any warning signal, either by blowing the whistle or ringing the bell, of the intention of backing the train. The deceased was in a position between the cars where he could not see the train backing. The two conductors, Clifford and Hampton, were in a position to see the train backing, and were within, according to proof, a half or two car lengths of the place where deceased was killed, and where they could have seen him.

The appellant contends that the court should have given a peremptory instruction to find for it. We are of the opinion that the court was right in refusing such instruction.

Appellant also complains that the court erred in submitting to the jury the question of

negligence of those in charge of Hampton's train, which was the train that killed the deceased. Under the proof in this case, it was negligence on the part of those in charge of the Hampton train to back in on this siding without giving any warning thereof by blowing the whistle or ringing the bell. It was also negligence on the part of Clifford in permitting this train to be backed in on this siding without making some effort to prevent it, or without giving Otis some warning of its approach.

The appellant contends that the noise the train made in moving ought to have been sufficient warning to him. It is possibly true that he could have heard the movement of the train, but it was not notice to him that it was moving on the long siding, as there were several other tracks at that point, and he might have heard it, and thought it was moving on some other track; and he could not have told from the noise whether it was backing or going forward.

The appellant contends that the court erred in instructing the jury that appellee could recover upon proof of ordinary negligence upon the part of those in charge of the train, and cites as authority for its position several decisions of this court—all of them, however, decided prior to the adoption of the new Constitution, and the enactment of section 6 of the Kentucky Statutes of 1903. By these sections it is provided that, whenever the death of a person shall result from an injury inflicted by negligence or wrongful acts, then in every such case damages may be recovered for such death from the person or persons, company or companies, corporation or corporations, their agents or servants, causing the same, and when the act is willful, or the negligence gross, punitive damages may be recovered. See *Linck's Adm'r v. Louisville & N. R. Co.* (Ky.) 54 S. W. 184; *Illinois Cent. R. Co. v. Coleman* (Ky.) 59 S. W. 13; and *Cincinnati, N. O. & T. P. Ry. Co. v. Cook's Adm'r* (Ky.) 67 S. W. 383. In this last case the court said: "Where death does not result, there can be a recovery for only the gross negligence of his superior who was engaged with him in the same service; but where death results, and the action is under the statute, it controls, and there may be a recovery for ordinary negligence of the superior servants engaged in the same employment."

The appellant contends that the court erred to its prejudice in its instruction defining "ordinary care." The instruction is as follows: "Ordinary care," as used in these instructions, is that degree of care which ordinarily prudent and skillful men usually exercise under circumstances and in occupations similar to those proven in this case, and the failure to exercise such care is negligence." It will be noticed that, if this instruction was not proper, it was as hurtful to appellee as it was to appellant, because the court, in its instructions, required ordinary care of appellee's in-

testate, before he could be allowed to recover anything. The objection of the appellant is to the word "skillful" in this instruction. This word is not commonly used by the courts in the definition of "ordinary care," but it is hard to distinguish the difference between the instruction as given by the court and the meaning of the ordinary definition. By this instruction, no especial skill was required. Ordinary skill is supposed to be possessed by ordinary men in conducting the business in which they are engaged. The word "skillful," as used, did not add a new, distinct, or different standard, but only required what should be required of ordinary men in the business in which they are engaged. It would have been better if the court had conformed to the ordinary definition, but we are not prepared to say that the instruction as given was erroneous; and, if erroneous, it was only technically so, and not prejudicial. It appears from the record that the appellee offered an instruction defining "ordinary care" in proper form, which was objected to by appellant, and the court sustained its objection, and it also appears that appellant did not offer any instruction on this point. It appears to us that where, upon its objection, a proper instruction defining "ordinary care" was refused, and where it offered no instruction on the subject, it cannot be allowed to complain that no proper instruction was given. See *Young v. Illinois Cent. R. Co.* (Ky.) 69 S. W. 1093, and *New York Life Ins. Co. v. Brown's Adm'r* (Ky.) 66 S. W. 613.

Wherefore the judgment of the lower court is affirmed.

UNDERHILL v. MURPHY et al.

(Court of Appeals of Kentucky. Feb. 12, 1904.)

STRIKE INJUNCTION—BUSINESS AS PROPERTY—PUNISHING CONTEMPT—TRENCHING ON DOMAIN OF CRIMINAL LAW—BONDS TO KEEP PEACE—ADEQUATE REMEDY.

1. The right to carry on a business and to fulfill contracts made in the course thereof is a property right, falling within the constitutional guaranty of the right to acquire and protect property, which injunction may issue to protect.

2. The Constitution guarantees the right to acquire and protect property. Ky. St. 1903, § 1291, provides that a court shall not impose for contempt more than \$30 as a fine, or imprisonment for more than 30 hours, without the intervention of a jury. *Held*, that a strike injunction to protect plaintiff's business and prevent violence toward and intimidation of his employes could not be denied on the theory that defendants' acts were of a criminal nature, and that to punish them as contempts would amount to an assumption of criminal jurisdiction to be exercised without the intervention of a jury.

3. A strike injunction to protect plaintiff's business and prevent violence toward and intimidation of his employes cannot be refused on the ground that Cr. Code Prac. §§ 383-392, furnishes an adequate remedy by providing for the prevention of offenses by requiring per-

sons to give security to keep the peace and be of good behavior, the proceedings to be begun by warrant issued in the name of the commonwealth, and so prosecuted, and the bond running to the commonwealth.

Paynter and Nunn, JJ., dissenting.

Appeal from Circuit Court, Kenton County. "To be officially reported."

Suit by John T. Underhill against Walter Murphy and others. Judgment for defendants, and plaintiff appeals. Reversed.

Orlando P. Schmidt, for appellant. J. L. Elliston, for appellees.

HOBSON, J. Appellant, John T. Underhill, is a plumber engaged in business in Covington, Ky., taking contracts in plumbing, and has in his employ journeymen plumbers. He has followed the occupation for a number of years, and has built up a large and lucrative business in Covington and adjoining cities, which is of great pecuniary value to him. He had on hand a number of important contracts in plumbing, including the contract for the plumbing in the new courthouse in Covington. The appellees, with the exception of Horgan, had been employed by Underhill in his plumbing business, working for wages. The appellees were members of a union organized for the protection of labor. A difference arose between Underhill and his workmen, who were members of the union, in reference to its relations with employers, and they then quit his employment. About this time a general strike occurred among those employed by master plumbers in Covington. In order to carry out his contracts when his employes left him, Underhill employed nonunion men to work in place of the union men who had quit. The appellees thereupon undertook to prevent the nonunion men from working by following them from place to place about the city, assembling about Underhill's shop, denouncing and threatening Underhill and his workmen. This continued for several weeks, and Underhill filed suit asking an injunction restraining the unlawful acts of the defendants. He alleged that he depended upon his business for a livelihood; that for three weeks continuously next prior to the institution of the action the appellees, in pursuance of a conspiracy to break up his business, had collected together daily near and in sight of his place of business, where they could observe every one going into or coming out of it, and by threats, intimidation, force, and violence attempted to compel his employes to quit his service; that they followed him and his employes to the places in the city where they were engaged at work carrying out contracts previously made by him, and there insulted them with opprobrious epithets, threatened them with violence, and assaulted them, so that on several occasions he had been compelled to call in the police force of the city to escort them away from the place, and protect them from the violence of the appellees; that the de-

fendants threatened to assault and beat him and his employes, to prevent any one from working for him, to prevent his customers from coming to or employing him, to destroy his good will, and to break up his business; and that all of these unlawful acts had continued from day to day and from hour to hour, in pursuance of the conspiracy formed between appellees; that the appellees were insolvent, and had no property subject to execution out of which the damages sustained by him might be made, and that, unless restrained by the court, they would proceed to carry out their threats, and completely break up his business and destroy its good will. Proof was heard on a motion for an injunction, which fully sustained the allegations of the petition. In fact, the proof is perhaps stronger than the pleading. It shows that the appellees not only picketed plaintiff's place of business, but that, to protect his employes from violence, he had to take them to and from the places where they worked in a conveyance, and that they had to enter his place of business through the alley and back door and over rear fences; and even then one of them was waylaid and beaten by three of the appellees. The proof shows a determined effort by conspiracy on the part of the defendants to break up and destroy the plaintiff's business by force and violence unless he acceded to the demands of the union to which they belonged. At the conclusion of the evidence the court sustained a demurrer to the petition, and overruled the motion to grant the injunction. The plaintiff declining to plead further, the action was dismissed.

When a man has, by years of toil and fair dealing with his customers, built up a valuable business and good will, he is as much entitled to protection by the law in this species of property as in the home that shelters him, or the coat that protects him from the winter's cold. The right of the plaintiff to carry on his business and to carry out the contracts which he had made was a valuable property right, and no less intrinsically property than if the same amount of money had been invested in a stock of merchandise or a city lot. If the defendants had conspired together by force and violence to burn up the merchandise, or to carry off the surface of the lot, upon elementary principles, the chancellor would protect the plaintiff from the destruction of his property. The acts of the defendant as truly destroyed the plaintiff's property when they broke up his business by force and intimidation as they would have done in the case of visible property by burning it or carrying it off. Among the inalienable rights which by the first section of the state Constitution are guaranteed as inherent in all men is "the right of acquiring and protecting property." The right to acquire and protect property is as sacred in the case of intangible property as tangible, and an injunction may be granted to protect intangible rights no less than those that are tangible.

The learned circuit judge refused to interfere on the ground that the acts committed by the defendants are criminal in nature, and punishable by the police department; that, if he had jurisdiction to enjoin the commission of the acts, it necessarily followed that he had jurisdiction to enforce a penalty for a violation of his order; and that this would amount, in substance, to holding that he could try and convict the defendants for a criminal act without the intervention of a jury. We cannot concur in this reasoning. If the defendants were undermining the plaintiff's house, or about to slide it with his family in it out into the Ohio river, an injunction would not be refused on the idea that, if they thus drowned any of the people in the house, they might be punished for murder, or, if they destroyed the house only, they might be indicted under the statute for the willful destruction of private property. The reason is plain: the punishment of the defendants for murder or for the destruction of the house, while it would vindicate the majesty of the law, would not help the plaintiff in any way. To relegate him to the processes of the criminal law is to allow his property to be destroyed, and to give him no remedy therefor but the satisfaction of seeing the wrongdoers punished. The inherent and inalienable right of acquiring and protecting property which is guaranteed by the Constitution means nothing if it means only this. If a man must stand by and see his property destroyed, and has no remedy but the slow process of the criminal law, which only punishes the offender, but restores nothing to him, then the constitutional guaranty of the enjoyment of life, liberty, and property under the law is a meaningless generality. If, in this case, the defendants are fined in the police court, this will not restore to the plaintiff the loss he has sustained by reason of the interruption of his business and his consequent inability to carry out his contracts. When his customers are driven away, and the good will of his business is destroyed, it will be too late, so far as he is concerned, for the punishment of the appellees by the criminal law to re-establish his ruined business, or even prevent future loss. If the circuit court had granted the injunction, and the defendants had disobeyed it, and he had punished them for contempt, the punishment would have been for their disobedience of the order of the court, regardless of whether their acts were also a violation of the criminal law of the land for which they might be indicted and punished in the criminal court. His judgment punishing them for contempt would have been no bar to the criminal proceeding against them for their violation of the law, and would not have affected this proceeding in any way. His judgment would have established nothing more than that they were guilty of contempt of court in disobeying his orders. Whether they were also guilty of a criminal

offense would have to be tried in the proper forum, and not in this action. The power of a court to punish for contempt is as old as the common law, and inherent in every court. The punishment for contempt would relate only to acts done after the injunction was granted, in disobedience of it; and even in this proceeding the defendants are protected as to a jury trial by section 1291, Ky. St. 1908, which provides: "A court shall not for contempt impose upon the offender a fine exceeding thirty dollars (\$30.00), or imprison him exceeding thirty hours, without the intervention of a jury."

It is also urged that the plaintiff had an adequate remedy under the Criminal Code by having the defendants to give security to keep the peace and be of good behavior. Cr. Code Prac. § 382. The rule that an injunction will not be granted where there is an adequate remedy at law refers to legal remedies, and not to criminal proceedings. In no case has it ever been otherwise applied, so far as we can find. The proceeding to require security to keep the peace is given in the Code under title 10, which embraces proceedings to prevent the commission of offenses. It looks to the prevention of offenses, and not to the redress of private wrongs. It is begun by a warrant issued in the name of the commonwealth, and is a prosecution by the commonwealth, under the control of its officers. If a bond is required, it is taken to the commonwealth. Cr. Code Prac. §§ 383-392. When the plaintiff's property is about to be destroyed, he is entitled to a remedy in his own name, and which he can himself control to protect him in the enjoyment of his own. The fact that the commonwealth might also take out a proceeding to require the defendant to give security for good behavior is immaterial, for both proceedings may be prosecuted at the same time—one in the criminal court by the commonwealth, and the other in equity by the plaintiff; one to prevent the commission of offenses, the other to preserve the plaintiff's property from destruction. Were the rule otherwise, an injunction could never be granted in the case of repeated trespasses, for in such cases the defendants might be put under bond for good behavior under the Criminal Code. But it has been uniformly held by this court that in such cases an injunction will lie. *Preston v. Preston*, 85 Ky. 16, 2 S. W. 501; *Ellis v. Wren*, 84 Ky. 254, 1 S. W. 440; *Walker v. Leslie*, 90 Ky. 842, 14 S. W. 682. The rule is universal. High on Injunctions, § 702.

The question before us has often arisen, and the decisions uniformly, so far as we can find, uphold the power of the chancellor to interfere by injunction in cases of this character. The subject was exhaustively considered by the United States Supreme Court in *Re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092, where the court thus stated its conclusion: "Something more than

the threatened commission of an offense against the laws of the land is necessary to call into exercise the injunctive powers of the court. There must be some interferences, actual or threatened, with property or rights of a pecuniary nature. But when such interferences appear the jurisdiction of a court of equity arises, and is not destroyed by the fact that they are accompanied by, or are themselves, violations of the criminal law." In *Vegelahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443—a case very much like this—the court, in answer to the objections made here, said: "Nor does the fact that the defendants' acts might subject them to an indictment prevent a court of equity from issuing an injunction. It is true that ordinarily a court of equity will decline to issue an injunction to restrain the commission of a crime; but a continuing injury to property or business may be enjoined, although it may also be punishable as a nuisance or other crime." So, in *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881, which was also a case very like this, the court, upholding the jurisdiction of the chancellor, said the cases were all against the defendant's contention. In *Beck v. Teamsters' Protective Union*, 118 Mich. 518, 77 N. W. 21, 42 L. R. A. 407, 74 Am. St. Rep. 421, which was also a similar case, the Supreme Court of Michigan said, "While some writers have doubted the remedy by injunction, it is now settled beyond dispute." To same effect, see *O'Neil v. Behanna*, 182 Pa. 237, 37 Atl. 848, 38 L. R. A. 382, 61 Am. St. Rep. 702; *Flaccus v. Smith*, 199 Pa. 128, 48 Atl. 894, 54 L. R. A. 640, 85 Am. St. Rep. 779; *Shoe Company v. Saxey*, 131 Mo. 212, 32 S. W. 1006; *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330; *Jackson v. Stanfield*, 137 Ind. 592, 36 N. E. 345, 37 N. E. 14, 23 L. R. A. 588; *Mobile v. L. & N. R. R. Co.*, 84 Ala. 115, 4 South. 108, 5 Am. St. Rep. 342; High on Injunctions, §§ 20, 745, 752, 770. The constitutional right of free speech may not be infringed. Peaceful persuasions or lawful appeals to reason or sentiment may not be interfered with. But when intimidation and violence are resorted to, and thereby property is destroyed, or its safety imperiled, the chancellor may properly, by injunction, protect the owner of the property in the enjoyment of his constitutional right that his property shall not be taken from him. The enforcement of the criminal law is for the criminal court, but where the breach of the criminal law is also a violation of a property right the chancellor may interpose by injunction to protect property.

The judgment appealed from is reversed, and the cause is remanded, with directions to overrule the demurrer to the petition and grant the temporary injunction as herein indicated.

PAYNTER and NUNN, JJ., dissent.

UNITED STATES CAST IRON PIPE & FOUNDRY CO. v. GABLE.

(Court of Appeals of Kentucky. Feb. 9, 1904.)

SERVANT'S INJURIES—PETITION—SUFFICIENCY—APPEAL—QUESTIONS PRESENTED.

1. Where there is no bill of evidence in the record, the only thing for the consideration of the Court of Appeals is whether the pleadings support the verdict.

2. A petition for servant's injuries, alleging that defendant negligently suffered a walkway on its premises to get out of repair, so that the covering to a waste pool of hot water became unsafe, which was known to the employer, and could have been known to its superior agents by ordinary care, but was unknown to plaintiff, and could not have been discovered by him by ordinary diligence; and that plaintiff, without fault, fell onto this covering, when it gave way, letting him fall into the boiling water—was sufficient to support a verdict for plaintiff.

Appeal from Circuit Court, Jefferson County, Common Pleas Division.

"Not to be officially reported."

Action by John Gable against the United States Cast Iron Pipe & Foundry Company. From a judgment for plaintiff, defendant appeals. Affirmed.

O'Neal & O'Neal, for appellant. Gardner & Moxley, for appellee.

O'REAR, J. There is no bill of evidence in this record. Consequently the only thing we can consider is whether the pleadings support the verdict. The petition alleges, in substance, that appellant, the employer, negligently suffered a walkway on its premises, used by its workmen, including appellee, to get out of repair, so that the covering to a waste pool of hot water was allowed to become rotten and unsafe, which fact was known to the employer, and could have been known to its superior agents in authority, by the exercise of ordinary care, but was unknown to the plaintiff, and which he could not have discovered by ordinary diligence. that the plaintiff fell onto this covering without fault on his part, when it gave way, letting him into the boiling water, whereby he was injured. The instructions seem to conform substantially to the pleadings. The pleadings are sufficient to support the verdict.

Judgment affirmed, with damages.

THOMPSON et al. v. RAGAN.

(Court of Appeals of Kentucky. Feb. 9, 1904.)

BANKRUPTCY—ATTACHMENT—DISSOLUTION—COURTS—JURISDICTION—MOTION BY TRUSTEE—DEFENSES.

1. Bankr. Act July 1, 1898, c. 541, § 67, subsec. "c," 30 Stat. 564. [U. S. Comp. St. 1901, p. 3449], providing that a lien obtained by attachment against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of bankruptcy if the lien was obtained while he was insolvent, and the enforcement will work a preference, etc., is binding on the state courts.

2. Where a debtor was adjudged a bankrupt within four months after the levy of an attachment, whereupon his trustee moved to vacate the attachment, as authorized by Bankr. Act July 1, 1898, c. 541, § 67, subsec. "c," 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], on the ground that its enforcement would create a preference, and that it was obtained while the debtor was insolvent, it was no defense that the property seized was exempt from execution in the state of the bankrupt's residence, and that his entire property, including that levied on, was less than his statutory exemption in such state, so that no part thereof could be paid to creditors; such question being for the determination of the federal court.

Appeal from Circuit Court, Henderson County.

"To be officially reported."

Action by G. W. Ragan against Charles Thompson and another. From an order denying the petition of Jefferson D. Smith, trustee in bankruptcy of defendant Thompson, to vacate an attachment, he appeals. Reversed.

John F. Lockett and A. W. & A. F. Funkhouser, for appellant. Montgomery Merritt, for appellee.

BURNAM, C. J. The appellee, G. W. Ragan, brought this action against the defendant Charles Thompson in the Henderson circuit court to enforce the payment of a note for \$224.25 executed to him by defendant Thompson on the 20th of January, 1898, and at the same time sued out a general attachment upon the ground that both he and the defendant were residents of the state of Indiana, which was levied by the sheriff upon an undivided one-third interest owned by him in 16 head of cattle and 12 head of hogs, which were subsequently sold under an order of the judge of the Henderson circuit court for the sum of \$215. On the 9th of May following, the appellant Jefferson D. Smith, of Evansville, Ind., filed his petition to be made a party to the proceeding, and alleged, in substance, that, immediately after the levy of the attachment, Charles Thompson filed his voluntary petition in bankruptcy in the District Court of the United States for the District of Indiana, and that on the 7th day of March, 1900, he had been adjudged a bankrupt, within the meaning of the acts of Congress relating to bankruptcy; that he had been duly appointed trustee of the estate of the bankrupt, and had executed bond and accepted the trust. Copies of the adjudication in bankruptcy and of the order appointing the petitioner trustee were filed with, and as a part of, his petition. He alleged that appellee's attachment was procured to be issued and levied at a time when defendant was insolvent, and that the enforcement thereof would work a preference in favor of the plaintiff, as one of the creditors of Thompson, and asked that the lien created by the levy of the attachment be dissolved, and the attached property be turned over to him as trustee of the estate of the bankrupt, or that the proceeds thereof should be paid over to him. Plaintiff, by way of reply, alleged that, under the

provisions of the Revised Statutes of the state of Indiana, where Thompson resided, money or property of the value of \$600 was exempt to a man of family from the payment of debts; that Thompson was, at the time of the filing of his petition in bankruptcy, entitled to these exemptions; that, in the schedule of assets filed by Thompson with his petition in bankruptcy, the entire amount, including the property involved in this suit, was of less value than \$600; that no assets of any kind came into the hands of his trustee, or could be made available for the payments of his debts; and that the fund in controversy in this case, if turned over to the trustee, would not be used for the payment of his debts. The trustee demurred generally to the reply, which was overruled, and, declining to plead further, the trial court adjudged that the attachment should be sustained; that the sheriff be allowed \$12.90 for his services, and the further sum of \$42.50 to be paid by him to J. W. Todd for taking care of the cattle; and that the remainder of the \$215 be paid to the plaintiff, Ragan; and Smith, as trustee, has appealed.

Subsection 4 of section 8, art. 1, of the Constitution of the United States, provides "that Congress shall have the power to establish uniform laws on the subject of bankruptcy throughout the United States." Pursuant to this provision of the federal Constitution, the Congress of the United States on July 1, 1898, passed an act to establish a uniform system of bankruptcy throughout the United States. Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]. Subsection "c" of section 67 of this act provides: "A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against the person within four months before the filing of a petition in bankruptcy by or against such person, shall be dissolved by the adjudication of such person to be a bankrupt if it appears that the said lien was obtained and permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or that such lien was sought and permitted in fraud of the provisions of the act; or if the dissolution of such lien would militate against the best interests of the estate of such person the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened." In *Bank of Columbia v. Overstreet*, 73 Ky. 151, it was decided by this court that all laws of Congress enacted pursuant to the powers dele-

gated to it by the federal Constitution were binding upon the state as well as the federal courts, and that they were bound to respect the rights acquired under them. This decision was approved in *Wood v. Carr* (Ky.) 73 S. W. 762. As the petition in bankruptcy of appellee was filed within four months after the levy of the attachment, and the trustee intervened in this proceeding, and sought to have the proceeds of the attached property turned over to him under the provisions of section 67 of the federal bankrupt law, we are of the opinion that his prayer should have been sustained to this extent, viz.: The attachment should have been sustained, and the costs incurred, including the allowance to the sheriff and to Todd for keeping the live stock prior to its sale, paid out of the proceeds of the attached property, and the balance of the attached fund adjudged to the trustee in bankruptcy. The question whether this property was exempt under the laws of Indiana is properly a question for the determination of the federal court in the bankrupt proceedings.

For reasons indicated, the judgment is reversed, and the cause remanded for proceedings consistent with this opinion.

JORDAN et ux. v. ABNEY et al.

(Supreme Court of Texas. Feb. 8, 1904.)

CONTRACT TO LEAVE PROPERTY BY WILL—SPECIFIC PERFORMANCE—PETITION—TRUST—STATUTE OF FRAUDS—ADOPTION—STATUTE.

1. The right of inheritance from adoption arises by operation of law, from the acts of the parties in compliance with the statute, and does not depend on or arise from contract.

2. A contract between two persons, upon a valuable consideration, that one will, at his death, leave property to the other, is enforceable.

3. Where plaintiff and decedent entered into a contract, not shown to be within the statute of frauds, by which decedent agreed to leave property to plaintiff by will, the plaintiff is entitled to specific performance as to property belonging to decedent at death.

4. Where plaintiff and decedent entered into a contract, not shown to be within the statute of frauds, by which decedent agreed to leave property to plaintiff by will, the fact that decedent left a will devising the property to his widow does not defeat an action for the specific performance of the contract.

5. Where testator agreed with plaintiff to leave his property to her by his will, and, in violation thereof, devised all of his property to his widow, a petition in an action for specific performance of the contract, in which it is not alleged that the property was devised to the widow on any trust created by the testator, does not state facts sufficient to create a trust for the benefit of the plaintiff in testator's interest in community property devised by him to his wife.

Certified Questions from Court of Civil Appeals of Third Supreme Judicial District.

Action by L. L. Jordan and wife against W. B. Abney, administrator, and others.

¶ 1. See *Specific Performance*, vol. 44, Cent. Dig. § 222.

Questions certified from the Court of Civil Appeals. Questions answered.

Jacob C. Baldwin, M. G. Fakes, and M. M. White, for appellants. W. B. Abney, for appellees.

WILLIAMS, J. The certificate of the Court of Civil Appeals states that exceptions of the defendants to the plaintiffs' petition were sustained, and the cause dismissed, but does not give the exceptions urged. The certificate also shows that plaintiffs amended their petition by referring to certain places in it, and adding certain words specified in the trial amendment. With the words supplied by the trial amendment inserted at the proper places, as well as we can ascertain them, the petition on which the questions arise is as follows:

"Come as plaintiffs Mrs. Daisy F. Jordan, joined by her husband, Lawrence L. Jordan, and, leave of the court being requested and obtained, file this, their first amended original petition, filed in lieu of their original petition filed on September 11, 1902, with their grounds of complaint, against John McIlhany, of Lampasas county, Texas; W. B. Abney, of Lampasas county, Texas, in his capacity as administrator of the estate of Harriet E. McIlhany; Wm. B. Frith, of Frostburg, Maryland; Joseph S. Whittington and John W. Whittington, both of Martinsburg, Berkley county, West Virginia; John Barrett, Joseph Barrett, Sam Barrett, and Mollie Barrett Athey, all the said Barretts being residents of Bakerton, Jefferson county, West Virginia; John T. Dorsey, of Kearneysville, Jefferson county, West Virginia; and W. H. Golden and wife, Elizabeth, of New York City, New York, as defendants.

"Aforesaid plaintiff Mrs. Daisy F. Jordan would represent and state to the court: That she was born at Leetown, West Virginia, in the year 1868; her parents being John W. Frith and Phoebe Ann Frith, both now long since deceased. That her said mother died when plaintiff was but a few months old. That her mother left a sister, namely, one Harriet E., who married one Joseph C. Ogle, of Galveston, Texas. That, some six years after the death of plaintiff's said mother, her aforesaid uncle and aunt, namely, Joseph C. and Harriet E. Ogle, having no children of their own, offered to adopt and did adopt the plaintiff. That said plaintiff's father and said Ogle and wife entered into a contract by which it was agreed that said plaintiff's father would surrender his said child to them; that they would rear said child, and legally adopt it as their own, and leave her their property at their death; and that at their death said plaintiff, as their said child, should and would have their property. That prior to said time, and shortly before the death of plaintiff's said mother, said Joseph C. and Harriet E. Ogle did agree and contract with plaintiff's said father and mother to take said plaintiff as their child, to rear her

as their own child, and to adopt said plaintiff. That in accordance with the aforesaid contract, and that in furtherance of said contract and in compliance with its terms, said plaintiff was carried by her said aunt to Galveston, from her home in West Virginia—she being about six years old at the time; placed in the family of her said uncle and aunt; taught by them to look upon them as her father and mother; not allowed to visit or correspond with her own father, her sisters and brothers, but estranged and weaned away from her old family ties. That she took the name of Ogle; knew and had no other name; looked upon her uncle and aunt as her own father and mother; gave them all love, obedience, and service that a daughter could give.

"Plaintiff would further state: That she was taught and led to believe, and was told by her said adopted parents, that she was their adopted child; that at their death she would inherit as their child, and acquire all property of which they died possessed; that she was their daughter, and she was led to believe that they would carry out said contract with her father, and leave her all their property at the death of both of them. That she was held out to the world by her said uncle and aunt as being their daughter, and always regarded and considered herself so to be. Plaintiff now sets out and charges the truth to be that she was their adopted child, and, as such child, entitled to their property at their death—they, her said adopted parents, never, at least since said adoption, having any children of their own, or any child or children or their descendants surviving their death; that, if they ever had a child of their own, it died prior to plaintiff's adoption.

"Plaintiff would further state that, when she was about fourteen years old, her said adopted parents purchased a ranch in Lampasas county, abandoning their old home in Galveston; that the said ranch consisted of the following tracts or parcels of land, the same being, lying, and located in the aforesaid county of Lampasas, state of Texas: [Here follows a description of the land by metes and bounds.]

"Plaintiff would further state: That she and her said adopted parents moved to Lampasas county, as aforesaid, on the foregoing property. That while on said ranch she not only performed daily household duties, which she had all along been performing since being old enough so to do, having all along since said adoption engaged actively in the household work, but that she assisted her uncle in outdoor work on the ranch, looking after the cattle, etc., and continued so to do as long as she remained with her said uncle and aunt, both prior and subsequent to her marriage. That on or about December 27, 1888, plaintiff married her coplaintiff, Lawrence L. Jordan, with the consent of her said adopted parents; she being married under the name of Daisy F. Ogle. That her said adopted father died

in the year 1894, leaving a will in which he devised plaintiff two small tracts of land, but left the bulk of his said estate, consisting of personal property and the foregoing described lands, which was community property of himself and wife, to his said wife. That plaintiff at said time gave no thought to said will or her adoption papers, she considering, and her adopted mother considering, it to be the wish and intent of said Joseph C. Ogle that his said wife should enjoy the estate during her lifetime, and at her death the same should and would go to plaintiff, as their child. That her said adopted mother so took said estate, considering the same to be her's only for life, and that the same was to go to said plaintiff at her death, and her said adopted mother took said estate charged with said trust. That she remained in possession thereof by and with the consent and approval of this plaintiff Daisy F. Jordan and her husband, always recognizing plaintiff's right therein, and agreeing with plaintiff to carry out said contract, and leading plaintiff to believe that she had been duly and legally adopted, and that after the death of said J. C. Ogle the plaintiff Daisy F. Jordan continued to live in the house of her said adopted mother for a considerable length of time, and continued to work for her, rendering valuable services. That she rented a boarding house and kept boarders for a short period, and turned over to her the revenues and gains therefrom, and worked for her in a great many other ways, under the express promise and agreement from her that she would carry out said contract with her father, and leave her all of said property at her death; and the said Harriet E. Ogle, in consideration of said services, care, and attention during the time she was a widow, agreed with plaintiff to carry out said contract, and leave her all her property at her death.

"Plaintiff would state: That she continued to give her said aunt all respect, love, and obedience as a child after the death of her said adopted father. That her said aunt considered plaintiff her child, and had no intent or thought but that said plaintiff should and would have all of said property as aforesaid. That her said aunt did, after her husband's death, and as a single woman, ratify the said contract of adoption, and expressly agree to carry out the terms thereof; agreeing with said plaintiff to leave her all of her property at her said adopted mother's death. That never at any time were the relations of mother and child changed. That the plaintiff gave to her said adopted mother a great deal of her time and attention while she remained a widow. That her said aunt continued to look upon plaintiff as her daughter; did so hold her out to the world; and publicly declared that said plaintiff was her daughter, and would have all of her property at her said death. That she was so held out by her said adopted

mother up to the time of her death. That some eighteen months prior to her said adopted mother's death, which occurred on or about May —, 1902, she married one John McIlhany, named as defendant in this cause. That W. B. Abney, named as defendant, has qualified as administrator of the estate of plaintiff's said deceased aunt and adopted mother. That John W. and Joseph S. Whittington are the surviving brothers of said deceased; the same being the sole surviving next of kin; deceased's father and mother having died long prior to her said death. That the Barretts named as defendants are the sole surviving children of one of the sisters of deceased, who has long since died; the other defendants being the brothers and sisters of plaintiff, and all of her said brothers and sisters. That, as before recited, plaintiff's deceased adopted mother left surviving her the two brothers afore named, and the children of her two sisters afore recited; she (the said deceased) having had two brothers and two sisters. Whence the foregoing parties, as the sole surviving next of kin, have been made parties to this suit.

"Plaintiff would further state that, after the death of her said aunt (she dying suddenly and intestate), she had all the proper records searched for her papers of adoption, which she had all along been taught and led to believe had been properly filed as required by law; that, after diligent search, she finds that no such papers have been filed, but said instrument of adoption was made out and signed by J. C. Ogle and wife, Harriet E. Ogle, and acknowledged by them before some notary public, as required by law, and were in the custody of Harriet E. Ogle, or some other person, at the time of her death, though never filed and recorded. Plaintiff now alleges and charges the truth to be that said papers (that is, the original papers of adoption) are in the custody and control of defendant W. B. Abney; he being the administrator as aforesaid, and having the custody of all papers belonging to the estate of said plaintiff's adopted mother. The said W. B. Abney is hereby notified to produce the aforesaid papers of adoption on final trial hereof, or secondary evidence will otherwise be offered to prove the contents of the same.

"Plaintiff would further state that she has faithfully carried out the terms of adoption on her part; that she rendered affectionate, loving service to her said adopted parents as aforesaid, as of a child to its parents, under the terms of the aforesaid contract of adoption entered into between her parents and her said deceased uncle and aunt; that she is entitled to a full and complete carrying out of the terms of said contract of adoption.

"Plaintiff would further state that she is rightfully entitled to all the lands of which the deceased, Harriet E. McIlhany, died seised and possessed, or in which she pos-

sessed any interest whatsoever, and to all of her personal property, of whatsoever description.

"Plaintiff would further state that aforesaid estate is now being administered upon in the probate court of Lampasas county, in the hands of W. B. Abney, defendant, as administrator, and is subject to division under the same; that her interest as next of kin amounts to very little; that said administrator refuses to recognize her as being an adopted child, the sole heir, and entitled to the estate as such. Whence she has been compelled to bring this suit in this court to set up and establish her rights as an adopted child, to set up and establish aforesaid adoption, and, furthermore, to seek equitable relief, and ask, as she now asks, for a specific performance of the aforesaid contract of adoption.

"Wherefore, process having been issued according to law, plaintiff prays that she be named as the adopted child of said Joseph C. Ogle and Harriet E. McIlhany; that she be declared the legal heir and child of Harriet McIlhany, deceased, and, as such, inherit as her sole surviving child; that she may be decreed a specific performance of the contract of adoption; that the title to all the realty belonging to said Harriet E. McIlhany be vested in her, and all of the personality, of any nature whatsoever; that all writs necessary may be issued in her behalf. Plaintiff prays for all further and general relief, both at law and in equity."

"There appears to be no direct authority in this state as to whether a specific performance can be had of a verbal contract to adopt as an heir, or to devise property to a person at death. In other states there is a direct conflict of authority. The following cases hold that specific performance can be had of a verbal contract to adopt: *Healey et al. v. Simpson et al.* (Mo. Sup.) 20 S. W. 881; *Wright v. Tinsley*, 30 Mo. 389; *Nowack v. Berger* (Mo. Sup.) 34 S. W. 489, 31 L. R. A. 810, 54 Am. St. Rep. 663; *Kofka v. Rosicky* (Neb.) 59 N. W. 783, 25 L. R. A. 207, 43 Am. St. Rep. 685; *Wright v. Wright* (Mich.) 58 N. W. 54, 23 L. R. A. 196; *Krell v. Codman et al.* (Mass.) 28 N. E. 578, 14 L. R. A. 860, 26 Am. St. Rep. 280; *Van Tine v. Van Tine* (N. J. Ch.) 15 Atl. 249, 1 L. R. A. 56; *Johnson v. Hubbell*, 10 N. J. Eq. 332, 64 Am. Dec. 778, where an extensive note will be found. The following authorities deny the right to such relief: *Lone v. Hewitt*, 44 Iowa, 363; *Tyler v. Reynolds*, 53 Iowa, 146, 4 N. W. 902; *Shearer v. Weaver*, 56 Iowa, 578, 9 N. W. 907; *Austin v. Davis* (Ind. Sup.) 26 N. E. 890, 12 L. R. A. 120, 25 Am. St. Rep. 456; *Wallace v. Long*, 105 Ind. 523, 5 N. E. 666, 55 Am. Rep. 222; *Johns v. Johns*, 67 Ind. 440; *Renz v. Drury* (Kan.) 45 Pac. 71."

The questions propounded are these:

"(1) Will an action lie for specific performance of a verbal contract to adopt a

child as an heir? And, if so, are the facts alleged in the pleadings sufficient to entitle the plaintiff to that relief?

"(2) Will an action lie to enforce the specific performance of a verbal contract to leave property to a person at death? And, if so, are the facts alleged in the pleadings sufficient to entitle the plaintiff to that relief, in view of the allegation that a will was made by Joseph C. Ogle, devising his property, with a small exception, to his surviving wife?

"(3) Are the facts alleged sufficient to create a trust for the benefit of the plaintiff in Joseph C. Ogle's interest in the community property devised to his wife?

"(4) Are the facts alleged sufficient to show such ratification of the original contract of adoption, or such execution of a new contract, on the part of Harriet E. McIlhany (née Ogle), after the death of her husband, and such consideration therefor, as entitled plaintiff to recover thereon."

1. The question as to specific performance of a verbal contract to adopt, merely, does not seem to arise, as the allegations are of a contract to adopt, and also to leave property at death. We are strongly inclined to think there is a distinction between the two classes of contracts, which some of the authorities have not observed. This is a question which we do not purpose now to discuss, since we do not regard it as involved in the case made by the petition. The mere contract to adopt, followed by the assumption and performance of the duties of parent and child, and the execution of adoption papers, not filed for record, as alleged, do not comply with the statute regulating adoption, and do not establish the right of inheritance thereby provided as a consequence of lawful adoption. This right arises by operation of law from the acts of the parties made in compliance with the statute, and does not depend on, or arise from, contract.

2. This is the real question in the case. That a contract between two persons, upon valuable consideration, that one will, at his death, leave property to the other, is enforceable, where no statute is contravened, is held by an almost unbroken current of authority, English and American. Such contracts, when sufficiently certain, have been held valid and enforceable, in equity as well as at law, whether they provide for the payment of money, or the leaving of specific property, or of all or a moiety of that which the obligor should leave at his death. They have usually been put in the form of agreements to bequeath by will, but this has not been regarded as an essential feature; agreements to leave the property, or that the obligee should have it at the death of the obligor, being held sufficient. In addition to the cases cited in the certificate, see *Wyche v. Clapp*, 48 Tex. 548, and authorities cited; *Hill v. Gomme*, 1 Beav. 540; *Gollmere v. Battison*, 1 Vern. 48; *Fortescue v. Hennah*,

19 Ves. Jr. 67; Izard v. Middleton, 1 Desaus. 116, and authorities cited in note. The legal effect of this kind of a contract is different from that given by law to mere statutory adoption, and we apprehend it has been through failure to observe this distinction that some of the courts whose decisions are referred to have been led to the conclusion that such contracts are excluded by the statutes allowing adoptions. The latter, as we have pointed out, is not a contract, and statutes authorizing and regulating it do not undertake to regulate contracts. They are intended, rather, to give the right of inheritance, which does not arise from contract, but from the law, while rights such as those upheld in the authorities to which we have referred are created and fixed by contract. The Indiana and Illinois courts refuse to specifically enforce oral contracts of this nature, when they involve land, although partly performed, because they are within the statute of frauds, while other courts, admitting that the statute, unless avoided, applies to the contracts when oral and relating to real estate, hold that performance, such as is here alleged, takes them out of its operation. This question is not now presented, because (1) the certificate does not show that benefit of the statute of frauds was claimed in the exceptions; and (2) the petition does not affirmatively show that the agreements alleged are not evidenced by writing. *Gonzales v. Chartier*, 63 Tex. 37. The original contract with J. C. Ogle, as alleged, is therefore held sufficient to entitle plaintiff to a specific performance of it as to property left, belonging to him at his death. This could not be defeated by the will bequeathing the property to his widow, since that only took effect after death. Authorities before cited. If the case made by the petition should be established, the legal title which passed by the will would be held by Mrs. Ogle and her heirs or devisees as trustees in invitum.

3. We assume that this question refers to a voluntary, express trust, under which Mrs. Ogle agreed to hold the property, and not to the character of trust mentioned above. It is not alleged that the property was bequeathed to her upon any trust created by the testator, by whom alone such a trust could be imposed. We therefore answer the question negatively.

4. The petition expressly alleges an agreement on the part of Mrs. Ogle, after she became competent to contract, that, in consideration of the female plaintiff continuing to perform the specified services and duties, she should have all of Mrs. Ogle's property at her death, and a performance by the plaintiff of all such duties and services. We see no reason to doubt that such agreement, thus performed by plaintiff, was binding on Mrs. Ogle's property left at her decease. The contract made while she was covert did not bind her, and we do not hold that the mere

continuance, after her husband's death, of the pre-existing conditions, would constitute it a contract on her part. A new agreement after her discovery, with all the essentials of a valid contract, is alleged; and this we hold to be sufficient—the statute of frauds apart—to bind the property left at her death.

EASTERN TEXAS RY. CO. v. SCURLOCK.

(Supreme Court of Texas. Feb. 8, 1904.)

NUISANCE—PUBLIC STREET—OCCUPANCY BY RAILROAD COMPANY—DEPRECIATION OF VALUE OF PROPERTY—OPINION EVIDENCE—CROSS-EXAMINATION.

1. In an action for damages from the depreciation in value of property owing to the occupancy of a neighboring street by a railroad company, the evidence of a witness who admits that he does not know the effect upon values which the railroad produced, and undertakes only to state that he himself would prefer the property if the road were not there, and also what other people said to him, is inadmissible.

2. Cross-examination of a property owner, testifying to the sum to which the value of the property has been reduced by the proximity of a nuisance, as to whether he will take that for it and as to what he will take, is proper.

Error from Court of Civil Appeals of First Supreme Judicial District.

Action by J. M. Scurlock against the Eastern Texas Railway Company. From a judgment of the Court of Civil Appeals (75 S. W. 366) affirming a judgment for plaintiff, defendant brings error. Reversed.

E. J. Mantooth and Wilson & Jackson, for plaintiff in error. M. M. Feagin and J. C. Feagin, for defendant in error.

WILLIAMS, J. Defendant in error sought by this action to recover damages resulting from the construction and operation of defendant's depot and railway upon a public street adjacent to his homestead. An element of damage claimed was diminution in the value of the property. The evidence tended to show interference with the comfort and convenience of plaintiff and his family in the use of their home by noise, smoke, cinders, and other circumstances connected with the operation of the road, and that the property had been thereby rendered less suitable for a residence. Other testimony tended to show that notwithstanding these things the market value of the property had not been diminished, but increased, by reason of special benefits resulting from improvement of the street and the location of the road and depot. It is now claimed by the plaintiff in error that the charge of the court authorized the recovery of damage, as for decrease in the value of the property, if its value for use as a residence only was lessened, although its market value generally, because of benefit arising from the presence of the railroad, was as great or greater than it was before the location of the road. The rule of law upon the subject is laid down in the case of *Boyer & Lucas v. St. Louis, San*

Francisco & Texas Railway Co., 8 Tex. Ct. Rep. 347, 76 S. W. 441, and need not be restated. The charges given in this case in terms made the measure of damage the difference in the market values before and after the construction and operation of the road, but contained such repeated directions to the jury that they should, in determining this, consider the purpose for which the property was used, that it was probably calculated to convey the idea that the values for that use were to control, or, at least, to unduly emphasize the fact so often referred to. It is doubtful if plaintiff in error, having asked a special charge in substantially the same language as that used by the court, can complain of this. As the judgment is to be reversed on other points, the objections noticed can be obviated in another trial.

We are of the opinion that the evidence of the witness J. J. Richardson as to the effect of the railroad upon the value of the property should have been excluded. His answers showed he had no knowledge of the value of the property before or after the acts of the defendant complained of, but he was allowed to state what others had said to him, and also his own private preferences upon the subject. Opinions of competent witnesses are admissible on such questions, with proper limitations, one of which is that before being allowed to give opinions they must be shown to possess knowledge sufficient to enable them to form intelligent ones. Unless a witness is thus qualified, he is not in a better position to form an opinion than the jury. Whatever may have been the opportunities of this witness to form an opinion, he candidly admitted that he did not know the effect upon values which the railroad produced, and undertook only to state that he himself would prefer the property if the road were not there, and what other people had said to him. His individual preferences were irrelevant, and the statements of others hearsay. *Southern Pac. Ry. Co. v. Maddox & Co.*, 75 Tex. 305, 12 S. W. 815. The plaintiff having testified in chief that the value of his property before the construction of the railway was \$2,000, and since such construction was \$1,000 or \$1,250, he was asked, on cross-examination, the following questions, to each of which, in succession, objection of his counsel that this was not the rule for arriving at the market value of the property was sustained: "What will you take for your place now?" "Will you take \$1,000 for your place now?" "You say the market value of your place now is \$1,250; will you take that for it?" We are of opinion that the questions were proper cross-examination. The defendant had the right, in all proper ways, to test the good faith and accuracy of the plaintiff's statements in chief, and this was one legitimate method of doing so. That the answer to the questions may not have afforded the proper measure of damage may be true, but with such explana-

tion as the witness might have offered they might have given some help to the jury in determining the fairness and correctness of the witness' statements of values. The judgment is reversed, and the cause remanded.

Reversed and remanded.

WESTERN UNION TELEGRAPH CO. v. SWEARINGIN.

(Supreme Court of Texas. Feb. 8, 1904.)

TELEGRAPH—NEGLIGENT DELIVERY OF MESSAGE—DAMAGES—PROXIMATE CONSEQUENCES.

1. Damages from a father's failure to be present at his son's funeral on account of delay in the transmission of a telegram reading, "Come, Frank is dead," are within the contemplation of the parties to the contract of transmission, and are recoverable, though a reply message from the father would have been necessary to secure a postponement of the funeral so as to admit of his reaching the place of interment in time.

Certified Question from Court of Civil Appeals of Second Supreme Judicial District.

Action by G. S. Swearingin against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appealed to the Court of Civil Appeals (65 S. W. 1080), which affirmed the judgment, and certifies a question to the Supreme Court. Answered.

Geo. H. Fearons and Stanley, Spoonts & Thompson, for appellant. G. H. Goodson, for appellee.

GAINES, C. J. This is a certified question from the Court of Civil Appeals for the Second District. The certificate is as follows: "In the above cause now pending before this court upon a motion to certify upon the following facts we held that appellee's damages were not too remote, but were in contemplation of the parties at the time of the sending of the message hereinafter referred to, and were properly recoverable in this suit. Appellee's son was killed at Ft. Worth, Texas, August 1, 1899. At about 1 o'clock p. m. of that day one J. M. Stuart, acting for the wife of the deceased, delivered to appellant at its Ft. Worth office the following message: 'Ft. Worth, Texas, Aug. 1st, 1899. To Green Swearingin, Comanche, Texas: Come, Frank is dead. Mrs. Swearingin.' Stuart paid the charges, and the company undertook the delivery of the message, but, upon ascertaining that Green Swearingin did not live within the established free delivery limits of the town of Comanche, a service message was returned to the Ft. Worth office to that effect, and Stuart was notified that the company would not undertake the delivery of the message to Swearingin at his home in the country without payment or guaranty of payment of the sum of two dollars extra charges. Stuart guaranteed this sum, but the message was not delivered until after the burial. If the message had been properly transmitted and delivered, appellee

would have received it in time to have left Comanche at 9 o'clock a. m. on August 2d, and would have notified Stuart of his departure, and would have reached Fort Worth at 1:30 o'clock p. m. of the same day, and in time to have attended the burial of his son. By reason of the failure to hear from Swearingin, however, Stuart concluded that he was not coming, and buried the remains at 11 o'clock a. m. on August 2d. If Stuart had received notice that Swearingin was on his way to Ft. Worth, he would have held the body until his arrival. Upon the authority of *Western U. Tel. Co. v. Norris*, 60 S. W. 982, 1 Tex. Ct. Rep. 685, in which a writ of error was refused by your honors, we held as above indicated. Appellant insists that this holding is in conflict with the holding of the honorable Court of Civil Appeals for the Third Supreme Judicial District in the case of *Western U. Tel. Co. v. Stone*, reported in 27 S. W. 144, and we therefore deem it our duty to grant the motion, and to certify to your honors whether or not we were in error in our said holding."

We are of opinion that the Court of Civil Appeals correctly held that the damages in this case were not too remote. The point is ruled by the decision in the case of *Western Union Telegraph Company v. Norris*, 60 S. W. 982, 1 Tex. Ct. Rep. 685, in which an application for a writ of error distinctly presenting the question was refused by this court. As to this matter the two cases are not distinguishable in principle.

The case of *Western Union Telegraph Company v. Stone* (Tex. Civ. App.) 27 S. W. 144, did not come to this court, but the opinion in that case is based upon the decisions of this court in *Western Union Telegraph Co. v. Linn*, 87 Tex. 7, 26 S. W. 490, 47 Am. St. Rep. 58, and *Western Union Telegraph Co. v. Motley*, 87 Tex. 38, 27 S. W. 52, in which it was held that the damages were too remote to authorize a recovery. In the *Linn* Case the telegram was, "Grace is very low. Can you come and bring Maud?" and was signed, "Kate." In that case, as in this, if the message had been promptly delivered the plaintiff could not have been present at the funeral at the time it actually took place; but it was averred and proved that if the delivery had been made according to the contract he would have given notice of his coming, and that the burial would have been postponed until his arrival. It was there held that the message was sufficient to notify the company that there was a relationship between the plaintiff and the person mentioned therein; that the latter might die; and that he might, by a failure to deliver it, be deprived of the opportunity to attend the funeral. But it was also held that it did not apprise the company that "Grace," the person mentioned, had a husband; that if the message had been promptly delivered the plaintiff would have advised the latter of his coming, and that the funeral would have

been postponed until his arrival. The *Motley* Case involved the same principle as the *Linn* Case, but according to the testimony the contingencies upon which the plaintiff would have succeeded in being present at the funeral were still more remote. In the *Stone* Case the message was: "Your mother died today. Funeral on Wednesday." There also the plaintiff could not have attended the funeral on the appointed day had the message been promptly delivered; but he sought to recover on the ground that, if it had been so delivered, he would have sent notice of his coming and the funeral would have been delayed. There the message showed upon its face that the time of the funeral was already fixed, and the telegraph company could not properly have been held to have foreseen that any postponement was contemplated.

In the present case it seems to us the effect of the language of the message is quite different: "Come, Frank is dead." These words give notice of the death of the person mentioned, and also indicate not only the desire of the sender that the plaintiff should attend the burial, but also a confident expectation that he would do so. Under such circumstances we are of opinion that it ought to have been foreseen that upon the delivery of the message there might be a necessary delay in starting upon the trip, and that the plaintiff would have notified the sender of the fact and of his coming and the probable time of his arrival, and that the funeral would have been accordingly postponed. Such we think would have been the natural and probable consequences if the message had been promptly delivered, and that, therefore, they should be held to be within the contemplation of the parties to the contract.

As is indicated by what we have already said, we answer the question in the negative.

STINSON et al. v. GARDNER, Co. Atty.

(Supreme Court of Texas. Feb. 8, 1904.)

ELECTION—INTOXICATING LIQUORS—CONTEST—STATUTE—QUALIFICATIONS OF VOTERS—TAX RECEIPTS—CONSTITUTIONAL LAW.

1. Under Rev. St. 1895, art. 3397, the grounds of contesting a local option election are that the election was illegally conducted, or that such irregularities occurred as to render the true result impossible to be arrived at, or very doubtful. *Held*, that a petition by those in favor of prohibition for a contest in such case, simply alleging the grounds in the words of the statute, and averring the payment by a certain person of the poll tax of 500 qualified voters without their consent, and with the evil purpose of having them vote against prohibition, states no ground of contest under the statute, in the absence of a charge that the 500 voters, or some of them, voted against prohibition.

2. Under Const. art. 6, § 2, as amended in 1901 (Laws 1901, p. 322), providing that any one who is subject to pay a poll tax shall not be entitled to vote unless he shall have paid the tax before he offers to vote at any election, and hold a receipt showing his poll tax was paid before the 1st of February next preceding such election, the receipt is not required to be exhibited at the time of voting.

Certified Questions from Court of Civil Appeals of Fifth Supreme Judicial District.

Action by J. R. Stinson and others against John M. Gardner, county attorney. Questions certified from the Court of Civil Appeals. Questions answered.

F. H. Prendergast, for appellants. Scott & Jones, for appellee.

BROWN, J. This is a certified question from the Court of Civil Appeals for the Fifth Supreme Judicial District. The statement and questions are as follows:

"On the 10th day of July, 1903, an election was held throughout Harrison county, in this state, to determine whether the sale of intoxicating liquors should be prohibited in said county. The commissioners' court of the county met, and on the 25th day of July, 1903, declared the result of said election to be a majority of 786 votes against prohibition. On July 30, 1903, appellants filed a contest of said election under the statute, and in the first count of their petition alleged substantially as follows: That the election had been illegally conducted, and that such irregularities existed as rendered the true result of the same impossible to be arrived at, or very doubtful of ascertaining; that on the 31st day of January, 1903, certain persons, to contestants unknown, who were desirous of defeating prohibition in Harrison county, through W. R. Hodge, their representative, paid to A. B. Blocker, tax collector of said county, the poll taxes due by five hundred voters of said Harrison county for the year 1902; that such payment was made for the sole purpose of qualifying and inducing the persons owing the tax to vote against prohibition; that the total amount of money so paid was about \$875, and was paid without any authority from the persons against whom said poll taxes were assessed, and for whom said money was paid; that such persons never repaid the amount, or any part thereof, and never promised to repay it, and never ratified said payment, except so far as to vote by reason of the authority thereby given; that said parties did vote at said election. Contestants, in the second count in their petition, alleged, in substance, that about nine hundred persons voted at said election without exhibiting to the managers thereof their poll-tax receipts, and without making and filing with the judge of said election an affidavit, in writing, stating that such receipts were lost; that said voters wholly disregarded the provisions of the Constitution requiring each voter to hold his poll-tax receipt, showing that his poll tax was paid before the 1st day of February preceding the election at which he offers to vote, or to make, in the absence of such receipt, an affidavit, in writing, that such receipt was lost; that the managers of the election allowed such persons to vote, and receive their ballots, without requiring them to exhibit their

poll-tax receipts, or without filing such affidavits.

"The contestee, John M. Gardner, on the 21st day of August, 1903, filed and urged a general demurrer and special exceptions to both counts of contestant's petition. The trial judge filed his conclusions of law arising on these demurrers in a written opinion, which is in the record before us. On the 25th day of August, 1903, the demurrers were overruled as to the first count in contestant's petition, the trial judge expressing his conclusion of the law arising thereon in the following language: 'A tax which is assessed upon one person, and paid for him by another without his previous authority, if he recognize the act, and promise to repay the amount on the ground that such person acted as his agent, he thereby acquires the right to vote, the same as if he had paid it with his own hand. On the other hand, when the tax is paid by a person other than the person against whom it is assessed, without authority to do so, it is not such compliance with the law as will clothe the voter with the qualifications of an elector, as regards taxes. A partisan paying the tax of a voter in order to have him cast a ballot for his candidate or cause does not so far clothe the voter with the qualifications of an elector, unless authorized or ratified by the voter. The plain intent of the law is to secure the purity of the ballot, and the freedom of the voter in his right of suffrage. Now, anything, either in the payment of taxes for him, or in any other way, which will induce the voter to cast his ballot contrary to his will, is not tolerated by the law. A person who intends to neglect to pay his tax is not disposed to vote, and it could not be said, in good policy, that a partisan would come along and pay the tax for the voter, and thereby induce the voter to vote his way, for the sake of public good. The mere voting after the payment by another would not alter the state of the question. Votes of this standing should not be counted on a contest, but should be rejected. The law certainly makes illegal "Any privilege bestowed or promised for the purpose of influencing a person in the performance of any duty, regardless of whether the privilege was bestowed direct or under semblance of the payment of a debt."'

"Contestee's demurrer to the second count in contestants' petition, which alleges, in substance, that the managers of the election did not require the voter to show his poll-tax receipt, nor file an affidavit that same was lost, with the judge of the election, was by the court sustained, and then held that the illegal votes otherwise complained of are not enough to change or render doubtful the result of the election, and dismissed the case at cost of contestants. The conclusions of law reached by the trial judge, and grounds upon which the demurrers were sustained, as to this phase of contestants' case, are expressed by the court as follows: 'The failure

of the managers of election to require the voter "to show his poll-tax receipt" at the time he offers to vote, or the failure of the voter at the time to exhibit it, does not determine that the person at the time he votes does not "hold a tax receipt showing the payment of his poll-tax before the 1st day of February next preceding the election," within the meaning, by proper and practical construction, of that clause of the Constitution, so as to make illegal and void that vote, and reject it on a contest. It would be a severe regulation which excludes the votes of qualified voters under such circumstances. The language of the law does not prohibit a more liberal construction in favor of the voter. The language of the Constitution embraces the ideas that if the voter has paid his poll tax, and before the 1st day of February next preceding the election, he is entitled to participate in the election, and that, if he has lost his poll-tax receipt, the managers of the election may require him to file an affidavit to the effect that he has lost his poll-tax receipt. In passing a poll-tax law, it was intended to regulate the exercise of the privilege to vote. The substantial end in view has been reached when the legal voter votes under prescribed qualifications for voters. To simply exhibit a receipt to the managers of the election would not appear to be of the substance of the law, or a condition to be complied with before he can rightfully deposit his ballot, but only a form. If the substance of the regulation of suffrage be not in all respects complied with by the voter at the time he votes, then, on a contest, the requirements of the law cannot relate back and be supplied. If only form be the violation, then the vote deposited is not illegal and void. If a voter has exercised a constitutional right, and has done so only in an irregular manner, or has disregarded some of the forms, which by intendment does not amount to a qualification prescribed for the exercise, this will not work a forfeiture of the right itself. The judges of the election are not deprived of jurisdiction to receive the vote because a qualified voter did not show his receipt for poll tax paid. By failing to show a poll-tax receipt the voter would not be considered like one who has not actually paid the poll tax in time. To neglect to comply with the law requiring qualification, not evidence of it, is the essence of any wrong to which the penalty of a forfeiture of a vote would attach. It follows that the neglect of the provision regulating the exercise of the privilege of voting, in requiring a qualified voter to hold a receipt for taxes paid, or supply same, when lost or misplaced, by affidavit, constitutes a mere irregularity, and does not affect the right itself. Therefore such votes are not void and illegal, but such requirements of the law can relate back to the time of voting, and be supplied on a contest.

"The contestants excepted to the ruling of

the court in sustaining contestee's special exception to the second count in their petition, and in dismissing the cause, and gave notice of, and duly perfected, their appeal to this court. The contestee also excepted to the ruling of the court in refusing to sustain his special exception to the first count in contestant's petition, and filed cross-assignment of error complaining at this action of the court.

"Question 1. Did the court err in overruling contestee's special exception to the first paragraph or count in the contestant's petition; in other words, did the payment of the poll tax by some person or persons other than the person against whom the poll tax was assessed, for the purpose of qualifying such persons to vote against prohibition, and as an inducement to them to vote against prohibition, at the election held on the 10th day of July, 1903, in said Harrison county—said money having been paid without any authority from the persons whose tax was paid, and never repaid, nor promised to be repaid, by them to the person who paid said taxes, and never ratified by them, except so far as to vote by reason of the authority thereby given—render illegal their votes so cast at said election?

"Question 2. Did the failure of the voters complained of to exhibit to the managers of the election their poll-tax receipts, showing that they had paid their poll tax in Harrison county for the year 1902, before the 1st day of February, 1903, or to file with the judge of said election an affidavit that such receipt was lost, and the reception of the votes of such persons by the election managers without requiring the exhibition of such poll tax receipts, or the filing of such affidavit, render illegal such persons' vote, and authorize the exclusion of the same in the count on a contest?"

Answer to the first question: The trial court erred in not sustaining the contestee's special exception to the first paragraph or count in the contestant's petition. In making the contest, the statute required the contestant to deliver to the contestee a statement of the grounds on which the contest was based. Rev. St. 1895, art. 1798. The statutory grounds of contest in a case like this are expressed in article 3397 of the Revised Statutes of 1895 as follows: "That the election was illegally or fraudulently conducted; or that by the action or want of action on the part of the officers to whom was intrusted the control of such election, such a number of legal voters were denied the privilege of voting as, had they been allowed to vote, might have materially changed the result; or if it appears from the evidence that such irregularities existed as to render the true result of the election impossible to be arrived at, or very doubtful of ascertaining." The petition in this case stated broadly "that the election had been illegally conducted, and that such irregularity existed as

rendered the true result of the same impossible to be arrived at, or very doubtful of ascertaining." It was not sufficient to allege the grounds in the language of the statute, but facts should have been averred which would show that the election was either illegal, or that the result was impossible to be arrived at, or that it was very doubtful of ascertaining. The facts set up did not show the existence of either ground. The payment by W. R. Hodge of the poll tax for 500 qualified voters of Harrison county, without their consent, with the evil purpose of having them to vote against prohibition, did not constitute illegality in the conduct of the election, for that has reference to the manner of holding the election, which might include receiving illegal votes. Nor is it charged that the 500 voters, or either of them, voted against prohibition. It was incumbent upon the contestant to allege and prove that the 500 voters had cast their ballots with the majority; otherwise the rejection of them would not have changed the result, and the contestant had no cause of complaint. The fact that 500 voters whose taxes had been paid by Hodge voted in the election does not render the true result doubtful, nor difficult to be ascertained. Therefore the facts alleged constituted no ground for the contest of the election, and the exception should have been sustained.

Answer to the second question: The failure of voters to exhibit their poll-tax receipts at the time of voting did not render the election illegal, nor authorize the exclusion of their votes from the count. Section 2 of article 6 of the Constitution of this state, as amended in the year 1901 (Laws 1901, p. 322), expresses the requirement to pay the poll tax in this language: "And provided further, that any voter who is subject to pay a poll tax under the law of the state of Texas shall have paid said tax before he offers to vote at any election in this state and hold a receipt showing his poll tax paid before the first of February next preceding such election. Or if said voter shall have lost or mislaid said tax receipt, he shall be entitled to vote upon making affidavit before any officer authorized to administer oaths that such tax receipt had been lost. Such affidavit shall be made in writing and left with the judge of the election, and this provision of the Constitution shall be self-enacting without the necessity of further legislation." It might be inferred from the latter part of the quotation that it was intended the voter should have his poll-tax receipt at the place where he voted, but there is no provision in the Constitution which requires that the receipt shall be exhibited at the time of voting. It only requires the voter shall hold his receipt; that is, that he shall have procured and have possession of the receipt, and, if it has been lost, then, in order to vote, he must make the affidavit which the law requires. The petition in this case does not

allege that the 900 persons who voted without exhibiting their receipts were not qualified voters. There is no allegation in the petition that the 900 persons voted against prohibition, and, while it would be as illegal for a man to vote for prohibition as against it without exhibiting his receipt, still the contestant could not complain on the ground that illegal votes were cast in favor of prohibition. It was necessary for the petition to show the result of the election against prohibition was caused, in whole or in part, by the casting of the 900 ballots. The allegations of the second count were insufficient to sustain either ground of contest, and the exception was properly sustained.

GULF, C. & S. F. RY. CO. v. STATE.

(Supreme Court of Texas. Feb. 4, 1904.)

INTERSTATE COMMERCE — CONTINUITY OF SHIPMENT — JURISDICTION OF STATE AUTHORITIES — FINDINGS — SUFFICIENCY OF EVIDENCE.

1. In an action against a railroad company for exacting greater compensation than that fixed by the Railroad Commission, in which the issue was as to whether a shipment from another state had lost its character as interstate commerce, the middleman who received the goods at the point of transshipment within the state testified that he had bought them from the consignor on December 24th. A letter from the consignor read: "We confirm sale to you on the 24th inst." The middleman referred to this letter as confirming the sale. *Held*, that a finding that on December 28th the middleman was informed of the interstate character of the shipment, "but at the time of making the contract" he did not know from whence the goods were to come, was sustained by the evidence.

2. A grain company at Kansas City, having sold a firm at Goldthwaite, Tex., two cars of corn, which as yet it did not own, contracted with a commission company, also at Kansas City, for the purchase of two cars of corn, to be delivered at Texarkana, Tex. Previously to this the commission company had purchased two cars of corn to be delivered to it at Texarkana, the shipment originating at Hudson, S. D., with a receiving carrier, whose bills of lading limited its liability to its own line, with a like limitation for all connecting carriers. The purchase from the commission company by the grain company took place while this shipment was at Kansas City, on its way south, and two days after the purchase the grain company ascertained that the corn to fill its order would come from Kansas City. The commission company had an agent at Texarkana, who by arrangement between the two companies reshipped the corn, without breaking bulk, to the firm at Goldthwaite, blank bills of lading having been furnished the commission company by the grain company, which were forwarded to the agent, who, when they were executed by the carrier receiving the corn at Texarkana, delivered them to its grain company. The receipt of these bills was the first notice the commission company had of the ultimate destination of the shipment. *Held*, that on delivery by the commission company to the grain company at Texarkana the shipment lost its character as interstate commerce, and from Texarkana to Goldthwaite fell within the jurisdiction of the State Railroad Commission.

Error from Court of Civil Appeals of Second Supreme Judicial District.

Action by the state of Texas against the Gulf, Colorado & Santa Fé Railway Compa-

ny. Judgment of the Court of Civil Appeals (73 S. W. 429) affirming a judgment for plaintiff, and defendant brings error. Affirmed.

J. W. Terry and Chas. K. Lee, for plaintiff in error. C. K. Bell, Atty. Gen., for the State.

GAINES, O. J. This suit was brought by the state of Texas to recover of the Gulf, Colorado & Santa Fé Railway Company a penalty of \$5,000, for demanding and receiving for transporting a car load of corn from Texarkana, Texas, to Goldthwaite, Tex., a greater compensation than that allowed and fixed by the Railroad Commission of Texas for such service. The case was tried without a jury, and a judgment was entered in the trial court for the sum of \$100. Upon appeal to the Court of Civil Appeals (78 S. W. 429) the judgment was affirmed.

The trial judge filed his findings of fact, which are as follows:

"(1) The Railroad Commission of Texas, after due notice of the time and place where the rates would be fixed by it, fixed and established the rates which might be charged by a railroad, or by two or more lines of railroad, whether under the same management and control or not, for the transportation of corn, between points within the state of Texas, in car load lots, at 12½ cents per one hundred pounds for a distance of over 165 miles, which rate became effective on March 10, 1899, and remained effective until the present time, of which action the defendant and the Texas & Pacific Railroad Company received legal notice before the rates prescribed became effective.

"(2) The distance from Texarkana, Texas, to Goldthwaite, Texas, over the Texas & Pacific Railway to Fort Worth, and from Fort Worth over the Gulf, Colorado & Santa Fé Railway to Goldthwaite, Texas, is more than 165 miles.

"(3) The Texas & Pacific Railway Company owns and operates a railroad from Texarkana, Texas, to Fort Worth, Texas, and the defendant from Fort Worth, Texas, to Goldthwaite, Texas, and each of these points and all intermediate points on each of said roads are entirely within the state of Texas.

"(4) The Texas & Pacific Railway Company executed a bill of lading, dated Texarkana, Texas, January 13, 1902, which bill of lading purported to acknowledge the receipt from the Samuel Hardin Grain Company at Texarkana, Texas, of one car of sacked corn, same being car 3845 P. & G., and which bill of lading purported to show that the said corn was consigned to shipper's order, notify Saylor & Burnett, Goldthwaite, Texas.

"(5) Said car load of corn was transported by the Texas & Pacific Railway Company to Fort Worth, and there delivered to the defendant, and was by it received and transported to Goldthwaite, Texas, where it ar-

rived on the 17th day of January, 1902, and Saylor & Burnett, who were acting for Samuel Hardin Grain Company, tendered to the defendant's agent at Goldthwaite \$82.50 in payment of the freight charges thereon. The said agent declined to accept said amount of \$82.50 in payment of said charges, and demanded \$165.00 for the transportation of said car load of corn from Texarkana, Texas, to Goldthwaite, Texas.

"(6) The agent of the defendant at Goldthwaite, Texas, charged, collected, demanded, and received from Samuel Hardin Grain Company \$165 for the transportation of said car load of 66,000 pounds of corn from Texarkana, Texas, to Goldthwaite, Texas. In so charging, collecting, demanding, and receiving said \$165 the said agent of the defendant was acting under instructions from the executive officers and attorneys of the defendant company, who believed and advised that said shipment was interstate commerce, and his action in so doing was subsequently ratified by the defendant.

"(7) The Samuel Hardin Grain Company made complaint to the Railroad Commission of Texas of the action of the defendant in charging more than 12½ cents per hundred pounds for transporting said corn, whereupon the Railroad Commission investigated such complaint, and ordered this suit to be instituted, in accordance with the provisions of article 4568 of the Revised Statutes of Texas.

"(8) On December 23, 1901, the Samuel Hardin Grain Company, at Kansas City, Mo., offered to sell Saylor & Burnett at Goldthwaite, Texas, No. 2 mixed corn at 86½ cents per bushel, for delivery on railway track at Goldthwaite, and this offer was accepted for two car loads of corn. This offer and acceptance was by telegraphic communication between the parties at their respective places of business. The Hardin Grain Company did not at that time have the corn, but on December 24, 1901, to fill the order it contracted with the Harroun Commission Company, at Kansas City, for the purchase of two 66,000 pound cars No. 2 mixed corn, at 75½ cents per bushel, to be delivered at Texarkana, Texas, to the Hardin Grain Company. Previously to this the Harroun Commission Company had contracted for the purchase of two cars of corn to be delivered to it at Texarkana, Texas, and with these two cars it expected to and did fill the order of the Hardin Grain Company. These cars had originated at Hudson, S. D. The receiving carrier at Hudson was the Chicago, Milwaukee & St. Paul Railway Company, who issued bills of lading limiting its liability to losses occurring on its road, with a like limitation of liability of all other carriers who should handle said corn in transit to its destination. By the terms of said bills of lading the corn was consigned to 'Forrester Bros., Texarkana, Texas,' and shipment made in cars of C., M. & St. P. Ry. Co.,

care of Kansas City Southern Railway at Kansas City, Mo., with the privilege to stop the corn at Kansas City for inspection and transfer. The corn reached Kansas City on December 17, 1901; was there unloaded, sacked, and transferred to the Kansas City Southern Railway Company, who on December 31, 1901, issued bills of lading reciting that the corn was loaded in cars No. 3,845 P. O. and No. 4,189 P. O., that same was received of Forrester Bros., and consigned as follows, 'Shippers order notify Harroun Commission Company Texarkana, Texas,' and reciting, further, that freight 14 cents per hundred lbs. was prepaid, and one of these cars, to wit, car 'No. 3,845 P. O.,' is the car in controversy in this suit.

"(9) The Harroun Commission Company paid no freight on the corn from Hudson, S. D., to Texarkana, Texas, as it had purchased it to be delivered at Texarkana.

"(10) The freight on the corn from Hudson to Texarkana was as follows: 18 cents per 100 lbs. from Hudson to Kansas City, and 14 cents from Kansas City to Texarkana—all of which was paid by the vendors of Harroun Commission Company. The minimum interstate rate from Hudson, South Dakota, to Goldthwaite, Texas, was 46 cents per 100 lbs., which would have been apportioned as follows: 18 cents from Hudson to Kansas City, and 28 cents from Kansas City to Goldthwaite, Texas. The G., C. & S. F. Ry. Co., the T. & P. Ry. Co., and the Kansas City Southern Ry. Co., together with other connecting lines from Kansas City, Mo., to Goldthwaite, Texas, had established a joint tariff of 35 cents per 100 lbs. on shipments from Kansas City to Goldthwaite via Texarkana and originating in Kansas City, had agreed on a division of that rate between them, and had filed tariffs establishing such rate with the Interstate Commerce Commission, and by such steps had brought themselves within the provisions of the interstate commerce laws.

"(11) The Hardin Grain Company's officers kept themselves informed of interstate commission freight rates and of the state commission rates, and the reason why they contracted for the corn to be delivered to them at Texarkana was because they could fill their contract with Saylor & Burnett at Goldthwaite at about 1½ cents per bushel cheaper than they could if they had bought the corn for delivery to them at Kansas City, and had shipped from Kansas City to Goldthwaite.

"(12) At the time of the purchase contract between the Hardin Grain Company and the Harroun Commission Company, Hardin, the manager of the former company, intended that the corn to be thereby acquired should go to Saylor & Burnett, and should be shipped to Goldthwaite from Texarkana as soon as practicable, and on December 26, 1901, two days after this contract for purchase had been made, Hardin was informed that the

corn with which the Harroun Commission Company expected to fill his order would be sacked in Kansas City, and be shipped out of Kansas City to Texarkana, but at the time of making the contract he did not know from whence the corn would come.

"(13) On December 31, 1901, the date of shipment from Kansas City to Texarkana, the Harroun Commission Company informed the Hardin Grain Company that the corn to fill the latter order had been loaded to start to Texarkana, and requested instruction as to how the corn should be shipped from Texarkana for the guidance of F. L. Adkins, their agent at that place, who would attend to such reshipping for the Hardin Grain Company as per former understanding. Thereupon, and in compliance with such request, blank bills of lading were made out by the Hardin Grain Company in Kansas City, and furnished to the Harroun Commission Company, to be forwarded to F. L. Adkins. These bills of lading were to be executed by the Texas & Pacific Railway Company and F. L. Adkins as agent for the Hardin Grain Company, and were for shipment of the corn to Goldthwaite, Texas, consigned to 'shipper's order, notify,' etc., giving the numbers and initials of cars, which information had been furnished by the Harroun Commission Company, and on January 14, 1902, the reshipment having been made as per instructions, the bills of lading, duly executed by the Texas & Pacific Railway Company, were by Harroun delivered to Hardin Grain Company, who thereupon paid the Harroun Commission Company \$1,779.64, the purchase price previously agreed upon for the corn, and the receipt of said blank bills of lading by the Harroun Commission Company was the first information had by that company of the intended final destination and disposition of the corn.

"(14) Neither Hardin Grain Company nor Harroun Commission Company had any store or warehouse at Texarkana, but under the agreement between the two companies (Hardin and Harroun) one F. L. Adkins, who was the agent of the Harroun Commission Company, and stationed at Texarkana, reshipped the corn at Texarkana for the Hardin Grain Company. That shipment was to Goldthwaite, Texas, over the Texas & Pacific Railway Company and the Gulf, Colorado & Santa Fe Railway Company by bill of lading reciting its receipt from Hardin Grain Company, and consigned to 'shipper's order, notify Saylor & Burnett, Goldthwaite, Texas,' and was transferred under original seals, and without breaking packages, to the Texas & Pacific Railway Company, after having remained at Texarkana five days. The only thing done by F. L. Adkins was to surrender the Kansas City Southern bill of lading, have the cars set over on the Texas & Pacific Railway, and take a bill of lading from the latter company. The corn reached Texarkana January 7, 1902, and was shipped out from Tex-

arkana January 13, 1902. The defendant was not a party to the bill of lading executed at Texarkana.

"(15) On December 31, 1901, Hardin Grain Company mailed to Saylor & Burnett an invoice of the corn, in the form of an account stating the car Nos. and initial, the amount of corn, and price to be paid by Saylor & Burnett."

The findings of fact were assailed in the Court of Civil Appeals in one particular only. It was assigned as error in that court, and is also assigned in this court, that the trial judge erred in concluding that "on December 26, 1901, two days after this contract for purchase had been made, Hardin was informed that the corn with which Harroun Commission Company expected to fill his order would be sacked in Kansas City, and be shipped out of Kansas City to Texarkana, but at the time of making the contract he did not know from whence the corn would come." It is insisted that the finding is contrary to the undisputed evidence adduced upon the trial. The question so presented, if it have a material bearing upon the decision of the case, lies at its very threshold, and is the first for our determination. But we do not concur in the proposition that the finding is not supported by the evidence. The contention of counsel for the plaintiff in error seems to be based upon the theory that the sale by the Harroun Commission Company to the Hardin Grain Company was only completed by the letter of the former to the latter, which was written on December 26, 1901. The following is a copy of that letter: "We confirm sale to you on 24th inst. of two 66,000 pound car of bulk No. 2 mixed corn at 75½c. per bus., delivered at Texarkana our weights and grades shipment as quickly as we can get cars. Cars to be held at our elevator for sacking." Now, there is nothing in the testimony as to the purpose of this letter. Samuel Hardin, of the Hardin Grain Company, testified in his first deposition, which was taken and read in evidence on behalf of the defendant corporation: "It is a fact that I bought the two cars of corn to fill this order from the Harroun Commission Company on the 24th day of December, 1901." The letter indicated that this was true. The words "sale to you on the 24th inst." tend at least to show that the sale had been made on the day mentioned. What meaning was intended to be conveyed by the word "confirm" is not so clear. It may be that an agreement had been entered into by the parties, in which the terms of the sale had been agreed upon, but which left the offer subject to the acceptance of the seller, dependent upon some contingency. Or it may be that the contract for the sale of the corn had been completed on the 24th of December, and that the purpose of the letter was merely to advise the purchasers as to the probable time of the delivery. It is probable that the letter may be of a form in use among dealers in grain and

other commodities sold in like manner, and that the language employed, according to commercial usage, had a meaning different from that which it imports in common parlance. But we find in the record no testimony as to any special meaning attached to the terms as ordinarily used by dealers in making transactions of the character of that under consideration. The letter must therefore be construed according to the ordinary import of the words employed, and in the light of the circumstances attending the transaction, and so construed we are of opinion that it does not show beyond dispute that the contract for the sale of the corn was not made before the letter was written. It is true that Hardin in his testimony speaks of the letter as confirming the sale, and it may be that the agreement was made subject to the confirmation of the Harroun Commission Company. But we think this would make no difference, since upon the confirmation the Harroun Commission Company were bound by the contract as originally made. It follows, therefore, as we think, that in the determination of the case the letter is entitled to no weight, except in so far as it shows that before the corn was delivered at Texarkana the Hardin Grain Company were apprised that it would be shipped from the state of Missouri into the state of Texas. Since we approve the finding of the trial court and of the Court of Civil Appeals to the effect that when the Hardin Grain Company made the contract for the purchase of the corn they did not know from what point it would be shipped, it is unnecessary for us to pass upon the question whether it would have altered the case had they known the fact.

This brings us to the main question in the case. The substance of the facts as found by the trial court and the Court of Civil Appeals seems to us to be these: The Hardin Grain Company, doing business in Kansas City, Mo., having made a contract with parties at Goldthwaite, Tex., for the delivery of two car loads of corn at that place, in order to comply with their undertaking contracted to purchase of Harroun Commission Company, who were also doing business at Kansas City, Mo., and had an agent at Texarkana, Tex., the same quantity of corn, to be delivered at the point last named; that the corn with which the Harroun Commission Company proposed to fulfill their contract was shipped from South Dakota to Texarkana, Tex., through Kansas City, Mo.; that while it was in transit at the latter place the Hardin Grain Company became apprised of that fact; that the corn was delivered at Texarkana, Tex., in accordance with the agreement to the Hardin Grain Company, who thereupon shipped it in the same cars, without breaking bulk, over the Texas & Pacific Railway and its connecting lines to Goldthwaite, Tex.

The question then is, was the transportation of the corn from Texarkana to Goldthwaite such a shipment within the state of

Texas as to be deemed a carriage subject to the control and regulation of the Railroad Commission of this state? If that question be answered in the affirmative, then the judgment in this case should be affirmed; if in the negative, it should be reversed. Since the contract of the Hardin Grain Company with the initial carrier at Texarkana was a contract for transportation wholly within this state, the question resolves itself into the inquiry whether the facts just stated change the character of the transportation, and make the carriage from Texarkana to Goldthwaite a part of an interstate shipment.

We are of opinion that as applied to the matter to be determined in this case the carriage of the corn from Texarkana to Goldthwaite should be deemed independent of and wholly disconnected from its transportation to Texas from South Dakota or Kansas City. The nearest approach to a decision of this question by this court is found in the following cases: *Houston Direct Navigation Co. v. The Insurance Co.*, 89 Tex. 1, 32 S. W. 889, 30 L. R. A. 713, 59 Am. St. Rep. 17; *Fuqua v. Brewing Co.*, 90 Tex. 298, 38 S. W. 29, 750, 35 L. R. A. 241; and *State v. Railway Co.* (Tex. Civ. App.) 44 S. W. 542. In the case last named the opinion is by the Court of Civil Appeals, but a writ of error was refused by this court. In the case first mentioned certain bales of cotton were delivered at Houston, Tex., to the Navigation Company for transportation to Galveston, in the same state, and the bill of lading contained this stipulation: "It is understood and expressly stipulated that the liability of the Houston Direct Navigation Company shall cease upon delivery to the next connecting line, and that the said Houston Direct Navigation Company and its connections, which receive and transport the said property, shall not be liable for loss by fire," etc. The evidence showed that the cotton was the property of foreign buyers, to whom it was consigned, and that the consignors contemplated an immediate and continuous shipment to foreign ports. The cotton was destroyed by fire before it was delivered by the navigation company to the connecting line, and the question was as to its liability for the loss. It was held that the shipment throughout was a foreign shipment, and that the statutes of this state which prohibited common carriers contracting for a carriage wholly within this state from limiting their liability at common law did not apply. In the *Fuqua* Case "the parties contracted for the sale and purchase of beer to be transported from Milwaukee to Amarillo, to be there delivered to Kingsbury and become his property," and it was held that as soon as the beer was delivered to Kingsbury it became a "part of the common mass of property within a state" and was "subject to its unimpeded control." In the case of the *State v. Railway Company*, supra, the shipment was from San Angelo, Tex., to Ft. Worth, in the same state: but the trial

court found as a fact that the purpose of the initial shipment was to transport the property to a point beyond the limits of the state, and the Court of Civil Appeals sustained this finding. It was held that this was an interstate shipment, and that therefore it was not subject to the regulation of the Railroad Commission of Texas. Upon the trial there was an attempt to show that the purpose of the shippers was to ship the property in controversy to Ft. Worth for sale at that point, and that the further carriage to Kansas City was contemplated only in the event of their failure to make a sale. If the state had succeeded in establishing this fact, the case would have been brought within the rule applied in *Coe v. Errol*, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. Ed. 715, that goods in transit do not cease to be subject to the jurisdiction of a state "until they have been shipped or entered with a common carrier for transportation to another state, or have been started upon such transportation in a continuous route or journey."

But such is not the case before us. Here the Harroun Commission Company, the original consignors, were the owners of the corn when shipped, and until its arrival at Texarkana and delivery there to the Hardin Grain Company in compliance with their contract for its sale. They neither intended nor contemplated any shipment beyond the point to which it was consigned. When the corn was delivered to them at Texarkana the contract on part of the carriers was performed and the carriage so far was at an end. Even had they known that the buyers intended to have the corn transported to a further point in Texas, we fail to see that it would have altered the case. Having ceased to be the owners of the corn upon its delivery to the Hardin Grain Company at Texarkana, as contemplated in their contract, they had no further control over it nor had they any further concern with it.

As to the point of time at which articles of commerce which have been transported from one state into another cease to be subject to the commerce clause of the Constitution of the United States, the Supreme Court of the United States distinctly held that they are exempt from regulation by the state into which they are carried until they are delivered to the consignee, and that if they are imported for the purpose of sale not then until they are sold, provided they are kept in the original packages. *Welton v. Missouri*, 91 U. S. 275, 23 L. Ed. 347; *Lelsy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128; *Emert v. Missouri*, 156 U. S. 296, 15 Sup. Ct. 367, 39 L. Ed. 430; *Waring v. The Mayor*, 8 Wall. 110, 19 L. Ed. 342; *Pervear v. The Commonwealth*, 5 Wall. 475, 18 L. Ed. 608. In the case last cited the court say: "Merchandise in original packages, once sold by the importer, is taxable as other property." If taxable, it is because it has become exempt from the operation of the commerce

clause of the Constitution of the United States, and fallen under the control of the state.

Nor do we think the case of the plaintiff in error presents any better aspect when viewed from the standpoint of the Hardin Grain Company. They were not the agents of the Harroun Commission Company, nor were the latter their agents. The relation between the two was merely that of buyers and sellers. The only circumstance which tends to show that the carriage from Texarkana to Goldthwaite was a part of an interstate transportation is the mere fact of its continuity. Immediately upon their receipt of the cars of corn, the purchasers, the Hardin Grain Company, caused them to be transferred to the tracks of the Texas & Pacific Railway Company and consigned them to Goldthwaite. But, as we apprehend, this makes no difference. It was no concern of the purchasers whether the corn which was delivered to them came from Texas or from another state. Nor was it a matter of any moment to the sellers what was done with it after its delivery. The instant the property was delivered and the sale completed, according to the authorities cited, it became a part of the common mass of property subject to the laws of Texas, and its further transportation within the state was a matter for state regulation.

It follows that in our opinion the judgment of the district court and that of the Court of Civil Appeals should be affirmed, and it is accordingly so ordered.

BURNAM v. TERRELL, Com'r. et al.

(Supreme Court of Texas. Feb. 15, 1904.)

PUBLIC LANDS—ISOLATED SECTIONS—SALE—RESCISSIION—COMMISSIONER OF GENERAL LAND OFFICE—MINISTERIAL DUTIES—ACTUAL SETTLER—LEASE.

1. Under 2 Batts' Rev. St. 1895, art. 4218y, providing that all sections of public land which are isolated and detached from other public lands may be sold, the determination of the Commissioner of the General Land Office as to whether sections are isolated is a ministerial, not a judicial, act, and is not conclusive on the matter.

2. Under 2 Batts' Rev. St. 1895, art. 4218y, providing that isolated sections of public land may be sold, where an application for the purchase of two sections was allowed on the supposition that they were isolated, when in fact they were connected by another section, it does not affect the validity of the sale of the two sections that abstracts previously furnished to the assessors of taxes showed that the connecting section had been sold, these abstracts not being made out for the guidance of prospective purchasers.

3. Where a Commissioner of the General Land Office inadvertently sells land which is not subject to such sale, it is proper for either himself or his successor in office, on discovery of the mistake, to rescind the sale.

4. Where one's application for the purchase of lands as isolated sections was allowed, when they were in fact not isolated, it does not render the sale valid that he was entitled to purchase as an actual settler, the application not having been made on that ground, nor the necessary affidavit of residence filed.

5. The sale of two sections of public land as isolated when they are in fact connected by a third section is not rendered valid by the subsequent invalid sale of the connecting section.

6. Where public lands were leased to one for 10 years, and he attempted to purchase them, but the sale was rescinded before the expiration of the 10 years, he cannot be treated as a lessee from the time of the sale, though his payments exceeded the amount which would have been due under the lease.

Original application by W. T. Burnam for a writ of mandamus to J. J. Terrell, commissioner of the general land office, and another. Refused.

Hill & Lee, for relator. C. K. Bell, Atty. Gen., T. S. Reese, Asst. Atty. Gen., and A. R. Pool, for respondents.

GAINES, C. J. This is a petition for the writ of mandamus filed by Burnam, as relator, to compel the Commissioner of the General Land Office to reinstate him as purchaser of two sections of school land in Menard county, and, in the event that cannot be done, to recognize him as lessee of the lands from the state. Ed Ellis, who made application to purchase the land subsequent to that of relator, was made a party defendant to the suit. The following are the facts disclosed by the petition and answers: The lands in controversy were a part of the school lands of the state and are known as section 66, in the name of Beaty, Seale & Forwood, and section 62, in the name of J. H. Gibson. The southwest corner of section 66 connects with the northeast corner of section 94 in the name of J. H. Gibson, which is also a school section. The northwest corner of section 62 also connects with the southeast corner of the latter section. But neither section 66 nor section 62 touch any other survey of school lands the title to which remained in the state. We will state the transactions which resulted in this controversy as nearly in the order of time as may be practicable. In 1883 section 94 was regularly sold by the commissioner to one Priest; but in 1895, by a decree of the district court in a suit brought by the state, the right of the purchaser was declared forfeited for the nonpayment of interest. A copy of that decree was filed in the land office on the 22d day of August of that year. On the 10th day of the same month the relator applied for a lease of sections 62 and 66 for the term of 10 years. They were awarded to him as lessee, and his lease was kept in good standing up to August 14, 1900. In June, 1900, relator made application to purchase section 66, and in July of the same year he applied also to purchase section 62. In his applications he complied in all respects with the law for the sale of "isolated and detached" sections of school lands. They were filed in the land office on the 16th day of June and the 8th day of July, respectively, and the lands were awarded to him by the commissioner then in office; section 66 on the 28th

day of July and section 62 on the 27th day of August, all in the same year. At the time of these awards the map in the land office had upon section 94 the mark "F. 14146," which, according to the practice in the land office, referred to the file number of the papers relating to the section, and was intended to show that the section had been sold to a purchaser under the statutes for the sale of the school lands, but did not show that the title had ever passed out of the state. This mark was placed upon the map in 1893, when the land was first sold. It also appears that in the abstracts of lands subject to taxation furnished by the Commissioner of the General Land Office to the assessors of the counties from the year ending December 31, 1885, and for each successive year thereafter to and including the year 1900, section 94 was entered as having been sold to Priest. On the 30th of August, 1895, after the sale of section 94 to Priest was forfeited, and a certified copy of the judgment of forfeiture had been filed in the land office, it was leased to one Perry Crowell for the term of five years. On August 6, 1900, one Wilkinson, as assignee of this lease, made application to purchase the survey as a detached section, and his application was accepted, and the land awarded to him. Having paid the purchase money in full on February 14, 1902, a patent therefor was issued to him. On the 9th day of March, 1903, the respondent Terrell, as Commissioner of the General Land Office, canceled each of the sales made to relator by his predecessor in office.

It therefore appears from the facts stated that at the time that the relator made his respective applications to purchase the two sections of land in controversy and at the time they were respectively awarded to him section 94, which was the connecting link between sections 62 and 66, had been sold by the commissioner under the terms required by the statute, but that the inchoate title thus acquired by the purchaser had been annulled by a judicial forfeiture for his failure to comply with the obligation of his contract, and that that section had become again a part of the state's school lands. As we understand the position of relator, it is not claimed that at the time the lands were awarded to him they were in fact detached. It is insisted, however, that, since the Legislature has invested the Commissioner of the General Land Office with the power to sell the "isolated and detached" sections of school lands in certain counties, of which Menard is one, the duty is necessarily devolved upon him to determine in the first instance what sections are so isolated and detached; and that when he has determined that question, and made a sale accordingly, his decision is conclusive upon the matter. It is a well-recognized rule that where an officer is empowered to determine a question of fact in the absence of some provision of

law for a revision of his ruling his decision is binding upon the courts. But does the case before us fall under that rule? The statute in question is in these words: "And all sections and fractions of sections, in all counties organized prior to the first day of January, 1875, except El Paso, Presidio and Pecos counties, which sections are isolated and detached from other public lands, may be sold to any purchaser, except to a corporation, without actual settlement, at one dollar per acre, upon the same terms as other public lands are sold under the provisions of this chapter." 2 Batts' Rev. St. 1895, art. 4218y. This does not in express terms authorize the Commissioner of the General Land Office to determine what sections were detached and what were not. But it is true that, in order to exercise the authority conferred by this provision, the commissioner must first satisfy himself that the land is detached. But were the circumstances under which this fact was to be ascertained such as would indicate that the Legislature contemplated that in ascertaining the fact he should act in a quasi judicial capacity, rather than in that of a ministerial officer? The distinction between the ministerial and judicial functions of executive officers is thus defined by Mr. Justice Wheeler in the case of the Commissioner v. Smith, 5 Tex. 479: "The distinction between ministerial and judicial and other official acts seems to be that where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial; but where the act to be done involves the exercise of discretion or judgment in determining whether the duty exists, it is not to be deemed merely ministerial." When the act in question was passed most of the school lands had been surveyed. The surveys had been delineated upon maps which were kept in the General Land Office. The sales were also made through that office, and the papers and records pertaining to such were held there on deposit. All the commissioner was called upon to do in order to ascertain what lands were in fact detached and subject to be sold under the statute was to refer to the maps and the records on file in his office. Most duties that executive officers are called upon to perform are dependent upon the existence of one or more facts; and very few occur in which a fact can be more readily ascertained by an officer in charge of a department of the state government than the fact that a section of school land has become "isolated and detached." Certainly the statute quoted does not expressly confer any quasi judicial authority upon the commissioner to determine the question; nor do we think that, under the circumstances, is any such authority to be implied.

Let us suppose that the sections in controversy had been in fact detached, and the

fact clearly appeared by the map and records in the land office, and an applicant had made application as required by the statute for their purchase, and that the commissioner had rejected the application. It seems to us that upon a proper proceeding for a writ of mandamus to compel him to accept the applications this court would not hesitate to grant the relief sought. The fact that the lands appeared upon the abstracts furnished the assessors of taxes as having been sold can, in our opinion, make no difference. The purpose of furnishing these abstracts was merely to inform the assessors what lands were subject to taxation. They were not made out for the guidance of prospective purchasers. It is plain that in this case the commissioner inadvertently made a mistake, and, acting upon the belief that the land had been detached, accepted the relator's applications to purchase. Mistakes of a like character are not infrequent, and are perhaps in a measure unavoidable. The cases which are brought to this court show that in such case it is the practice in the land office for the commissioner to correct his mistake by rescinding his previous action, and where he has erred in making a sale to cancel his award. This seems to us a legal and proper practice, and that, when the mistake is discovered, the duty may be performed either by the officer who made it or by his successor in office. For these reasons, we think the mandamus to reinstate the relator as a purchaser of the two sections of land in controversy should not be awarded.

The relator further avers that at the time he made his applications to purchase sections 66 and 62 he was the owner of and resided upon another survey of land; that these sections were within a radius of five miles of such survey; and prays that, in the event that these lands in controversy were not legally sold as detached lands, he be held a purchaser as an actual settler. It is sufficient, in answer to this prayer, to say that, in order to have entitled him to purchase as an actual settler, his applications should have been placed on that ground, and in his affidavit he should have made oath as to the facts of his ownership of and residence upon his home survey. This was not done. Therefore, although he may have been competent to purchase as an actual settler, not having applied to purchase as such, he acquired no right by his applications unless the lands were in fact detached.

It also appears by the allegations of the petition and answer that after the relator was accepted as a purchaser section 94 was applied for by one Wilkinson as a purchaser, and that it was awarded and patented to him. But it also appears from the answer that section 94 was sold to Wilkinson as a detached section, upon the theory that sections 66 and 62 had been legally sold. This we hold was not correct, and that, therefore, the

sale of section 94 was not valid, and did not detach the other two sections with which it was connected. Besides, we think that the rule announced in *Hazelwood v. Rogan*, 95 Tex. 295, 67 S. W. 80, in reference to premature applications to purchase, would hardly apply to the facts of this case. In that case the application was made a very short time before the land was on the market, and the award was made after the land became subject to sale, and before any intervening right had accrued. Here, when the application was accepted and the award was made, the land was not detached, and was not subject to sale as such.

It is also claimed that—in case the sales to relator should be held void—since, at the time of relator's attempt to purchase the land in controversy, they were leased to him for the term of 10 years extending from August 10, 1895, and the lease was in good standing, and since the purchase money paid by him is sufficient to cover the accrued rents, the money should be applied to the rent, and he should be reinstated as lessee. Where a lessee of the public free school lands before the expiration of his lease has, with the concurrence of the commissioner, attempted to renew and extend his lease for an additional term of years, we have held that the attempted new lease is invalid; but, where the rents paid under the attempted lease are sufficient to keep the old lease in good standing, they will be applied to the valid lease, and the rights of the lessee thereunder preserved. Such is not the case before us. Here, since his attempted purchase, the relator has paid no rents; and we are of opinion that the Commissioner of the General Land Office has no right or authority to apply the purchase money paid by him to the satisfaction of the rents that would have accrued had the lease remained in force.

Our conclusion is that the writ of mandamus should be refused, and it is accordingly so ordered

Ex parte PARSONS.

(Court of Criminal Appeals of Texas. Jan. 27, 1904.)

HABEAS CORPUS—ARREST PENDING APPEAL FROM CONVICTION.

1. Where one was convicted in county court and fined less than \$100, and, after giving notice of appeal and recognizance, was arrested under a capias pro fine issued on the theory that the appealed case would be dismissed for want of jurisdiction, he will be discharged on habeas corpus proceedings.

Original application by Nelson Parsons for a writ of habeas corpus. Relator discharged.

Callicutt & Call and Ballew & Wheeler, for relator. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is an original writ of habeas corpus before this court. Ap-

plicant was convicted, and appealed from conviction in the corporation court to the county court, where he was again convicted; the fine assessed being less than \$100. Notice of appeal was given to this court, and recognizance taken. Subsequently he was arrested under capias pro fine pending his appeal. In fact, the appeal has not yet been disposed of by this court. The capias pro fine was issued and applicant arrested on the theory that the appealed case would be dismissed for want of jurisdiction in this court. The officers of the county a quo cannot determine the jurisdiction of this court, or when it attaches. This court will decide its own jurisdiction, or when it attaches.

The relator is discharged.

Ex parte FREEDMAN.

(Court of Criminal Appeals of Texas. Jan. 27, 1904.)

HABEAS CORPUS—ARREST PENDING APPEAL FROM CONVICTION.

1. Where one was convicted in county court and fined \$25, and, after giving recognizance and notice of appeal, was arrested under a capias pro fine, he will be discharged on habeas corpus proceedings, though the amount of the fine did not authorize an appeal.

Original application by Alex Freedman for writ of habeas corpus. Relator discharged.

Calliecutt & Call and Ballew & Wheeler, for relator. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Relator filed an application for the writ of habeas corpus, which was granted, and made returnable before the court at the present term. The bond was fixed at the sum of \$100. By the agreed statement of facts it is made to appear that complaint was filed against Alex Freedman in the corporation court of the city of Corsicana, charging him with a violation of the Sunday law. Relator was convicted, and appealed to the county court. The county court refused to dismiss the appeal, holding that the corporation court had jurisdiction to try the case originally; and the trial in the county court resulted in the conviction of relator, his fine being assessed at the sum of \$25 and costs. Relator filed his motions in arrest of judgment and for new trial, which were overruled. Thereupon he gave notice of appeal to the Court of Criminal Appeals, and entered into recognizance upon the 31st day of January, 1903. On the 30th day of November, 1903, alias capias pro fine issued from the county court, and was placed in the hands of the sheriff; and relator was taken in custody of said officer, but was not actually imprisoned, though restrained of his liberty and held subject to the order of said sheriff pending his application for the writ of habeas corpus. When the writ was granted, relator gave bond, as above stated.

Under the statutes authorizing appeals to this court, the judgment of the county court was final, and no valid recognizance could be entered by the county court, since the amount of the fine was not such as authorized an appeal to this court. There being no authority for an appeal, in the very nature of things there could be no valid recognizance entered into. Then, if there is no valid recognizance, it necessarily follows that the alias capias pro fine was proper to collect the fine and costs adjudged against relator.

The above are the views of the writer. However, a majority of the court hold that after notice of appeal, and the trial court has caused appellant to enter into recognizance, the trial court loses jurisdiction over the case. Consequently the capias pro fine was improperly issued. See Nelson Parsons' Case (just decided) 78 S. W. 502. It follows from the opinion of the majority on the question of arrest, which is solely under consideration now, that relator, being illegally arrested, inasmuch as he had entered into recognizance and given notice of appeal, is entitled to his discharge. When the record showing he has entered into recognizance comes before us on appeal, we will pass on the questions involved.

The relator is accordingly discharged.

ROSS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 27, 1904.)

RAPE—ASSAULT WITH INTENT—FORCE.

1. The force used by one requesting intercourse, with a threat to injure if it be refused, he at the time having hold of her hand, but doing nothing on her refusal, though he had opportunity, is not sufficient to show intent to use sufficient force to overcome all resistance, necessary for a conviction of assault with intent to rape.

Appeal from District Court, Milam County; J. C. Scott, Judge.

Miles Ross appeals from a conviction. Reversed.

Wallace & Camp, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of assault with intent to commit rape, and his punishment assessed at confinement in the penitentiary for a term of 10 years.

The only question to be considered is the sufficiency of the evidence to sustain the verdict. An examination of the record discloses without controversy that appellant was under 14 years of age at the time of the alleged assault. The judge instructed the jury that they could not convict appellant of an assault with intent to rape if they found he was under 14 years of age. However, the jury seemed to have disregarded the instruction of the court and the uncon-

¶ 1. See Rape, vol. 42, Cent. Dig. §§ 18, 31.

tradicted evidence in the case. Evidently, under such circumstances, the court should have awarded appellant a new trial. Further than this, it does not occur to us that the record shows the use of sufficient force to have authorized the jury to convict appellant of an assault with intent to commit rape. The law requires, before the jury can convict appellant of this character of offense, they must find that he intended to use sufficient force to overcome all resistance. As far as we are advised from the record, all that appellant did was to ask prosecutrix to copulate with him. He seems to have had her by the hand at the time he made the request. He told her, in this connection, if she did not consent he would kill her; but as soon as she objected and screamed he made no further attempt, although he appears to have had ample opportunity to have at least made further attempt to accomplish his purpose by the use of force, as no one was near at the time, the nearest persons being her brothers, who were some three-fourths of a mile away. Under the decisions of this court the force used was not sufficient to manifest his determination and specific intent to have intercourse with prosecutrix at all hazards. *Jim Dina v. State* (decided at present term) 78 S. W. 229, and authorities there cited.

The judgment is reversed, and the cause remanded.

WATSON v. STATE.

(Court of Criminal Appeals of Texas. Jan. 27, 1904.)

DRUGGIST—SALE OF LIQUOR FOR MEDICINAL PURPOSES—PATENT MEDICINES.

1. Pen. Code 1895, arts. 455, 466, prohibiting any person not a qualified pharmacist from compounding or retailing medicines, do not apply to sales of liquor on prescription of physicians under a license taken out for that purpose, or to sales of patent medicines and pills.

Appeal from Hunt County Court; F. M. Newton, Judge.

D. N. Watson was convicted of compounding and retailing medicines without being a qualified pharmacist, and appeals. Reversed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of compounding and retailing medicines without then and there being a qualified pharmacist, and continuing that business without having been examined by a qualified board of pharmacists and obtaining a certificate, etc. The statute under which he was convicted is article 466, Pen. Code 1895, which provides: "Any person not a qualified pharmacist, but who continues to compound prescriptions or retail medicines without complying with this law, shall, upon the first conviction, be sentenced to pay a fine of not less

than fifty nor more than one hundred dollars," etc. Article 455, Id., reads: "It shall be unlawful for any person, unless a qualified pharmacist within the meaning of this law, to open or conduct any pharmacy or store for compounding medicines, or for any one not a qualified pharmacist to prepare physicians' prescriptions or compound medicines, except under the direct supervision of a qualified pharmacist as hereinafter provided." The sale occurred in Greenville, which was a town of more than 1,000 inhabitants, and local option was in force in the entire county of Hunt. The facts show that appellant was engaged in the business of selling whisky upon prescription of physicians in the town of Greenville, Hunt county, under a license taken out for that purpose; and that he sold on December 1, 1902, on a prescription, one quart of whisky. The prescription was regular on its face, etc. In addition to this, he only sold patent medicines and pills. It is contended that the evidence does not show a violation of the statute. This contention is correct. The statute under which he was indicted has no application to this sort of case. In the sale of whisky upon prescription it is not necessary to compound any medicines or drugs, nor was this law ever intended to apply to such character of sales on prescription.

The judgment is reversed, and the cause remanded.

SANCHEZ v. STATE.

(Court of Criminal Appeals of Texas. Jan. 27, 1904.)

CRIMINAL LAW—MURDER—EVIDENCE—CONFESSIONS—TRIAL—CONTINUANCE—APPEAL—STATEMENT OF FACTS—SETTLEMENT OF BILL OF EXCEPTION

1. Overruling an application for continuance in a criminal case cannot be reviewed on appeal where the record contains no statement of facts.

2. The court's action in refusing to delay a trial for murder until he had signed a bill of exception to the introduction of defendant's written confession was not error, where counsel had taken considerable of the court's time in preparing the bill, and, though he excepted to the court's action, gave no reason for the exception, and the bill was examined and signed as early as practicable, and many of the bystanders at the trial were accessible to counsel for consultation.

3. Where, on a trial for murder, the state's testimony that written confessions of the defendant were voluntary is controverted by defendant's testimony, they are admissible, subject to a proper charge by the court.

4. That an indictment of an accessory to a murder stated that the deceased was choked to death by the principal does not render invalid an indictment, returned the following day, charging the principal with the killing by "ways, means, and manner, and by instruments to the grand jurors unknown."

Appeal from District Court, Frio County; E. A. Stevens, Judge.

Jose Sanchez was convicted of murder in the first degree, and appeals. Affirmed.

E. R. Lane, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the first degree, and his punishment assessed at confinement in the penitentiary for life.

There is no statement of facts in the record. By bill of exception No. 1, appellant insists that the court erred in overruling his application for continuance. In the absence of the facts, this bill cannot be reviewed.

By bill No. 2, appellant insists the court erred in sustaining the state's exception to the introduction of the original petition in the case of *Gregoria Torres v. Margarito Torres*. At the time said testimony was offered, counsel informed the court that he proposed to prove by copies that Gregoria Sanchez contracted the loathsome disease of syphilis from her former husband, Margarito Torres, and that was one of the issues in the civil suit; and another issue was that Margarito Torres debauched the sister of Gregoria, aged 14 years, and cohabited with her. The explanation of the court to the bill states in substance that no testimony was offered by the state on the trial of the case that rendered or could possibly render this testimony admissible.

Bill No. 3 complains that, when the state offered what it claimed to be the voluntary written confession of defendant, his counsel objected to its introduction, and asked time to prepare his bill. The court granted counsel time to prepare the bill, and he immediately thereafter presented the same to the court, stating that he desired the same signed by the court with as little delay as possible, for the reason that the bystanders who had heard the statements and the court's ruling thereon would disperse, and the defendant be prejudiced in his rights. Which last request the court overruled, stating that he had 10 days of the term in which to sign the same; and also overruled appellant's request that he delay the trial until he signed the same, and directed the trial to proceed. The court appends this qualification: "Defendant's counsel had consumed a considerable portion of the court's time in the preparation of his bill of exceptions, and, when he presented it and requested that proceedings be further delayed, the court stated he would examine it as early as convenient, but would not then further delay the proceedings of the court for that purpose. Defendant's counsel did except to the ruling of the court, but he said nothing about bystanders, nor did he give any reason for his exception; and the court did examine said bills of exception as early as practicable, and there are many of the bystanders residing in Pearsall who are accessible to defendant's counsel, and he could consult them if he wishes to." We do

not think there was any error in the ruling of the court.

Bill No. 4 complains that the court erred in admitting in evidence the several written confessions of appellant. The proper predicate for the introduction of this testimony, as shown by the bill, was laid by the state. However, this predicate is seriously controverted by the defendant; that is, the testimony of the state shows that the statements were voluntary, and the testimony of the defendant perhaps tends to show the converse. This condition would not per se render the statements inadmissible, but under various decisions of this court the statements would be admissible. Where there is an issue as to whether or not the confession is voluntary, that issue should be presented by the court in a proper charge to the jury. However, appellant does not insist, either by bill or motion for new trial, that the court's charge is erroneous in this respect, but merely objects to the introduction of the statement. There was no error in the ruling of the court.

Bill of exceptions No. 5 shows that appellant offered a certified copy of the indictment returned against Leandre Guterres by the grand jury of La Salle county on September 9, 1901, and No. 902 on the docket of said district court, styled "*State of Texas v. Leandre Guterres*, charged with the offense of accessory to murder." Whereupon the state's counsel objected to the introduction of said certified copy, on the ground that it was immaterial, irrelevant, and foreign to any issue in the case on trial. The court sustained the exception. The bill of exceptions does not show any purpose or reason for the introduction of the testimony. However, were we permitted to consult the motion in arrest of judgment, we find that the indictment offered in evidence charged that deceased was choked to death by defendant, and that Leandre Guterres was an accessory thereto, whereas the indictment against appellant charges the killing was done by "ways, means, and manner, and by instruments to the grand jurors unknown." The indictment against this defendant was returned September 10th, whereas the indictment against the accomplice was returned September 9, 1901. Appellant reasons from this fact that the grand jury did know the manner and means of the death of deceased, and the indictment should have so charged. We do not think it follows from said facts that this was true. The court did not err in refusing to grant motion in arrest of judgment on this account.

The other grounds of the motion for new trial cannot be reviewed in the absence of the facts.

No reversible error appearing in the record, the judgment is affirmed.

MCCARTY v. STATE

(Court of Criminal Appeals of Texas. Jan. 27, 1904.)

THEFT—CONVERSION OF BAILEE—INDICTMENT—BILL OF EXCEPTIONS.

1. An indictment under Pen. Code 1895, art. 877, making conversion by a bailee theft, alleging that defendant having possession of two horses, then and there the property of G. by virtue of his contract of hiring with W., who was acting for G. as agent, did, without the consent of G., convert the same, is defective in not directly and positively alleging that W. was duly authorized by G., and in not alleging absence of consent of the agent.

2. A bill of exceptions to remarks of counsel should be either granted or refused outright, and not signed with the qualification that the judge was unable to say whether the remarks were made.

Appeal from District Court, Parker County; J. W. Patterson, Judge.

C. H. McCarty appeals from a conviction. Reversed.

Preston Martin, for appellant. Jas. C. Wilson, Co. Atty., and Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of the theft of two horses, and his punishment assessed at confinement in the penitentiary for a term of four years; hence this appeal.

The conviction was under article 877, Pen. Code 1895, which makes the conversion by a bailee theft. Appellant made a motion to quash the indictment because the contract of bailment, that is, its particular character, was not set out in the indictment; and because the contract of bailment was not distinctly alleged, but only inferentially stated; and because there was no averment of want of consent on the part of the person hiring, to wit, Henry Walker. In reference to the first proposition, it has been held that it is not necessary to allege the particular character of bailment. *Elton v. State*, 40 Tex. Cr. R. 339, 50 S. W. 379, 51 S. W. 245.

In reference to the second objection urged by appellant, we note that he relies upon *Smith v. State* (Tex. Cr. App.) 42 S. W. 302, and also *Elton's Case*, supra. An examination of *Smith's Case* shows that it refers to *Calkins v. State*, 34 Tex. Cr. R. 251, 29 S. W. 1081. In the latter case it was held that the indictment must show a contract of bailment, and must allege with whom the bailee contracted; that the general allegation that the property was held by virtue of a contract of bailment by the accused was not sufficient. In *Smith's Case*, supra, it was held that the contract and the parties thereto must be directly averred, and not be left to inference. *Elton's Case* recognizes the principle announced in *Smith's Case*, but differentiated the latter from the former. In the *Elton Case* it was alleged that appellant had possession of the two certain horses, and the same were then and there the property of

Arthur Cain, and the possession thereof had been theretofore acquired by the said Elton by virtue of a contract of hiring and borrowing made by said Elton with one D. W. May, who was thereunto duly authorized by the said Arthur Cain. Then the want of consent to the conversion by both said Cain and May was alleged. The facts of this case are substantially the same as in the *Elton Case*, but the allegations in the indictment are not as direct and positive. In this case it is alleged "that appellant, having possession of two horses, then and there the property of one John Gilbert, by virtue of his contract of hiring with one Henry Walker, who was acting for the said John Gilbert as the agent and employé of the said John Gilbert, did then and there, unlawfully and without the consent of the said John Gilbert, the owner thereof, fraudulently convert," etc. It will be seen that in the present indictment it is alleged that Henry Walker, from whom appellant procured possession, was acting for the said John Gilbert (the owner) as his agent and employé. It is not distinctly charged, as in *Elton's Case*, that said Walker was duly authorized by the said Gilbert, etc., but we get his authority from the allegation that he was acting as such agent. We think the allegation should be direct and positive, and not be left to inferences. Moreover, inasmuch as the contract of hiring in this case was made through an agent, which would seem to concur with the idea that such agent might act by the terms of the contract, or otherwise consent to the disposition of the property by the bailee, consequently the want of consent of the agent should be alleged in the indictment, as was done in *Elton's Case*. True, the statute (article 877, Pen. Code 1895) says that, if the conversion is made without the consent of the owner, the offense is complete; still, inasmuch as the agent directly parts with the property and his agency, and its extent is involved in the case, in our opinion his want of consent should be alleged. We think the indictment here comes within the rule laid down in *Smith v. State*, supra, and is not in its form like the indictment in *Elton's Case*. Therefore we hold the indictment defective, and it should have been quashed.

There is but one other question we deem necessary to notice; that is, the question raised by appellant as to the remarks of the prosecuting attorney concerning the failure of appellant to testify in the case. It appears from the statements of appellant's attorney on this point that, during the opening speech for the state by John W. Moyer, assistant prosecuting attorney, he used the following language: "I tell you, gentlemen of the jury, they have not tried to explain anything in this trial. Where is Joe Harrold, an accomplice with defendant here? Why is he not placed on the stand to explain how it all happened? He knows, and the defend-

ant knows; but they are afraid to go on the stand and explain this—I mean Joe Harrold is afraid to go on the stand and tell about it.” At this juncture, as shown by appellant’s counsel, he excepted to said remarks. The judge explains this bill as follows: “This bill is signed with the following statement as a part of and in qualification of the same: That, while said counsel was addressing the jury, defendant’s counsel, Preston Martin, Esq., came to me and called my attention to the fact that counsel for state had alluded to and commented to the jury upon defendant not testifying in the case, and I at the time made a note of what defendant’s counsel claimed, and defendant’s counsel then and there objected and excepted to the remarks of counsel for the state. I was busy at the time writing my charge to jury, and did not hear what counsel was saying, and the counsel for state positively denied making any such remarks, and, after hearing affidavits both by state and defendant, I am not able to say whether the remarks were made or not, and I do not know whether or not same was made, and this bill is signed with the foregoing statement and qualification as part of same.” From further proceedings as to this bill it appears it was contested by the state, and affidavits pro and con introduced. Besides the affidavit of his counsel, appellant introduced the affidavit of the deputy district clerk, and they concur in stating that the argument was used as alleged by defendant. On the other hand, both the county attorney and assistant county attorney made affidavits directly controverting the alleged statement. In that connection the county attorney in his affidavit states that his assistant, Mr. Moyer, did allude to the fact that McCarty’s accomplice, Joe Harrold, and McCarty’s wife did not take the stand, and that he used the remark in that connection—why were they not here to testify to these things, if true, etc. In connection with these affidavits, the state also introduce the affidavits of a number, perhaps a majority, of the jury, who stated that they did not hear the remark attributed by appellant to prosecuting attorney. We understand there are but two ways to take a bill of exceptions to the action of the court during the progress of a criminal trial—one by bill presented by the defendant and allowed by the judge; and the other, in case of refusal, to take a bill signed up by bystanders. The affidavits here presented could not be considered in the nature of a bill by the bystanders, and unless the bill, as signed by the judge, is a bill of exceptions, then appellant has no bill on the subject of said remarks. We are advised of no case presenting the exact question as the bill of exceptions here shows. In Spangler’s Case, 42 Tex. Cr. R. 233, 61 S. W. 314, on motion for rehearing, a bill with a similar certificate was embraced in the record; that is, the judge certified he was busy at the time, and did not remember any of the matters contained in the bill as

having been introduced in evidence, and refused to allow the bill as to the argument on certain evidence because he had no recollection of it. In a subsequent bill, however, it was shown, that the evidence recited in the first bill was introduced in evidence over appellant’s objection, and we construed the two bills together. But here there is no second bill, and the judge certifies he did not hear what counsel was saying at the time, and the state’s counsel positively denied making any such remarks as attributed to him, and that he then heard affidavits both by state and defendant, but was unable to say whether the remarks were made or not, and signed the bill with this qualification. We believe it was the duty of the court, when the exception was first made to him (he, being busy about other matters, had not heard what was said), to have stopped the case and made inquiry of counsel, and have then determined the matter while it was fresh. Failing in this, he should at least, after having heard the affidavits, decided the question one way or the other, either granting or refusing the bill outright. As it is, we are unable to determine whether the judge intended to grant appellant some sort of a bill of exceptions, or to refuse it altogether. Appellant was entitled to have his bill either approved by the judge or disallowed, as in the latter case he would then have the right to resort to bystanders. At any rate, the trial judge was not authorized to refer a question of fact for decision by this court, when it was a part of his functions to decide that matter for himself. However, this question is not likely to arise on another trial, and is not necessary to a decision thereof, inasmuch as the indictment is defective. Because of such defect, the judgment is reversed, and the prosecution ordered dismissed.

BROWN v. STATE.

(Court of Criminal Appeals of Texas. Jan. 27, 1904.)

MURDER—CHALLENGE OF JURORS—PERSONAL PRIVILEGE—INSTRUCTION ON MANSLAUGHTER—SUFFICIENCY OF EVIDENCE.

1. The fact that the court, in a criminal prosecution, refused to excuse one juror because he had a cold, though he was not incapacitated from business, and another because he was a city fireman, thereby compelling defendant to challenge them peremptorily, is not ground for reversal; the bill of exceptions not showing that he exhausted his challenges, or was compelled to take any objectionable juror.

2. In a prosecution for murder, it appeared that accused previously prepared to kill decedent, who, he claimed, was his paramour, because she refused to live with or marry him; that, though he said he was in the habit of carrying a pistol, the one he took with him on the occasion of the homicide was a bright, new one, and his credibility was impaired by contradiction on other issues; that he exhibited no undue excitement before or after the time of the homicide; and that his manner did not attract the notice of witnesses who were present, though

he was excited afterwards. *Held*, that it was not error to omit to instruct on manslaughter.

8. Evidence in a prosecution for murder *held* to sustain a conviction of murder in the first degree.

Appeal from District Court, Travis County; R. L. Penn, Judge.

John Brown was convicted of murder, and appeals. Affirmed.

A. S. Phelps, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of murder, and his punishment assessed at confinement in the penitentiary for life, and appeals.

Appellant excepted to the action of the court in refusing to allow him to challenge two of the jurors for cause, and thus requiring him to peremptorily challenge said jurors. One of the jurors claimed to be sick with a cold, but said he was able to go about his business, and the court refused to excuse him. The other juror stated he was a fireman of the city of Austin, and asked to be excused on that account. The court refused to excuse him. Appellant challenged both of said jurors. No question was made as to the competency of said jurors. Both merely claimed to be excused on account of personal privilege, which the court refused to recognize. We believe, if the court had, over appellant's objection, excused said jurors, there might be some force in his contention; but even then his objection might be plausible, but would not be valid. Besides this, appellant's bill of exceptions does not show that he exhausted his challenges—much less, that he was forced to take any objectionable juror. Under the rule laid down by this court, even if the jurors had shown themselves subject to challenge for cause, appellant could not complain. *Loggins v. State*, 12 Tex. App. 65; *Hudson v. State*, 28 Tex. App. 323, 13 S. W. 388; *Brown v. State*, 42 Tex. 179, 58 S. W. 131; *Carter v. State* (Cr. App.) 76 S. W. 437, 8 Tex. Ct. Rep. 319.

Appellant contends that the court should have submitted to the jury the law of manslaughter, which it failed to do. Under our view of the record, no such adequate cause was shown as to have required the court to give a charge on manslaughter. *Ford v. State*, 40 Tex. Cr. R. 280, 50 S. W. 350.

Appellant insists that the evidence fails to show murder in the first degree, and that consequently the conviction should not be permitted to stand. We have examined the record with relation to this contention, and, in our opinion, there can be no question that this phase of the case is fully sustained. It might be, if the court had failed to charge on murder in the second degree, appellant might complain, but a charge on that subject was given. Evidently, under the proof here, appellant had previously prepared to kill deceased, who he claimed, was his paramour, provided she refused to live with him or mar-

ry him. He states himself that this was the occasion of his killing her. According to his statement, he went to where she was working, with a pistol, and, although he says he was in the habit of carrying a pistol wherever he went, in view of his complete contradiction by the state upon other issues, and the fact that the pistol was a bright, new one, the jury hardly believed his testimony that he was in the habit of carrying it. Moreover, there does not appear on his part, either before or at the time of the homicide, any undue excitement. His manner on that occasion before the shooting was not such as to particularly attract the witnesses who were present. The fact that he may have been excited afterwards is of small significance, as such a deed, either in its accomplishment or thereafter, was calculated to excite the person committing it. Without any cause, except, as he says that the woman refused to longer cohabit with him or marry him, he determined to kill her, and perpetrated his diabolical crime without any particular manifestation of passion or excitement. His act appears to have been coolly done, and, in our opinion, the jury would have been fully warranted in inflicting the death penalty. Through humanity, they gave him a lesser punishment, and we find nothing in this record to authorize us to disturb their verdict.

The judgment is affirmed.

BALL v. STATE.*

(Court of Criminal Appeals of Texas. Jan. 20, 1904.)

CRIMINAL LAW—IMPROPER ARGUMENT OF COUNSEL—FAILURE TO REQUEST WRITTEN CHARGE—ABSENCE OF BILL OF EXCEPTIONS—INSTRUCTIONS—MISTAKE AS TO TERM OF COURT—REVIEW OF EVIDENCE—RAPE.

1. In a criminal prosecution, statements of the prosecuting attorney in argument that if ever there was a man who swore a lie on the witness stand defendant swore one, and that defendant was as guilty a scoundrel and liar as was ever tried in a courthouse, are not ground for reversal.

2. Defendant's failure to request a written charge when objecting to the argument of the prosecuting attorney precludes a review thereof.

3. A complaint of the argument of the prosecuting attorney, in defendant's motion for a new trial, which is not verified by bill of exceptions or affidavit, cannot be considered on appeal.

4. A mistake of the court, in instructing the jury in a criminal case, in referring to the trial as held at a previous term, is not ground for reversal, though there was a previous trial of the cause.

5. Where there is evidence to support a conviction, it will not be reversed because a preponderance of the evidence may favor defendant.

6. Defendant, indicted for rape by force and threats, cannot complain of the court's failure to define threats in its instructions.

Appeal from District Court, Parker County; J. W. Patterson, Judge.

*Rehearing denied February 10, 1904.

G. T. Ball was convicted of rape, and appeals. Affirmed.

Preston Martin, Gilbert & Gilbert, and Brown & Bledsoe, for appellant. Jas. C. Wilson, Co. Atty., for the State.

BROOKS, J. This is a conviction for rape, the punishment assessed being confinement in the penitentiary for a term of 14 years. The former appeal is reported in 72 S. W. 384, 7 Tex. Ct. Rep. 105.

The first bill of exceptions complains that the prosecuting attorney in his argument to the jury used the following language: "If ever there was a man who swore a lie on the witness stand, this man Ball swore one." Appellant excepted on the ground that it was "unwarranted, vituperative and denunciatory of defendant, and calculated to injure defendant's rights before the jury, and defendant at the same time requested the court to stop counsel in such unwarranted argument, and to withdraw and instruct the jury not to consider the improper language used, which the court declined to do." The court's explanation to the bill reads: "Counsel for state did use the language complained of, and that defendant's counsel at the time called the court's attention to same, and objected and excepted to said remarks; but counsel did not request the court to withdraw same from the jury, or to instruct the jury to disregard the same; that the court, when his attention was called to the remarks by counsel, simply noted the objection and exceptions, and did not stop counsel or instruct the jury to disregard same. This statement is made as explanatory of and part of this bill." His second bill of exceptions complains of the following language used by the prosecuting attorney: "This defendant is as guilty a scoundrel and liar as was ever tried in a courthouse." Appellant urges the same objections, and the court qualifies the bill in substantially the same language as that quoted above as to the first bill. Mere expressions of belief on the part of prosecuting attorney as to the guilt of defendant is not ground for reversal. *Thomas v. State*, 33 Tex. Cr. R. 607, 28 S. W. 534. In *Frizzell v. State*, 30 Tex. App. 56, 16 S. W. 751, prosecuting attorney used the following language: "Defendant was a tramp, a vagabond, and a felon." Counsel for appellant interrupted the speaker, and objected to the language. He did not request the court to instruct the jury in relation thereto. In that case it was held the remarks were not such as were calculated to illegally affect the defendant's rights; citing *Walker v. State*, 28 Tex. App. 503, 13 S. W. 860. Appellant did not ask a written charge that the court instruct the jury to disregard this language. This is necessary. *Habel v. State*, 28 Tex. App. 588, 13 S. W. 1001; *Jackson v. State* (Tex. Cr. App.) 37 S. W. 430.

In motion for new trial appellant insists

error was committed by the county attorney in his closing argument to the jury, wherein he stated that defendant had doubtless made similar attempts on Myrtle Ball, prosecutrix, previous to the time of the alleged assault upon her, as testified by Myrtle Ball. This complaint is not verified by bill of exceptions nor affidavit, and therefore cannot be considered.

In motion he complains "the charge of the court, as delivered to the jury, purports to have been made as upon a trial of said case at the March term, 1903, of the district court of Parker county, Tex., when the trial of said case was held at the October term, 1903, of said court, and upon facts shown in evidence at said October term, 1903, and not at the March term of said court. And because said charge, being entitled as of the March term, 1903, of said court, naturally caused an inquiry upon the part of the jury as to the former trial of this cause, and as to the result of the trial at said time, to the prejudice of the rights of this defendant." We cannot see how the mere mistake in the term of the court could prejudice the rights of defendant.

He also excepted to the following portion of the court's charge: "If you find and believe from the evidence, beyond a reasonable doubt, that defendant did in Parker county, Tex., on or about the 20th day of August, 1902, and before the 3d day of October, 1902 [which is the day of the filing of the indictment], have carnal knowledge of said Myrtle Ball, and if you believe the said Myrtle Ball was then and there a female under the age of 15 years, and that the said Myrtle Ball was not then and there the wife of defendant, you will find defendant guilty of rape, as charged in the first count of the indictment." Appellant excepted to this charge, because the evidence did not support it; that, if any rape was shown to have been committed, it was committed by force and against the consent, and not with the consent, of prosecutrix; and because the court having in the previous portion of said charge defined rape as the carnal knowledge of a female under the age of 15 years, not the wife of the person, with or without her consent, and with or without the use of force, and the charge complained of above permitted the jury to find defendant guilty whether said rape was committed with or without the consent and with or without the use of force, and was a charge without support in the evidence. There is ample evidence to support the charge complained of. The evidence is sufficient to support the verdict of the jury. We will not reverse a case, as appellant insists, because the preponderance of the evidence may be in favor of defendant, even if it be conceded his contention is true. The evidence on the part of the state, if true, makes out a complete case of rape upon a child under 15 years of age, and authorizes the conviction of appellant under the charge.

Appellant's last insistence is that the court erred in not defining threats in his charge. The indictment alleges rape by force and threats. Such a charge would be against appellant, and he cannot, therefore, complain of its omission.

The judgment is affirmed.

Ex parte WINDSOR.

(Court of Criminal Appeals of Texas. Jan. 27, 1904.)

HABEAS CORPUS—REMEDY AT LAW.

1. One under arrest on a complaint for receiving a bet, and who contends that, under the agreed facts, this was not an offense, may not have the remedy of habeas corpus, the remedy at law being sufficient.

Original application by Harry Windsor for habeas corpus. Denied.

Cecil Smith, W. A. Hanger, Newton & Ward, and Wm. P. Ellison, for relator. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. This is an original application for the writ of habeas corpus, which was granted by the presiding judge at a former day, and made returnable before the court. The application, together with the exhibits, shows that relator is under arrest, charged by complaint and information with unlawfully engaging and assisting in taking and accepting from one Max Price a bet of \$10 on a horse race to be thereafter run, on December 10, 1903, in the state of Louisiana, etc. In connection with the application there is also an agreed statement of facts which tends to show that the bet or wager was not made in Grayson county, Tex., but was made in Hot Springs, in the state of Arkansas; the contention being that the same is not an offense in this state under the Acts of the Twenty-Eighth Legislature, prohibiting the buying and selling of pools, etc., on horse races. See Gen. Laws, 28th Leg. p. 68, c. 50. It appears from the presentation of the case that it is an attempt on the part of relator to avoid a trial in the court below, and have the case tried in this court. It has been frequently held by this court that the writ of habeas corpus can only be granted in extraordinary cases, where the remedy at law is not adequate. See *Ex parte Ezell*, 40 Tex. 451, 19 Am. Rep. 32; *Ex parte Dickerson*, 30 Tex. App. 448, 17 S. W. 1076; *Ex parte Lambert* (Tex. Cr. App.) 36 S. W. 81; *Ex parte Japan* (Tex. Cr. App.) 38 S. W. 43. It has also been decided that the writ will not be granted where an appeal lies. *Ex parte Matthews* (Tex. Cr. App.) 49 S. W. 623. In *Ex parte Easley* (Tex. Cr. App.) 51 S. W. 1132, it was decided that where a magistrate held to bail, but the criminative evidence was weak and unsatisfactory, this court would not interfere by habeas corpus to reduce the bail—much less, to release the prisoner. *Ex parte Eckhart*

(Tex. Cr. App.) 50 S. W. 349, holds this court would not interfere by habeas corpus to prevent a trial. It occurs to us that this case come within the principles announced in the above-cited cases. We will not assume that the court below will not properly administer the law, and will not determine questions presented to it, in a legal and proper manner. If on the trial of this case below the evidence is not sufficient to show the commission of an offense in the state of Texas, we apprehend the lower court will so decide. If not, an appeal will lie. Therefore we hold that, the relator's remedy being adequate at law, we will not interfere to prevent a trial of his case in the court below.

Relator is remanded to custody, and the costs of this proceeding are adjudged against him.

ABBOTT et al. v. STATE.

(Court of Criminal Appeals of Texas. Jan. 27, 1904.)

BAIL BOND—FORFEITURE—SCIRE FACIAS—PEREMPTORY INSTRUCTION—ALTERING COMPLAINT IN PROSECUTION—APPEAL—JUDGMENT NISI.

1. The statement of facts on appeal from a judgment in scire facias on a forfeited bail bond must show the judgment nisi was introduced in evidence.

2. Scire facias proceedings on a forfeited bail bond are not affected by the fact that after the forfeiture and the rendition of judgment, the principal in the bond having been rearrested, the complaint which was the basis of the prosecution was altered by insertion of a count.

3. Though a scire facias on a forfeited bail bond is of a criminal character so far as to give the Court of Criminal Appeals jurisdiction, yet the trial thereof is regulated by the civil procedure, so that a peremptory instruction may be given.

Appeal from Dallas County Court; Ed S. Lauderdale, Judge.

Scire facias by the state against H. H. Abbott and others. Judgment for plaintiff. Defendants appeal. Reversed.

Miller & Fouraker, for appellants. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. This is an appeal from a judgment against the principal and sureties in a scire facias case. The statement of facts fails to contain the judgment nisi, consequently the case must be reversed. *Nelson v. State* (Cr. App.) 73 S. W. 398, 7 Tex. Ct. Rep. 341. However, appellants insist that the court should pass on two other questions which are likely to arise again in the court below. They contend that after the forfeiture of the bond and rendition of the judgment, the principal in the bond in the meantime having been rearrested, the county attorney altered the complaint and information, which was the basis of the prosecution, and inserted an additional count therein, to wit, a count for simple gaming; the original complaint and information charged exhibit-

ing a gaming table, etc. It is contended that on account of this alteration the original complaint and information were vitiated, and thus rendered null and void, and that the scire facias case could not thereafter be prosecuted. In that connection they cite us to *Kiser v. State*, 18 Tex. App. 201; *Collins v. State*, 16 Tex. App. 274; *Wegner v. State*, 28 Tex. App. 419, 13 S. W. 608; *Butler v. State*, 31 Tex. Cr. R. 63, 19 S. W. 676. We have examined these cases, and each of them involves an alteration or change in the nisi judgment or bond. We understand that in a scire facias proceeding the judgment nisi and the bond constitute a part of the case, and must be introduced in evidence. Not so with the complaint or information. These, under the judgment nisi, appear to be functus; that is, it is not necessary to introduce either the complaint or information in evidence. *Martin and Neal v. State*, 16 Tex. App. 265. Accordingly we hold that the alteration of the complaint did not affect the scire facias proceeding. Even if it be conceded that this alteration, unexplained, might have affected it, still there was no alteration of the count in the information on which the judgment nisi was taken; and the alteration was simply the inserting of another count, and on proper motion the inserted count would have been stricken out. *Kiser v. State*, 13 Tex. App. 201. Appellants also contend that the charge of the court which instructed the jury to find for the plaintiff was error, inasmuch as this was a criminal case, and it is not competent in a criminal case to give a peremptory instruction to the jury. While this court has held that a scire facias proceeding was of a criminal character so far as to give this court jurisdiction, yet in the trial thereof it is regulated by the civil procedure (article 490, Code Cr. Proc.). *Short v. State*, 16 Tex. App. 44. If appellants' contention be correct, this case must be tried according to procedure in purely criminal cases, and the judge would be required to charge on reasonable doubt in favor of the principal and sureties on the appeal bond. We hold that, where there is no controversy as to the facts proven in the scire facias proceedings, and the facts authorize a finding in favor of the state, it is not error, where the case is tried by the jury, for the court to instruct the jury to find for the state.

The judgment is reversed, and the cause remanded.

MILLER v. STATE.

(Court of Criminal Appeals of Texas. Jan. 27, 1904.)

CRIMINAL LAW—REMARKS OF PROSECUTING ATTORNEY—NEW TRIAL.

1. Where the district attorney calls the jury's attention to the fact that the evidence of the accused on his own behalf in the examining trial is not produced on the present trial, and says the reason is that it would show him guilty, a

new trial should be granted the accused on conviction, though the court charges the jury to disregard these remarks.

Appeal from District Court, Millam County; J. O. Scott, Judge.

Henry Miller was convicted of rape, and appeals. Reversed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of the rape upon a girl under the age of 15 years; the penalty assessed being five years' confinement in the penitentiary.

The district attorney, making his closing speech to the jury, remarked: "Gentlemen of the jury, the defendant's counsel has brought here and introduced in evidence on the trial the evidence of old Bob Hardy, given by him on the examining trial, to contradict his evidence given on this trial. Gentlemen, the defendant testified in his own behalf on the examining trial. Where is his testimony? They have not introduced it on this trial." And, turning to defendant's counsel, he said: "Why did you not read the defendant's evidence given on the examining trial? I will tell you why. Because his evidence showed that he was guilty." And the defendant excepted to the remarks," etc. The court states by way of explanation to this bill: "When defendant objected to the above language, I immediately sustained the objection, and told the jury to disregard the statement, as there was no evidence in the case of any testimony given by defendant at the examining trial." These remarks were improper. The fact that he testified in the examining trial should not have been discussed. This is not only a statement of the fact that defendant had testified on the examining trial, which was not before the jury, but there was a further statement that appellant's evidence given on the examining trial would have shown his guilt. These remarks, even treated from this standpoint, should not have been indulged, and the court should have promptly granted a new trial. But they go further, and, if they do not directly, they certainly do acutely indirectly, call attention to the fact that defendant did not testify on this trial.

There is another bill of exceptions reserved to the remarks of the district attorney. We deem it unnecessary to discuss that bill, inasmuch as we have reversed for the remarks reserved in the other bill.

The judgment is reversed, and the cause remanded.

REESE v. STATE.

(Court of Criminal Appeals of Texas. Jan. 27, 1904.)

AGGRAVATED ASSAULT—EVIDENCE—SUFFICIENCY.

1. In a prosecution for aggravated assault, there can be no conviction where the evidence

nowhere shows that defendant made the assault on prosecutrix, but shows that prosecutrix made the assault on defendant.

Appeal from Hunt County Court; F. M. Newton, Judge.

W. H. Reese was convicted of aggravated assault, and appeals. Reversed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Conviction of aggravated assault, the penalty assessed being a fine of \$25.

The only question we deem necessary to pass upon is the sufficiency of the evidence. In our opinion the evidence is not sufficient to support the finding of the jury. It nowhere shows that appellant made an assault upon prosecutrix, but clearly shows that prosecutrix made the assault upon appellant.

Because the evidence is not sufficient, the judgment is reversed, and the cause remanded.

RANDLE v. STATE.

(Court of Criminal Appeals of Texas. Jan. 27, 1904.)

ASSAULT WITH INTENT TO MURDER—CONTINUANCE—ABSENT WITNESS—FAILURE TO SUMMON—IMMATERIALITY OF TESTIMONY.

1. A continuance of a prosecution for assault with intent to murder, sought on account of the absence of a witness who has not been summoned, and whose testimony that the injuries actually inflicted on the prosecuting witness were slight does not present a controverted point, is properly refused, the evidence clearly showing that defendant, had she not been prevented, would have killed the prosecuting witness.

Appeal from District Court, Fort Bend County; Wells Thompson, Judge.

Ella Randle was convicted of assault with intent to murder, and appeals. Affirmed.

J. C. Florea and W. L. Davidson, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of assault with intent to murder, and her punishment assessed at confinement in the penitentiary for a term of two years. The indictment follows the approved forms. *Morris v. State*, 13 Tex. App. 65; *Nash v. State*, 2 Tex. App. 362.

Appellant insists that the court erred in not postponing the case on account of the absence of Dr. O'Farrow. This witness had not been summoned. Furthermore, his testimony would not have been material. The substance of his statement is that the injuries upon the person of the prosecutrix were slight. There is no evidence controverting

this fact. However, the state's evidence shows appellant went into the house of prosecutrix, knocked her down, and was on top of her with a dirk, having already inflicted some cuts upon her person, when she was seized by parties and taken away. The evidence clearly shows that if not prevented, she could and probably would have killed prosecutrix.

The judgment is affirmed.

MARKS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 27, 1904.)

INTOXICATING LIQUORS—LOCAL OPTION—CRIMINAL PROSECUTION—EVIDENCE—DISTINCT OFFENSES.

1. In a prosecution for violation of the local option law, evidence that defendant, some eight or nine years previous to the trial, had been indicted a number of times for violations of the local option law, was inadmissible either to prove the offense charged, or to impeach defendant as a witness.

Appeal from Hill County Court; L. C. Hill, Judge.

Sam Marks was convicted of violating the local option law, and appeals. Reversed.

Douglass & Shurtliff and Spell & Phillips, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for violating the local option law. During the trial appellant testified in his own behalf. On cross-examination he was forced to testify as to the fact that, when local option was heretofore in force in Hillsboro, he was indicted in the court a number of times for violations of that law, and that this occurred in 1894 and 1896. Several objections were urged to the introduction of this testimony. *Stewart v. State* (Tex. Cr. App.) 38 S. W. 1144, is directly in point, and conclusive of the question that this was error. The state calls our attention to the *Levine Case*, 35 Tex. Cr. R. 647, 34 S. W. 969. We are of opinion that case is not in point, nor is the question analogous. In *Levine's Case* conviction was sought for violating the Sunday law, and the evidence of previous sales was introduced for the purpose of showing his guilt in the case on trial. The matters in the case in hand occurred eight or nine years before this trial, and could not have been introduced for that purpose. This case could not be made out by alleged violations eight or nine years previous to its alleged occurrence. Under the authorities this evidence was not admissible for the purpose indicated, nor to impeach appellant as a witness.

The judgment is reversed, and the cause remanded.

PERRY v. STATE.

(Court of Criminal Appeals of Texas. Jan. 27, 1904.)

BURGLARY—EVIDENCE—ADMISSIBILITY—SUFFICIENCY.

1. Testimony in a prosecution for burglary showing that the burglarized store was entered by the use of bits of the same size as those taken from another building, which were found early the following morning near where defendant was seen, and there later identified with property on his person taken from the burglarized store, is admissible.

2. Evidence in prosecution for burglary examined, and held sufficient to sustain a conviction.

Appeal from District Court, Travis County; George Calhoun, Judge.

Syd Perry was convicted of burglary, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of burglarizing a store belonging to Thaxton. The night this burglary occurred, a brace and bit were taken from a blacksmith shop just across the street from the store, about 60 feet distant. The evidence shows the entry to the house was effected by the use of bits of the same size as those taken from the blacksmith shop, and found early the following morning near where defendant was seen close to a fire in a hollow in a rough and unfrequented pasture. Defendant moved out of this hollow in a direction toward the place some 300 yards away, where he was positively identified with two or more suits on, and his pockets filled with property of a kind similar to that taken from the burglarized store. The brace and bit were found near the point where the fire was, "and in connection with the pair of new pants and canned goods positively identified as property taken from Thaxton's store on the night of the burglary charged in the indictment," as the court states in his qualification, and that for these reasons it was permitted to go before the jury. We do not believe this was error. The testimony was properly admitted.

Witness Hill was permitted to testify that he saw defendant in the woods about a mile and a half from the burglarized store, and that he saw two combs and the handle of two brushes sticking out of appellant's pocket. This was admitted, with the same explanation by the court as that to the previous bill.

Geo. Mathews testified that he found some old pants, a pair of new pants, and some empty cans in said pasture, about a mile and a half from the burglarized house, and found, also, covered up under the leaves, the brace and bit in question. This was admitted with the same explanation as given by the judge, already stated, and also upon the further statement of the judge that the pants and property stated by witness as being taken

from the store of Thaxton at the time it was burglarized was identified as the property of Thaxton; and the record shows further, in addition to the identification of the pants, that the canned goods had the private price mark of Thaxton on them when recovered. Witness Fox's testimony was objected to, and is admissible for the same reasons already stated, as well as the testimony of the witness Townsend.

We do not believe the court erred in failing to charge the jury, as contended by appellant, on the possession of recently stolen property. The property mentioned in his exception to the charge is that testified by the witnesses Mathews, Hill, and Fox. This was the property taken from the house itself, and relied upon by the state to connect defendant with the burglary. This is burglary, and all the property came from the house. Appellant is not charged with theft. He gave no account of his possession; did not undertake to explain it in any manner. We think the evidence is sufficient, and there was no such error in the trial of the case as requires a reversal.

The judgment is affirmed.

PERRY v. STATE.

(Court of Criminal Appeals of Texas. Jan. 27, 1904.)

BURGLARY—EVIDENCE—ADMISSIBILITY—SUFFICIENCY.

1. Where defendant in a prosecution for burglary was found under suspicious circumstances, tending to show that he was in actual possession of goods taken in another burglary, as well as tools taken in the burglary with which he was charged, and with which entry was gained to the other burglarized house, proof of the other burglary is admissible as part of the res gestæ, serving to identify defendant in connection with the crime charged.

2. Evidence in a prosecution for burglary showing that defendant was found in close juxtaposition to the goods taken in the alleged burglary, under circumstances which indicated that he was in possession of them, though not in the immediate, actual possession thereof, is sufficient to support a conviction.

Appeal from District Court, Travis County; George Calhoun, Judge.

Syd Perry was convicted of burglary, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of burglary, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal.

There are several bills of exception in the record, but all relate to the admission of an extraneous crime, to wit, appellant was charged with the burglary of the blacksmith shop of T. A. Hartung. The proof shows that there were taken from said house a brace, and two brace bits belonging thereto. The extraneous crime proven was the burglary of

a storehouse about 50 yards from the shop; the proof showing that the burglaries were committed on the same night, and near the same time, and the goods taken from the storehouse, and also the brace and bits were found the next day in a thicket in a pasture near Manor, where the burglary was committed. Appellant was found, under suspicious circumstances, in the immediate vicinity of said goods. The circumstances tend strongly to show that he was in the actual possession of them when first seen. Under these circumstances, the proof of the other burglary was held admissible. It occurs to us that this character of testimony was relevant and admissible as a part of the *res gestæ* of the alleged burglary; serving to develop the same, and to identify appellant in connection therewith. *Kelley v. State*, 31 Tex. Cr. R. 211, 20 S. W. 365; *Fielder v. State* (Tex. Cr. App.) 49 S. W. 376; *Bright v. State* (Tex. Cr. App.) 74 S. W. 912. There was no question made here as to the taking of the brace and bits for a merely temporary purpose, as in *King v. State* (Tex. Cr. App.) 67 S. W. 410. However, if such question had been made, we believe the same decision would have been reached as in *King's Case*. Appellant not only used the brace and bits for the purpose of consummating the burglary of the storehouse, but he evidently carried them away with him, for when found they were in the thicket with the other goods in the vicinity of where appellant was seen. This disposes of all the bills of exception.

We have examined the record carefully, and, in our opinion, it supports the verdict. In *Davis v. State* (Tex. Cr. App.) 74 S. W. 919, appellant was found in possession of the goods taken in the alleged burglary about a month after the commission thereof, and this was the principal evidence against him, and the conviction was sustained. In this case it is true that appellant was not found in the immediate actual possession of the goods taken in the alleged burglary, but he was found in close juxtaposition thereto, and under circumstances which indicate unmistakably that he was in possession of them. This was a much stronger case showing actual possession than *Lamater v. State* (Tex. Cr. App.) 42 S. W. 304.

There being no error in the record, the judgment is affirmed.

ROSS v. STATE.

(Court of Criminal Appeals of Texas. Jan. 27, 1904.)

RAPE—ASSAULT WITH INTENT.

1. A request for intercourse, with a threat to injure if it be refused, does not constitute an assault with intent to rape.

Appeal from District Court, Milam County; J. C. Scott, Judge.

Ned Ross appeals from a conviction. Reversed.

Wallace & Camp, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of an assault with intent to commit rape, and his punishment assessed at confinement in the penitentiary for a term of 15 years.

The following is substantially all the evidence adduced upon the trial: Annie Stolta testified: She was a girl over the age of 15 years. That about July 29, 1903, in Milam county, she was at her father's tank, one-fourth mile from the house, in company with an 11 and a 12 year brother, and some smaller children, who were in the tank, except the little one she had gone after. That defendant, in company with his brother Miles Ross, came to where she was, and stopped and talked with them. That defendant said, "Annie, let me fuck you;" and she said she would not do it. Whereupon he pulled his knife, and said, "If you don't, I will cut your throat." This is all that defendant said to her, and she left and went to the house. That her brothers got after defendant, and chunked him and ran him off. Defendant did not strike or offer to strike her. He did not touch her. She told her mother of this occurrence on the night after it occurred. Prosecutrix was well acquainted with defendant; he having lived, with his father, on the farm of prosecutrix's father a few years ago. Prosecutrix had often talked with defendant. That she was now angry with him. He was a negro, and she a white German girl. Prosecutrix's mother testified that on or about the night of July 29, 1903, her daughter Annie mentioned to her that a party had gotten after her and assaulted her. This is all the testimony adduced upon the trial, as contained in the record before us. It shows a gross and infamous insult to prosecutrix, but it does not show that he made an assault on prosecutrix with intent to rape her. This being true, we cannot permit this conviction to stand.

The judgment is reversed, and the cause remanded.

DODSON v. STATE.

(Court of Criminal Appeals of Texas. Jan. 27, 1904.)

CRIMINAL LAW—CONTINUANCE FOR ABSENT WITNESS—REMARKS OF PROSECUTING ATTORNEY.

1. Refusal of continuance for absence of a witness is not error, the story to which witness would testify being rendered improbable by what others testified to and by the affidavit of the prosecuting attorney as to what witness testified to before the grand jury.

2. Remark of the prosecuting attorney, in argument, on a trial for assault with intent to murder, that "it is just such impudent and sassy negroes as defendant is shown by the evidence to be causing trouble in this country," is not prejudicial.

Appeal from District Court, Travis County; George Calhoun, Judge.

Sam Dodson appeals from a conviction. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of assault with intent to murder, and his punishment assessed at confinement in the penitentiary for a term of two years.

He insists that the court erred in refusing his second application for continuance. Attached to the bill presenting this matter is the following explanation by the court: "The case having been continued for the term once before on application of defendant because of the nonattendance of witness Chas. Van Zandt, for whom process had been taken out by the state, but not by defendant, and returned: 'Not served. Witness not found.' The state had caused to be issued four subpoenas for said witness, all of which had been returned: 'Not served. Witness not found.' On October 17, 1903, the case was continued, as above stated, on application of defendant. The criminal docket was again set for trial at the next term of court on November 16, 1903, and on that date, and not before, defendant caused to be issued a subpoena for said witness. The case, when reached on the docket on November 16, 1903, was postponed at the request of defendant until he could hear from said subpoena, which was issued to Williamson county, Texas. On November 20, 1903, when the case was again reached on the docket and called for trial, the return of the sheriff of Williamson county showed that the said witness Van Zandt could not be found, after diligent search, in Williamson county, and defendant's second application for continuance on the ground of the absence of said witness Van Zandt was overruled." Attached to the motion for new trial is the affidavit of the absent witness, Chas. Van Zandt, which states, in substance, that on the morning of the difficulty he and defendant had started to the prairie to chop cotton, and while passing Heep's place they applied to prosecutor Thrift for work, and were employed by Thrift to chop cotton for the remainder of the day for 60 cents. At noon he and defendant went to the house occupied by Egbert Hall. They discussed the situation, and concluded if they continued to work for prosecutor there might be some difficulty between them, as Thrift had not been satisfied with their work in the morning, and grumbled a good deal at them. They returned to where Thrift and Neal Sorrell had eaten dinner at the well, and Dodson said to Thrift that they would not work any longer, as they found it impossible to please him; therefore they wanted their money, and would quit. Thrift stated that he did not employ them by the half day, but by the day. Defendant then said that it did not make any difference to him whether he was employed by the day or half day, just so he got his money. Some other words were passed by Dodson and

Thrift, and Thrift picked up a brush and started towards Dodson, and said to him, "You damn black son of a bitch, I'll beat your head off." Dodson asked Thrift several times to stop, but Thrift continued advancing towards Dodson until near the fence, when Thrift threw down the brush, put one hand in his pocket and the other on the fence, and started through the fence, when Dodson reached to the ground and picked up a rock and threw it at Thrift. When the rock was thrown, both affiant and Dodson ran away, and affiant does not know what further happened. That Dodson was in no way responsible for affiant being absent from the trial; that he has been away from Travis county, in San Saba county. The district attorney, by his own affidavit, controverts the above statement of the witness Van Zandt in the following manner: That he examined the witness before the grand jury touching the assault made by defendant, Sam Dodson, on Thrift; and Van Zandt, after testifying that he and Dodson went to work for Thrift on the day of the assault, and worked until dinner time, when they proposed to quit, stated he did not say a word, but after some conversation between Thrift and Dodson about him (Van Zandt) and Dodson quitting work, and Dodson demanding from Thrift pay for the work up until noon, Thrift stated to Dodson that he could not pay them, as he had no money in the field with him, and Dodson replied, "I always heard you wouldn't pay, and now I know it; but you'll have to pay me, and pay me now;" that at the time there was a barbed-wire fence between where Thrift was sitting down and Van Zandt and Dodson were standing; that as soon as Dodson said this Thrift grabbed a little piece of brush, and jumped up, and started towards where they were, and said to Dodson, "Get away from here, and don't sass me any more, and if you don't get away I will give you a whipping;" that when Thrift started towards where they were, he (Van Zandt) turned, and ran off, and did not see Dodson when he threw the rock, and did not know whether he had the rock before he (Dodson) came up to the fence or not. Prosecuting witness and the negro Sorrell, who was with prosecutor at the time of the difficulty, swear to a converse statement to that set up by the affidavit of Van Zandt, and the affidavit of the district attorney clearly controverts the salient features of the affidavit of Van Zandt, rendering the same improbable in the light of this record. Therefore we hold that the court did not err in overruling the application for continuance, nor in refusing the motion for new trial on this ground.

Appellant reserved a bill of exceptions to the refusal of the following special charge: "You are further instructed that the state must prove beyond a reasonable doubt that defendant, at the time the assault was committed, if any such assault was committed, intended to kill the said Geo. W. Thrift, and,

if the state fails to prove this intent beyond a reasonable doubt, you will acquit defendant of assault with intent to murder." This charge was substantially given, as stated by the court in the qualification to the bill, in the main charge of the court.

Bill No. 3 complains of the following language used by the district attorney in his argument to the jury: "It is just such impudent and sassy negroes as the defendant is shown by the evidence to be causing trouble in this country." No special charge was presented by appellant to the court on this matter. Furthermore, we do not see how it could have injured appellant.

The charge of the court is correct. The evidence supports the finding of the jury. The judgment is affirmed.

SMITH v. STATE.

(Court of Criminal Appeals of Texas. Jan. 27, 1904.)

CRIMINAL LAW—EVIDENCE—COMMISSION OF OFFENSE—TIME—ALIBI.

1. Where, in a prosecution for burglary, the witnesses as to the date of the commission of the offense were not specific, it was proper for the court to permit them to testify to facts by which they fixed a day, and for the jailer who had defendant in custody to testify that defendant was placed in jail on the 15th day of the month, where he remained until the time of the trial, which was after the 26th of the same month, for the purpose of showing that the offense was committed before the indictment was rendered.

2. Where a burglary was committed between 7:30 and 8:30 o'clock in the evening, defendant's evidence that he reached the house of a friend at 10 o'clock that night, where he was invited to spend the night, was insufficient to present a defense of alibi.

Appeal from District Court, Travis County; George Calhoun, Judge.

Will Smith was convicted of burglary of a private residence, and he appeals. Affirmed.

A. S. Phelps, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for burglary of a private residence, the penalty assessed being five years in the penitentiary. There is a considerable portion of this record devoted to the question of whether or not the burglary is shown to have been committed prior to the presentment of the indictment. The witnesses were not specific as to the day, and fixed the time by circumstances. We do not think there was any error in permitting the witnesses to testify to facts by which they fixed the day. For instance, the jailer testified that appellant was placed in jail on the 15th day of the month—the indictment having been returned on the 26th day of the same month—and that he had been in jail during the entire time from his incarceration to the time of the trial. There were other facts tending to show that the offense was committed prior to the 15th.

The charge of the court is criticised because it did not submit the issue of alibi. This is not raised by the testimony. The nearest approach to it was that defendant testified he was at the residence of a friend, who had invited him to spend the night, which was the night of the alleged burglary, and his statement is that he reached there at 10 o'clock that night. The burglary is shown to have been committed somewhere about 7:30 to 8:30 o'clock, or possibly earlier.

It is contended the evidence is not sufficient. After a careful review of the statement of facts we are of opinion that it is sufficient.

The judgment is affirmed.

MAXWELL v. STATE.

(Court of Criminal Appeals of Texas. Jan. 27, 1904.)

ASSAULT—SELF-DEFENSE—EVIDENCE—CHARACTER OF DEFENDANT—PREVIOUS OFFENSES.

1. In a prosecution for assault, evidence that prosecutrix was making an assault, and defendant thereupon pushed prosecutrix away to avoid the consequences of the assault upon herself or her son, and that when pushed by defendant prosecutrix fell down, was sufficient to require the giving of a requested instruction on self-defense.

2. The state cannot prove the bad reputation and character of defendant except in rebuttal after defendant has placed his character in issue.

3. In a prosecution for assault it was error to permit the state to show previous instances in which defendant was either tried or arrested for disturbance of the peace.

Appeal from Hunt County Court; F. M. Newton, Judge.

Mrs. B. Maxwell was convicted of simple assault, and appeals. Reversed.

R. D. Thompson, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Conviction for simple assault, fine assessed being \$25. The evidence for the state shows that appellant struck Mrs. McBride with a stick of stove wood, and that Mrs. McBride was a very old woman. There were two counts in the information charging aggravated assault—one producing serious injury by means of the blow, and the other an assault upon an aged and decrepit woman. The difficulty arose over the right of possession to some discarded cross-ties taken from the track of the Gulf, Colorado & Santa Fé Railway. Defendant's evidence shows that Mrs. McBride was making the assault, and she only pushed her away to avoid the consequences of an assault upon herself or her son, and that when pushed by appellant the old woman fell down. This required the court to give the special requested instructions in regard to the theory of self-defense, but which was refused.

The state was permitted, over the objections of appellant, to introduce evidence of

the bad reputation and character of appellant, when she had not herself placed that reputation in evidence. The state cannot resort to this character of testimony except in rebuttal after the defendant has placed his or her character in issue.

The state was also permitted to introduce in evidence some previous cases against appellant in which she was either tried or arrested for disturbances of the peace. This evidence was erroneously admitted.

For the reasons indicated, the judgment is reversed, and the cause remanded.

SMITH v. STATE.

(Court of Criminal Appeals of Texas. Jan. 27, 1904.)

MURDER—REASONABLE DOUBT—INSTRUCTION—APPEAL—COMPETENCY OF JUROR.

1. That a juror on his voir dire answered that he had paid his poll tax prior to February 1st, which was not true, the tax having been paid February 4th, is not a ground for reversal of a judgment of conviction for murder, where there is no attempt to show that he was not fair and impartial.

2. A charge on reasonable doubt as to the whole case is sufficient without a charge on reasonable doubt as between murder in the first and second degrees and between murder in the second degree and manslaughter.

Appeal from District Court, Fort Bend County; Wells Thompson, Judge.

Shepherd Smith was convicted of murder in the second degree, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of 50 years; hence this appeal.

In appellant's amended motion for new trial he attempts to raise the question as to the competency of C. B. Randle to sit as a juror in said case. The reason assigned is that said Randle answered on his voir dire that he had paid his poll tax prior to the 1st of February, but this was not true; that said poll tax was paid on February 4, 1903. There is no showing that appellant was injured by the fact that said Randle sat as a juror in said case; no attempt to show that he was other than a fair and impartial juror. Before he could avail himself of an objection of this character, it was incumbent on him to show that said juror was not fair and impartial, and that he suffered some injury attributable to said juror having sat in the case. This question was before this court in *Carter v. State*, 76 S. W. 437, 8 Tex. Ct. Rep. 320, and it was there held, under similar circumstances, that the action of the court was not reversible error.

Appellant further complains that the court

failed to charge on reasonable doubt as between murder in the first and second degrees and murder in the second degree and manslaughter. However, the court did charge on reasonable doubt as applied to the whole case, and this was sufficient. *McCall v. State*, 14 Tex. App. 353; *Hall v. State*, 28 Tex. App. 146, 12 S. W. 739; *Frizzell v. State*, 30 Tex. App. 42, 16 S. W. 751; *McKinney v. State* (Tex. Cr. App.) 55 S. W. 175.

Appellant further insists that the evidence is not sufficient to sustain the verdict. The defense set up by appellant was insulting conduct of deceased toward the wife of appellant. The jury heard the testimony; and the court gave a fair charge on this subject, and evidently the jury did not believe appellant's evidence, but believed the theory of the state, which showed that the homicide was an unprovoked murder.

There being no error in the record, the judgment is affirmed.

ROBERTSON v. STATE.*

(Court of Criminal Appeals of Texas. Jan. 13, 1904.)

CRIMINAL LAW—APPEAL—RECOGNIZANCE.

1. A recognizance on appeal in a criminal case which fails to comply with Code Cr. Proc. 1895, art. 887, in that it does not state that appellant was convicted "in this cause," and requires "personal" appearance "until discharged by due course of law," instead of that accused will "not depart without leave of this court," is insufficient.

Appeal from District Court, Collin County; J. M. Pearson, Judge.

A. T. Robertson was convicted of an aggravated assault, and appeals. Dismissed.

Abernathy & Abernathy, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of an aggravated assault, and fined \$100. The Assistant Attorney General moves to dismiss the appeal because the recognizance does not comply with article 887, Code Cr. Proc. 1895. First, it does not state that appellant was convicted of a misdemeanor "in this cause," and it is not made to appear in what cause he was convicted; second, it is more onerous than the law provides, in that it requires him to make his "personal" appearance; third, because it states "until discharged by due course of law," instead of "not depart without leave of this court." The form of recognizance prescribed by article 887 is plain and simple, and we have repeatedly held that it should be complied with. The motion is well taken. *Meeks v. State*, 74 S. W. 910, 7 Tex. Ct. Rep. 824. The appeal is accordingly dismissed.

*Rehearing denied February 10, 1904.

BLAIN v. STATE

(Court of Criminal Appeals of Texas. Jan. 27, 1904.)

ASSAULT—PREMEDITATED DESIGN—EVIDENCE—SUFFICIENCY—APPEAL—BILLS OF EXCEPTIONS.

1. Bills of exceptions to questions propounded by the state to witnesses cannot be considered on appeal where the witnesses' answers are not disclosed in the bills.

2. Testimony introduced by the state showing that defendant and another determined to assault prosecutor, followed him, came upon him unawares, and immediately proceeded to assault and knock him down, and then set upon and beat him, was sufficient to authorize a charge upon assault with premeditated design.

Appeal from Grayson County Court; G. P. Webb, Judge.

Sam Blain was convicted of an aggravated assault, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of an aggravated assault, and his punishment assessed at a fine of \$100 and imprisonment in the county jail for a period of four months, and appeals.

Appellant made a motion for continuance, which was overruled by the court, and he assigns this as error. We do not think the diligence used as to either of said witnesses is sufficient. By the witness Whitesides appellant says that he expected to contradict one of the state's witnesses (Cassell) as to a remark to which it was understood Cassell would testify, to wit, that defendant said a short time before the alleged assault that he would drive his fist through Ivy's face. Appellant proposed to prove by said witness Whitesides that he was present, and appellant did not make any such remark. By the witness Stanton appellant proposed to prove that he was across the street, and saw the difficulty, and that the blows struck by appellant with a billy on prosecutor were only light taps. It does not occur to us, from a review of the record, that the testimony of either of said witnesses, even if material, was probably true, or would have had any effect with the jury. However, as stated above, no diligence was used for said witnesses.

Appellant's bills of exception Nos. 2, 3, and 11 are to certain questions propounded by the state to witnesses. The answer of the witnesses is not disclosed in the bills. Consequently these cannot be considered.

The information contains four counts characterizing the assault as an aggravated assault, to wit: First, an assault inflicting serious bodily injury; second and third, an assault with a deadly weapon; and, fourth, an assault with premeditated design, and by the use of means calculated to inflict serious bodily injury. The court charged on each phase of said assault which characterized the same as an aggravated assault. The court

also charged on simple assault in case the jury should have a reasonable doubt of the commission of an aggravated assault on the part of appellant, and believed him guilty of an assault. Appellant reserved an exception to the charge on aggravated assault, and requested certain special instructions traversing the court's charge; that is, instructing the jury to acquit defendant on the ground that the evidence failed to show any phase of an aggravated assault. This involves the question as to whether or not there was evidence tending to sustain said counts. In our opinion, there was such evidence. It may be that the evidence is not sufficient to sustain the charge predicated on serious bodily injury, yet there was some testimony tending to show this. But the billy was described, and from its description and the manner of its use the jury may have been warranted in believing it was a deadly weapon. There is no question in our minds that the testimony was ample to sustain the charge of assault with premeditated design, as, from the state's standpoint, and the evidence introduced by it, appellant and Holcomb determined beforehand to assault prosecutor, Ivy. They followed him, coming upon him unawares, and immediately proceeded to assault and knock him down, and then both set upon and unmercifully beat him. The cause of their animus is not disclosed. Evidently they held a grudge against him, and set upon him in a clandestine and cowardly manner.

Appellant complains of the court's charge on principals. Even if it be conceded that the court's charge on principals was erroneous, in that it instructed the jury to consider appellant a principal with Holcomb, whether or not he was present at the time of the alleged assault, yet, as stated, if the court's charge can be criticised on this account, the facts disclose that appellant was a principal with Holcomb at the time of the alleged assault, and participated with him throughout.

We have examined the record carefully, and, in our opinion, the evidence thoroughly sustains the conviction, and the punishment inflicted by the verdict was not excessive. There being no error in the record, the judgment is affirmed.

SANDERS v. STATE

(Court of Criminal Appeals of Texas. Jan. 27, 1904.)

HOMICIDE—MISCONDUCT OF JURY—VERDICT ARRIVED AT BY LOT.

1. A verdict should be set aside as arrived at by lot where it was shown by testimony of jurors that, after they had agreed to find defendant guilty of murder in the second degree, they could not agree on the term of punishment, but varied in estimates from 5 to 60 years, and finally agreed that each would put down the number of years he wished to give defendant, and the total would be divided by 12, which agreement was carried out, the result being 18

years and 1 month, and after some discussion the 1 month was knocked off, and 18 years adopted as a verdict.

Appeal from District Court, Houston County; John Young Gooch, Judge.

Alex Sanders was convicted of murder in the second degree, and appeals. Reversed.

Jno. I. Moore and L. A. Sallas, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of 18 years.

There is no statement of facts in the record. The only question that can be reviewed, in the light of this record, is a bill of exceptions which insists that the verdict of the jury was arrived at by lot. Juror Burton testified that, after the jury had agreed to find defendant guilty of murder in the second degree, they had trouble in agreeing on the term of punishment. Some of the jury wanted to give appellant 5 years, some 7, some 10, some 15, and some 60 years. It was finally proposed that each juror should put the number of years he wanted to give defendant down on paper, and add the total, and then divide the result by 12, and the result thus obtained should be the verdict of the jury. This was agreed to by all the jury, with this additional agreement: That no juror should put down on the paper a longer term than 25 years. After this agreement was made, each did put down the number of years he wanted to give defendant, ranging from 5 to 25 years. This was added up, and then divided by 12, and the result was 18 years and 1 month. After a little discussion, the 1 month was knocked off, and 18 years was adopted as the verdict of the jury. "Without having taken the ballot as we did, I do not believe we would have ever arrived at the verdict we did, or at any other verdict. The jurors who were willing to give five years only were the ones who were stubborn, and would not agree for a longer term than five years." The juror Story testified substantially as did Burton, and further states that he could not say whether the jury would have reached a verdict in any other way or not; that up to the time of this agreement they had failed to arrive at a verdict, after discussing the case fully. The juror Starnes states the same, and says he does not think they would have reached a verdict in any other way. Foreman Caillier testified to the same effect. Appended to the bill of exceptions presenting this matter is the following qualification by the court: "That, while the jury agreed to arrive at a verdict by lot, they did not abide by the agreement, but ultimately all agreed that the punishment should be eighteen years."

In the opinion of the writer, the action of the court in overruling the motion for new

trial on this ground is supported by *McAnally v. State* (Tex. Cr. App.) 57 S. W. 832; *Barton v. State*, 34 Tex. Cr. R. 613, 31 S. W. 671; *Pruitt v. State*, 30 Tex. App. 156, 16 S. W. 773. However, a majority of the court hold that the judgment should be reversed under the authority of *Driver v. State*, 37 Tex. Cr. R. 160, 38 S. W. 1020. In that case the jury agreed to ascertain the verdict as to the penalty by each juror setting down on paper the number of years he was in favor of giving defendant in the penitentiary, and then add up the same, divide by 12, and the quotient should fix the number of years to be given defendant in the penitentiary. And it was further agreed to be bound by and abide by this result, and the verdict returned was for the round number of years thus ascertained, leaving off the fraction of months over. It was held on motion for new trial that the burden was on the state to show that this agreement had been subsequently abandoned, and that the verdict was not in conformity with the agreement, before it could be upheld as returned. And although, after the number of years of punishment had been ascertained, two of the jurors refused to abide the result, but, after several hours' deliberation, did agree, and the same verdict was returned by all the jurors, there being no evidence that the original agreement had ever been abandoned, the verdict was contrary to law, and a new trial should have been granted. Under the authority of *Driver's Case*, the court holds that the verdict in this instance was arrived at by lot.

The judgment is accordingly reversed, and the cause remanded.

SMITH v. STATE.

(Court of Criminal Appeals of Texas. Jan. 27, 1904.)

WITNESSES—IMPEACHMENT—GROUNDS.

1. A party cannot impeach his own witness on a point on which he fails to testify, but to authorize impeachment the witness must testify to something injurious to the party offering him.

Appeal from Dallas County Court; Ed. S. Lauderdale, Judge.

Robert H. Smith was convicted of violating the Sunday law, and appeals. Reversed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of violating the Sunday law, and fined \$20. The indictment charges that appellant, as a merchant, grocer, and dealer in goods, wares, and merchandise, did unlawfully open and permit his store and place of business to be opened for the purpose of traffic and sale. It also charges that he sold 26 pints of beer to Ella Hogan. The court, in its charge, submitted both phases of the indictment to the jury. The verdict is general. Appellant insists that the evidence is not sufficient to

support the conviction. While there is a conflict in the evidence as to whether there was an actual sale, as alleged in the indictment, yet the evidence clearly supports the proposition that appellant kept open his place of business for the purpose of sale. The verdict being general, it is amply supported by the evidence.

By bill of exceptions appellant insists the court erred "in permitting the county attorney to offer Arthur Ledbetter as a witness to impeach state's witness Louis Dellibas, to prove a statement that said witness had told the county attorney in the witness room that he had delivered the 28 pint bottles of beer to Ella Hogan as charged in the indictment," to which defendant objected on the ground that the statement was made in the absence of defendant, was denied on the stand by witness Dellibas. The court qualifies the bill as follows: "That a predicate was laid by asking witness Dellibas, by county attorney, if he had not made above statement, and said witness on stand denied having made such statement." The state insists that the court did not err in this ruling, and that it is permissible for a party to impeach his own witness when misled by the witness, or when surprised by the testimony of the witness. This is a correct proposition of law. But where the witness, as the bill of exceptions here shows, fails to testify, this would not authorize the impeachment of the witness. The witness must testify to something injurious to the party offering him before such party is authorized to impeach his own witness. The mere failure to give testimony does not per se lay a predicate or authorize a predicate to be laid for impeaching one's own witness. *Erwin v. State*, 32 Tex. Cr. R. 519, 24 S. W. 904; *Dunagain v. State*, 38 Tex. Cr. R. 614, 44 S. W. 148; *Finley v. State* (Tex. Cr. App.) 47 S. W. 1015; *Thomas v. State*, 14 Tex. App. 70. It follows, therefore, that the court erred in permitting the testimony as shown by said bill for the purpose of impeaching the state's own witness.

For the error discussed, the judgment is reversed, and the cause remanded.

ELMORE v. STATE.

(Court of Criminal Appeals of Texas. Jan. 27, 1904.)

HOMICIDE—EVIDENCE—RES GESTÆ—IMPEACHMENT—INSTRUCTIONS—HARMLESS ERROR—APPEAL—BILLS OF EXCEPTIONS—SUFFICIENCY—MOTION FOR NEW TRIAL.

1. A bill of exceptions taken to the admission of evidence is insufficient, where it fails to show how the testimony came to be introduced, but simply recites what the state was permitted to prove by witness, and appellant's objection.

2. In a prosecution for homicide, testimony as to insulting words used by defendant to a woman in a conversation at which deceased was present, concerning which the difficulty originated, was admissible as part of the *res gestæ*.

3. In a prosecution for homicide, testimony as to insulting words used by defendant to a wo-

man at a dance, in which deceased occupied a position authorizing interference with such conduct, was admissible, when the matter was reported to deceased, who thereupon accosted defendant about it, which gave rise to the difficulty.

4. In a prosecution for homicide, it was competent for the state, in impeachment, to show by defendant that he had served a term in the penitentiary of another state.

5. In a prosecution for homicide, a statement in a charge on self-defense as to the law if deceased was using or attempting to use a weapon calculated to inflict death or serious bodily injury could not have prejudiced defendant, though deceased was shown to have had no weapon at the time.

6. Motion for a new trial for newly discovered evidence cannot be considered on appeal when there is no bill of exceptions in reference to the matter, and no order of the trial court overruling the motion, or any exception thereto, appears in the record.

Appeal from District Court, Fannin County; Ben H. Denton, Judge.

Gus Elmore was convicted of murder in the second degree, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of five years; hence this appeal.

Appellant excepted to the action of the court permitting state's witness Cecil Hildinger to testify that Gus Elmore said to Miss Flora Smith, when she refused to dance with him, "That, by God! I don't want to dance with you, but I wished to swap drawers with you," and then said, "I wanted to swap breeches with you." Appellant objected to this testimony on the ground that it was not relevant, and was in no way connected with the homicide for which defendant was being tried, and tended to prejudice appellant with the jury, and further because said Miss Smith was in no way related to deceased, Wheeler, and deceased was in no way connected with the control of the premises where said conversation took place. The court explains this bill by stating that "it was shown by the testimony that deceased was there, and the party or dance was given to him, and that he and some one else were in charge of said dance or party; and some witness testified deceased heard the statement himself, and witness Wise had testified that defendant had told what he had said to the young lady." In the first place, appellant's bill of exceptions is insufficient to raise the question as to the admissibility of said evidence. It has been repeatedly held that bill of exceptions to the action of the court excluding testimony should show the conditions or environments under which said testimony was admitted. Here nothing is shown in the statement of facts in the bill as to how said testimony came to be introduced, but simply the recitation is that the state was permitted to prove by witness what Gus El-

more said to Miss Flora Smith, and then follows appellant's objections. Now, if deceased was present at the conversation, and heard the insulting words of appellant to Miss Flora Smith, and the difficulty originated in regard to this, it was admissible in evidence as a part of the *res gestæ*. Or, if deceased occupied some position as to said party or dance which authorized him to interfere and prevent wanton remarks, and he was told of this conduct of appellant toward Miss Smith, and he accosted appellant in regard thereto, and the difficulty grew out of this, it was competent evidence. Under the explanation of the court, we think sufficient was shown to demonstrate that the testimony was competent. We do not believe appellant's bill was sufficient to present the question claimed as error to this court, and, under the explanation given by the court, it occurs to us that the testimony was admissible. Other bills of exception on this subject are disposed of by what we have heretofore said.

It was competent to show, as was done by Gus Elmore, who testified in his own behalf, that he had served a term in the State Penitentiary at Leavenworth, Kan. This testimony went to his credit.

Appellant attempted to take a bill of exceptions to the action of the court permitting the witness Scruggs to prove that Charley French told him about two weeks after the killing that Gus Elmore told him (French) that he (Elmore) was going to kill Amos Wheeler that night at the dance. However, the court refused to approve this bill, stating that appellant took no bill of exceptions to the admission of this testimony. This disposes of that matter.

Appellant criticises the charge of the court, stating that the court, throughout its charge on self-defense, limited defendant's right to defend against an unlawful attack or hostile demonstration; claiming that this was a charge on actual danger, and that "hostile demonstration" means actual danger, and appellant was thus deprived of the appearance of danger, on which he relied. We find the use of the language "hostile demonstration" in connection with the charge on manslaughter, being an incident to said charge, but nowhere do we find that expression in the charge on self-defense. Under our view of the case, the court was not required to give a charge on manslaughter at all. In the charge on self-defense, the court charged both actual and apparent danger, and he charged on self-defense in connection with threats and without threats. In our opinion, the charge is a full and fair exposition and application of the law of self-defense to the facts of the case; in fact, is more liberal toward defendant than was required by the testimony. These charges are embraced in subdivisions 24, 25, 26, and 27 of the court's charge, and we find no error in connection with the same.

Appellant complains that the court, in the twenty-sixth paragraph of his charge, injured appellant by the following: "If deceased at the time was using or attempting to use a weapon calculated to inflict death or serious bodily injury, it is to be presumed that he intended to inflict death or serious bodily injury." The court in that paragraph instructed the jury as follows: "No person is bound to retreat in order to avoid the necessity of killing his assailant, and any one, in defending himself, has the right to take into consideration the disposition and the size of his adversary, and his knowledge of the character of his adversary, and the defendant has the right to inflict violence, and to pursue and kill his adversary, so long as the danger, or reasonable appearance of danger, or death or serious bodily injury from his adversary continues; and, where the question arises as to whether or not a person guilty of a homicide has reason to apprehend danger, the facts and circumstances must be viewed and considered from his standpoint at the time, and from no other, and, if deceased at the time was using or attempting to use a weapon calculated to inflict death or serious bodily injury, it is to be presumed that he intended to inflict death or serious bodily injury." This, as we understand, is an abstract statement of the law, and, although deceased was shown not to have had a weapon at the time, that portion of the charge which stated, "If deceased at the time was using or attempting to use a weapon calculated to inflict death or serious bodily injury," could not have injured appellant. If it is intimated that the court here presumed deceased was armed, it would be in favor of appellant; but the charge is full as to appellant's right on the appearance of danger, and this portion of said charge could not have misled or have confused the jury.

Immediately following this paragraph of the charge is paragraph No. 27, in which the court says: "Now, if you believe from the evidence that defendant, Gus Elmore, shot and killed A. A. Wheeler at the time and place alleged in the indictment, but you further believe that prior thereto said A. A. Wheeler had made threats against defendant's life, and that at the time of the killing said Wheeler, by some act then done, manifested an intention to execute the threats so made, or that at the time of the killing said Wheeler had made or was making an unlawful attack upon defendant, or had done or was doing some act or acts which, either alone or together with accompanying words of said Wheeler, if any, produced in defendant's mind, as viewed from his standpoint, a reasonable apprehension of death or serious bodily injury at the hands of said Wheeler, and that he did such killing to protect himself from such danger, or apprehension of danger, then said killing was in justifiable self-defense; and if you so find, or if you have a reasonable doubt as to whether said

killing was in justifiable self-defense or not, you will find defendant not guilty."

In the motion for new trial, appellant insisted that the court should grant the same on account of newly discovered evidence. We find no bill of exceptions as to this matter; nor do we find that the motion for new trial was overruled by any order or judgment of the court, and no exception taken thereto. Consequently the matter is not presented in such form as can be reviewed. We would remark, however, that, looking at the testimony and the circumstances under which appellant claims that the same was newly discovered, we do not believe the court erred if it overruled the motion on said account.

No error appearing in the record, the judgment is affirmed.

WESTERN UNION TELEGRAPH CO. v. ROBERTS.*

(Court of Civil Appeals of Texas. Dec. 18, 1903.)

TELEGRAPH COMPANY—NEGLIGENT DELAY OF MESSAGE—PLEADING—VARIANCE—OPENING CASE AFTER ARGUMENT—PROPRIETY—FACT OF PREJUDICE.

1. There is no variance between a petition in an action against a telegraph company for negligently delivering a message announcing the increased illness of the recipient's mother, which alleges that she was at the home of plaintiff's sister, "at" H., a small village, and proof that the sister's house was two miles in the country.

2. The statutory provision (article 1298, Rev. St. 1895), that the trial court may, before argument is closed, permit either party to supply an omission in the testimony, is merely directory; and allowing the opening of a case after argument is concluded, after having ascertained that the witnesses of the opposite party are still available, is not error, counsel for such party being permitted to reargue the case on the additional testimony.

3. In an action against a telegraph company for negligence in delivering a message to plaintiff announcing her mother's increased illness at her sister's residence 11 miles away and 2 miles from a railroad station, whereby she was precluded from taking a train which would have brought her to her mother before the latter's death, plaintiff's evidence showed that the roads between her residence and her sister's were impassable, owing to rains; that the time consumed in railroad passage from one place to the other was 40 minutes; that, if plaintiff had been enabled to take the train, she would have reached the station 12 hours before her mother's death; and that no rain fell on that evening. After argument the court permitted plaintiff to introduce testimony that the road from the station to her sister's was passable, and that a conveyance was in readiness to carry plaintiff had she caught the train as expected. Held that, as the evidence introduced before argument would have necessitated a finding that plaintiff could have reached her mother's bedside before her death, the court's action in opening the case was not ground for reversal.

Appeal from District Court, Harris County; Chas. E. Ashe, Judge.

Action by Missouri Roberts against the Western Union Telegraph Company. Judge-

*Rehearing denied, and writ of error denied by Supreme Court.

ment for plaintiff, and defendant appeals. Affirmed.

Norman G. Kittrell, Jr., and Hume & Hume, for appellant. Edgar Watkins and Frank O. Jones, for appellee.

PLEASANTS, J. Appellee brought this suit against the appellant to recover damages for mental anguish caused her by the alleged negligent delay of appellant in delivering a telegram sent appellee by her sister, advising her of the fatal illness of their mother. The facts constituting plaintiff's cause of action are thus stated in the petition:

"That heretofore, to wit, on or about the 12th day of December, 1902, plaintiff's mother was visiting the sister of plaintiff at Humble, in the county of Harris and state of Texas. That while plaintiff's said mother was visiting her sister, plaintiff's mother became very ill, and on the 12th day of December, 1902, and about one o'clock p. m., for the benefit of plaintiff, and in order that she might know the condition of her mother, plaintiff's said sister, whose name is Martha Sayers, telegraphed plaintiff as follows:

"Humble, Texas.

"Mrs. M. Roberts, New Caney, Texas: Mama is much worse.

"[Signed] Martha Sayers."

"That said telegram was delivered to the agent of the defendant by the said Martha Sayers, or some one by her directed, and for the benefit of the plaintiff prepaid the costs of transmitting said telegram, to wit, the sum of twenty-five cents, said sum being paid to the agent of the defendant, and said telegram delivered to said agent as aforesaid about one o'clock on the 12th day of December, 1902. That the distance from Humble to New Caney is about eleven miles, and that, had the defendant exercised ordinary care, said telegram would have been delivered almost immediately. That had said telegram been delivered before 5:30 p. m. of the 12th day of December, plaintiff could have taken the train that went from New Caney to Humble, and could have visited her mother and could have seen her mother before her death. That the defendant, through its officers, agents, servants, and employes, negligently failed to promptly and with ordinary care deliver said telegram, and negligently failed to deliver the same until 6 o'clock p. m. on the 12th day of December, 1902, and too late for the plaintiff to take the train and go from New Caney to Humble, said train having left the depot before plaintiff received said telegram. That on said date the creeks and streams between New Caney and Humble were in such condition that it was impossible for plaintiff to have gone through the country to Humble at night to see her mother. That the next train that plaintiff could have taken from New Caney to Humble was at 8 o'clock a. m. on the 13th of December. That, had said telegram been promptly delivered, plain-

tiff would have taken the train and gone to see her mother. That plaintiff's mother, whose name was Sarah A. D. Presswood, died on the 18th day of December, 1902, at 7 o'clock a. m., and by reason of defendant's failure to deliver said telegram hereinbefore copied plaintiff was unable to get to see her mother until after she had died. That by reason of being deprived of seeing her mother before her death, plaintiff suffered, and still suffers, great mental anguish and pain. The plaintiff had great affection for her mother, and loved her mother, and it was a great deprivation suffered by plaintiff to be deprived of being with her mother during her last illness and being with her at the time of her death."

The defendant's answer consists of a general demurrer and general denial. The trial of the case in the court below by a jury resulted in a verdict and judgment in favor of plaintiff for \$1,200.

The evidence is undisputed, and establishes the following facts: On the 12th day of December, 1902, and for several years prior thereto, plaintiff and her mother, Mrs. A. D. Presswood, now deceased, had their home at the town of New Caney, in Montgomery county. On the date above named Mrs. Presswood, who was visiting plaintiff's sister, Mrs. Sayers, near the village of Humble, in Harris county, became very ill, and Mrs. Sayers, desiring to notify plaintiff of their mother's condition, wrote and sent to appellant's agent at Humble the following telegram:

"Humble, Texas.

"Mrs. M. Roberts, New Caney, Texas:
Mama is much worse.

"[Signed]

Martha Sayers."

This telegram was delivered to the agent by Mrs. Sayers' son about 1 o'clock p. m. on December 12, 1902, and the charges for its transmission and delivery to plaintiff at New Caney paid. Humble and New Caney are both upon the railroad, and are 11 miles distant from each other. The telegram was not delivered to plaintiff until 6 o'clock p. m. of the day on which it was sent, too late for her to take the evening train to Humble, which left New Caney just at the time the telegram was delivered to her. Owing to the impassable condition of the roads between New Caney and Humble, due to excessive rains, it was impossible for plaintiff to have made the trip between the two places after she received the telegram and before the death of her mother otherwise than by rail. She took the first train going to Humble for New Caney after receiving the telegram, but did not reach Humble until after her mother's death, which occurred on the morning of December 18, 1902. If the telegram had been delivered with reasonable promptness, plaintiff would have gone to Humble by rail on the evening of the 12th, and reached her mother several hours before her death. She and her mother were fond of each other, and plaintiff suffered much distress and anguish of

mind by being deprived of the privilege of being with her and ministering to her in her last hours.

The first witness who testified in the case for plaintiff—Dr. Shadlin—stated that plaintiff's sister, Mrs. Sayers, at whose home the mother died, lived about two miles from Humble. He further stated that all of the roads around Humble, except the graded roads, were in a very bad condition on account of recent heavy rains. Several witnesses were then called by plaintiff, and testified to the bad condition of the roads generally, and especially as to the impassability of the road between New Caney and Humble. The time and circumstances of the sending of the telegram by Mrs. Sayers and its delivery to plaintiff were then shown, as was also the time of Mrs. Presswood's death, and the schedule of the trains between New Caney and Humble. In detailing the circumstances under which the telegram was sent, Mrs. Sayers stated that she gave the telegram to her son, just after dinner, to take to the telegraph office. She had dinner about 12 o'clock, and it did not take more than 15 minutes to get through with it. The son also testified that he left home on horseback with the telegram, after dinner, and that he delivered it to the operator at Humble for transmission to New Caney about 1 o'clock. Dr. Shadlin testified that he met the boy with the telegram on the road between Mrs. Sayers' home and the telegraph office, about three-fourths of a mile from the latter place, between 12 and 1 o'clock. Plaintiff then testified that she would have gone to Humble by the train on the evening of the 12th if the telegram had been delivered promptly; that she did go on the next morning, but arrived after her mother's death; and that she suffered great mental anguish because of her failure to see her mother before her death and to be with her in her last sickness. After the above testimony was in, plaintiff rested her case, and defendant offered no testimony. Counsel for plaintiff and defendant then addressed the jury and submitted the case. After the argument had been closed, but before the court had charged the jury, plaintiff's counsel stated that he had omitted to prove a fact which he thought was material to his case, and asked that Mrs. Sayers be recalled for the purpose of making such proof. Counsel for defendant objected to the introduction of any further evidence by the plaintiff on the ground that, the argument having been closed, and the case submitted by counsel for both sides, it was not competent nor lawful for the court to allow plaintiff to reopen the case and re-examine the witness for the purpose of eliciting material testimony which should have been brought out on the first examination of the witness. This objection was overruled, and the plaintiff was permitted to show by Mrs. Sayers that she sent a conveyance to the station at Humble to meet plaintiff on the arrival of the train from New Caney on

the evening of the 12th, and that the road between her home and Humble was graded, and travel over same was not seriously affected by the wet weather.

The several assignments of error contained in appellant's brief present as grounds for reversal of the judgment of the court below the following: First. Because the cause of action shown by the evidence is not the cause of action alleged in the petition, and the judgment is upon evidence not supported by any pleading. Second. Because the trial court was without authority in law to permit plaintiff to recall and re-examine her witness Mrs. Sayers, and submit to the jury the testimony thus elicited after the argument of the case had been closed. The contention of appellant upon the insufficiency of the pleading to support the case made by the evidence is thus stated in the first assignment of error: "The cause of action alleged by the plaintiff was damages for pain and anguish of mind suffered by her because of the defendant's negligent failure to deliver promptly to her the telegram sent to her by her sister from Humble to New Caney, eleven miles distant, informing her that her mother was much worse, whereby the plaintiff was deprived of the opportunity, of which she could and would have availed had the telegram been duly delivered, to go to and be with her mother at Humble before her death; whereas the plaintiff was awarded judgment on a verdict rendered on evidence of damages from pain and anguish of mind suffered by her because of deprivation of opportunity to go to and be with her mother before the latter's death at the residence of Mrs. Sayers, two miles from Humble, without allegation that the plaintiff's mother was at the residence of Mrs. Sayers, or was sick or died there, or of the locality of said residence, or its distance from Humble, or of the practicability or means of provision for the plaintiff's reaching it on said night of December 12th, even had she duly received the telegram at New Caney, and taken the train and duly arrived thereon at Humble at 6:40 p. m. that night." We cannot agree with appellant's counsel in this contention. The allegation that plaintiff's mother was taken sick while on a visit to Mrs. Sayers at Humble would be ordinarily understood to mean that she was taken sick at Mrs. Sayers' home or place of residence, and the expression "at Humble" cannot be restricted in its meaning to one of the group of houses known as the village of Humble. The only evidence in the record descriptive of the place known as Humble is that it is a small village in Harris county, at which there is a railroad station. The number of inhabitants or the area covered by the village is not shown, nor is it shown that said village had any definite limits. We think, as ordinarily used and understood, the word "at," when used in relation to a village

or settlement of this character, means anywhere in the neighborhood of such village or station, and there was no variance between the allegation that plaintiff's mother was sick "at Humble" and the evidence which showed that the house at which she was sick was about two miles from the village or station of that name. *Williams v. Ry. Co.*, 82 Tex. 559, 18 S. W. 206; *Frey v. Ry. Co.* (Tex. Civ. App.) 24 S. W. 950.

The second ground urged for a reversal is not without force, but we are of the opinion that article 1298 of our statutes, which provides, in substance, that the trial court may at any time before the argument in a case is closed permit either party to supply an omission in the testimony, since it only establishes a rule of procedure, is merely directory, and a party complaining of its infraction must, in order to obtain a reversal of the judgment of the court below by reason of the disregard of the rule, show that he has been injured thereby. No such showing is made by the appellant, but, on the contrary, the bill of exceptions as modified by the trial judge shows that before admitting the testimony complained of he inquired of counsel for appellant whether they had dismissed any of their witnesses, and was informed that they had not. The court then admitted the testimony, and counsel for appellant were told that they could reargue the case upon the additional testimony, and did discuss same before the jury. We think it apparent from this statement that appellant was not injured by the action of the court in admitting the testimony, and the assignment presenting the question should not be sustained. *Meyers v. Maverick* (Tex. Civ. App.) 28 S. W. 716. We are further of opinion that the assignment is without merit for the reason that, even had this testimony been excluded, no other verdict than one in favor of plaintiff could have been properly rendered under the evidence adduced before the argument of the case was begun. The testimony of Mrs. Sayers and her son shows that the latter carried the telegram from Mrs. Sayers' home to the station at Humble in less than an hour. The evidence further shows that the train which left New Caney at 6 p. m. on the evening of the 12th reached Humble at 6:40 p. m. of that day. There was no evidence of any rain on the evening of the 12th. In the absence of any rebutting testimony on the part of the appellant, the jury must have found from the evidence that, if the plaintiff had arrived at Humble at 6:40 p. m. on the evening of the 12th, she could have reached Mrs. Sayers' home before the death of her mother, which did not occur until about 7 o'clock a. m. of the next day.

We think the assignments present no error that would authorize a reversal of the judgment of the court below, and it is affirmed. Affirmed.

BULL v. SAN ANTONIO & A. P. RY. CO.
(Court of Civil Appeals of Texas. Nov. 19, 1903.)

**RAILWAY—INJURY—NEGLIGENCE—EVIDENCE—
—APPEAL—STATEMENT OF FACTS
—BRIEF—FILING.**

1. A statement of facts filed after the time allowed by the court will not be stricken out for that reason, where it appears that it came into the judge's hands in time, but that he delayed action thereon because of disagreement of the parties.

2. Though an appellant's brief was not filed in accordance with the rules, it will not be stricken out where the appellee does not appear to have been injured.

3. In an action for injuries from being thrown from a wagon by the running away of a team of mules, alleged to have been frightened by a locomotive whistle, evidence that plaintiff was in plain view, 30 feet from the track, when the whistle blew, and that the engineer could see him there at a distance of 200 feet, does not warrant a reversal of a verdict for defendant as contrary to the law and evidence, where no facts are stated to show that the whistle was blown negligently, or that the mules were frightened by it.

Appeal from District Court, Lavaca County; M. Kennon, Judge.

Action by John Bull against the San Antonio & Aransas Pass Railway Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Paulus & Ragsdale and H. B. Leonard, for appellant. Patton & Schwartz, for appellee.

GARRETT, C. J. The appellee has filed motions in this case to strike out the statement of facts, and also to strike out the brief of the appellant and affirm the judgment. Both motions will be overruled. It is improper practice to date back the file mark, as was done by the clerk, at the direction of the judge, in filing the statement of fact in this case. The written instructions to do so, in the form of a letter, have been incorporated in the record by order of the district judge, and may be considered as a part of his approval, and make it appear on the face thereof that the statement of facts was actually filed more than 10 days after adjournment—the time allowed by the court; and, it so appearing, this court can pass upon the question, which otherwise would have been one for the trial court to determine. The statement of facts should be stricken out, but for the fact that it appears from the recitals in the vacation order on direction of the judge that it had come into his hands in time, but that, owing to the disagreement of the parties, he delayed action in order to get the stenographer's notes before making his statement. It was thus delayed without the fault of the appellant, and, if we were to strike out the statement upon the appellee's motion, and the appellant should ask that it be reinstated, we would have to grant his request upon the showing above stated; hence the motion to strike out should not prevail.

† See Appeal and Error, vol. 3, Cent. Dig. § 1014.

We do not sustain the motion to strike out the brief, because, although not filed in accordance with the rules, the appellee does not appear to have been injured thereby, but the court reserves the question of the sufficiency of the brief to require a consideration of the assignments of error to be passed on when the case has been submitted.

(Jan. 15, 1904.)

John Bull brought this suit against the San Antonio & Aransas Pass Railway Company to recover damages for personal injuries received by him, which were alleged to have been caused by the frightening of the plaintiff's team of mules by a locomotive at a public crossing under the defendant's line of railway, causing the mules to run away, whereby plaintiff was thrown from his wagon and hurt. The grounds of negligence alleged against the defendant were that the engineer failed to sound the whistle and ring the bell of the engine as it approached the crossing, and to keep the bell ringing until the crossing was reached, and that the engineer blew the whistle when near the crossing so as to frighten the team. There was a trial by jury, which resulted in a verdict and judgment in favor of the defendant.

There are no statements under the first and second assignments of error, and they are passed without consideration.

The third assignment of error is that the verdict of the jury "was contrary to the law and evidence in this case, in this: that the uncontradicted evidence showed that the plaintiff was in plain view of the engineer as he passed along by where this plaintiff was on the said public road, and could have been seen by said engineer, had he so much as looked for any one along said public highway at said crossing. The law requires him to keep such lookout." The statement under this assignment is very meager. It appears from the statement made that the plaintiff was in plain view from the track, and that he had passed out from under the bridge about 30 feet when the whistle blew, and might have been seen by the engineer at a distance of about 200 feet, if as far as 30 feet from the track. No facts are stated to show that the whistle was negligently sounded, or that the mules were frightened by it.

No reason is shown why the verdict should be set aside. No error having been shown in the judgment, it will be affirmed. Affirmed.

HOUSTON & T. C. R. CO. v. CITY OF DALLAS.*

(Court of Civil Appeals of Texas. Jan. 2, 1904.)
**RAILROADS—CONFORMING GRADE TO STREET—
—POLICE POWER—CHARTER POWER—PLEADING—HARMLESS ERROR—REASONABLENESS
OF ORDINANCE—MANDAMUS.**

1. Under the exercise of the police power railroad companies may be compelled to conform

*Rehearing denied January 30, 1904.

their tracks at a street crossing grade, though the railroad is constructed prior to the laying out or extension of the street, and when constructed was outside the city, and was constructed under a charter granted by the state; and it is immaterial that the city has acquiesced in the grade of the railroad for a number of years, that compliance with the requirement to lower the railroad grade is impracticable, and will entail loss or injury to the railroad company's property, or cause delay in the operation of its business, or cause it to incur large expense.

2. Specific power is granted a city council to pass an ordinance compelling railroads operating in the city to adjust the grade of their tracks, where they intersect streets, to the street grade, and to construct proper crossings thereat, at their own expense, by a section of the city charter empowering the council to direct and control the laying and construction of railroad tracks, and to require that they be constructed and laid so as to interfere as little as possible with the ordinary travel and use of the streets, and to require railroad companies to construct, at their own expense, such crossings as the city council may deem necessary; notwithstanding another section of the charter, providing that the city council shall have power to grade or otherwise improve any street, such improvements to be entirely at the cost of the city, provided that when any kind of a railroad is operated on such a street the operator thereof shall pay for improving the part of the street between the rails and for two feet on each side thereof, and the city shall pay for all street intersections so improved, except the portion occupied by said railroads, which shall be paid as above provided by the operators thereof; the latter section referring to streets along which a railroad is operated.

3. Failure of a petition to require a railroad to conform the grade of its track to the grade of streets where it crosses them to allege the grade of a certain street is harmless where the judgment does not require the company to change its grade at the crossing of such street.

4. The reasonableness or necessity of an ordinance requiring a railroad company to conform the grade of its tracks to that of streets where it crosses them is not open to question, the council not having exceeded its power under the city charter.

5. A city is entitled to the remedy of mandamus where a railroad company refuses to comply with an ordinance requiring it to conform the grade of its tracks where it crosses streets to the grade of the streets.

Appeal from District Court, Dallas County; T. F. Nash, Judge.

Mandamus by the city of Dallas against the Houston & Texas Central Railroad Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Baker, Botts, Baker & Lovett, W. J. J. Smith, and R. De Armond, for appellant. W. T. Henry and J. J. Collins, for appellee.

TALBOT, J. This action was brought by the city of Dallas, a municipal corporation of more than 10,000 inhabitants, specially incorporated by an act of the Legislature of the state of Texas, against the Houston & Texas Central Railroad Company, on the 23d day of November, 1901, to compel by the writ of mandamus the said railroad company to reduce its main railroad embankment and track at the intersection of certain named streets

and avenues within the corporate limits of said city and lying between Pacific avenue and the corporate limits on the north, so as to conform to the grade of said streets and avenues. The distance between Pacific avenue and the corporate limits of the city on the north, as traversed by the track of the railroad company, is about 1½ miles. It was alleged by appellee "that at the crossings of each of the said intersecting streets and avenues the embankment of appellant is at such an elevation as to be an obstacle and impediment to the free and convenient use of the said streets and avenues, respectively, and the said track is maintained at such a height across each of said streets and avenues as to prevent the public from safely and satisfactorily enjoying the use of the said streets for ordinary travel and passage along and over the same." Appellee further alleged that it is essential to the public convenience and safety that at the crossings of such streets and avenues the elevation of the said track should be lowered and reduced to the grade of the street or avenue on either side of the track; that at Swiss avenue the elevation of the embankment and track thereon is nine-tenths of a foot above the grade of the street; at Live Oak street it is 3.4 feet, at Hawkins street it is 3.7 feet, at Bryan street it is 4 feet, at Boll street it is 4.2 feet, at San Jacinto street it is 4.4 feet, at Ross avenue it is 4.2 feet, at Flora street it is 4.3 feet, at Cochran street it is 3.5 feet, at Hall street it is 3.8 feet, at Thomas avenue it is 3 feet, and at Washington avenue it is 3.2 feet. Appellee prayed for a peremptory writ of mandamus against appellant, compelling it, at its own expense, to reduce its embankment and track at the intersection of the streets and avenues named in appellee's petition so as to conform to the grade of said streets and avenues. The suit appears to have been brought under an ordinance of appellee passed September 23, 1901, in pursuance of certain charter powers conferred by an act of the Twenty-Sixth Legislature, approved May 9, 1899 (Sp. Laws 1899, p. 93, c. 8). Appellee's petition was sworn to by its city engineer, and said ordinance was attached to the same as an exhibit, and reads as follows:

"An Ordinance Defining the Duties of Railway Companies in Regard to Their Tracks at Street Crossings.

"Be it Ordained by the City Council of the City of Dallas.

"Section 1. That all railroad tracks in the city of Dallas shall be laid and constructed and so kept and maintained as to interfere as little as possible with the ordinary travel and use of the streets crossed by such railroad track, or tracks, by the owners of such tracks, and at their expense.

"Sec. 2. That whenever and wherever any railroad track or tracks cross or intersect any street of the city of Dallas, the person, association or corporation owning the said track

¶ 5. See Mandamus, vol. 22, Cent. Dig. § 267.

or tracks shall keep and maintain the same at a grade with the street on either side of the crossing, and whenever at any crossing with any street of the city of Dallas any railway track is either above or below the grade of the street crossed, such track or tracks shall by the owner thereof be either reduced or elevated, as the case may be, to conform with the grade of the street intersected, and such crossing shall be made to conform to the grade of such intersected street entirely at the expense of the person, association or corporation owning the track or tracks crossing the street.

"Sec. 3. That after the track or tracks have been reduced or elevated to grade of the intersected street, as above provided, it shall be the duty of the owner of the track or tracks to place and maintain the crossing in such a condition as to interfere as little as possible with the ordinary travel and use of the street.

"Sec. 4. That this ordinance shall become effective from and after its passage.

"Passed September 23rd, 1901.

"I. A. Moore, City Secretary."

The defendant answered by general demurrer, special exceptions, a general denial, and sworn plea. In defendant's sworn plea the allegations in appellee's petition were denied, and it was therein alleged in substance, that, if appellee city ever adopted or passed the ordinance attached to appellee's petition, the same is unreasonable, null and void; that appellee had no power or authority to pass said ordinance, nor to make the same applicable to appellant; that appellant owns all of its right of way throughout the city of Dallas, and has owned and been in peaceable, adverse, and exclusive possession thereof more than 20 years, during which time it has used the same and operated its railroad with its track upon the grade which now exists through the city of Dallas, without interruption, and has had its said right of way, except at public crossings, fenced; that the grade complained of in appellee's petition is not a menace or danger to public travel, but operates to safeguard the public from danger and accidents at said crossings. That it is impracticable for appellant to comply with the demands of appellee, contained in its petition; that, if said ordinance be applicable to appellant at all, its demands are unreasonable and void, because appellant operates its said railroad under a charter from the state of Texas, and has expended vast sums of money in constructing and equipping its said railroad for safe transportation of freight and passengers; that the grade complained of by appellee was at the time its railroad track was constructed, and ever since has been, necessary to enable appellant to properly and safely conduct its business, and was so constructed with the knowledge, acquiescence, direction, and consent of appellee, and that appellant has so maintained it for more than 20

years; that the greater portion of the grade complained of was constructed before the corporate limits of Dallas included the same, and that most, if not all, the streets which now intersect that portion of the track were opened and built across the same after the construction thereof, and that to compel appellant to now reduce its grade to the grade of said streets, without compensation, would be a new and unreasonable burden, and the taking of appellant's property without due process of law; that to comply with appellee's demands it would require an expenditure of more than \$50,000 for the actual work, and would suspend or seriously delay its freight and passenger traffic, thereby resulting in much more loss to appellant; that appellant's right of way is too narrow to enable appellant to reduce its railroad embankment and track without suspending entirely all traffic over said track; that said ordinance is further oppressive, unreasonable, and void because the grades of the several streets mentioned in appellee's petition and the grades of all the streets of the city of Dallas which intersect that portion of appellant's track complained of are variable and different with reference to each other, and that it is impracticable for appellant to comply with said ordinance and preserve a grade and track upon which it can safely operate its trains; that to comply with said ordinance it would form a series of undulations in said track, dangerous, if not impossible, to the operation of its trains. Appellant further alleged that the streets referred to in appellee's petition which would cross its right of way and track could only be properly constructed by having a crown in the middle thereof with which to turn off the rain and storm waters, and, should appellant be forced to lay its rails flush with the streets for the whole width of each of said streets, it would result in making appellant's track a channel and sluiceway for rain and storm waters, which in such case could not be turned into the gutters of the streets; that the only way to divert the water from appellant's roadbed and track would be to construct near it a large sewer, which would cost appellant about \$60,000. Appellant further alleges, in effect, that between the said intersecting streets it owns and has fenced its right of way, which is segregated from adjoining property abutting on each side of said respective streets, and that the action of the city in this suit is an attempt to regrade the streets, and, should the same be done and reduced as demanded, the result would be that defendant's abutting property on each side of said several streets at the points of intersection would be damaged and taken without any compensation whatever to appellant; that said ordinance is unreasonable and void, because it denies to appellant the equal protection of the law, in that other railroad companies own and operate railway tracks through the city of Dallas

on embankments far above the grades of intersecting streets, and higher than the embankment of appellant complained of, without interference of the city, although there is much more travel over said intersecting streets than there is upon the streets intersecting appellant's embankment and track complained of; that, should said ordinance be held reasonable and valid, and appellant compelled to reduce its embankment and track as sought by plaintiff, appellee would later compel appellant to lower its grade within the city limits south of the Texas & Pacific Railroad to a grade corresponding with the grade of intersecting streets, in which event the grade now sought to be enforced north of said railroad would not correspond with the new grade which the appellee will seek to compel south of said railroad, and the result would be that it would be impossible and impracticable for appellant to operate its trains over its road in said city of Dallas; that appellee has an adequate remedy at law, and should not be granted the equitable relief sought in this suit. This answer of appellant was duly sworn to by one of its authorized agents. Appellee, by supplemental petition, excepted generally and specially to appellant's answer. A trial was had before the court on January 5, 1903, without a jury, and all of appellant's demurrers to appellee's petition were overruled, and appellee's demurrers to appellant's answer sustained, and without the introduction of any evidence the court rendered judgment for appellee, awarding the peremptory writ of mandamus, and allowing appellant 12 months from date of said judgment in which to comply with the same.

It is insisted by appellant that the court erred in overruling its demurrers to appellee's petition and in sustaining appellee's exceptions to its answer. Various reasons are assigned for appellant's contention, which involve the right and authority of appellee to compel appellant to reduce the grade of its embankment and railroad track situated within the corporate limits of the city of Dallas so as to conform at the intersection of streets with the grade of such streets. It is contended that the ordinance under which this suit is brought and sought to be maintained is void for the want of power in the city council to pass it; that if any such power is attempted to be conferred, it is by virtue of section 113 of appellee's charter, and that such section applies only to the original construction of railroad tracks after the date of said charter; that the ordinance was not intended to have a retroactive effect; that, if section 113 confers any power on the city council to pass the ordinance, such power is but a general one, and said section is controlled by the specific power contained in section 158 of the charter, which has special reference to intersections of streets with railway tracks, and provides that the city shall pay a portion of the expense and the

railway a portion for any grading or improvement of such intersection, whereas this suit seeks to require appellant to pay the entire expense; that appellee's suit, in effect, is an attempt to compel appellant to reduce the grade of its track, not only at street crossings, but between such crossings and for the distance of $1\frac{3}{4}$ miles, and by such regrading defendant's private property and easement to use its property along its track between the intersecting streets would thereby be taken for no public use, and without compensation; that it appears from said petition that appellee has an adequate remedy at law.

It seems to be the well-settled law of this country that railroad companies may be compelled to adjust and conform the grade of their roadbeds and tracks to the grade of intersecting streets of a city. It is said "that they are impressed with a public character, and as such are subject to the general police regulations prescribed by the Legislature itself, or by municipal corporations exercising delegated authority under a valid statute." That a railway corporation takes its franchise upon the implied condition that the rights and privileges thereby conferred shall yield to the burdens imposed by the development of the country, and shall be exercised and enjoyed subject to the dominant authority of the general welfare, public safety, and necessity, is placed beyond controversy by a long line of decisions upon the subject. Crossings at the intersection of streets and railroad tracks are recognized as places peculiarly dangerous, and, whenever the conditions at such crossings demand a change to promote the convenience and safety of the public, the railway company may be required, under the legitimate exercise of the police power of the state, to make the necessary change and improvement at its own expense. For the reason stated, it has been held by the great weight of authority that the power is a continuing one, and applies with equal force to railroads constructed prior to the laying out or extension of the street. Applying these principles, it follows that it is immaterial that appellant's roadbed and track to be affected by the enforcement of the ordinance in question were constructed before the passage of the same, and that since such construction the corporate limits of the city of Dallas have been so extended as to include within its boundaries said roadbed and tracks. Such facts cannot impair the power of appellee to have the grade of said tracks reduced at street intersections whenever the growth, increase of travel, and public safety demand it. That appellant may have constructed its road under a charter granted by the state cannot affect the question. Railroad corporations are largely under the control of the Legislature of the state, and hold whatever charter privileges which may have been granted to them subject to any laws passed or regulations prescribed in the exercise of its police

powers that the public safety and necessities may demand. *Indianapolis Railway Company v. State*, 37 Ind. 469; *Elliott on Roads & Streets*, §§ 75, 778-780; *New York & New England Ry. Co. v. Bristol*, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. Ed. 269; *People v. Boston & Albany R. Co.*, 70 N. Y. 569; *State v. St. Paul Ry. Co. (Minn.)* 28 N. W. 3, 59 Am. Rep. 313; *Chicago R. Co. v. State (Neb.)* 66 N. W. 624, 41 L. R. A. 481, 53 Am. St. Rep. 537; *Illinois Central Ry. Co. v. City of Chicago*, 141 Ill. 586, 30 N. E. 1044, 17 L. R. A. 530; *Elliott on Railroads*, § 1102. We are of the opinion that the rule announced is applicable to the particular circumstances of this case as they appear from the pleadings.

Among the enumerated powers conferred upon the city council of appellee by its charter we find the following: "Sec. 113. To direct and control the laying and construction of railroad tracks, turnout and switches, and to require that they be constructed and laid so as to interfere as little as possible with the ordinary travel and use of the streets, and to require that they be kept in repair. To regulate the use of locomotive engines, to direct and control the location of cable and other street and railroad tracks, and all steam railroad tracks, and to require railway companies of all kinds to construct, at their own expense, such bridges, turnouts, culverts, crossings and other things, as the city council may deem necessary. To regulate the speed of all railroad trains within the city limits, and their stops at street crossings, and to require said companies to keep the streets through which they run in repair, and to light the same whenever deemed necessary, and to prescribe the kind of light to be used, and to levy special taxes or assessments upon them for street improvements, the same as against property owners." This provision of appellee's charter is specific, and fully authorized and empowered its council to pass and have enforced the ordinance under which this suit is brought. It confers the power to compel railroads operating within the city limits to adjust the grade of their tracks to correspond to the grade of intersecting streets of the city and to construct proper crossings thereat at their own expense. Evidently the city council, in the rightful exercise of the power here conferred, passed the ordinance referred to, and appellee is forced by the refusal of appellant to comply with its provisions and demands to seek its enforcement through the process of the courts. It was the province and duty of the city council to ascertain and determine the necessity for the alteration of the grade of appellant's roadbed and track at its intersection with the streets and avenues specified in appellee's petition, and it does not appear that in the action taken the legitimate powers conferred have been transcended. The case does not come within the rule applicable in a suit growing out of a sum-

78 S.W.—34

mary abatement of a nuisance by a city, which cannot be said to be such per se, and wherein it may be alleged and proved that the thing thus abated was not in fact a nuisance.

The contention of appellant that the effect of this suit is to include and require the reduction of appellant's railroad embankment and tracks between street crossings is not sustained by the record. An inspection of appellee's petition will show that the purpose of the suit was to compel appellant to conform the elevation of its tracks to the grade of the intersecting streets named at the point of intersection, and the prayer of the petition is limited to such relief. It is but an effort to secure, through the exercise of the police power existing in the state, and delegated to appellee by legislative enactment, safe and necessary railroad crossings at street intersections. That appellee is entitled to the aid of a writ of mandamus to accomplish this purpose under the circumstances disclosed by the record admits of little doubt. *Chicago R. Co. v. State (Neb.)* 66 N. W. 624, 41 L. R. A. 481, 53 Am. St. Rep. 557; *People v. Boston & Albany R. Co.*, 70 N. Y. 569; *State v. St. Paul Ry. Co.*, 35 Minn. 222, 28 N. W. 245.

Appellee's petition is not subject to the objection that it does not allege the respective grades of each of the intersecting streets specified therein. The petition distinctly alleged the elevation of the appellant's embankment and track above the grade of the respective streets at points of intersection with the exception of Montezuma street. The judgment of the court specifically names the streets and the reduction to be made of appellant's track at their intersection, and Montezuma street is not included therein, and hence no injury can result to appellant on account of the failure to allege the grade of the track at this street crossing. We conclude that there was no error in overruling appellant's exceptions to appellee's petition.

The next question for consideration is the action of the court below in sustaining appellee's general and special exceptions to appellant's answer, and rendering judgment for appellee upon the pleadings without the introduction of proof. Numerous errors have been assigned attacking the action of the court in this respect, but we deem it unnecessary to discuss them in detail. Appellant's contention, in effect, is that appellee had no power under its charter to pass the ordinance involved in this suit; that, if authorized to pass it, such authority is by virtue of section 113 of its charter, and the same confers only a general power, and the averments of its answer were sufficient, if true, to show that the ordinance was unreasonable, and entitled appellant to a trial by jury upon that issue, and all the issues pertaining thereto, as alleged in its answer; that section 113, conferring only a general power, is

governed and controlled by the specific power and obligation contained in section 158 of the charter; that section 158 of the charter has special reference and application to grading of streets at their intersection with railway tracks, and provides for a fair and equitable distribution of the expense of such improvement; that all the matters and things set up in its answer were proper defenses to appellee's demands and subjects of inquiry, pertinent to the question of the reasonableness or unreasonableness of the ordinance, and evidence thereof should have been heard, etc. We do not agree to the contention that section 113 of appellee's charter confers upon the city council only a general power. The language of the section does not, in our opinion, warrant such conclusion. On the contrary, it occurs to us that the language used aptly expresses and confers a special power upon appellee's council to pass the ordinance involved in this controversy. It is difficult to conceive how the language used could have been more definite and specific in conferring the power intended, unless the minutest particularity had been observed in framing the section in respect to the manner in which the grading should be done and the crossing constructed. The language used is: "To direct, and control the laying and construction of railroad tracks, turnouts, and switches and to require that they be constructed and laid so as to interfere as little as possible with the ordinary travel and use of the streets and to require that they be kept in repair. To regulate the use of locomotive engines, to direct and control the location of cable and other street and railroad tracks and all steam railroad tracks and to require railway companies of all kinds to construct, at their own expense such bridges, turnouts, culverts, crossings, and other things, as the city council may deem necessary." The language is sufficiently specific to confer special authority upon the city council to require by ordinance the grading and construction of crossings at street intersections in the manner deemed by it necessary for the convenience and safety of the public. It is believed that this section of appellee's charter has special reference to the construction and regulation of street crossings at intersections with railroad tracks to promote the convenient use thereof and reduce the danger to public travel and is in no manner affected or controlled by section 158 of said charter. So much of the language of section 158 as is necessary to show its purpose and its bearing upon the question at issue is as follows: "The city council shall have power to grade, raise, repair, macadamize or otherwise improve any avenue or street or any portion thereof in the city to such an extent and out of such material and under such regulations as said council may provide. All such improvements shall be entirely at the costs of the city, provided that when any person or cor-

poration operates any street railroad or railroad of any kind on such street or avenue such person or corporation shall pay for paving or otherwise improving that part of the street between the rails and between the tracks and for two feet on each side of the rails of such road. The city shall, out of the general fund, pay for all street intersections, so improved except that portion occupied or used by said railroads, which must be paid as above provided by operators thereof. The city council shall by resolution passed designate the streets or avenues or portions thereof to be improved, the nature of the improvements to be made, and the material to be used." The language of this section very clearly indicates that it applies more particularly to the method, manner, and character of material to be employed and used in improving the streets generally, or such of them as the city council may designate; that, in so far as its provisions relate to railroads and the owners and operators thereof, it has special reference to that character of improvement and those streets along and upon which their railway tracks may be constructed. The duty and obligation to provide the public with safe street crossings is imposed upon city councils as the governing body of the city, and the exercise of its judgment in determining that such crossings where intersected by railroad tracks are dangerous, and require, by ordinance duly passed by virtue of special authority conferred by the charter of the city, that such crossing shall be changed and made safe for the use of the general public by and at the expense of the railway company, the reasonableness of such action will not ordinarily be investigated and determined by the courts. That the city has acquiesced in or consented to the present grade of appellant's track for a number of years and the compliance with the ordinance or the city's demands to lower said grade so as to conform to the grade of intersecting streets at the points of intersection is impracticable, and will entail loss or injury to its property, or cause delay in the operation of its business, or cause it to incur large expense in the performance of the work, or otherwise affect appellant's rights, as alleged in its answer, would not deprive appellee of the right to exercise its police power for the public convenience and safety in the manner sought, and hence constitutes no defense to this action. *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1036; *Patterson v. Kentucky*, 97 U. S. 501, 24 L. Ed. 1115; *Sentell v. N. O. & Carrollton Ry. Co.*, 166 U. S. 698, 17 Sup. Ct. 693, 41 L. Ed. 1169; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; *Cleveland v. City of Augusta (Ga.)* 29 S. E. 584, 43 L. R. A. 638; *Elliot on Railroads*, § 1102. Further discussion of appellant's claims and contentions would protract this opinion at too great a length.

We have carefully considered the allega-

tions of appellant's answer filed herein, and the several assignments of error presented and urged for a reversal of this case. None, in our opinion, furnish satisfactory reasons for so doing. The appellee was without an adequate legal remedy, and the court properly awarded the writ of mandamus. We believe, however, the judgment rendered is subject to the criticism of appellant in that it does not conform to the pleadings, and requires appellant to reduce the grade of its track between the street intersections and for the entire distance from Pacific avenue to the north corporate limits of the city. It is true the judgment following this general adjudication names the street crossings and the reduction to be made, but, to avoid any uncertainty as to the scope of the same, the judgment will be reformed so as to confine the reduction of the grade of appellant's railroad tracks to the street intersections named therein, and appellant will be allowed 12 months from the date of the judgment of this court herein in which to comply with the judgment of the court below.

The judgment of the court below, as reformed, is affirmed.

HALE et al. v. BICKETT.

(Court of Civil Appeals of Texas. Jan. 27, 1904.)

SHERIFFS—EXECUTIONS—FAILURE TO RETURN—LIABILITY OF OFFICER—APPEAL—QUESTIONS REVIEWABLE—ABSENCE OF ASSIGNMENTS.

1. Under Rev. St. 1895, art. 2387, making an officer and his sureties liable for failure to return an execution or for making a false return, a showing that defendant in the judgment was insolvent would not absolve the officer from liability, in view of testimony that defendant owned property subject to execution, and within the sheriff's jurisdiction.

2. The ruling of the trial court on the admission of testimony cannot be reviewed on appeal in the absence of assignments of error.

Appeal from Milam County Court; R. B. Pool, Judge.

Proceedings by J. H. Bickett against E. B. Hale and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Moore & Adams, for appellants. U. S. Hearrell, for appellee.

KEY, J. This case originated in the justice's court, but was finally tried in the county court. It is a proceeding instituted under article 2387 of the Revised Statutes of 1895, and is a motion against the sheriff for a failure to return executions issued by a justice of the peace upon a judgment in favor of J. H. Bickett and against Will Carson. From a judgment in favor of Bickett, the sheriff and his sureties have appealed.

The trial court found as a fact that an alias execution was issued on the judgment, and placed in the hands of Sheriff Hale, and never returned by him; and that the testi-

mony failed to show that he could not, by the exercise of proper diligence in executing the writ, have collected the plaintiff's judgment. This finding is assailed, but we think it is supported by testimony. The sheriff having failed to return the execution, he was liable, by force of the statute referred to, for the full amount of the judgment, unless it was made to appear that no injury had resulted to the plaintiff; and merely showing that the defendant in the judgment was insolvent was not sufficient to absolve the sheriff from liability, especially as there was other testimony tending to show that Will Carson owned property subject to execution and within the sheriff's jurisdiction. *Griswold v. Chandler*, 22 Tex. 637. Much of the testimony bearing on the question of Will Carson's ownership of property was objected to by appellants, but the objections were not followed up by assignments of error, and therefore the ruling of the trial court in that respect cannot be revised by this court.

All the points properly presented in appellants' brief have been considered, and our conclusion is that the judgment should be affirmed, and it is so ordered.

TEXAS & P. RY. CO. v. BRATCHER.

(Court of Civil Appeals of Texas. Jan. 23, 1904.)

CARRIERS—OVERCROWDED COACH—MISCONDUCT OF PASSENGERS—NEGLIGENCE—INSTRUCTIONS—EVIDENCE—SUFFICIENCY—QUESTION FOR JURY.

1. Where, in an action against a carrier for injuries to plaintiff's wife by providing an over-crowded, unlighted, and filthy coach, the uncontradicted testimony of the conductor was that, before plaintiff's wife boarded the train, four coaches were set out of the train because not needed, and that they had plenty of coaches to haul the crowds, a charge that the great demand on the carrier's facilities on account of a veterans' reunion should be considered in extenuation of its failure to provide a proper coach is properly refused as unsupported by the evidence.

2. Evidence in an action against a carrier for injuries to plaintiff's wife by reason of negligence in failing to require proper conduct on the part of her fellow passengers examined, and held sufficient to warrant submission to the jury of the question whether her fellow passengers were smoking, drinking whisky, cursing, and crowding up against her.

3. In an action against a carrier for injuries to plaintiff's wife by reason of negligence in failing to require proper conduct on the part of her fellow passengers, a charge which authorizes the jury, if they find that, as the proximate result of defendant's negligence, plaintiff's wife suffered inconvenience, humiliation, fright, alarm, and excitement, and was made sick, and suffered physical pain and mental suffering, they should find for the plaintiff such damages as may have resulted therefrom, in which charge were repeated the results of the injuries, in referring to the manner of estimating the damages, is not cause for reversal; there being no contention that the verdict is excessive.

Appeal from District Court, Van Zandt County; R. W. Simpson, Judge.

Action by E. P. Bratcher against the Tex-

as & Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

T. J. Freeman, H. M. Cate, and J. A. Germany, for appellant. Geo. W. Scott and F. J. McCord, for appellee.

BOOKHOUT, J. This suit was brought by the plaintiff, E. P. Bratcher, in the district court of Van Zandt county, to recover damages alleged to have been sustained by his wife while a passenger on one of defendant's trains out of Dallas, Tex., en route to Grand Saline, Tex., on the 24th day of April, 1902, resulting from the alleged failure of the defendant to provide a proper and suitable car for plaintiff's wife on said trip; the plaintiff alleging that the passenger coach in which plaintiff's wife was directed to take passage by defendant's agents was improperly lighted, was dark and filthy, and that she was compelled to ride in said car, without lights, from Dallas to Grand Saline, a distance of 65 miles, at night; that she was subjected to all kinds of insults and indignities; that said car was filthy and dirty, and filled with all kinds of filthy fumes, odors, and smells; that the coach was full of drunken men, who were cursing and swearing and calling out that they had been robbed; that men sat down on the arm of the seat occupied by plaintiff's wife, and leaned over and back upon the plaintiff's wife, and that she was in constant fear and excitement for a period of six hours, it being so dark she could not see; that the constant dread, fear, and excitement brought on a spell of nervousness, and made her sick, from which she sustained damage in the sum of \$1,000. The defendant answered by general denial, and the case was tried before the court and jury at the spring term of the district court of Van Zandt county, 1903, resulting in a verdict and judgment for the plaintiff in the sum of \$350; and, a motion for a new trial having been overruled, defendant gave notice of appeal to this court.

It is contended that the court erred in refusing to give at the request of appellant the following special charge: "Gentlemen: You are charged that while the law imposes upon a carrier of passengers the duty of exercising that high degree of care usually exercised by a very prudent and careful person engaged in a similar line of business towards its passengers, while in the carrier's charge, yet the circumstances surrounding the acts of the carrier (the defendant in this case) are always to be considered by the jury in deciding whether the defendant has discharged its duty to the passengers in its charge; so that, if you find from the evidence that on the 23d day of April, 1902, there was an unusual and extraordinary demand for transportation made upon the defendant, growing out of the attendance upon the Confederate reunion at Dallas, you will then consider

whether the defendant has exercised due diligence and care, as already defined to you, in anticipating and providing transportation for such passengers as might have been reasonably anticipated, by a very prudent and careful person similarly situated as the defendant was, to meet said demand; and if you find from the evidence that such demand for transportation exceeded such anticipations and expectations, which is a question for you to decide, you will then further inquire whether or not, if such anticipations and expectations were exceeded, the defendant exercised due diligence to meet said demand after discovering or being informed of the volume of such demand, to provide proper and convenient transportation for such passengers as presented themselves for carriage, and as to whether or not the defendant was negligent in failing to meet this demand, and to provide proper and adequate transportation, convenience, and comfort to its passengers on said occasion; but, in passing upon the question of negligence, you are charged that the defendant in this case would only be liable for a failure to exercise such a degree of care under all circumstances surrounding the defendant on the 23d day of April, 1902, taking into consideration the nature of the demands made upon the defendant, the number of passengers it was called upon to transport, its facilities, which facilities must have been such as a very prudent and careful person in the same line of business, similarly situated, would have provided under like circumstances; and if you believe, taking the situation of the defendant on the 23d day of April, 1902, into consideration, as presented by the evidence, that the defendant exercised the highest degree of care that a very prudent person similarly situated, under all the circumstances, engaged in the same business, would have exercised, and was not guilty of negligence, as defined to you, you will find for the defendant." There was no error in refusing this charge. The fact that the appellant had used a high degree of care in providing for the convenience and comfort of its passengers, and that the crowd in attendance at the Confederate reunion at Dallas was unprecedented—exceeded all expectations—was, under the evidence, immaterial. W. E. Hunter testified (and his testimony on this point is uncontradicted) that he was the conductor of the train upon which the appellee's wife became a passenger; that it was made up at Ft. Worth, and, when the train reached Dallas, four coaches were set out of the train because they did not need them; and that they had plenty of coaches to haul the crowd. It is clear from the evidence that the condition of the car in which appellee's wife was directed to, and did, take passage, was not due to the unprecedented crowd attending the reunion. For the same reason, there was no error in refusing the special charge No. 2 requested by appellant, the refusal of which

is made the ground of the second assignment of error.

It is insisted that the court erred in charging the jury as follows: "Now, if you find and believe from the evidence that defendant's employes furnished to plaintiff's wife a car to take passage in from Dallas to Grand Saline, which was not lighted, and was filthy and dirty, and that plaintiff's wife's fellow passengers were smoking, drinking whisky, cursing, and crowding up against plaintiff's wife; and you further find that the omissions and acts, if any, were negligence, as that term is herein defined; and if you further find that, as the proximate result of said negligence, if any, plaintiff's wife suffered inconvenience, humiliation, fright, alarm, and excitement, and was made sick, and suffered physical pain and mental suffering—then you will find for plaintiff such damages, if any, as plaintiff may have suffered by reason of the loss of his wife's services, and such damages, if any, as plaintiff's wife may have suffered; and in estimating the damages, if any, you may take into consideration the loss of time of plaintiff's wife, the inconvenience, fright, alarm, and excitement, if any, together with her mental suffering and physical pain while sick, if she was sick, which was the proximate result of the negligence, if any, of defendant's employes in charge of its train, and therefrom you will ascertain and determine what amount of cash money will be a fair and reasonable compensation for such injuries, if any." The contention is that there was no evidence that plaintiff's wife's fellow passengers were smoking or drinking whisky, or that they were crowding up against plaintiff's wife. This contention is not tenable. There was evidence sufficient to justify the submission of those matters to the jury. Nor is the charge subject to the criticism that it sets forth with undue prominence the results which the jury might consider as flowing from the negligence of defendant. The part of the charge complained of reads, "That if the jury found, as the proximate result of said negligence, the plaintiff's wife suffered inconvenience, humiliation, fright, alarm, and excitement, and was made sick, and suffered physical pain and mental suffering, then the jury could find for the plaintiff such damages as may have resulted therefrom," and again repeating the results of such injuries in the part referring to the manner of estimating the damages. It is not contended that the verdict is excessive, and we think it clear that the jury were not prejudiced by this repetition.

Appellant contends in its fifth assignment that "the court erred in charging that plaintiff could recover on account of plaintiff's wife's fellow passengers smoking, drinking whisky, cursing, and crowding up against her, for the reason that there was no evidence that there was any smoking in the car, the only evidence thereof being that plain-

tiff's wife only thought that she smelt whisky, and could smell smoke, which, under the circumstances—the windows being open—could have as easily come from the outside as from the inside, and because the said smoking and drinking of whisky would be too remote a circumstance on which to predicate damages." In view of the evidence there was no error in submitting the issue complained of in this assignment. The evidence shows that it is about 65 miles from Dallas to Grand Saline. That appellee's wife entered the car about 7 o'clock p. m. at Dallas, and did not arrive at Grand Saline until about 1:30 a. m. the next morning. The coach was not lighted, and Mrs. Bratcher testified it was so dark she could not distinguish a white man from a negro; that the car was dirty and filthy. She further says: "There was a noisy crowd drinking in the car, judging from the way they acted. During the trip there was loud talking and cursing in the car, and the odor in the car smelled like cigar smoke and a whisky barrel, or both." A large, fleshy man sat down on the arm of her seat, and leaned back against her. It was shown that she was a lady of refined sensibility, as she was frightened. She says she did not see the conductor or other officer or agent of the company in charge of the train until they reached "the water tank near Grand Saline." It was then the conductor came around and took up her ticket. She says it was so dark that, had the conductor passed through the coach, she could not have recognized him. We think it clear that defendant's agents in charge of the train could, by the exercise of due care, have known of the improper conduct of the fellow passengers of plaintiff's wife. Mrs. Bratcher was made sick, and the following morning her family physician had to be called, and he found her suffering with fever and very nervous. She was sick between two and three weeks, during which time her physician visited her every day.

We conclude that the record fails to disclose any error in the judgment, and the same is affirmed.

PARKS et al. v. DALLAS TERMINAL RY. & UNION DEPOT CO.

(Court of Civil Appeals of Texas. Jan. 23, 1904.)

RAILROADS—EMINENT DOMAIN—ASSESSMENT OF DAMAGES—ACCEPTANCE OF JUDGMENT—STATUTE—APPEAL

1. Gen. Laws 1899, 28th Leg. p. 105, c. 70, permitting railroads in condemnation proceedings to take possession of property sought to be condemned pending litigation, and providing that on appeal from the county court the appeal shall be governed by the same law as in other causes, except the judgment of the county court shall not be suspended thereby, does not authorize property owners, who have accepted money paid into court on a judgment

of the county court, and executed receipt in full therefor, to appeal.

Error from Dallas County Court; E. S. Lauderdale, Judge.

Condemnation proceedings by the Dallas Terminal Railway & Union Depot Company against O. F. Parks and others. From a judgment for less than claimed, defendants bring error. Dismissed.

Cobb & Avery, for plaintiffs in error. Bonner & Gilbert and J. C. Roberts, for defendant in error.

BOOKHOUT, J. On March 13, 1902, the Dallas Terminal Railway & Union Depot Company, a railway corporation, presented its petition to the county judge of Dallas county, Tex., praying for the condemnation of certain property therein described, belonging to plaintiffs in error. Commissioners were appointed as required by law, who, after hearing, filed their award in the county court of Dallas county, Tex., March 26, 1902, to which award plaintiffs in error filed their objection. On September 27, 1902, said cause was duly tried in the county court of Dallas county, Tex., before a jury, and a verdict was rendered in favor of plaintiffs in error for the sum of \$3,500, upon which verdict the court rendered judgment in their favor for the sum of \$3,500, with 6 per cent. interest from date until paid and costs of suit; and that upon the payment of said judgment by the defendant in error to plaintiffs in error, or into court for their benefit, the land sought to be condemned be divested out of plaintiffs in error and vested in defendant in error. Plaintiffs in error filed a motion for a new trial. On October 1, 1902, defendant in error paid into court \$3,500, the amount of said judgment, and \$6.90 interest thereon. On October 18, 1902, the court overruled the motion for a new trial by plaintiffs in error, and on the same day, to wit, October 18, 1902, plaintiffs in error voluntarily drew from the court said sum of \$3,506.90, and receipted the judgment in words and figures as follows:

"Received of A. S. Jackson, Co. Clerk, Three Thousand Five Hundred Six and 90/100 (\$3506.90) Dollars in full of this judgment and interest, this October 18th, 1902.

"Cobb & Avery, Attorneys for Defdts."

On September 11, 1903, plaintiffs in error filed their petition in error and cost bond in the sum of \$250, and took out transcript, and filed the same in this court on the 5th day of December, 1903. The defendant in error moves the court to dismiss the writ of error on the ground that the plaintiffs in error, having accepted the benefits of the judgment of which they complain, cannot prosecute a writ of error to reverse the same. As a general rule, a party cannot accept the benefits of an adjudication, and then appeal from the judgment. *Matlow v. Cox*, 25 Tex. 578; *Dunham v. Randall et al.* (Tex. Civ.

App.) 32 S. W. 720; 2 Enc. Plead. & Prac. p. 174. And it is held by the Court of Appeals for the Second District that this rule is applicable to proceedings for the condemnation of land under the railroad right of way statute. *Twombly v. Chicago, R. I. & S. F. Ry.* (Tex. Civ. App.) 31 S. W. 81. See, also, *Lewis, Em. Dom.* § 556.

The plaintiffs in error cite the statute of 1899 (Gen. Laws 26th Leg. p. 105, c. 70), and contend that by reason of the provisions of this statute they are authorized to prosecute their writ of error notwithstanding they have accepted the benefits of the judgment from which they appeal. This statute was enacted, as stated in its caption, "to permit railroad and other corporations having the right of eminent domain to enter upon and take possession of property sought to be condemned, pending litigation, upon the payment or security of the award of the commissioners appointed to appraise, and costs; and the deposit of money sufficient to cover additional damages that may be adjudged and the giving of bond for future costs and to repeal laws in conflict herewith." The statute expressly provides that, "if the cause should be appealed from the decision of the county court, the appeal shall be governed by the same law as in other cases; except the judgment of the county court shall not be suspended thereby." Thus it is seen the appeal is to be governed by the general statutes relating to appeals, except the judgment is not to be suspended thereby. The exception is made for the purpose of permitting the railroad or other corporations, upon complying with the conditions of the statute, to take possession of the land and continue its work. After the award by the commissioners appointed to assess the damages the railroad company excepted thereto, and the case was then tried in the county court, and upon the verdict of the jury judgment was rendered for \$3,500 and interest in favor of defendants. The railroad company thereupon deposited the amount of judgment, with interest and costs, in court, for the benefit of plaintiffs in error. The plaintiffs in error accepted the same, and executed a receipt in full of the judgment. Thereafter they prosecute this writ of error to reverse the judgment. This they could not do. They were not compelled to accept the damages and receipt the judgment. Their act in so doing was voluntary. It is not like the act of the railroad company in making the deposit in court. This the statute required to be done before the company could enter upon and take possession of the property. Such payment is compulsory, in that it must be made before the company could enter upon and take possession of the land. As stated, the object of the statute is to provide a mode of procedure whereby the railroad or other corporation having the right of eminent domain can enter upon and take possession of the property sought to be con-

demned pending litigation. It does not change the manner of appeal further than that an appeal is not to suspend the judgment.

We are cited by plaintiffs in error to the ruling in the states of Ohio and Indiana to the effect that where a railroad company, in proceedings instituted by it for condemnation of its right of way, pays the damages awarded by the court to the clerk thereof, and enters into possession of the land, the fact that the company has perfected an appeal from the judgment does not justify the clerk in refusing to pay back the damages to the owner, or prevent the latter from taking proceedings to recover the same. *Melly v. Zurmehly*, 23 Ohio St. 628; *Meyer v. State*, 125 Ind. 335, 25 N. E. 351. This ruling is based upon the statutes of those states. It is to be noted that the appeal was by the railroad company, and not by the owner of the land. This fact would distinguish this case from the cases cited. We do not hold that pending an appeal by the railroad company the defendants in judgment would not be entitled to the benefits of the judgment. This question is not involved in this appeal. We conclude that the motion to dismiss the writ of error is well taken, and the same is sustained.

Writ of error is dismissed.

TUCSON LAND & LIVE STOCK CO. v. EVERETT.

(Court of Civil Appeals of Texas. Jan. 23, 1904.)

TRESPASS—JUSTIFICATION—INSTRUCTIONS—PREPONDERANCE OF EVIDENCE.

1. The herding by defendant of his horses on plaintiff's land is not justified by the consent given defendant by one whose lease from plaintiff had not gone into effect at the time of such herding, this affecting only the question of vindictive damages.

Appeal from Nolan County Court; W. L. Grogan, Special Judge.

Action by the Tucson Land & Live Stock Company against J. N. Everett. Judgment for defendant. Plaintiff appeals. Reversed.

Beall & Beall, for appellant. J. F. Eidson, for appellee.

STEPHENS, J. If appellee wrongfully herded his horses on the land of appellant as alleged, and as the evidence tended to prove, the consent of one Linthicum, whose lease from appellant had not at the time of such herding gone into effect, was no justification, and the court erred, as assigned, in submitting this issue to the jury. What passed between appellee and Linthicum could only have been relevant to the issue of vindictive damages.

The charge quoted in the second assignment was objectionable for the reason given in the proposition under that assignment.

The charge complained of in the third assignment, which undertook to define "pre-

ponderance of evidence," if not in itself erroneous, was superfluous, and should be omitted on the next trial. *Railway v. Reagan* (Tex. Civ. App.) 34 S. W. 796.

The judgment is reversed, and the cause remanded for a new trial.

BONNER et al. v. BONNER.

(Court of Civil Appeals of Texas. Jan. 23, 1904.)

PAROL PARTITION—TRESPASS TO TRY TITLE—CLAIM OF COMMON SOURCE—EVIDENCE—TAX DEED—DEFENSE OF LIMITATIONS—OPERATION AS TO PLEADING AND PROOF OF PAROL LEASE—REVIEW—CONFLICTING EVIDENCE—HARMLESS ERROR.

1. A decedent having distributed his lands by parol gift among his children in his lifetime, and each having gone into possession and acquiesced in the partition, and held the same in severalty for more than 20 years, no fraud or inequality in the partition being alleged or shown, the same is valid and confers title.

2. The interposition of the 10-year statute of limitation in favor of defendant's grantor in trespass to try title renders material the question whether he occupied the land under a parol lease from plaintiff during such time, and objections to that part of the petition setting up such lease, and to the evidence thereof, for the reason that the lease was not to be performed in one year, were properly overruled.

3. In trespass to try title, a tax deed purporting to convey to defendant's grantor land in controversy, and reciting that it was sold as the property of an "unknown owner," is not inconsistent with the claim of common source asserted by plaintiff, and, not raising an issue on that point, was properly excluded.

4. A finding by the jury on conflicting evidence is conclusive on appeal.

5. Where the facts established clearly entitle plaintiff to recover, error in instructing the jury to find in his favor in case the evidence satisfied them of certain facts becomes immaterial.

Appeal from District Court, Freestone County; L. B. Cobb, Judge.

Action by O. A. Bonner against W. P. Bonner and others. From a judgment for plaintiff, defendants W. P. Bonner and another appeal. Affirmed.

W. B. Moses, W. R. Boyd, J. G. Anderson and Callicutt & Call, for appellants. T. H. Bonner, C. L. Watson, and Anderson & Anderson, for appellee.

TALBOT, J. This is an action, in the nature of trespass to try title, instituted by O. A. Bonner, appellee, against Mrs. Martha Bonner, W. P. Bonner, Mary E. Richards and her husband, W. E. Richards, J. A. Bonner, Annie W. Anderson and her husband, A. D. Anderson, and Sallie Belle Robinson and her husband, W. B. Robinson, in the district court of Freestone county on the 20th day of January, 1902, to recover possession of and quiet his title to about 1,000 acres of land, a part of the James James survey.

Appellee, O. A. Bonner, alleged in substance that his father, Dr. John Bonner, gave him by parol gift and partition, as his part of his estate, the said land in controversy, and

that at the death of his father he took possession of the same, and has been in actual, peaceable, and adverse possession of said land under said gift and partition since his father's death, a period of more than 20 years, and that he made valuable improvements on said land prior to the institution of this suit. That on or about the 1st day of January, 1900, Dr. James I. Bonner, deceased, defendants' grantor, entered upon said land and ejected him therefrom, and defendants continue to withhold possession from him. He further alleges that the said Dr. John Bonner, deceased, prior to his death, by parol gift divided out his lands and other property to his children. That Dr. James I. Bonner, deceased, received by parol gift and partition at the same time his portion of said estate, of equal value with the other children. That the land so given to the said James I. Bonner in said partition is now claimed by the appellants as heirs of the said James I. Bonner, deceased, under and by virtue of said parol gift and partition. That all of the heirs of the said Dr. John Bonner, deceased, ratified said partition by accepting same and taking possession of said lands, and are now occupying and enjoying the peaceable and uninterrupted possession of the same, and have been since the death of said John Bonner, deceased, a period of more than 20 years. That all the heirs of the said John Bonner, deceased, accepted said gift and partition, and have since recognized and admitted that title passed in partition to each to the land and property thus given by their father to each of them and to the exclusion of the other. Appellee further alleges in substance that on or about the 1st day of November, 1884, Dr. James I. Bonner agreed with him that if he would give him (Dr. James I. Bonner) the use of the pasturage of a portion of his above-described land, to wit, about 400 acres, he, the said James I. Bonner, would fence it in and keep up the fence for and in consideration of the use of the same as a pasture for his stock, and would annually pay the state and county taxes due, not only on the land he thus inclosed for pasturage, but the state and county taxes on appellee's entire tract of land. That said contract was faithfully complied with on the part of the said James I. Bonner. All of the defendants, except appellants W. P. Bonner and Mrs. Martha Bonner, disclaimed as to all the land sued for. Appellant Mrs. Martha Bonner disclaimed as to all the land sued for, except about 300 acres described in her amended original answer filed February 26, 1903. Appellant W. P. Bonner disclaimed as to the land described in Martha Bonner's pleadings, and to about 200 acres known as the "Anglin Field," described in his answer filed February 26, 1903. Besides said disclaimers, appellants Mrs. Martha Bonner and W. P. Bonner answered by general and special exceptions, general denials, pleas of not guilty, and the

said W. P. Bonner pleaded the statute of limitation of 10 years. The case came on for trial February 27, 1903, appellants' exceptions were overruled, a jury trial had, and verdict was rendered for appellee for all the land sued for, and against appellant W. P. Bonner for \$15 for timber converted, and judgment entered accordingly. Appellants excepted to the action of the court in overruling their demurrers, filed a motion for new trial, which being overruled, they appeal to this court and ask a reversal of said judgment.

The evidence shows that Dr. John Bonner, of Freestone county, Tex., left surviving him at the date of his death, in 1878, the following children: Dr. James I. Bonner, John L. Bonner, Andrew Bonner, O. A. Bonner, Mrs. W. W. McCrery, and I. H. Bonner. Dr. James I. Bonner is now dead, and was the husband of appellant Mrs. Martha Bonner, and father of appellant W. P. Bonner. Dr. John Bonner owned and possessed a large landed estate, and, before his death, by parol gift gave each of his said children, at different dates, specific portions thereof. Each of said children accepted the gift, and entered into possession of the parcels of said land allotted to them respectively, more than 20 years before the institution of this suit, and have held possession thereof in severalty, using and enjoying the same as their own property, since the date of their respective entries. It does not appear that the respective tracts so given and received were not of equal value, or that there was any partiality or unfairness in the distribution made. Dr. John Bonner executed and delivered to his children John L. Bonner, I. H. Bonner, and Mrs. McCrery deeds of conveyance for the lands given to them. These deeds, however, or at least one of them, were given at their request, and long after they had been in possession of said lands. Andrew Bonner and appellee did not receive deeds from their father for their respective tracts, but the record does not show that any request was ever made therefor. A deed from Dr. John Bonner to James I. Bonner, dated January 9, 1871, for a part of the Bankhead and Claypool surveys, was introduced in evidence, but said deed was neither acknowledged nor recorded. The land in controversy is a part of that portion given to appellee, O. A. Bonner, and is a part of the James James survey. In 1884 or 1885, Dr. James I. Bonner, through whom appellants claim, leased that part of appellee's land in controversy for an indefinite length of time, by a verbal agreement, to be used by him as a pasture for his stock. He agreed, for the use of said land, to fence it and pay the annual taxes thereon, and on appellee's entire tract of land, during the time he so held and used the pasture. By virtue of this agreement Dr. James I. Bonner entered upon said land and held it under the terms thereof, keeping up the fences and paying appellee's taxes for the use

of the same. If, prior to a short time before his death and the institution of this suit, he held the same adversely to appellee, such holding was unknown to appellee, and not of such character as to affect him with notice or knowledge thereof. The record fails to show that any improvements were made on the land by appellee. Dr. James I. Bonner conveyed the land in controversy to his wife, Martha Bonner, on the 12th day of February, 1895, but the deed was not filed for record until July, 1897; and he and his wife deeded to appellant, W. P. Bonner, on the 27th day of November, 1900, the land claimed by him in this suit.

Appellants' first and second assignments of error are predicated upon the action of the court in overruling their special exceptions to appellee's petition. The grounds of complaint are: (1) That said petition attempts to assert a parol gift of land, accompanied by possession and valuable improvements made, from Dr. John Bonner, when said petition shows on its face that possession of said land was not taken by appellee until after the death of said Dr. John Bonner, and that no improvements were made by appellee on said land during the lifetime of said Dr. John Bonner; and that said petition does not show that improvements of any value were ever placed upon said land by appellee. (2) That a parol agreement is therein alleged between Dr. James I. Bonner and appellee, wherein Dr. James I. Bonner leased the land in controversy; and said petition shows that by the terms of said lease it was not and could not have been completed within the period of one year, and was in violation of the statute of frauds.

The question presented under these assignments for decision is the same raised, though in different form, by appellants' fourth, fifth, sixth, eighth, and ninth assignments of error. The contention in effect is that the petition complained of bases appellee's right to recover solely upon the ground that Dr. John Bonner by parol gift gave the land in controversy to him, and that such a gift cannot be sustained and enforced unless it is alleged and proved; that appellee took possession of the land in Dr. Bonner's lifetime, and upon the faith of such gift made valuable improvements thereon; and this seems to be the theory upon which the case was submitted to the jury. If it be true that appellee's petition rests his right to recover alone upon the fact of a parol gift from his father, then the proposition of law asserted as applicable thereto is correct, and appellants' exceptions should have been sustained. It is well settled law in this state that the taking possession of and making valuable improvements on the faith of the gift are essential ingredients to take a parol gift of land out of the operation of the statute of frauds and make the same binding. *Murphy v. Stell*, 43 Tex. 123; *Willis v. Matthews*, 46 Tex. 478; *Montgomery v. Carlton*,

56 Tex. 361; *Baker's Ex'rs v. De Freese*, 2 Tex. Civ. App. 524, 21 S. W. 963.

We do not concur, however, in the proposition that appellee's right to recover the land is predicated alone upon a parol gift of the same from his father, without possession having been taken and improvements made. The petition, it is true, alleges that such gift was made; but it also alleges, in addition to the parol gift to appellee, that a similar gift was made to each of Dr. John Bonner's children, and that each accepted the gift, and went into possession of the land given him in partition of their father's estate, and has been enjoying the same for more than 20 years. These allegations are sustained and established by the undisputed evidence in the case, and if the property so distributed among his children did not constitute Dr. John Bonner's entire estate, and was not the only partition thereof ever made, it is not shown by the record before us. On the contrary, that such property did comprise his entire estate, and said gifts constitute the only partition thereof ever made, is the fair, if not irresistible, conclusion deducible from all the facts and circumstances in evidence before us. Dr. John Bonner having given and distributed his lands to and among his children in his lifetime, and each one having gone into possession of the part allotted to him and acquiesced in such partition, and held the same in severalty for more than 20 years, no fraud or inequality in the partition being alleged or shown, we are of the opinion the same is valid and conferred title. The above facts, except as to the possession of appellee of the land allotted to him, are not disputed, or, if so, were so conclusively established by the evidence that ordinary minds could not reasonably differ about them. The issue of appellee's possession of the land was submitted to the jury, and their finding was favorable to appellee. The trial court properly overruled appellants' objections to that part of appellee's petition setting up that Dr. James I. Bonner had leased from him the property in controversy by a parol lease which could not be performed in one year, and to the evidence offered in support thereof. The appellant W. P. Bonner had interposed the statute of limitation of 10 years in support of his claim to the land sued for, and the character of Dr. James I. Bonner's possession of the same, under whom appellants claim, thereby became a material inquiry. The parol lease pleaded, and the evidence offered in support thereof, were pertinent to that issue. If Dr. James I. Bonner had held possession of the land under and by virtue of said lease, and not adversely to appellee, then said plea of limitation would avail appellant nothing. The trial court correctly submitted the issue to the jury, and their verdict embraces a finding upon the question in favor of appellee.

There was no error in excluding the tax deed from James Robinson, tax collector of

Freestone county, to James I. Bonner, dated May 1, 1878, purporting to convey to said Bonner 1,971 acres of land, a part of the J. James survey, in said county, offered by appellants to show or tending to show that they and appellee did not claim title to the land in controversy under a common source. It is true, it has been held in this state that a "void tax deed, purporting to evidence the sale of land as the property of an owner named, may be used to show the claim of title by a defendant when sued by some one claiming from the same source." *Garner v. Lasker*, 71 Tex. 433, 9 S. W. 332; *Burns v. Goff*, 79 Tex. 236, 14 S. W. 1009. But it will be observed that in such cases the deeds admitted purported to evidence the sale of land as the property of an owner named. If the deed offered purports to evidence the sale of land of an unknown owner, it cannot be known therefrom whether the parties claim from the same or different source. The deed offered and excluded in the present case, as shown by the bill of exception, recited that the land was sold as the property of an "unknown owner." Its recitals were not inconsistent with the claim of common source asserted by appellee, and would have amounted to no evidence on that issue. The evidence does not raise an issue on the question of common source, and the court correctly refused appellants' special instruction requested, as shown by their eighth assignment of error.

As to the contention of appellants that a division line between the lands owned by appellee and Dr. James I. Bonner had been agreed upon and recognized by them, by the location of which it appeared that appellants were entitled to the land in controversy or a part thereof, it is sufficient to say that the evidence was conflicting upon the issue, it was fairly submitted to the jury, they found adversely to appellants' contention, and we are not authorized to disturb their finding upon it.

Upon the whole case, we believe a correct result has been reached. The controverted issues involved were submitted to the jury. Their findings thereon were favorable to the appellee. That Dr. John Bonner divided his landed estate among his children by way of partition, and that the same has been acquiesced in for many years by them, is placed beyond controversy by the facts and circumstances disclosed by the record, and is of that uncontradicted and conclusive character as would have warranted, at the hands of the court, a peremptory instruction upon that phase of the case. In this view of the case it becomes immaterial that the court may have erred in charging the jury in effect to find for appellee in case they believed from the evidence that Dr. John Bonner gave him the land in controversy and put him in possession thereof, regardless of valuable improvements having been made thereon by him on the faith of such gift.

We believe justice has been attained in this case, a proper verdict and judgment rendered, that no reversible error is found in the record, and the judgment of the court below is affirmed.

CLARK et al. v. ELMENDORF.*

(Court of Civil Appeals of Texas. Jan. 20, 1904.)

TRESPASS TO TRY TITLE—DEED OF TRUST—MATURITY—TAXES—NONPAYMENT—FORECLOSURE—CORPORATIONS—ACTS OF PRESIDENT—RATIFICATION—TRIAL—JURY—MISCONDUCT—OBJECTIONS—WAIVER—PENALTIES—LIABILITY OF PARTIES—SEQUESTRATION—AFFIDAVIT—DUPLICITY.

1. Where, under a deed of trust, the holder of the note secured was empowered to declare the entire debt due if the taxes were not paid, an extension of time for the payment of the principal sum did not create a new contract, nor prevent the creditor from enforcing the deed of trust, before the end of such extension, for the debtor's failure to pay the taxes as provided.

2. Where a deed of trust provided that if the grantor should fail to pay the state, county, or city taxes on the property according to the tax rolls in the hands of the tax collectors, the whole of said indebtedness remaining unpaid, at the option of the holder, should become immediately payable, such clause referred to taxes which might remain unpaid at any time before the principal debt became due, and was not limited to taxes due prior to the execution of the deed.

3. *Sayles' Ann. Civ. St. 1897, art. 5232j*, requiring the tax collector on March 31st of each year to make a list of delinquent taxes, has no application to the provision declaring that taxes are delinquent on February 1st of each year, and after that time, if not paid, a penalty shall accrue thereon.

4. Where, after the execution of a deed of trust by the president of a corporation in its behalf, the corporation asked for release of parcels of the land included, and received and used the money the deed was given to secure, it thereby ratified the president's act.

5. Where the holder of a debt secured by a deed of trust foreclosed the same for nonpayment of taxes by the grantor as authorized by the deed, and in an action to try title, based on such foreclosure proceedings, proved that the state, county, and city taxes on the land for the year previous to the foreclosure were not paid by the grantor in the deed, she was not required to further prove that such taxes were properly levied.

6. A creditor of a corporation, in possession of certain land previously owned by it, was not entitled to hold the property, as against the purchaser under proceedings to foreclose a deed of trust thereon, under a verbal agreement made by an agent of the corporation that the creditor should hold the property for the debt due him from the corporation.

7. Where, prior to the submission of a case to the jury, plaintiff's counsel informed the court that plaintiff's son and one of the jurors had taken one or two glasses of beer together during the progress of the trial, and offered to excuse the juror and accept a verdict by the remaining jurors, to which defendants would not agree, whereupon the entire jury considered the case, to which defendants at the time raised no objection, defendants were not entitled to have an adverse verdict set aside for such misconduct.

8. Where, in an action to quiet title, plaintiff's son, who was 25 years of age, and who

*Rehearing denied February 10, 1904, and writ of error denied by Supreme Court.

had acted in the suit as plaintiff's agent, during the trial drank beer with one of the jurymen, of which plaintiff had no knowledge, it was error for the court to impose a penalty against her for her son's misconduct.

9. An affidavit for a writ of sequestration, alleging that plaintiff feared that defendants would make use of the premises in controversy to waste or convert to their own use the fruits or revenues produced by the property, was objectionable for duplicity.

Appeal from District Court, Bexar County; S. J. Brooks, Judge.

Action by Mrs. Henry Elmendorf against Rushby Clark and another. From a judgment in favor of plaintiff, defendants appeal. Modified.

Paschal & Ryan, for appellants. James Routledge, for appellee.

FLY, J. This is an action of trespass to try title to lands situated in and near the city of San Antonio, instituted by appellee against Rushby Clark and Edward MacKechnie. The jury returned a verdict in favor of appellee for the land, and for rent in the sum of \$100 against MacKechnie, and against Clark for \$300. As will more fully appear herein, a remittitur of \$100 was made the condition of overruling the motion for new trial, and the court entered a judgment for appellee, as amended by the remittitur.

On September 11, 1897, the Lakeview Land Company, a corporation, executed a deed of trust on the land in controversy to George C. Altgelt, as trustee, to secure Mrs. Minna Herff in the payment of a certain promissory note for \$8,000 principal, and six other notes for the interest to become due on the principal sum. Payment of the notes was guaranteed by Henry Elmendorf, the deceased husband of appellee. When the principal note became due, in September, 1900, the Lakeview Land Company failed to pay it; and the guarantor, Henry Elmendorf, paid \$2,000 on the principal, and \$320 interest, and \$125 attorney's fees on June 1, 1901, and the holder of the notes granted an extension on them for one year. Henry Elmendorf died in December, 1901, and appellee was appointed his executrix. The land company failed to pay any part of the notes, or the state, county, and city taxes due on the land for 1901; and on March 1, 1902, appellee paid \$6,222.70, being the balance due on the notes, and the same were transferred to her by Dr. Adolph Herff and Mrs. Minna Herff, the holders thereof. It was provided in the deed of trust given by the Lakeview Land Company to Mrs. Herff that "should said Lakeview Land Company fail to pay the State, County or City taxes upon said property, according to the tax rolls in the hands of the tax collectors, then and in such case the whole of said indebtedness remaining unpaid, shall at the option of the said M. Herff, or holder, or holders of said obligations mature and become payable and the lien created by this deed may then be foreclosed by judicial pro-

ceedings, or the said trustee, Geo. C. Altgelt, or his successor or substitute herein, as hereinafter provided, upon the request said M. Herff or other holder of said obligations (which request shall be presumed), may proceed to enforce and execute this trust and after advertising the time, place and terms of the sale of all the above conveyed and described property for at least twenty days," etc., and should sell the same. On March 5, 1902, the taxes remaining unpaid, appellee declared the notes due, and requested the trustee to sell the lands described in the deed of trust. The sale took place as provided by law and the terms of the deed of trust on April 1, 1902, and the land was sold to appellee.

The first assignment of error complains of the deed from the trustee to appellee being admitted in evidence, on the ground that the debt was not due, an extension having been granted until June 1, 1902, and the sale was therefore void. If it should be admitted that appellants could take advantage of such a matter as the lack of maturity of the debt of the mortgagor at time of foreclosure, with whom they have no privity, still we think there is no merit in the assignment of error. Under the terms of the deed of trust, the holder of the notes was empowered to declare the notes due if taxes were not paid; and the extension did not create a new contract, nor in any manner attempt to alter the terms of the old contract. The option to declare the debt due under the contingencies named remained the same.

There is no force nor merit in the contention that the clause as to the failure to pay taxes maturing the notes referred to taxes due prior to the execution of the mortgage. It evidently referred to taxes that might remain unpaid at any time before the principal debt became due.

Under the terms of the law of 1897, the taxes were delinquent on February 1st of each year, and after that time, if they were not paid, a penalty of 10 per cent. on the entire amount of the taxes accrued. The provision as to the collector on March 31st of each year making a list of delinquent taxes has no reference whatever to the time when the taxes are delinquent. Sayles' Ann. Civ. St. 1897, art. 5232j. The state and county taxes on the land in controversy for 1901 were delinquent, therefore, in March, 1902. The notices of sale were properly given, and the sale legally made thereunder.

The deed of trust purported to be executed by "The Lakeview Land Company by E. A. Gammon its president," and it is the contention of appellant that the mortgagor being a corporation, and it being recited in the mortgage that it was made by virtue of a unanimous resolution of its stockholders, it was incumbent upon appellee to prove the alleged authority, before the deed of trust was admissible in evidence. Unless it was incumbent on appellee to prove that the president

of the land company was authorized to execute the deed of trust, the recital therein that it was executed under authority of the stockholders did not create the duty to prove it. However, setting aside a discussion of the authority of the president of the corporation to execute the deed of trust, the evidence was ample to show a ratification of his act by the corporation. It was in evidence that at various times after the execution of the deed of trust, and while it was in force and effect, the Lakeview Land Company asked for release of parcels of the land included in the deed of trust, and received and used the money the deed of trust was given to secure. The acts amounted to a full ratification of the act of the president, and the corporation was bound by his act in making the deed of trust. *Ft. Worth Pub. Co. v. Hitson*, 80 Tex. 216, 14 S. W. 843, 16 S. W. 531; *Thompson, Corp.* §§ 5286, 5298.

On the trial of the cause an attorney was permitted to testify that he had examined a book purporting to be the ordinances of the city of San Antonio, and that he had made a copy therefrom of an ordinance providing for the levy of certain taxes. The objections to the evidence should have been sustained, but it is not apparent how it could have injured the cause of appellants. Appellee has proved that the state, county, and city taxes of 1901 were not paid by the Lakeview Land Company, and it was not incumbent on her to go back of that, and prove that the taxes were properly levied. It would be presumed that they were, and it was totally unnecessary to introduce the evidence complained of. It could have had no effect upon the result of the trial in any way.

Clark swore that in 1893 he took charge of the land in controversy, which belonged to the Lakeview Land Company, and had remained on it ever since; that in July, 1895, Henry Elmendorf told him that he could keep the pastures as security for a debt, and hold possession until he was paid. Elmendorf was at the time manager for the land company. Clark swore he treated the property as his own after the conversation with Elmendorf. The endeavor was to hold the property of the Lake View Land Company under a verbal agreement made by an agent of the corporation that the property should be held for a debt due by the company to Clark. This is the sum and substance of the claim upon which appellants sought to hold the property legally belonging to appellee. The court very properly instructed the jury to return a verdict for appellee.

The evidence sustained the verdict for the amount of rent found by the jury.

It appears from a bill of exceptions that after the court had read his charge to the jury, and before the jury had retired to consider the verdict, counsel for appellants were informed, in the presence of the court, but not in the hearing of the jury, by counsel for appellee, that he had been informed that E.

H. Elmendorf, a son of appellee, and Albert Beze, a juror, had, at a recess during the progress of the trial, taken one or two glasses of beer together, and suggested that appellee was willing to excuse the juror, and allow a verdict to be returned by 11 jurors. To that proposition appellants did not agree, and the jury of 12 men considered the case. No objection was raised at the time by appellants, and no complaint was made until a motion for a new trial was presented. By the affidavits attached to the motion for new trial, it appeared that Sam Rose, a witness for appellee, had been seen talking to a juror during the course of the trial by an attorney for appellants, and that E. H. Elmendorf and Beze had drunk beer together. From the evidence heard by the court in passing on the motion for new trial, it appeared that Rose and a juror had spoken casually to each other about some trivial matter in no manner connected with the case. It further appeared that E. H. Elmendorf, on the first day of the trial, after adjournment, had drunk beer with the juror Beze, and had carried him to his office in a buggy. They disclaimed having mentioned the case. When counsel for appellee heard of it, he told counsel for appellants and the court of the occurrence. The court ruled that Elmendorf and Beze had not been guilty of any intentional wrong, but that, on account of the misconduct of E. H. Elmendorf, he would require appellee to remit \$100 of her judgment. The remittitur was entered under protest, and appellee, by a cross-assignment, complains of being forced by the court to enter the remittitur. Appellants are in no position to complain of the jury by which their cause was tried. Their counsel knew all about the conversations and the beer drinking before the jury had retired, and they remained silent, and took their chances for a verdict with the jury as constituted. The court expressed a willingness to relieve the jury of the juror Beze, but appellants would not agree to it. They invoked no action upon the part of the court, but, on the other hand, seemed to desire no action; and, when the verdict was adverse, they sought to nullify it by complaints of things they well understood before, and by their silence acquiesced in. The conduct of Elmendorf and Beze was reprehensible, and the court would have been justified in inflicting severe punishment upon them. It is true, they swore that they did not know there was any harm in the son of one of the parties to the suit drinking beer with one of the jurors during the progress of a trial; but when American citizens, old enough to be practicing medicine and serving on juries, are so woefully ignorant of the proprieties and duties connected with jury trials, they might well have the lesson impressed upon their minds in a way that it would never be effaced. The very foundations of our rights of person and property rest upon the purity of the ballot box and the jury system of our country, and he who de-

bases or corrupts either is a menace to our institutions. The able and conscientious judge who tried the case, and who at all times has evinced the highest desire and determination to keep pure the channels of justice, felt that punishment should be meted out for the inexcusable conduct of the son of appellee and the juror, and, in effect, fined appellee in the sum of \$100 for the acts of her son. It appeared that she had no knowledge whatever of the conduct of her son, a man 25 years of age; and, although he may have employed attorneys to institute the suit for his mother, and in other ways acted as her agent, we do not think she should be held responsible and punished for his unauthorized and illegal acts. She either had to enter the remittitur, or have the verdict set aside and a new trial granted. Had she refused to remit, another trial would have ensued, and the action of the trial court in forcing the remittitur could never have been reviewed. We do not think the remittitur should have been required.

The court properly quashed the writ of sequestration because of duplicity in the affidavit. Appellee stated in the affidavit that she feared "that the defendants will make use of such possession to waste or convert to their own use the fruit or revenues" produced by the property. These are evidently two distinct grounds for the issuance of the writ of sequestration, the first carrying with it the idea of destruction; the other, appropriation. They are not different phases of the same act and are not synonymous. The same rigid rules applied to attachments apply with equal force to writs of sequestration. *Rohrbough v. Lespold*, 68 Tex. 254, 4 S. W. 460; *Dunnenbaum v. Schram*, 59 Tex. 281.

The judgment will be corrected by striking out the remittitur, and, as amended, will be affirmed.

BUCKNER et al. v. VANCELEAVE et al.

(Court of Civil Appeals of Texas. Jan. 20, 1904.)

EXECUTION—RETURN—SHERIFF'S DEEDS—DESCRIPTION OF PREMISES—EXTRINSIC EVIDENCE—TRESPASS TO TRY TITLE—DEFENSES.

1. While it is essential that the sheriff's return on execution under which land is levied on and sold, as well as his deed made by virtue thereof, should identify the land with reasonable certainty, yet neither will be declared void for uncertainty, where it is possible, by any reasonable rules of construction, to ascertain from the description, aided by extrinsic evidence, what property is intended to be conveyed.

2. In trespass to try title, a plea setting up improvements in good faith, in which, as an evidence of such faith, defendant states as facts the deeds under which he claims, does not deprive him of taking advantage of the defense of an outstanding title.

Error from District Court, Gonzales County; M. Kennon, Judge.

Action by Zelta A. E. Buckner and others against L. J. Vanceleave and others. There was judgment for defendants, and plaintiffs bring error. Affirmed.

B. R. Abernethy, for plaintiffs in error.

NEILL, J. This is an action of trespass to try title brought by the plaintiffs in error against the defendants in error to recover an undivided one-half of all that Thos. P. Crosby headright league and labor survey situated in Gonzales county, which is described in plaintiff's petition by metes and bounds, and alleged to contain about 1,600 acres. A partition of the land between plaintiffs and defendants was also asked for. The defendants answered by pleas of not guilty, the statute of limitations, and improvements in good faith. In replication to defendants' pleas of limitation, plaintiff pleaded insanity for a period anterior to the accrual of any rights in the defendants or those under whom they claim, lasting until within less than two years next prior to the date of filing this suit. The case was tried before a jury, who, under a peremptory instruction from the court, returned a verdict for defendants. From a judgment entered upon this verdict, the plaintiffs have brought error.

The facts in this case are uncontroverted. They show that the land was patented to Thos. P. Crosby on the 5th of September, A. D. 1818. It is described in the patent as situated in Goliad land district, on Los Olmos creek, a branch of the Sandies, about 43 miles northwest by north of the town of Goliad; that plaintiff, as well as defendants, claims the land under Thos. P. Crosby as a common source, the plaintiff as an heir of the patentee, which claim the evidence is sufficient to establish, and the defendants under a sheriff's sale made under and by virtue of an alias execution issued out of the district court of Brazoria county upon a judgment returned on the 10th day of October, 1856, in favor of B. R. Brown against Thos. P. Crosby for the sum of \$444.06, which execution was directed to the sheriff of Gonzales county, and commanded him to make of the property of Crosby the amount of the judgment, together with interest and costs, and to return the execution to the term of the district court of Brazoria county commencing on the first Monday of April, 1857. Under such sale the property was purchased by the plaintiff in execution, and deed executed to him by the sheriff, which was acknowledged by him on the 25th of February, 1857. The judgment and execution upon which this deed rests were duly proven. The several defendants exhibited a regular chain of title to the premises in controversy from Brown down to themselves, respectively. The evidence shows that the Thos. P. Crosby league and labor survey contains 4,805 acres, two-thirds of which lies in Karnes county, and one-third in Gonzales county.

Conclusions of Law.

The plaintiff's first assignment of error complains that the court erred in permitting defendants, over her objection, to introduce

in evidence the return of the sheriff on the execution issued from the district court of Brazoria county in the cause of B. R. Brown against Thos. P. Crosby, for the reason that the return did not sufficiently describe the land levied upon and sold thereunder. That part of the return set out in plaintiff's statement under this assignment is as follows: "I received the execution, which is hereto attached, on the 31st day of December, A. D. 1856, and on the same day I seized and levied on about one-third of a league of land lying in Gonzales county, on the Los Olmos, a prong of the Sandies, the same being a part of the league and labor granted as the headright of Thos. P. Crosby, bearing date September 5, 1848, about 25 miles from the town of Gonzales; and on the same day I advertised the said land to be sold at the courthouse door in the town of Gonzales, at public auction, to the highest bidder for cash, on the first Tuesday, it being the 3d day, of February, 1857, by posting notices of the time and place and terms of sale at the courthouse door in the town of Gonzales and two other places in said county of Gonzales, but not in the same city or town, for a period of twenty days before said first Tuesday in February."

It is essential that the sheriff's return upon an execution, under which land is levied upon and sold, as well as his deed made by virtue thereof, should identify the land with reasonable certainty; but the degree of certainty required is always qualified by the application of the rule that that is certain which can be made certain. The return will not be declared void nor the deed for uncertainty, if it is possible, by any reasonable rules of construction, to ascertain from the description, aided by extrinsic evidence, what property is intended to be conveyed. *Norris v. Hunt*, 51 Tex. 609; *Knowles v. Torblitt*, 53 Tex. 557; *Bowles v. Brice*, 66 Tex. 724, 2 S. W. 729; *Cantagrel v. Von Lupin*, 58 Tex. 570; *Plereson v. Sanger*, 93 Tex. 160, 53 S. W. 1012; *Hermann v. Likens*, 90 Tex. 448, 39 S. W. 282; *Jones on the Law of Real Property in Conveyancing*, § 323. It is not a matter of conjecture what property the sheriff's return shows was levied upon when we look to the extrinsic evidence. From the return, aided by such evidence, it is apparent that the very land in controversy was levied upon and sold by virtue of the execution. Therefore the court did not err in admitting the return in evidence over plaintiff's objection.

The description of the land in the sheriff's deed is identical with that on the return made by the sheriff on the execution. There is no substantial variance between the execution by virtue of which the levy was made and the description in the deed of the execution by virtue of which the land was sold. It is apparent that the execution described in the deed is the one by virtue of which the levy and sale was made. We hold, there-

fore, that the court did not err in permitting defendants to introduce the sheriff's deed in evidence.

Inasmuch as the execution sale and the deed made thereunder conveyed to the purchaser, B. R. Brown, all of Thos. P. Crosby's title in the land, it is unnecessary to discuss any assignment of error which complains of the court's admitting in evidence any of the deeds or title papers through which defendants or any of them claimed the land under Brown; for the sheriff's deed to him shows an outstanding title, which defeats plaintiff's action. No statement under any proposition or assignment in plaintiff's brief shows any such special plea pleaded by any of the defendants as would prevent him from interposing as a defense an outstanding title. It certainly cannot be seriously contended that a plea setting up improvements in good faith, in which, as an evidence of such faith, the defendant states as facts the deeds under which he claims, deprives him of taking advantage of the defense of an outstanding title.

There is no error in the judgment, and it is affirmed.

PELLEY v. DENISON & S. RY. CO.*

(Court of Civil Appeals of Texas. Jan. 16, 1904.)

CARRIERS—INJURIES TO PASSENGER—PROXIMATE CAUSE—DISCOVERED PERIL—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS—ANTECEDENT INJURY—EVIDENCE—ADMISSIBILITY—NEW TRIAL—WHEN GRANTED—DILIGENCE.

1. In an action against a street railway for injuries to a passenger, where the evidence raised the issue as to whether the injuries from which the passenger suffered were caused by the accident in the car or had existed previous thereto, an instruction that there could be no recovery unless the negligence of defendant was the direct and proximate cause of the injury was proper.

2. In an action against a street railway for injuries to a passenger, caused by the sudden starting of the car before she had reached her seat, evidence that the conductor had been informed when she entered the car that she was unwell, and needed assistance, did not raise the issue of discovered peril.

3. In an action against a street railway for injuries to a passenger, where the only evidence of contributory negligence was of the conduct of the passenger in passing up the aisle of the car without taking the first vacant seat, it was proper for the court in its charge to single out that fact in presenting the issue of contributory negligence.

4. In an action against a street railway for injuries to a passenger, testimony that witnesses had never heard of the passenger's having hernia, and never heard her make complaint of that trouble, prior to the date of the accident, was properly excluded on the issue as to whether the passenger was ruptured prior to the accident.

5. Where plaintiff and his wife were well acquainted with parties whose evidence plaintiff alleged to be newly discovered, and all of such parties resided in the same town with him, in many instances being close neighbors,

*Rehearing denied February 6, 1904, and writ of error denied by Supreme Court.

a new trial for the alleged newly discovered evidence of such witnesses was properly denied for lack of diligence.

6. A new trial will not ordinarily be granted on the ground of newly discovered evidence, where such evidence is merely cumulative, or sought for the purpose of impeachment.

Appeal from District Court, Grayson County; Rice Maxey, Judge.

Action by H. Pelly against the Denison & Sherman Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Wilkins, Vinson & Moore, for appellant. Head & Dillard, for appellee.

TALBOT, J. Appellant, H. Pelly, brought this suit against the appellee, the Denison & Sherman Railway Company, to recover damages for personal injuries alleged to have been sustained by his wife on the 23d day of February, 1902, while she was a passenger on one of appellee's electric cars, through the negligence of its servants in the operation of said car. Mrs. Pelly, at the time she claims to have been injured, was in company with her daughter, Mrs. Judd, and had boarded the car at Sherman to be carried to Denison, where she was going on a visit. It is alleged that when Mrs. Pelly entered the car the employes of appellee in charge thereof caused the same to be started or moved forward with a jerk, before she was able to reach a seat and sit down, precipitating her against one of the seats in said car, injuring her right side, and producing ventral hernia. It was further alleged, in effect, that the conductor on said car was informed by appellant at the time his wife boarded the same that she was in poor health, and needed assistance. Appellee pleaded the general issue and contributory negligence on the part of appellant's wife. A trial before a jury resulted in a verdict and judgment for appellee, from which appellant appeals.

The state of the case, as shown by the evidence of appellant, is that Mrs. Pelly, wife of appellant, was sick in October, 1901, and again in January, 1902, just prior to the alleged accident, suffered with an attack of la grippe; that at the time she entered appellee's car she was still weak, and in poor health; that while in the aisle of the car, and before she could be seated, the car was started by the operatives thereof with a jerk, throwing her against the back of one of the seats, injuring her right side, and producing a rupture; that she had and still suffered greatly therefrom; that there was but one vacant seat in the car when she entered, which was near the front end of the same, and that she did not pass any vacant seats before the car was put in motion; that she had not been ruptured before the alleged accident; and that the conductor on the car was informed, when Mrs. Pelly boarded it, that she had been sick, and needed assistance. It is shown by the evidence intro-

duced by the appellee that after Mrs. Pelly entered the car the same was started and moved off easily; that she was not thrown against the back of one of the seats of the car by starting or moving the same with a jerk, and was not thrown against one of the seats at all; that the rupture of which she complained was received long before the date of her alleged injury in the car; that the conductor in charge of the car was informed at the time Mrs. Pelly entered the same that she was sick, and he was requested to take care of her; that the conductor observed Mrs. Pelly until she became seated; that she experienced no accident or injury while walking to her seat, and that she passed three vacant seats in the car, in either of which she could have taken her seat before the car was put in motion, but that she did not have time to reach the one in which she did seat herself before the car started. Upon the case as developed the court below instructed the jury that they should find for the defendant if they believed that appellant's wife was not injured as alleged in his petition. But that if they believed "from the evidence that when plaintiff's wife got on board of defendant's car defendant's servants in charge of the car caused same to start while plaintiff's wife was walking to a seat therein, and before she had reasonable time to get seated therein, and that by so starting said car she was thrown against a seat and injured, as alleged in plaintiff's petition; and if you further believe from all the facts and circumstances in evidence that said servant or servants, in starting said car in the manner and when it was started, were guilty of negligence, and that such negligence, if any, was the direct and proximate cause of the injury, if any, to plaintiff's wife—you will find for plaintiff, unless you find for defendant under the instructions hereinafter given you." The clause of the court's charge quoted is assailed on the ground that it was error to make the appellant's right to recover depend upon appellee's negligence being the "proximate cause of his wife's injury." Application of the rule announced in the cases of *Railway Company v. Rowland* (Tex. Sup.) 38 S. W. 756, and *Railway Company v. McCoy*, Id. 38, is invoked. We believe the rule inapplicable as sought to be applied, as disclosed by the record before us. The issue was sharply presented by the evidence as to whether Mrs. Pelly was injured in the car or had suffered a rupture prior to the alleged accident. Appellant was not entitled to recover unless his wife was injured by being thrown against the seat in the car, as a proximate result of negligence on the part of appellee's servants in starting the car as alleged. This is simply what the charge complained of, free from any undue stress or emphasis of the question, required the jury to believe before they were authorized to find in favor of appellant; and in view of the issues and

facts of the case we think the same correct, and must be upheld.

Appellant insists under his first and second assignments of error, which are grouped, that the issue of discovered peril was raised by the evidence, and that the court erred in not submitting that issue to the jury. To this proposition we do not assent. We are of the opinion that such issue was not involved in the case, and that the court properly omitted the submission of it to the jury. The question arising upon the facts as shown by the record, and upon which appellee's liability depended, was negligence vel non on the part of its servants in starting the car, and thereby causing injury to appellant's wife. It is not perceived how the issue of discovered peril, as distinguished from negligence in starting the car, could arise under the evidence as it appears in the record.

Complaint is made of that part of the court's charge which reads: "Or if you believe from the evidence that there was a vacant seat in said car near the door, through which plaintiff's wife entered into said car, and that, instead of taking said seat, she passed same, and proceeded to walk toward the front end of the car, and that while walking towards said front end the car was started by those in charge of it, and plaintiff's wife was thereby thrown against a seat and injured, as alleged in plaintiff's petition, and if you further believe from all the facts and circumstances in evidence that in failing to take said seat near the door, if you find there was a vacant seat there, plaintiff's wife was guilty of negligence, and that such negligence proximately caused or contributed to cause her injury, if any was sustained, you will find for the defendant, even though you should find and believe that defendant's servants were guilty of negligence in starting the car at the time it was started." The grounds of complaint are, in effect: First, that it is error to single out and give undue prominence to such issue; second, that, although appellant's wife was guilty of negligence in not taking a vacant seat near the door, she would still be entitled to recover if appellee's servants in charge of the car knew of her condition, knew she had not seated herself, and started the car, and thereby injured her. The only facts upon which the defense of contributory negligence on the part of appellant's wife was based were the facts grouped in the charge attacked, and, if such facts raised the issue, the appellee was entitled to have the same presented to the jury in the form submitted.

The second ground of objection urged is based upon the hypothesis that the evidence raised the issue of discovered peril. That issue has been disposed of in treating the subject as presented under appellant's first and second assignments of error, and it follows from what we have said that neither ground of objection here raised can be sustained.

The point is not made by any assignment of error that the facts do not raise the issue of contributory negligence on the part of appellant's wife. That question is not before us for decision, and we express no opinion upon it.

Upon the issue as to whether appellant's wife was ruptured prior to the time of the alleged accident, appellant offered the testimony of several witnesses to the effect that they never heard of Mrs. Pelly having hernia or rupture, and never heard her make complaint of that trouble, before February 23, 1902. When this evidence was offered appellee objected to it on the ground that it was irrelevant, immaterial, and hearsay, and going into a large amount of collateral inquiry. The objections were sustained, and the evidence excluded. In this action of the court there was no error. If such testimony would have been admissible under any circumstances, its admissibility in this cause is not made apparent by the bill of exceptions reserved to its exclusion found in the record before us. Besides, an examination of the statement of facts discloses that other witnesses and some of the witnesses mentioned in the bill of exceptions did testify upon the trial substantially as the bill states said witnesses whose testimony was excluded would have testified had they been permitted to do so.

We believe there was no error in the trial court refusing to grant appellant a new trial upon the ground of newly discovered evidence. The diligence used to ascertain the existence of said testimony before the trial is insufficient. It appears from the record before us that the appellant and his wife had been well, and, as to some of them, intimately, acquainted with the parties whose evidence he alleges was newly discovered. It seems that appellant and each of said parties resided in the same town, and in some, if not all, instances were close neighbors. The testimony desired was merely cumulative, and contradictory of witnesses who had testified on the trial in behalf of appellee. A new trial, ordinarily, will not be granted on the ground of newly discovered evidence where such evidence is merely cumulative, or sought for the purpose of impeachment, or when it is not made to appear that such evidence has come to the knowledge of the applicant since the trial, and that it could not have been discovered before the trial by the exercise of proper diligence. *Scranton v. Tilley*, 16 Tex. 183; *Adams v. Eddy et al* (Tex. Civ. App.) 29 S. W. 180; *Conwill v. Ry. Co.*, 85 Tex. 96, 19 S. W. 1017. It has also been held "that the granting or refusing of a new trial on the ground of newly discovered evidence is to a great extent in the discretion of the trial judge, and his refusal will not be revised by an appellate court unless it appears that such discretion has not been exercised according to the established rules of law and the principles of adjudged cases." *Mitchell v. Bass*, 26 Tex.

372. After carefully reviewing the evidence as it appears in the record, and the alleged newly discovered evidence as shown by the affidavits attached to appellant's motion, we do not feel authorized to say that the trial judge abused his discretion in this case.

The evidence was conflicting on the vital issues in the case. The jury have solved them in favor of appellee. There is sufficient evidence to justify and support their verdict, and, in so far as raised by the assignments of error and the propositions thereunder, we find no reversible error in the record, and the judgment of the court below is therefore affirmed.

TEXAS & P. COAL CO. v. MANNING.

(Court of Civil Appeals of Texas. Jan. 23, 1904.)

MASTERS—FELLOW SERVANTS—POWER OF SUPERINTENDENCE—AUTHORITY—EVIDENCE—DOUBLE PRESUMPTIONS—QUESTION FOR JURY.

1. Mere passive consent by an employer that one employé direct another, when unaccompanied with a duty on the part of the directed employé to obey the directions given, will not fix liability on the employer for negligent directions of the directing employé.

2. Where neither express authority to one employé to direct another, nor knowledge of authority assumed by such employé brought home to the employer or to any one standing in the relation of vice principal, was shown, consent on the part of the employer to the exercise by the employé of such authority will not support an inference or presumption of authority to such employé to direct and control the other.

3. The sufficiency of evidence to show authority of one employé to direct another is, when it does not necessitate a conclusion of such authority, for the jury.

Appeal from District Court, Tarrant County; Irby Dunklin, Judge.

Action by Earnest Manning against the Texas & Pacific Coal Company. From a judgment for plaintiff, defendant appeals. Reversed.

Jno. W. Wray, for appellant. Wynne, McCart, Bowlin & McCart, for appellee.

CONNER, O. J. This is an appeal from a judgment for the sum of \$7,750 in appellee's favor for injuries received while operating one of appellant's brick machines at Thurber, Tex. The petition upon which the trial proceeded, so far as necessary to set out, and omitting formal parts, is as follows: "That plaintiff is a minor child of the age of, to wit, 11 years. That on the 29th day of August, 1902, plaintiff was in the service of defendants at Thurber, Texas, defendants being then and there engaged in the manufacture of pressed bricks; and that plaintiff's duties in said service of defendants was to brush off bricks with a brush after they had been pressed in a machine used by the defendant for that purpose. That said machine was complicated, and difficult to work, and that plaintiff, on account of his

extreme youth and inexperience, was unable to understand or know how to operate same, and was physically unable to operate same. That the agent and servant of defendants whose duty it was to operate said brick-pressing machine, and who had charge and control of plaintiff while so in defendants' service, ordered plaintiff to run and operate said brick-pressing machine, and that plaintiff, while undertaking to do so under the instructions of and under the directions of defendants' said servant, and while using such care and caution for his own safety as he was capable of using, got his left hand caught in said machine, and that thereby three of his fingers, to wit, the first, second, and fourth fingers of same, were crushed and mutilated, and the leaders of same were broken and drawn out of said hand up into his arm above his wrist. That said machine was extremely dangerous for him to use and operate on account of his said youth and inexperience and lack of physical capacity to use and operate same, but that plaintiff himself, on account of his youth and inexperience, was not capable of understanding or appreciating or knowing the dangers to him incident to the attempted use and operation of said machine by him, but that the defendants and defendants' servant who ordered plaintiff to use said machine did know that plaintiff was too young and small and weak and inexperienced to use such a dangerous and complicated machine; and that it was gross negligence in the defendants and in said agent and servant of defendants who directed plaintiff to use and operate said machine to so have plaintiff to use and operate same. Plaintiff further alleges that the said agent and servant of defendants who directed him to use and operate said machine negligently failed to warn plaintiff of the dangers incident to the use of said machine, and negligently failed to instruct him as to the dangerous nature thereof."

The evidence relied upon as supporting the asserted liability of appellant is thus stated in the brief of appellee: "Appellee testified: That when he was hurt, Less Kyle, who was machine man, went to get a drink, and told him to off-bear [brick] while he was gone. That he took orders from Less Kyle. That Kyle had been controlling or in charge of the machine about a week at that time. That he was hurt about 9 o'clock in the morning, and that before he was hurt he had been brushing brick. That he quit work brushing brick and went to off-bearing because his boss told him to, and that boss was Less Kyle, and that he was doing his (Kyle's) work at the time he was hurt. At the time he was hurt he weighed 60 or 65 pounds. That he never had any experience about machinery or its dangers; never did think whether the brick machine was dangerous or not; never thought nothing about danger. That Kyle nor no one else ever warned or instructed him about the danger of

taking brick out of the machine. 'I worked under Less Kyle a week. Before him, Austin Cody. Mr. Kyle had been my boss for about three weeks; the other man about a month. I was working for the company when Kyle took Cody's place. I had worked under Cody ever since I went back to brushing brick, except the time I worked under Kyle.' He had been brushing brick about two months before he was hurt. His mother testified that she had hired him to defendant to brush brick. Did not know that he had been put to off-bearing until after he was hurt. Robert McErwin testified: That he had worked for the Texas & Pacific Coal Company in the brick yard at Thurber twice, seven months the first time, quitting in January, 1903, trucking part of the time and off-bearing part of the time. That Kyle run the machine, and off-bore half the brick made by it. That he was in charge of the men there working under him. If a man came there wanting a job, and he needed the man, he put him on. There were two off-bearers, two brush boys, and a number of truckers required to run the machine, and Less Kyle was the machine man at the time appellee was injured. Less Kyle was not used by appellant as a witness, but was put to work at Thurber, wheeling brick, by Marchman, for appellant, on the Monday morning before the trial. Marchman testified for appellant (he being its only witness): That he was general superintendent of the Green-Hunter Brick Company at the time appellee was injured, and that appellant [appellee] was in the service of said company. Here is a sample of his evidence on cross-examination on the question as to who directed appellee about his work, and as to Kyle's power: 'Q. Who directed this boy about his work while he was working around that machine? Didn't Less Kyle do it? A. Mr. Kyle had no authority whatever to direct any one. Q. I didn't ask you what authority. I asked you who directed him. A. I don't know who directed him except myself. Q. Suppose you wasn't there? A. That was my business to be there. Q. But suppose you wasn't there, who then directed this little boy about what he was to do when you wasn't there? A. I have an assistant head engineer. Q. Where does he work? A. He works at the Green & Hunter Brick Co., head engineer of the yard. He works all over the yards. I was on the yard, but not at the machine when the plaintiff was hurt. I don't know where my assistant was at the time. Q. Suppose you and he (that is, your assistant) were both away. Now, when you and your assistant didn't happen to be there at the machine, who told this boy what to do? A. Who told him what to do? Q. Yes. A. Might have been a heap of people that told him what to do, as far as I know. Q. Who told him what to do? Who was the man that was there to direct this little boy and the other boys working

there brushing brick, when the machine was running, and you were not there, and your assistant was not there? A. Why, didn't need any director. He was familiar with his job. Q. Who was the man that was there to direct this little boy and these other boys that worked there in brushing these bricks when this machine was running and you was not there, nor when your assistant was not there? A. Kyle was machine man. There was a second off-bearer. Kyle was the man that oiled the machine. Q. That meant the head man, didn't it? A. It meant just like I have explained it to you. Q. If you or your assistant was not there, didn't Kyle, the machine man, have charge of the machine? A. He didn't have charge of it any more in my absence than he did when I was present. The machine run as long as the engine would. If it didn't have any dirt, it wouldn't make any brick. It would run just the same.'" In this state of the allegation and proof the court gave the following charge, to which error is assigned: "If you believe from the evidence that on the occasion in controversy Lester Kyle directed the plaintiff to bear off brick from the machine in controversy while the same was in operation, and that in so doing plaintiff had his hand caught and injured in said machine; and if you further believe from the evidence that said Kyle and plaintiff were at the time employes of the defendant, and that Kyle had the permission and consent of the defendant to direct the plaintiff to bear off brick; and if you further believe from the evidence that said work, which plaintiff was performing at the time of his injury, was dangerous, and that plaintiff was unacquainted with such dangers, and that said Kyle failed to warn him of such dangers, and that he was guilty of negligence in directing plaintiff to bear off said brick without warning him of such dangers, and that such negligence was the proximate cause of plaintiff's injury—then you will return a verdict for plaintiff, unless, under instructions hereinafter given you find that plaintiff was himself guilty of negligence proximately contributing to his injury." No complaint is made of negligence on appellant's part in respect to the service of brushing off brick, for which it seems appellee was employed, and it is quite evident from the petition and the evidence that the negligence relied upon as fixing liability upon the appellant corporation is the negligence of Kyle in giving the order and in failing to warn appellee of the danger incident to the operation of the brick machine. Ordinarily, as against persons or corporations not affected by the fellow-servant act, as is the case here, appellee and Kyle must be classed as fellow servants, notwithstanding the fact that Kyle was the "boss," and hence that in such case Kyle's negligence is not imputable to the common employer. See *Young v. Hann* (Tex. Sup.) 70 S. W. 950. Appellee therefore sought by

avowment and proof to impress Kyle with authority from appellant to direct and control appellee in the matter involved, and thus fix upon appellant the liability charged in accord with the principles announced in the cases of *Oil Co. v. McLain* (Tex. Civ. App.) 66 S. W. 226, and *U. P. Ry. Co. v. Fort*, 17 Wall., 553, 21 L. Ed. 739, upon which appellee seems principally to rely; or, failing in this, to otherwise fix upon Kyle the character of a vice principal by showing that he was empowered to hire and discharge employes working with and about the brick machine of which Kyle had the superintendency. The terms used in the petition as the foundation for these contentions, when interpreted in the light of the evidence, are, in substance, that Kyle, whose duty it was to operate the brick machine, "had charge and control" of appellee while in appellant's service. It is only by a most strained construction, if at all, that the quoted terms can be held to import that Kyle had power to employ and to discharge. But, if so, no such issue of liability was submitted to the jury, as must have been done if the evidence raised the issue. See *Young v. Hann*, supra. Indeed, a special charge requiring such a finding was refused. So that at best the only allegation fixing liability upon appellant for Kyle's negligence is that appellant had given Kyle power or authority to direct and control appellee. We have not felt entirely clear that the words quoted import authority of extent justifying appellee's obedience to the order given to engage in a hazardous undertaking beyond the scope of his employment; but, adopting this, the most favorable construction of the petition, as we are required to do in case of general demurrer only (*Towne's Texas Pleading*, p. 259), we feel at some loss to account for the court's action in submitting, as was done in the charge above quoted, the issue of mere "permission and consent" on appellant's part for Kyle to direct appellee. The issue made by the petition and the evidence under the most favorable construction seems rather one of authority, and this issue, though requested, was not submitted in any form unless the charge quoted can be said to do so. Mere consent or permission to so direct, that is unconscious or passive, unaccompanied with a duty on appellee's part to obey Kyle's orders, will not fix liability upon appellant. Had express consent or permission been shown, authority might, and perhaps should, be implied; but there is an entire absence of this in the evidence. That appellant consented for or permitted Kyle to direct appellee in any degree is but an inference from other evidence—as that Kyle assumed such power, and no prohibition thereof on appellant's part was shown. Express authority was not shown, nor was it shown that knowledge of Kyle's assumed authority was brought home to appellant, or to any one standing in the relation to it of a vice principal; and to infer

from the evidence appellant's consent and permission, and therefrom to further infer authority as alleged, seems to be basing presumption upon presumption, which must be accepted as objectionable without citation of authority. That the evidence may be sufficient to show the asserted authority in Kyle cannot, as is insisted by appellee, relieve the objection to the charge. The evidence certainly does not necessitate such a finding, and its sufficiency therefore was for the jury, under appropriate instructions submitting this issue, as was appellant's right to have done.

Argument of appellee's counsel, to which error is assigned, need not be discussed, as it is not likely to be made in the same form upon another trial. In so passing the assignment, however, we do not wish to be understood as approving such argument in its entirety.

For the error discussed, however, in the court's charge, the judgment is reversed, and the cause remanded.

ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. SWINNEY.*

(Court of Civil Appeals of Texas. Jan. 9, 1904.)

INJURY FROM NEGLIGENCE OF FELLOW SERVANT AND STRANGER—SPECIAL JUDGE.

1. Plaintiff, fireman on an engine, injured by collision of such engine with that of defendant, another railroad company, the proximate cause being defendant's negligence, may recover therefor of defendant, though plaintiff's engineer was guilty of contributory negligence, plaintiff not having acquiesced or participated therein.

2. When a special term of the court is called, and the regular judge is not present on the day when the term is to begin, but is away holding a regular term of his court in some other county of his district, the election of a special judge to preside at the special term is valid.

Appeal from District Court, Hunt County; T. D. Montrose, Special Judge.

Action by Noah Swinney against the St. Louis Southwestern Railway Company of Texas. Judgment for plaintiff, and defendant appeals. Affirmed.

E. B. Perkins and Crosby & Dinsmore, for appellant. Yates & Carpenter, for appellee.

TALBOT, J. Swinney was a fireman on a locomotive drawing a freight train of the Sherman, Shreveport & Southern Railway, and on the 24th day of September, 1900, while in the discharge of his duties, the engine and train on which he was at work collided with an engine and freight train operated by appellant at the intersection and crossing of appellant's railroad and the road of the said Sherman, Shreveport & Southern Railway in the city of Greenville. By reason of the collision the engine of the Sherman, Shreveport & Southern Railway was over-

*Rehearing denied January 30, 1904, and writ of error denied by Supreme Court.

turned, and appellee thereby injured. The proximate cause of the collision and appellee's injury was the negligence of the employees of appellant in charge of its said train in the respects alleged by appellee, and the evidence tends to show that said collision and injury were contributed to by the negligence of the engineer operating the engine which appellee was firing. Appellee was not guilty of contributory negligence, and the verdict is warranted by the evidence. This suit was brought on June 29, 1902, against appellant to recover damages for the injury sustained, and resulted in a verdict and judgment for appellee in the sum of \$650.

Appellant complains in its first assignment of error in being required to go into trial at a special term of the court, and before a special judge, elected by the practicing attorneys. The special terms had been regularly ordered, but on the day appointed for it to begin the regular judge of the district was absent, holding a term of his court in another county of the district. The contention, in effect, is that when a special term of the court is called, and the regular judge is not present on the day when the term is to begin, but is away holding a regular term of his court in some other county of his district, the election of a special judge to preside at the special term is unauthorized and void. This court had occasion very recently to pass upon this question in the case of the Missouri, Kansas & Texas Railway Company v. Huff, 78 S. W. 249, and there decided against the position assumed by appellant in this case. The reasons for our holding are sufficiently given in the Case of Huff, supra, and it is unnecessary that we add anything to the discussion of that proposition. See, also, Munzeshelmer v. Fairbanks, 82 Tex. 351, 18 S. W. 697.

The only remaining question is, can the negligence of the engineer in charge of the engine which appellee was assisting to operate in the capacity of fireman at the time he was injured, which contributed to the collision and his injury, be imputed to appellee, and preclude a recovery, he being free from negligence himself? The question was raised in the trial court by special charges requested by appellant, which were refused, and is presented in this court by proper assignments of error. The doctrine is well recognized that a servant injured by the concurrent negligence of his master and fellow servant can recover against the master. This, it is said, is because the master in such case would be one of two joint wrongdoers or tortfeasors, and as such would be responsible to the servant. The negligence of the fellow servant will not be imputed to the servant injured, and thus relieve the master from liability. Having been injured by the combined negligence of the master and his fellow servant, the injured party may have his action against either or both. It is held that the principle applies to a stranger with much stronger rea-

son. The case of Ft. Worth & D. C. Ry. Co. v. Mackney (Tex. Sup.) 18 S. W. 952, is in point. In that case Judge Collard, speaking for the court, said: "The servant contracts with the master, and it is for him alone that he assumes the risks of his fellow servants' negligence. The master himself would be liable in the place of the stranger, and by a much stronger reason the stranger would be. There is no express or implied contract with the stranger to assume any risks on his account." *Railway v. Chambers*, 68 Fed. 143, 15 C. C. A. 327; *Perry v. Lansing*, 17 Hun, 34; *Railway v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266; *Gray v. Philadelphia & Reading R. R. Co.* (C. C.) 24 Fed. 168. In the case of *Gray v. Philadelphia & Reading R. R. Co.*, supra, the precise question involved in the case we are considering was before the court, and the defendant requested the court to instruct the jury "that plaintiff, being a fellow servant with the engineer of the Lehigh Valley Company, and being engaged in a joint enterprise with him, could not recover, if they found that the engineer's negligence contributed to the collision." The court, in discussing the proposition, said: "Although the plaintiff was a fellow servant of the engineer, he was a subordinate, and had no control over the movements of the locomotive. If he was not guilty of any personal negligence, and did not countenance the negligent conduct of his fellow servant, upon reason and according to the weight of authority he ought not to be precluded from a recovery against the defendant." It follows that, although the negligence of a fellow servant contributes to an injury, the proximate cause of which was the negligence of a stranger, the same is no defense to the latter. This doctrine is supported by reason and authority, and is in accord with our views upon the subject. There is no error assigned to the court's charge as actually given in this case; and, while adhering to the principles of law enunciated in the authorities referred to, the court guarded the rights of appellant by instructing the jury that appellee could not recover if guilty of negligence himself, contributing to his injury, or if he acquiesced or participated in the negligence of his engineer.

There was no error in the action of the court below in the respects complained of, the verdict is justified and supported by the evidence, and the judgment is therefore affirmed.

TEXAS & P. RY. CO. v. FENWICK et al.
(Court of Civil Appeals of Texas. Jan. 9, 1904.)

CARRIERS—PASSENGERS—NEWSBOYS—RELEASE OF LIABILITY—VALIDITY.

1. Under Const. art. 10, § 2, declaring railroads, public highways, and railroad companies

*Rehearing denied February 6, 1904.

common carriers, and Sayles' Ann. Civ. St. 1897, arts. 319, 320, imposing on railroads common-law duties and liabilities, and forbidding them to limit or restrict such liability by general or special notice, or any contract whatever, a railroad cannot contract away its liability for injuries to a newsboy employed by another corporation to sell its papers, etc., on the trains of the railroad, by an antecedent release, though the execution thereof by the newsboy is imposed as a condition of affording him transportation.

Appeal from District Court, Tarrant County; M. E. Smith, Judge.

Action by H. S. Fenwick and another against the Texas & Pacific Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

T. J. Freeman and Stanley, Spoons & Thompson, for appellant. Carlock & Gillespie, for appellees.

SPEER, J. H. S. Fenwick and Charles Fenwick, father and son, prosecuted this as a consolidated suit against the Texas & Pacific Railway Company and the Crescent News & Hotel Company, to recover damages for an injury to the son occasioned by the negligent derailment of one of the railroad company's passenger trains, upon which he was riding as a newsboy. The railroad company defended by pleading the general issue, and specially the release embodied in the following contracts, viz.:

"This contract made this 18th day of December, 1901, between the Texas & Pacific Railway Company, party of the first part and the Crescent News & Hotel Company, party of the second part, witnesseth: That the party of the first part in consideration of the stipulations hereinafter contained, hereby grants to the party of the second part for the term of one year the exclusive news privilege of the Texas & Pacific Railway, beginning Jan. 1st, 1902, and the party of the first part agrees to transport free of charge on each of its passenger trains, except limited special trains, one of the news agents of the party of the second part together with boxes containing necessary stocks for sale upon the train, said boxes to be suitable in size and shape, not to exceed five hundred pounds in weight, and to be transported in second-class coach of said train. Sufficient room for the disposal of said boxes of stock will be allowed by train employees of the party of the first part. Said party of the first part further agrees to transport free of charge in baggage car packages of supplies intended exclusively for the use of the party of the second part, and its business under this agreement; and to provide annual passes for two officials of the party of the second part, and such trip passes as it may from time to time have occasion to send over the line of the party of the first part, exclusively on its business contemplated under this agreement. The party of the second part in consideration of the above-granted privileges,

hereby agrees to pay the party of the first part the sum of Twelve Thousand six hundred dollars per annum, to be paid in monthly payments of one thousand and fifty dollars per month, during the term of this agreement; said sum to be paid to the Treasurer of the Texas & Pacific Railway Company at Dallas, Texas, by the party of the second part on or before the fifth day of each month, and any failure or refusal on the part of the party of the second part to make any payment as above provided, shall at the option of the party of the first part render this agreement void, and said party of the first part may refuse to permit the said party of the second part to further enjoy the privileges above granted. Said party of the second part further agrees to employ as its agents on the trains of the said railway persons of suitable, cleanly and respectable appearance, behavior and habits and to uniform said agents and to require that each and every person employed by it under this provision sign a release for all claim for damages for personal injuries received in any manner while upon the trains or premises of said railway, and said party of the second part further agrees to protect and make good to the party of the first part any claims for damages and personal injuries or destruction of property which may be brought against said party of the first part by employes or officers of said party of the second part during the continuance of this agreement. Said party of the second part further agrees to provide for sale upon the passenger trains of said railway and at the station during the time the train stops, newspapers, books, periodicals, stationery, candles, fruits, confections, cigars and tobacco, cake and other refreshments, and any other goods and specialties usually sold by well-regulated news companies on passenger trains, but no obscene or objectionable literature of any kind shall be offered for sale or carried on the trains by the agents of said party of the second part, and all goods sold or offered for sale under this agreement shall be good in quality and reasonable in price. The agents and employees of the parties of the second part while upon the trains and premises of the said railway shall be subject to the train rules of the party of the first part and for improper behavior while upon the trains of the said railway may be summarily dismissed by the train conductor, and shall not be again employed by the second party except by consent of the party of the first part. This agreement is conditioned upon the prompt and faithful compliance of the party of the second part with all the stipulations contained herein, and the party of the first part may at its option declare it void for any violation of its provisions by the party of the second part, upon reasonable notice by the party of the first part.

"In witness whereof, the parties hereto sign their names the day and year first above

written. The Texas & Pacific Railway Company. By [Signed] L. S. Thorne, 1st Vice President & Genl. Manager. The Crescent News & Hotel Company. By [Signed] John H. Coniff, General Manager.

"Witness: [Signed] C. C. Crow, Robert Strong."

"Release. Whereas, I, Charles S. Fenwick, age 18 years, have been employed by the Crescent News and Hotel Company as News Agent, I hereby agree to release said Crescent News & Hotel Company and any and all railroad companies and other corporations or persons upon whose roads, stations, boats, landings or trains I may prosecute my business as such agent from any and all claims for damages for any injury that may be done me from any cause while so employed, and I hereby agree not to claim or demand from said Crescent News & Hotel Company or other corporation or person upon whose roads, stations, boats, landings or trains, said Crescent News & Hotel Company may transact its business any damages or compensation for any injury I may incur whatever, while prosecuting my business as said agent in or upon the said roads, stations, boats, landings or trains.

"Signed and dated at Fort Worth in the State of Texas this 14th day of June, 1902. [Signed] Charles S. Fenwick.

"In the presence of as witnesses [Signed] R. C. Patty, H. F. Botto."

"Release. Whereas, Charles Fenwick, age 18, has been employed by the Crescent News & Hotel Company as News Agent: Now, therefore, I, H. S. Fenwick, his father, do hereby give my consent to said employment, and by these presents hereby ratify and confirm the same, and do hereby release and discharge the said Crescent News & Hotel Company for all claims I have for his services during the time he may be employed, and the said Crescent News & Hotel Company is authorized and empowered to make payment of all sums due the said Charles S. Fenwick for his services to the said Charles S. Fenwick, and his receipt therefor shall be deemed a full satisfaction thereof as against all parties. And in consideration of said employment and One Dollar to me in hand paid, the receipt of which is hereby acknowledged, I do hereby release from all claims, demands, actions and causes of action which might arise by reason of any injury to the person or property of the said Charles S. Fenwick the said Crescent News & Hotel Company and any and all railroad companies or other corporations or persons upon whose roads, stations, boats, landings or trains the said Charles S. Fenwick may prosecute his business.

"Witness our hands this 13th day of June, 1902, at Decatur, Wise county, Texas. [Signed] H. S. Fenwick.

"Witness: [Signed] C. H. Knox."

This contract of release is attacked by appellee as being void for the reason that it

contravenes public policy, and is further contended to be not binding on the son because of his minority.

There was a trial, and verdict against the railroad company in favor of Charles for \$1,500, and in favor of H. S. Fenwick for \$500, and a verdict in favor of the News & Hotel Company.

The charge of the court is not subject to the objections urged in the first and second assignments of error, and the only question we deem it necessary to discuss is the validity or invalidity of the contract exempting appellant from liability.

It is conceded by appellant that the lawbooks are full of decisions that a common carrier cannot contract against its own negligence, and that such is the law; but it is contended, and with apparent reason, that the relation of common carrier and passenger does not exist where the railroad company undertakes to transport a person under the circumstances here shown. It is argued that, "where a railroad company undertakes to do that about which the duties of a common carrier are not concerned, a different question arises, and in such instances the rules of private contracts govern." To this last proposition we may, for the purposes of this opinion, assent; but this only postpones the real question in the case, which is, did the railway company, in its dealing with appellee, occupy toward him the relation of common carrier? That it did not, we are cited to the reasoning of the United States Supreme Court in *Baltimore & O. S. W. Ry. Co. v. Voight*, 176 U. S. 498, 20 S. Ct. 385, 44 L. Ed. 560, and the line of cases there approved. In that case Voight was an express messenger in the employ of an express company, and was riding in a railway car set apart for carrying express matter. He was injured through the negligence of the railway company, but was denied a recovery because of a contract of release substantially the same as the one here pleaded. To the same effect are most of the cases in the United States where the question has been under consideration, and, were we to be governed by mere numerical strength of decisions, or even the weight of authority elsewhere, we would undoubtedly uphold the right to make the contract in this case, but we are unwilling to aid in committing this state to such a doctrine. We are also cited to the decision of our own Supreme Court in *Missouri, K. & T. Ry. Co. v. Carter*, 95 Tex. 461, 68 S. W. 159, in which it was held that a railroad company could lawfully contract for immunity against the negligence of its servants in communicating fire to property adjacent to its right of way. This may be so. We have no war to make upon that holding, but do not think it conclusive upon the question here presented. And it may be true, as evidenced by the quotations in the Carter Case from the line of decisions above referred to, that our Supreme Court approved

the doctrine that a railroad could enter into a contract of carriage as a private carrier in this state in such way as to exempt it from the results of its own negligence, but we will not attribute such an intention to them in the decision of that case. The gist of the reasoning in those cases which uphold such contracts is that the railroad company, in doing that which under the law it is not its business to do as a common carrier, has the right to act in the capacity of a private carrier, and to impose immunity from liability for negligence, as a condition precedent to its engaging in such undertaking. *Baltimore & O. S. W. Ry. Co. v. Voigt*, supra; *Railway v. Mahoney*, 148 Ind. 196, 46 N. E. 917, 47 N. E. 464, 40 L. R. A. 101, 62 Am. St. Rep. 503; *Railway v. Keefer*, 146 Ind. 21, 44 N. E. 796, 38 L. R. A. 93, 58 Am. St. Rep. 348; *Bates v. Railway*, 147 Mass. 255, 17 N. E. 633; *Robertson v. Railway*, 156 Mass. 525, 31 N. E. 650, 32 Am. St. Rep. 482; *Griswold v. Railway*, 53 Conn. 371, 4 Atl. 261; *Coup v. Railway*, 56 Mich. 111, 22 N. W. 215, 56 Am. Rep. 374; *Railway v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627. But with us, can a railway company in any case constitute itself a private carrier of persons or property? By the terms of the Constitution of this state, railroads are declared to be "public highways," and all railroad companies "common carriers." Const. art. 10, § 2. By statute it is provided that "the duties and liabilities of carriers in this state shall be the same as are prescribed by the common law," and that they "shall not limit or restrict their liability as it exists at common law, by any general or special notice, or by inserting exceptions in the bill of lading or memorandum given upon the receipt of the goods for transportation, or in any other manner whatever, and no special agreement made in contravention of the foregoing provisions of this article shall be valid." *Sayles' Ann. Civ. St.* 1897, arts. 319, 320. It is the business of a common carrier to carry persons and property for hire. If it undertakes to transport a person, the relation of carrier and passenger exists between them. It is said in *Gulf, C. & S. F. Ry. Co. v. Wilson*, 79 Tex. 375, 15 S. W. 280, 11 L. R. A. 486, 23 Am. St. Rep. 345, that "essentially the relation of carrier and passenger exists in every case in which the carrier receives and agrees to transport another not in its employment, whether this be by contract between them, or between the carrier and some other person in whose employment the person to be carried is, for the purpose of transacting on the train the business of his employer, as in case of mail agents, express agents or messengers, and others having duties to their employers to perform which can be performed only by such person traveling on railway trains or other public conveyances. Whether the public carrier of passengers receives an agreed compensation for the transportation of such persons, is compensated therefor by the charge for the

car, or for transportation of the property of which the person to be carried has charge, or receives no compensation whatever for the carriage of such a person, is a matter of no importance. It is enough that he is lawfully on the car, and entitled to transportation, to give him the character of passenger, and to entitle him to recover for an injury resulting from the negligence of the carrier or its servants, if this occurs without fault on his part." That was the case of a mail agent riding in a mail car, which was shown to be more dangerous than the ordinary passenger coaches. Accordingly it is held that persons riding on free passes or drovers' passes are passengers, and, too, whether they ride on passenger trains or on freight trains. In all such cases the carrying company owes the passenger the duty of exercising the highest degree of care for his safety. *Railway v. McGown*, 65 Tex. 648; *Railway v. Flood* (Civ. App.) 70 S. W. 331, 5 Tex. Ct. Rep. 925; *Railway v. Ivy*, 71 Tex. 409, 9 S. W. 346, 1 L. R. A. 500, 10 Am. St. Rep. 758; *Railway v. Rogers*, 21 Tex. Civ. App. 605, 53 S. W. 366; *Harden v. Railway* (Civ. App.) 77 S. W. 431, 8 Tex. Ct. Rep. 714. Now, it will not do to say that because the railroad company is under no legal obligation—not its business—as a common carrier, to transport a person at a reduced rate of fare, or without compensation, or to transport him in an unusual way or at an irregular hour, it therefore may undertake such transportation as a private carrier upon terms of liability of its own making. If it undertakes the transportation at all, it does it in the capacity of a common carrier. It is a matter of no concern that the passenger is carried under a different contract than that upon which passengers are usually carried, or that he remains continuously upon the company's trains, or thereon transacts a business with its passengers. Even if the *Voigt* Case and the other express messenger cases cited above are correctly decided, it does not follow at all that such holding would be proper in this state, under the policy of our laws to treat railroad companies as common carriers only. By express statute, railroad companies are made, in effect, common carriers of express companies, their agents, and merchandise. *Sayles' Ann. Civ. St.* 1897, art. 4540. So that the reason which underlies the decision in those cases (i. e., that the railroad companies, when transporting the merchandise and servants of express companies, are not doing so as common carriers) does not exist with us.

The undoubted policy of our law, evidenced not alone by the express terms of the organic and legislative enactments, but by the judicial interpretations thereof, is to regard railroad companies, in their relation to persons and property being transported upon their trains, as common carriers of the same. If this conclusion is correct, then it cannot be denied that the company in this instance

had no power to contract as it did with reference to the transportation of this newsboy. It is all very nice to uphold the principle of freedom of contract, but when that freedom involves the privilege of negligently causing the death of a passenger by a common carrier, all the authorities agree that such contract is reprobated by the law. *Railway v. McGown*, supra; *Railway v. Ivy*, supra; *Railway v. Flood*, supra; *Railway v. Rogers*, supra; *Mexican N. R. Co. v. Jackson*, 118 Fed. 549, 55 C. C. A. 315; *Starr v. Railway* (Minn.) 69 N. W. 633; *Jones v. Railway* (Mo.) 28 S. W. 883, 26 L. R. A. 718, 46 Am. St. Rep. 514.

Finding no error in the proceedings of the district court, its judgment is in all things affirmed.

STANDEFER v. AULTMAN & TAYLOR MACHINERY CO.*

(Court of Civil Appeals of Texas. Jan. 2, 1904.)

SALES—MACHINERY—WARRANTIES—BREACH—JUDGMENTS—CONCLUSIVENESS—EVIDENCE—ADMISSIONS BY AGENT—COURTS—JURISDICTION—AMOUNT IN CONTROVERSY—DETERMINATION.

1. Where a contract for the sale of threshing machinery required the seller to send an expert to put the machinery in operation, and the seller's general state agent and manager was sent, and, after making an ineffectual effort to make the machinery operate properly, he admitted that it was a worthless outfit, and was not the machinery he had represented it to be to the buyer, nor the machinery ordered, but that the machinery plaintiff had ordered was torn up in a railroad wreck, etc., such admissions were admissible against the seller in an action by the buyer for breach of warranty.

2. Where plaintiff in an action for breach of warranty in a sale of threshing machinery had worked around threshers for 30 years, and had run other threshers for 17 years, and was familiar with their operation, he was competent to testify as an expert that the machinery in question was old and worn out when delivered.

3. Where plaintiff was qualified to testify as an expert, the fact that he was a party to the suit and interested in the event thereof did not disqualify him.

4. Where, in an action for breach of warranty in the sale of threshing machinery, plaintiff pleaded and relied on the written contract executed between himself and defendant, plaintiff was properly confined by the court to the warranties contained in such contract.

5. Where the seller of threshing machinery obtained a judgment of foreclosure against plaintiff on the notes given for the purchase money thereof, such judgment, though a bar to plaintiff's right to rescind the contract, was not a bar to plaintiff's action for breach of warranty.

6. Whether the amount in controversy is within the jurisdiction of the county court is to be determined by the amount put in controversy by the plaintiff.

Appeal from Bosque County Court; B. J. Word, Judge.

Action by John W. Standefer against the Aultman & Taylor Machinery Company.

*Rehearing denied February 6, 1904.

From a judgment in favor of defendant, plaintiff appeals. Reversed.

H. S. Dillard and Robertson & Robertson, for appellant. N. J. Wade and Burgess & Burgess, for appellee.

SPEER, J. Appellant bought from appellee certain threshing machinery, and instituted this suit to recover damages for an alleged breach of warranty of the same. It appears from appellant's first bill of exceptions that while he was upon the witness stand testifying in his own behalf he offered to testify that J. W. Brown, the state agent and manager in Texas for appellee, came to Bosque county, and, after making an ineffectual effort to make the machinery operate properly, admitted to witness that "the thing wasn't any good, and was a worthless outfit; that it was a hurried-up job, and was not the machinery he had represented it to be to plaintiff; and that it was not the machinery plaintiff ordered, but that the machinery plaintiff had ordered was torn up on the road in a railroad wreck." This testimony was excluded upon the objection that it was "hearsay, and the declarations of said Brown are not binding on the defendant, the same appearing to have been made by said Brown after the signing of the order for the machinery." This ruling was error. Not only was Brown shown to have been the general state agent and manager for appellee—its alter ego—in this state, but the admission was made at a time when the transaction between the parties was still pending. The transaction in part was contemporaneous with the admission. The contract of purchase and sale contemplated that the appellee should, in case of necessity, send an expert to set the machinery in operation. This it had been called upon to do, and was in the act of doing, when the admission was made. Brown, the agent, was engaged at the time in an act in furtherance of the transaction concerning which he spoke, and his statements should have been admitted. *Cooper Grocery Company v. Britton*, 74 S. W. 91, 7 Tex. Ct. Rep. 408.

The same witness offered to testify that the machinery in question was worn out and old when he got it. This, too, was excluded as the opinion of the witness. The testimony had shown that appellant had been farming for about 30 years, and that during that time he had worked around threshers, and that he had run a horse-power thresher for 10 years in McLennan county, and another for 7 years in Bosque county, and that he was familiar with the working of threshers, and the manner of operating them; that he had never run a steam thresher, but that, so far as the threshers are concerned, it did not make any difference whether the power was horse or steam; that the machine or separator worked the same, and that the only difference was that steam threshers ran at a higher speed, but that the separator and

its attachments worked the same with both powers. This, we think, qualified the witness to give his opinion in the particulars about which he offered to testify. Interest does not disqualify one to testify as an expert, as appellee suggests.

In confining appellant to the warranties contained in the written contract or order, the court committed no error, since this was the contract pleaded and relied on. The judgment of foreclosure obtained by appellee against appellant on the notes given for the purchase money of the threshing machine would operate as a bar of his right to a rescission, but not of his remedy for a breach of warranty. *Bingham v. Kearney* (Cal.) 68 Pac. 597. It would seem, however, that, if appellant contracted to pay the \$145 freight—same to be credited on his purchase money notes—that this item is necessarily concluded by the former judgment. He already has, or must be held to have, this credit. *W. O. Belcher Land Mortgage Company v. Norris* (not yet officially reported) 78 S. W. 390.

The evidence tends to show a waiver upon the part of the company of the requirements concerning notice and use and redelivery of the defective machinery, and these questions, or such of them as were pleaded, should have been submitted to the jury.

The amount put in controversy by plaintiff was within the jurisdiction of the court. His version, and not that of appellee, of the amount due upon the Dallas county judgment, will control in this respect. So that, if the amount of the judgment, viz., \$275, be added to the items sued for, the amount is less than \$1,000. That appellee alleges the amount of the judgment to be more than \$1,000 cannot alter the rule.

The judgment is reversed, and the cause remanded for another trial.

ST. LOUIS, I. M. & S. RY. CO. v. CARLISLE.*

(Court of Civil Appeals of Texas. Jan. 16, 1904.)

CARRIERS—CATTLE—TRANSPORTATION—DELAY—DEFECTIVE CARS—FOOD AND REST—FEDERAL STATUTE—EVIDENCE—NEGLIGENCE—ADMISSIONS OF AGENT—ISSUES—SUBMISSION.

1. Where, in an action for damages to beef cattle by delay and rough handling in transit, there was no evidence showing the authority of the conductor of the train to bind the company by his declarations constituting admissions of negligence, and such admissions were not made with regard to any matter in which the conductor was employed to represent the company, they were inadmissible against it.

2. Where, in an action against a carrier for injuries to beef cattle by delay and rough handling, there was neither pleading nor evidence raising an issue that the damage was occasioned by defendant's tracks being out of repair, it was error to submit such issue to the jury.

3. In an action for injuries to beef cattle from delay in transportation the time necessary

lost in stopping the cattle for food and rest under a federal statute should not be included in the jury's computation of negligent delay.

4. Where defendant accepted a defective cattle car from a connecting carrier, and undertook to transport the cattle therein, it was liable for damages caused to the cattle from delay caused by the defects in the car.

Appeal from Mitchell County Court; W. B. Crockett, Judge.

Action by John Carlisle against the St. Louis, Iron Mountain & Southern Railway Company and another. From a judgment in favor of plaintiff, defendant St. Louis, Iron Mountain & Southern Railway Company appeals. Reversed.

Henry & Henry, for appellant. Ben Rands and E. W. Bounds, for appellee.

SPEER, J. John Carlisle sued the Texas & Pacific Railway Company and the St. Louis, Iron Mountain & Southern Railway Company in the county court of Mitchell county, and recovered judgment, for damages to a shipment of beef cattle intended for market upon an allegation of rough handling and delay. The latter company alone appeals.

The first assignment of error is overruled for the reasons given in *St. Louis, Iron Mountain & Southern Ry. Co. v. White*, 76 S. W. 947, 8 Tex. Ct. Rep. 517.

The second and third assignments are sustained. In the absence of evidence showing the authority of the conductor to bind the company by his declarations in the way of admissions of negligence, we must hold that proof of such statements is inadmissible. The general rule is that, before the admissions of one person are admissible in evidence against another, it must appear that such person had authority to speak for the other concerning such matter. This may appear, of course, in many ways, but it must in some way appear. Here it in no way appears that the delay to which the conductor's statements related was in any manner due to the fault of such conductor, or that the schedule of the train was in any manner under his control. In other words, the admissions seem to be concerning a matter in which he is not shown to represent the company by which he is employed. We are cited to no case holding such declarations of a third person admissible in evidence. The question of the admissibility of the statements of the agent having authority to bind his principal has recently been considered by us in *Cooper Grocer Co. v. Britton*, 74 S. W. 91, 7 Tex. Ct. Rep. 408, and in *Standefor v. Aultman & Taylor Mach Co.* (not yet officially reported) 78 S. W. 552.

It is also urged that the trial court erred in submitting to the jury to determine the question of damages arising from the tracks of the appellant being out of repair, in that there was neither pleading nor evidence to justify the submission of such an issue. This assignment must also be sustained upon the

*Rehearing denied February 6, 1904.

† See *Carriers*, vol. 9, Cent. Dig. § 822.

grounds urged. The error appears to have crept in in connection with such a charge as to the other defendant in the case where the same may have been applicable and necessary.

Upon another trial the jury should not be allowed to include in their computation of negligent delay the time necessarily lost in stopping the cattle for food and rest under the federal statute, as seems to have been done upon this trial.

Appellant asks us to hold that the Texas & Pacific Company alone would be liable for the special damages to that car of cattle which was delayed by appellant at Poplar Bluff on account of defects in the car, which defects existed at the time the same was turned over by the Texas & Pacific Company to it at Texarkana, and which defects were such that it could not reasonably be expected to make the trip from Texarkana to St. Louis, the place of destination. But we think, when it received the car from the first carrier, and undertook to transport the cattle in it, appellant thereby made it a part of its own agency and means of transporting appellee's cattle, and is liable precisely the same as though such car was its own. *Willingford v. Columbia & G. R. Co.*, 26 S. C. 258, 2 S. E. 19.

Other assignments not discussed are overruled.

Judgment reversed, and cause remanded.

DAVIS et al. v. CULP et al.*

(Court of Civil Appeals of Texas. Dec. 16, 1903.)

FRAUDULENT CONVEYANCES—CREDITORS.

1. A deed from an insolvent vendor, without a valuable consideration, executed under such circumstances as to charge the vendee with notice, may be set aside at suit of creditors.

2. A deed from an insolvent vendor, executed with the intent of defrauding his creditors, under such circumstances as to charge the vendee with notice, may be set aside at suit of creditors, though for a valuable consideration.

Appeal from District Court, Bastrop County; Ed. R. Sinks, Judge.

Action by Nelson Davis and others against J. H. Culp and others. From a judgment for defendants, plaintiffs appeal. Reversed.

J. B. Price and Fiset, Miller & McClendon, for appellants. J. E. B. Laird and Fowler & Fowler, for appellee.

FISHER, C. J. We construe the appellants' petition to attack the deed from James H. Culp to John F. Culp not only on the ground that it was simulated and without consideration, but also that it was executed

in fraud of the plaintiffs and other creditors of James H. Culp; and there is some evidence in the record which has a tendency to support these averments. We are inclined to the opinion that the charges of the court as complained of in the first and second assignments of error were erroneous. The charge complained of in the first assignment of error instructs the jury that they could find for plaintiffs if the deed was executed without a valuable consideration, and was a simulated transaction for a fraudulent purpose. The concurrence of both of these conditions was not necessary to be shown in order to entitle the plaintiff to recover. If the deed was without a valuable consideration, and the vendor was insolvent, or was executed for the fraudulent purpose of defeating the claims of the plaintiff and other creditors, and the circumstances were such as to charge the purchaser with notice of such intent, the plaintiff would be entitled to recover upon proof of either of such facts. The charge complained of in the second assignment of error is as follows: "If, on the other hand, you believe from the evidence that said James Henry Culp executed said deed to John F. Culp for a valuable consideration to him paid by said John F. Culp, then you will find for the defendants." This authorizes a recovery by the appellee John F. Culp upon the mere proof of the fact that a valuable consideration was paid for the property in question. If this was true, and such conveyance was executed by James Henry Culp for the purpose and with the intention of defrauding his creditors, and the circumstances were such as to indicate a knowledge of such intent and purpose on the part of the vendee, the plaintiffs would be entitled to recover, although a valuable consideration was paid. This last charge, in eliminating this feature of the case, is positive error, as is indicated by the ruling of the court in *Scott v. Railway Co.*, 93 Tex. 625, 57 S. W. 801, which, by analogy, is in point.

Appellees insist that the judgment should be affirmed on the ground that the undisputed evidence shows that the plaintiffs' cause of action was barred by the five-years statute of limitation and for this reason they should not be permitted to complain of the charge of the court. The question of limitation was not submitted to and passed upon by the jury, and we express no opinion as to the facts, except to say that the evidence is not of such a conclusive character in favor of John F. Culp upon this issue as would entitle him to a peremptory instruction in his favor, or would authorize this court to reverse and render if judgment had been against appellees in this issue.

For the errors pointed out, the judgment is reversed, and the cause remanded. Reversed and remanded.

*Rehearing denied February 10, 1904.

¶ 2. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. § 493.

HOLLIS v. FINKS et al.*

(Court of Civil Appeals of Texas. Dec. 9, 1903.)

COUNTY COURTS — JURISDICTION — SUITS INVOLVING LAND TITLE—CANCELLATION OF NOTES.

1. An action to recover the purchase money paid for land, and to cancel a note and unpaid indebtedness contracted in the purchase, based on fraudulent representations of the vendor in inducing the purchase, does not involve the title to land directly, but, if at all, only incidentally, and is within the jurisdiction of the county court.

2. The county court has jurisdiction to cancel an indebtedness, evidenced by note secured by a vendor's lien, the amount of which is within its jurisdiction.

Appeal from McLennan County Court; G. B. Gerald, Judge.

Action by J. W. D. Hollis against J. H. Finks and others. From a judgment for defendants, plaintiff appeals. Reversed.

N. B. Williams and W. H. Forrester, for appellant. Clark & Bolinger, for appellees.

FISHER, C. J. This is a suit, filed in the county court of McLennan county by the appellant against appellees, to recover the sum of \$99.28, with 6 per cent. interest from December 18, 1900, and for the sum of \$103.50, with 6 per cent. interest from November 5, 1901, and for the cancellation of a note or indebtedness in the sum of \$70.65, executed by appellant to appellees. These several sums, together with the note, were the purchase price of a certain tract of land bought by the appellant from the appellees.

The appellant's cause of action is predicated upon averments to the effect that he was misled and deceived, and thereby induced to purchase the land from the appellees, by reason of certain false and fraudulent representations and statements, which are set out in appellant's petition. The note that is sought to be canceled, it seems, also retained a vendor's lien upon the land; and it is in effect alleged that the appellees had no title to convey, but that the appellant was induced to purchase by reason of false and fraudulent representations, upon which he relied. As stated above, this is a suit to recover the purchase money paid by appellant, and to cancel the note and indebtedness still unpaid. The county court dismissed the case for the want of jurisdiction, either upon the theory that it involved the title to land, or that it was necessary to enter a decree canceling title or lien upon land, in order to afford the appellant the relief prayed for. We are of the opinion that the court below erred in declining to entertain jurisdiction. The title to land is not directly, but, if at all, only incidentally, involved. Plaintiff's cause of action is for money paid to and received by the appellees by reason of the fraud perpetrated upon the appellant. The indebtedness evi-

denced by the note still outstanding could be canceled by the judgment of the county court. That indebtedness is predicated upon the same fraud that induced appellant to pay out the cash sums.

It is not necessary for us to decide whether the county court has the power to cancel a vendor's lien, or a lien upon real estate, but we are of the opinion that it has the authority, if the amount is within its jurisdiction (which is the case here), to cancel an indebtedness, and this is the relief asked by the appellant, so far as the unpaid note is concerned. By analogy, the principles decided in *Mixan v. Grove*, 59 Tex. 575, *Crawford v. Sandridge*, 75 Tex. 384, 12 S. W. 853, and the *City of Victoria v. Schott*, 9 Tex. Civ. App. 334, 29 S. W. 681, support the views expressed.

Reversed and remanded.

PARKER et al. v. HALE.*

(Court of Civil Appeals of Texas. Dec. 9, 1903.)

EXEMPTIONS—CROPS—WRONGFUL LEVY—DAMAGES—EVIDENCE—RIGHT OF TENANT TO SUE.

1. An ungathered crop on the homestead of a debtor is exempt from forced sale.

2. In an action for damages for loss of crop by reason of the wrongful levy thereon by defendants, evidence that the levy prevented plaintiff from hiring hands to care for the crop before it was destroyed by rain is sufficient to support verdict for plaintiff for both actual and nominal damages.

3. A tenant on shares has sufficient interest in a crop to enable him to maintain an action for damage thereto by reason of a wrongful levy thereon, notwithstanding the landlord's lien for his share and for supplies furnished the tenant.

Appeal from McLennan County Court; G. B. Gerald, Judge.

Action by T. A. Hale against J. E. Parker and another. From judgment for plaintiff, defendants appeal. Affirmed.

J. B. Scarborough, for appellants. A. C. Prendergast, for appellee.

FISHER, C. J. The evidence, in our opinion, is sufficient to support the verdict of the jury. The premises upon which the crop levied upon was located was the homestead of the appellee, and the crop then in the field ungathered was exempt from forced sale. There is evidence that, but for the levy, the appellee could, with the assistance of hired hands, have gathered the cotton crop before it was injured and destroyed by the rain; and it appears that the levy upon the cotton by the appellants had the effect of preventing the appellee from hiring hands, which was necessary, in order that the entire crop should be gathered. And the effect of the levy in this respect was not a remote

*Rehearing denied February 10, 1904.

*Rehearing denied February 10, 1904.

¶ 1. See *Homestead*, vol. 25, Cent. Dig. § 108.

cause of the failure to gather the crop, as, in our opinion, it was a fact that ought to have been contemplated as one of the results that might follow from the levy upon the crop by the appellants. There is no merit in the contention of the appellants that the appellee, Hale, had no interest in the crop sufficient upon which to base this action for damages, for the reason that his landlord, Ross, had a superior right thereto by reason of his landlord's lien for his share of the crop and for supplies furnished Hale. Hale was entitled to damages for the value of the crop lost by reason of the wrongful seizure by appellants. If appellants' levy had not been made, Hale could, according to the verdict of the jury, have realized from the cotton \$150 more than the crop actually gathered; and this sum would belong to Hale, subject to the lien of the landlord for supplies, and which, if so applied, would to that extent extinguish an indebtedness of Hale's.

There is no merit in the assignments that complain of the verdict and judgment for the sum of \$1 nominal damages in addition to the sum of \$150 actual damages. Both of these items could have been recovered under the evidence. There is no complaint that the verdict is excessive in these respects. At least, if there is an objection to it in this respect, it is only inferential, and not direct, as required by the rules.

There is some confusion in the charge of the court, but we are of the opinion that it is not of a character possibly calculated to mislead the jury, and we are of the opinion that the verdict is right on the facts. We are of the opinion that there was no error in refusing the charges requested, and that there was no error in admitting the testimony objected to.

There are a number of assignments of error which we have considered in consultation, but we deem it unnecessary that each should be reviewed in this opinion.

The judgment is affirmed.

SMITH et al. v. INTERNATIONAL & G. N. R. CO.*

(Court of Civil Appeals of Texas. Jan. 6, 1904.)

RAILROADS—TRESPASSERS ON TRACK—COMPANY'S LIABILITY—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS—EVIDENCE—ADMISSIONS AGAINST INTEREST.

1. A charge that it was the duty of those operating trains to use ordinary care to avoid injuring persons on the track applied to all persons, trespassers as well as those lawfully on the track, and it was not necessary to repeat it in a special charge defining trespassers and licensees.

2. A license to use a railroad track as a thoroughfare for pedestrians does not include a license to use the same for sleeping and sitting purposes, and persons so using it are tres-

passers, to whom the company owes no duty except to use every means to avoid injuring them after discovering their perilous position.

3. Persons lying or sitting on railroad tracks, whether awake or asleep, are guilty of the grossest character of contributory negligence, and, in the absence of any evidence of the discovery of their perilous position before they were struck by a train, the company is not liable.

4. Declarations of a person a few hours after he was struck by a train, and a short time before he died, to the effect that he was asleep at the time, are admissible as against interest, irrespective of their admissibility as a part of the *res gestae*.

Appeal from District Court, Bexar County; J. H. Clark, Judge.

Action by Emma B. Smith and others against the International & Great Northern Railroad Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

P. H. Swearingen, Edw. Dwyer, and W. S. Anderson, for appellants. Hicks & Hicks, for appellee.

FLY, J. Appellants sought to recover in the district court damages accruing by reason of the death of Joseph Oliver Smith, the husband of Emma B. Smith, and the father of the other two appellants. The trial resulted in a verdict and judgment in favor of appellee.

It appears from the statement of facts that deceased and Emery A. Turner left Taylor, Tex., late in the afternoon of July 7, 1902, to go to Rockdale. They were walking, and went about 1½ miles, when they were stopped by a heavy rain. They went under a shed, and remained until 8 o'clock, when they started back to Taylor, and, the road being very muddy, they went through a gate and walked on the railroad track, which was fenced. After going about 500 yards from the gate, they sat down on the track, and, according to the evidence of Turner, had just seated themselves with their faces towards Taylor when they were struck by a rapidly moving train, and both were badly injured. Smith died from his injuries. Smith, a short while before he died, stated that he and Turner were asleep when they were struck by the train; and Turner stated to one witness, a short time after the accident, that he was cutting a whip handle when he was struck, and to another that he was asleep at the time. On the trial he testified that Smith was about to pull off his shoe, and he was cutting on a pencil, when they were struck. It was a dark night. It was raining very hard, and a strong wind was blowing. The evidence justified the jury in finding that the men were asleep on the track; that part of the track where the accident occurred had been used by people as a pathway. The employees on the train that struck the two men did not discover them on the track, although they kept an outlook.

The first assignment of error is not well taken. The court had charged the jury that

*Rehearing denied February 10, 1904, and writ of error denied by Supreme Court.

It is the duty of those operating railroad trains to exercise ordinary care to avoid injury to persons on the track, and it was unnecessary to repeat it in a special charge. The charge given by the court applied to all trespassers as well as those lawfully on the tracks, and there was no call for a charge defining trespassers and licensees.

If it be conceded that the railroad track, by public use and acquiescence on the part of the railroad company, had become a thoroughfare for pedestrians, Smith and Turner were trespassers, whether they were sitting down on the track pulling off shoes, cutting on whip handles or pencils, or were asleep; and the railroad company owed them no duty except to use every means to prevent injury to them after discovering their perilous position. If the public had a license to use the track as a highway, no license can be inferred to use the track for sleeping or sitting purposes. In the case of *Railway v. Cowles* (Tex. Civ. App.) 67 S. W. 1078, deceased was crossing the railroad at a place where the public was licensed to go, and stopped to kick a coupler on a car, and while so engaged was run over and killed; and this court said: "The license to deceased was to use any part of the yard for the purpose of crossing the railroad tracks, and for that purpose alone, and only while using the yard with that object in view did the duty to him exist that is incumbent upon a railroad company in case of a licensee." Whether the public had a license to use the track or not, under the facts of this case, is of no importance. The two men were trespassers, and the only duty that the railroad company owed them was to use all means in its power to keep from injuring them after they were discovered. If men can go upon railroad tracks on dark nights in driving rains and sit down or lie down and be considered licensees because people were accustomed to walking on the track, there is no limit to the liability of railroad corporations to trespassers on their tracks.

In the case of *Railway v. Shifflet*, 94 Tex. 131, 58 S. W. 945, three boys had gone upon a railroad track at a point where the public used it as a pathway, and were killed. It was presumed that they were asleep when they were run over by a train and killed. The only question upon which negligence was hinged was the youth and indiscretion of the Shifflet boy. The Supreme Court held that lack of discretion did not arise under the facts, and said: "If he had remained awake, either sitting or standing upon the track, and the accident had occurred to him, he could not have been excused, because he was negligent, and was responsible, under the facts, for his acts." In this case it does not matter whether Smith and Turner were lying down or sitting down on the track, or were awake or asleep. They were guilty of the grossest character of contributory negligence, and, in the absence of any evidence

of the discovery of their perilous position, the railroad company is not liable.

None of the objections to the charge is well taken. The law applicable to the facts was fully and fairly presented.

The admissibility of the declarations of Smith, made a few hours after he was hurt and a short time before he died, to the effect that he was asleep when struck by the train, need not be tested by the rules applied to *res gestæ*, but by those applicable to declarations of deceased persons made against their interest. It was clearly shown that Smith was conscious and his mind clear when he said that he was asleep on the track when struck by the train. The declaration was against his interest. It would be extremely improbable that such declarations would be false. He must have known whether he was asleep or not when he was injured. The declarations were admissible. Sections 147-149, 1 Greenleaf, Ev.

The judgment is affirmed.

TEXAS COTTON PRODUCTS CO. v. DENNY BROS. et al.*

(Court of Civil Appeals of Texas. Dec. 9, 1903.)

INSTRUCTIONS — REQUESTS — RECORD ON APPEAL — FALSE REPRESENTATION — CONCLUSIONS OF LAW — INTENT.

1. That failure to charge on a subject may be complained of, a charge must have been requested.

2. Special charges requested may not be considered on appeal, the record not showing whether they were given or refused.

3. Statement of one that he has a landlord's lien on property is not necessarily a mere conclusion of law, which may not be the basis of an action for false representations.

4. One, though not intending to deceive, may be liable for a false statement of a character calculated to mislead and deceive.

Appeal from Hays County Court; Ed. R. Kone, Judge.

Action by the Texas Cotton Products Company against Denny Bros. and others. Judgment for defendants. Plaintiff appeals. Reversed in part.

Eugene Williams, for appellant. Will G. Barber and O. T. Brown, for appellees.

FISHER, C. J. We find no error in the record as to Denny Bros. We cannot say, from the facts, that the appellant was entitled to a marshaling of the assets and securities, as claimed in its fifth assignment; but, however, if it is correct in this contention, no charge was asked upon this subject. *Security Co. v. Bank*, 93 Tex. 582, 57 S. W. 22. There are a number of special charges found in the record which were requested by the parties to this suit, but it does not appear from any statement contained in the record, or appended to the charges, whether they

*Rehearing denied February 10, 1904.

¶ 4. See *Fraud*, vol. 22, Cent. Dig. § 2.

were given or refused. Therefore we cannot consider them.

None of the assignments present any reversible error, except the one that complains of the following charge of the court: "But upon the other hand, if you should find from the evidence before you that Dailey represented to said company or its agents that he had the landlord's lien upon Massey's cotton to secure him for the supplies furnished Massey by and through Edwards, then you are instructed that that was a conclusion of law for which Dailey was in no wise responsible, and you will find for Dailey against said company, unless you further find from the evidence that he knew the statements to be false, and also that he made them with the intent to deceive the Texas Products Company, its agents or employes." The question whether Dailey had a landlord's lien was a mixed one of law and fact. If Dailey represented to the appellant that he had a landlord's lien upon Massey's cotton, which was superior to the right of Denny Bros., or if that was the effect of his representation and statement, then the jury should have been permitted to pass upon its truth or falsity. If Dailey did not have a landlord's lien at the time that he made the statement and representation, and that statement was not true, the jury should have been permitted to pass upon that question, and say whether or not such statement was of a nature calculated to mislead and deceive the appellant. If it was of such a character, and was false, the fact that Dailey did not intend to deceive would not defeat the appellant's right to hold him responsible for the effect produced and occasioned by the representations. For the error in giving this charge, the case will have to be reversed as to appellee Dailey.

The charge as set out under the first assignment, and as there complained of, is somewhat confusing, but doubtless upon another trial this charge will be corrected.

The judgment of the trial court is affirmed as to Denny Bros., and reversed and remanded as to appellee Dailey. Affirmed in part, and reversed and remanded in part.

DALLAS CONSOLIDATED ELECTRIC STREET RY. CO. v. RUTHERFORD.*

(Court of Civil Appeals of Texas. Jan. 9, 1904.)

ACTION FOR PERSONAL INJURIES—TRIAL INSTRUCTIONS AS TO DAMAGES—RULINGS ON EVIDENCE.

1. In an action for injuries to plaintiff's wife, who had testified that two of her ribs were broken, plaintiff was asked if he objected to her submission to an X-ray examination; and it was objected that he should have an opportunity to consult with counsel, and for that purpose the court excluded the examination at that time, and the subject was not again mentioned. *Held* not error. This being only a qualified ruling, if an answer was denied, the

question should have been renewed, and a direct ruling sought, if the examination was refused after consultation.

2. The petition alleged that before the accident plaintiff's wife was in perfect health, and the injuries and consequent suffering were the direct result thereof, whereas the defense was that they were partially due to other independent causes, on which issue the evidence was conflicting. Some evidence tended to show that troubles incident to gestation were aggravated, but the petition did not specially allege that such was the case. *Held*, that the submission as an element of damages of aggravation of suffering from other causes was subject to objection as an item not supported by both the pleading and the evidence.

3. The jury were instructed, in finding for plaintiff, to compensate him for his wife's physical suffering and mental anguish, and the impairment of her health, proximately caused by defendant's negligence. *Held*, that this authorized an award for all the injuries shown, and a submission in a subsequent paragraph of aggravation of suffering from other causes, as an element of damages, was objectionable, as tending to confuse the jury, and cause them to double the damages for the same injury.

4. Physicians differed on the issue as to whether womb trouble from which plaintiff's wife suffered was produced by the accident in question. The one who attended her in childbirth was unable to say whether her womb resumed its normal position during the month thereafter, but said that she complained of her back and headache. *Held*, that this did not indicate that such a condition was produced at childbirth as to call for an effort to replace the womb, and, in the absence of other evidence, no hypothesis was presented authorizing expert testimony as to probable results of a failure to replace the same.

Appeal from District Court, Dallas County; T. F. Nash, Judge.

Suit by N. R. Rutherford, Jr., against the Dallas Consolidated Electric Street Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Finley, Knight & Harris, for appellant. Cockrell & Gray and Curtis Hancock, for appellee.

RAINEY, C. J. Appellee (plaintiff below) instituted this suit to recover of appellant damages for personal injuries to his wife, alleged to have been occasioned by the negligence of appellant's servants in operating a street car. Defendant pleaded the general issue. A trial resulted in favor of plaintiff, from which this appeal is prosecuted.

On the trial the following procedure was had, viz.: Plaintiff, while on the stand in his own behalf, was asked by the defendant's attorney the following question: "Have you any objection, at the noon hour, in going down there and have her submit to an examination under the X-ray?" Counsel for plaintiff objected on the ground that it was only a question of procedure, and that he should have an opportunity of talking to his counsel, which objection was by the court sustained. To the ruling of the court, defendant excepted. The witness did not request the privilege of a consultation with his attorneys. In the qualification of said bill, the court says: "Approved and allowed, with the qualifica-

*Rehearing denied January 30, 1904.

tion that it was not pretended that the matter of examining plaintiff's wife with the X-ray had ever been mentioned before this; and the court sustained the objection in the following language: 'He has a right to consult his attorney, and I will exclude the examination at this time.' And the subject was not again mentioned during the trial." Plaintiff's wife had testified that two of her ribs were broken by the accident, and had not united. Physicians who had treated plaintiff's wife differed as to whether the ribs were broken, and it was shown that the X-ray would disclose a fractured rib. In a recent case (Ry. Co. v. Cluck, 77 S. W. 403, 8 Tex. Ct. Rep. 681) decided by our Supreme Court, it was held, where a proposition had been made to have a committee of skilled physicians make an examination to determine the extent of the injuries, which proposition was refused, that such refusal was a matter for the jury to consider, and it was error in the court to sustain objections to a question seeking to show such refusal. In that case it appears that the proposition and refusal were made before the beginning of trial, while in this case there is no suggestion that prior to propounding the question to plaintiff there was any proposition made to that effect. There was no objection, however, made for this reason; and, under such circumstances, we do not think the court would err in sustaining such objection, for, if the party should be willing, the court could use its discretion in suspending the trial till such examination could be made. But the objection here was that the witness should have an opportunity of consulting his attorney before answering. The effect of the court's ruling, as shown by his explanation appended to the bill of exception, was that time would be given. This was a qualified ruling of the court, and, if an answer was desired, the question should have been renewed, and a direct ruling sought if the examination was refused after consultation with his attorneys.

Complaint is made of the fifth paragraph of the court's charge, which reads as follows:

"If, however, you find and believe from the evidence that plaintiff's wife has suffered from other causes than the accident in question, but further find that her suffering from other causes has been aggravated or increased by the accident in question, and that such accident was caused by defendant's negligence, then plaintiff would be entitled to recover for such increase or aggravation of her suffering, if any, resulting from such other causes, if any."

One objection urged is that "it is error for the court to submit as an element of damage an item which does not find support in both the pleading and the evidence." The allegations of plaintiff's petition pertinent to this issue are "that by reason of said fall, and through the negligence and carelessness of defendant's servants as aforesaid, plaintiff's

wife received serious and permanent injuries; that her right eighth and ninth ribs were broken and torn and lacerated; that the adjacent cartilages and ligaments that bind and hold the ribs in place at the back and front were strained, torn, and separated; that plaintiff's said wife was far advanced in a state of pregnancy at the time of her said injury to her ribs, and that, by reason of her near approach to maternity, her said ribs were forced out, and the said ligaments and cartilages have not grown back together as they were before her said injury; that she is left deformed, and her side at said injury is a source of constant pain and suffering; that it is tender, has not healed, and never will, but that it is a permanent injury; that the shock and jar of said fall produced and brought about misplaced uterus in plaintiff's said wife, and that she is now suffering from retroflexion of her uterus, as a consequence of such injury, and that same is permanent and incurable; that said shock and injuries, and the fright and pain caused, did produce a neurasthenic or nervous condition in plaintiff's said wife, from which she is now suffering greatly, causing her to lose flesh and to be but a shadow of her former self; that before said accident plaintiff's wife was a robust woman, in perfect health; that, as a proximate and direct result of said injuries, plaintiff's wife has suffered and does suffer great physical pain, and that she did suffer great mental anguish from the apprehension of a miscarriage; and that it was with great care and nursing and attention that she was spared from an unnatural delivery of her child."

The defense urged by defendant to the alleged injury of a misplaced uterus, a nervous condition, and fear of a miscarriage, was that they were brought about by other and independent causes than the alleged accident. The evidence on this issue consisted mostly of expert evidence of physicians, and was conflicting. There was some evidence tending to show that some of the troubles incident to gestation were aggravated, but there is no specific allegation in the petition that any particular trouble incident to gestation existed at the time of the accident that was increased or aggravated by the injuries received. On the other hand, it was alleged "that before said accident plaintiff's wife was a robust woman, in perfect health," and that the injuries alleged were the direct result of the accident. The issue joined was whether such injuries resulted from the accident. Under the issue joined and the pleading, plaintiff was entitled to recover such damage as the proof shows was the direct and proximate result of defendant's negligence. We think the charge, under the circumstances, was subject to the objection urged. We also think it is especially subject to the other objections urged, to the effect that it was calculated to confuse and mislead the jury, and cause them to increase

the recovery by giving damages twice for the same injury. The court, in paragraph 3 of its charge, instructed the jury that, if they found for plaintiff, "you will find for plaintiff such an amount as you believe will be a fair and just compensation for the physical suffering and mental anguish of plaintiff's wife, if any, and the impairment of her health, if any, proximately caused by defendant's negligence, if any," and reasonable amount for doctor's bills, etc. Under this charge the jury were authorized to award plaintiff compensation for all the injuries shown to have existed under the pleadings and proof. The charge as to increase and aggravation of the suffering was calling their attention to, and making prominent, one issue in a manner that was calculated to induce the jury, and probably did induce them, to believe that in addition to giving damages for suffering, etc., as stated in paragraph 3, they might give further damages for the increase and aggravation of suffering. It was proper for the court to instruct the jury that they could not give plaintiff damages for suffering that arose from an independent cause, but it was error in going further, in the manner he did, and charging them they could find for increase and aggravation of suffering, after having charged on the full measure to which plaintiff was entitled.

There was no error in not permitting Dr. Rosser to testify as to what would likely be the effect or result if, after the birth of the child, the womb is not replaced in its normal condition. This implies that the womb was misplaced by childbirth, and that there was something necessary to be done to place it in proper position. There is no evidence showing in this instance that such conditions resulted from the birth of the child as required any act to replace the womb. It is true that Mrs. Rutherford suffered from womb trouble, and that such trouble sometimes follows childbirth. The physicians differed on the issue whether the trouble was produced by the accident. And further, Dr. Rogers, who attended her in childbirth, testified that he could not say whether her womb resumed its normal position during the month after childbirth or not; that she complained of her back and headache, which is a natural consequence; and that the womb failing to resume its natural position will usually cause pain in the back. This evidence does not indicate that such a condition was produced at childbirth as required or called for any effort on the physician's part to replace the womb, and, until evidence was introduced tending to raise the issue, no hypothesis was presented authorizing testimony of expert witnesses as to probable results from a failure to replace.

Several assignments of error are presented complaining of remarks made by the trial judge tending to humiliate defendant's counsel and prejudice or disparage him before the

jury. As the case will be reversed on another ground, we deem it unnecessary to discuss these assignments, believing that the matter complained of will not likely occur on another trial.

For the error in giving the charge as indicated, the judgment will be reversed, and the cause remanded.

EQUITABLE LIFE ASSUR. SOC. v. MAVERICK.

(Court of Civil Appeals of Texas. Jan. 13, 1904.)

INSURANCE—AVOIDANCE OF CONTRACT—FALSE REPRESENTATIONS—KNOWLEDGE OF FALSITY—ESTOPPEL—APPEAL—ASSIGNMENTS—PROPOSITIONS—PLEADING—EVIDENCE—TRIAL—DISCRETION OF COURT.

1. One applying for life insurance, who did not know the truth of matters concerning which an insurance agent made false representations, and relied on the representations of the agent, though he could have informed himself of the truth by means of information at hand, will not be estopped to complain of their falsity unless he was inexcusably negligent in not informing himself.

2. A proposition under an assignment of error stating that, even if a charge was not correct, it was sufficient to call the court's attention to the issue involved, and to require it to give a proper charge on the subject, cannot be considered in the absence of an assignment alleging that the court should, in view of the request, have given another and proper charge on the subject.

3. In a suit to avoid a contract of insurance on the ground of fraudulent representations of the agent, and to cancel the policy, it was not necessary for plaintiff to offer, as a condition of relief, to pay defendant any part of the premium, nor could defendant be prejudiced by plaintiff's retention of the binding receipt or the policy.

4. It is within the sound discretion of the trial judge to permit the stenographer to read three times, in the presence of the jury, certain testimony of plaintiff while testifying on his own behalf, and to allow him to correct a statement therein.

5. In a suit to avoid a contract of insurance on the ground of false representations of the agent, it was not necessary for plaintiff to allege that the agent knew the falsity of the representations, as they were, in effect, defendant's statements, and their effect on the contract would be the same whether the agent knew their falsity or not.

6. An assignment complaining of the admission in evidence of certain letters cannot be sustained when another letter to the same effect was admitted without objection.

Appeal from Bexar County Court; Thos. Haynes, Special Judge.

Action by Lewis Maverick against the Equitable Life Assurance Society. From a judgment for plaintiff, defendant appeals. Affirmed.

Keller & Keller, F. H. Smith, and J. M. Patterson, for appellant. R. B. Minor, Robt. T. Neill, and M. W. Davis, for appellee.

JAMES, C. J. The nature of the case is sufficiently given by stating that appellee signed an application for insurance with appellant, and gave his note for a premium of

\$328.45. He brought this suit, in effect, to avoid the contract and the note, upon the ground that he was induced to sign the application and give the note by the agent's fraudulent representations concerning the provisions which the policy would embody; he being ignorant of the nature of the policy, except from what the agent represented to him, and he relying, as he had to do, on what the agent represented. He alleged, also, that the agent agreed at the time that if the policy, when it came, was not such, he would return the note. After demurrers and general denial, defendant pleaded estoppel, and, by a cross-action, asked judgment against plaintiff on the note.

We shall consider first the third and seventh assignments of error. The charge asked and refused was to the effect that, if plaintiff failed to avail himself of the means at hand of ascertaining the truth or falsity of the agent's representations, he was estopped to complain of their untruth. If plaintiff knew the truth of the matter, he could not claim that he was deceived. But if he did not know it, and relied on the statement of the agent at the time, but could have informed himself of it by means of information at hand, he is not necessarily estopped. This would depend upon whether or not he was inexcusably negligent in not informing himself. *McMaster v. N. Y. Life Ins. Co.*, 183 U. S. 25, 22 Sup. Ct. 10, 46 L. Ed. 64; *Bostwick v. Mutual Life Ins. Co. (Wis.)* 92 N. W. 246. If the testimony of *Maverick* was credited by the jury, there is no doubt of the insufficiency of this assignment. The third proposition under this assignment of error is that, if the charge as asked were not strictly correct, it was sufficient to call the court's attention to the issue involved, and to require it to give a proper charge on the subject. There is no assignment alleging that the court should, in view of this request, have given another and proper charge on the subject, and in the absence of such an assignment the question cannot be considered.

The fourth assignment complains of a refused charge, which, according to the above view of the law, would have been correct if it had been so framed as to submit the question of reasonable care on the part of plaintiff, under the circumstances, in his failing to inform himself through the means of information at hand. But the requested charge did not do this. The court submitted the case by charging, merely, if, at the time of the application, defendant, through its agent, agreed with plaintiff that said contract, when delivered, should contain the stipulations set forth in his petition, and, further, that plaintiff did not accept the contract tendered him by defendant, to find for plaintiff. The issue of whether plaintiff exercised the care required of an ordinarily prudent person, in failing, under the circumstances, to know the facts in reference to the terms of

the policy, was not submitted, was not asked to be submitted, and there is no assignment of error complaining of its omission.

The fifth and sixth are also not well taken, because there was nothing for plaintiff to restore to defendant, except the policy, and this was sought to be canceled. If he was entitled to this relief, there never had been, in contemplation of law, any contract of insurance. It is therefore evident that it was not necessary for plaintiff, as a condition to the relief sought, to offer to pay defendant any part of the premium; and defendant could not have been prejudiced by plaintiff retaining the binding receipt, or, for that matter, the policy itself. *Bostwick v. Ins. Co.*, supra.

We overrule the first and second assignments of error, which complain of the overruling of defendant's motion for new trial because the verdict is against the great weight and preponderance of the evidence, and because the court refused to give an instruction directing the jury to find for defendant. The evidence was sufficient to sustain the verdict.

The eighth assignment is without any force. It appears that plaintiff was permitted to testify that 2 or 3 weeks would have been a reasonable time for the company to have delivered the policy. The application fixed the time for delivery at 40 days. It was in fact delivered in 16 days. Nothing was submitted to the jury involving the consideration of reasonable time. How this matter was calculated to injure defendant, we cannot see.

The complaint made by the ninth assignment, that the charge assumed facts, has frequently been ruled against. *Ry. v. Lehmberg*, 75 Tex. 61, 12 S. W. 838.

The tenth is so obviously not well taken that it need not be discussed.

The eleventh complains of the court's allowing the stenographer to read over in the presence of the jury certain testimony of plaintiff while testifying in his own behalf, three times, and in permitting the witness to correct a statement therein. This was a matter in the sound discretion of the trial judge. The witness was upon the stand testifying, and we cannot see that the court abused its discretion.

The twelfth, thirteenth, fourteenth, and fifteenth assignments have reference to the ruling on defendant's special demurrers to the petition. The only one of these exceptions which merits discussion is the one which charges that the pleading is insufficient, in not alleging that the false and fraudulent representations of the agent, *Holland*, were known by him (*Holland*) to be false at the time of making same; nor is it alleged that said representations were not known to be false by plaintiff at the time they were made. *Holland* was defendant's agent, by whose acts it was bound. It was not necessary for plaintiff to allege that

Holland knew his representations to be false. If false, they were defendant's statements, and defendant would certainly be held to have known their falsity. Besides, if they were false and material, and plaintiff was induced to enter into the contract by reason of them, their consequences upon the contract as to plaintiff would be the same, whether Holland knew them to be false, or believed them to be true. And, further, plaintiff alleged that the statements were false, and were fraudulently made for the sole purpose of inducing plaintiff to exclude the note, etc. And the petition also alleged that the representations were false, though plaintiff did not discover that fact until after the execution and delivery of the note.

The sixteenth and seventeenth assignments complain of the admission in evidence of letters written by plaintiff to defendant's representative, dated March 4, March 12, and April 9, 1902. The bills of exception show that plaintiff offered these letters to show that the policy was returned to defendant, and upon the ground expressed in them, viz., that it did not contain the stipulations contracted for. The objection was that the letters were self-serving. The letters of March 4th and April 9th are the ones that were subject to the objection. But it appears that another letter from plaintiff to defendant, dated February 17, 1902, giving the same reasons for his not accepting the policy, was admitted without objection. Under these circumstances, the assignments cannot be sustained.

Affirmed.

On Motion for Rehearing.

(Feb. 10, 1904.)

The charge referred to by the third assignment was erroneous in making the failure of plaintiff to ascertain the truth or falsity of the representations, and in acting upon same, without resorting to the means at hand for ascertaining same, an estoppel, without reference to the circumstances. The charge, being erroneous, was properly refused. We are not convinced that where improper charges are asked with reference to the submission of an issue, and are refused, the appellate court is required to revise the judgment for nonsubmission of the issue indicated, where there is no assignment charging this error. In the absence of such an assignment, we should assume that the party wanted the issue submitted as requested, if at all. His position is simply that the court should have submitted the issue as requested. The decisions of the Supreme Court which refer to the principle that an erroneous request concerning an issue amounts to a sufficient request for a proper submission of the issue do not hold that a failure to submit the issue under such circumstances can be considered without an assignment. *Kirby v. Estill*, 75 Tex. 484, 12

S. W. 807; *Earle v. Thomas*, 14 Tex. 583; *Ry. v. Hodges*, 76 Tex. 90, 13 S. W. 64; *Freybe v. Tiernan*, 76 Tex. 286, 13 S. W. 370. Rule 24 for the government of this court (67 S. W. xv) provides, in substance, that the specific error claimed must be pointed out by an assignment of error. Here the error assigned is the failure to give the particular instruction, and not the failure to submit the issue indicated by it. This rule is invariable unless the error be a fundamental one. We think it cannot be claimed that, when the defense consists of more than one issue, the omission of the trial court to submit one of the issues is fundamental error. Moreover, it appears from an examination of the answer in this case that defendant claimed that plaintiff knew the terms of the contract, and was therefore estopped—not that he was estopped because he failed to use the means at hand to inform himself. It may be that the court did not submit this issue because he considered that form of estoppel had not been pleaded, and, if so, we are not prepared to say that the court was not correct.

The requested charge No. 2, involved by the seventh assignment of error, reads: "You are instructed that if, at the time the said contract of sale was tendered to plaintiff by defendant's agent, the plaintiff received and accepted the same from said agent, after having had a reasonable opportunity, if he did so have, to read over and examine the said contract of sale, then you will find for the defendant." This instruction had reference to the delivery of the policy. It will be seen that on this subject the court instructed the jury, without any qualification whatever, to find for defendant if they believed from the evidence that plaintiff accepted the contract of insurance tendered him by defendant.

The motion is overruled.

INTERNATIONAL & G. N. R. CO. v. MERCER.*

(Court of Civil Appeals of Texas. Jan. 13, 1904.)

RAILROADS — CROSSING ACCIDENT — ARGUMENT OF COUNSEL—FRIGHTENING HORSE—ADMISSIBILITY OF EVIDENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY—EXCESSIVE VERDICT—APPEAL—FAILURE TO EXCEPT.

1. Under *Sayles' Ann. Civ. St.* 1897, art. 1360, providing that whenever either party is dissatisfied with any ruling he may except thereto at the time, and at his request time shall be given to embody the same in a written bill, a failure to except to the court's ruling on improper remarks of opposing counsel precludes a review of its action.

2. In an action against a railroad company, plaintiff's attorney said that the company had not only pursued plaintiff, but had "attempted to cast their mud and slime over the citizenship of" the county. The court sustained the company's objection, and instructed the jury to

*Rehearing denied February 10, 1904, and writ of error denied by Supreme Court.

wholly disregard the remark. Plaintiff's attorney also disclaimed any intention to make an improper argument, and told the jury he withdrew the remark, and asked them not to consider it. *Held* that, as the court did all that the company requested, it was not in a position to complain of the action taken.

3. In an action against a railroad company for injuries from frightening plaintiff's horse at a crossing, evidence of a third person that he met plaintiff at the crossing, and that his horse shied at the company's caboose at the same time with plaintiff's, is admissible.

4. Evidence in an action against a railroad company for injuries arising from the frightening at a crossing of plaintiff's horse, on plaintiff's attempting to drive around the end of a caboose standing partly over the crossing, examined, and *held* to make the question of contributory negligence one for the jury.

5. In a personal injury action the only doctor who testified stated that in his opinion plaintiff's injuries were permanent, and that he was not able to do any physical labor. This was more than one year after the accident. Plaintiff swore that he was confined to his bed for 23 days, and then hobbled about the house for 3 weeks; that every time he did any work it brought great pain to his side; that he was restless, and slept poorly, and had great pain in his kidneys and bladder, and had a pain and ringing in his head all the time. *Held*, that a verdict for \$7,000 was not excessive.

Appeal from District Court, Frio County; E. A. Stevens, Judge.

Action by J. T. Mercer against the International & Great Northern Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Hicks & Hicks, for appellant. C. A. Davies, H. C. Carter, and Perry J. Lewis, for appellee.

FLY, J. Appellee sued appellant for damages resulting from personal injuries, and recovered the sum of \$7,000. The facts, shown by the record, justify the conclusion that appellee received permanent injuries and suffered great pain and anguish through the negligence of appellant in obstructing a public crossing by stopping a car on the crossing. Other facts are set out in connection with the different assignments of error.

On the trial of the cause O. A. Davies, one of the attorneys for appellee, in the opening address to the jury said that appellant and its counsel had not only pursued John Mercer, but had "attempted to cast their mud and slime over the citizenship of Frio county." Appellant objected to the remark, and the objection was sustained by the court, and the jury instructed to "wholly disregard and not consider" the remarks, and Mr. Davies disclaimed any intention to make an improper argument, and told the jury that he withdrew the remark, and asked the jury not to consider it. The court did all appellant asked in connection with the remarks, and there is nothing in the bill of exceptions that indicates that any exception was reserved at the time to the action of the court, but that afterward a bill of exceptions was prepared. If appellant was dissatisfied with the ruling of the court in regard to the

remarks, it should have excepted at the time the ruling was made. *Sayles' Ann. Civ. St. 1897, art. 1360.* Not only did appellant not so except, but even now it is not in a position to offer any objection to the ruling of the court, because the court ruled exactly in accordance with its desires. There is nothing that tends to show that any improper influence was exercised over the jury by reason of the remarks. What has been said applies with equal force to the remarks complained of in the eighth and tenth assignments of error.

Appellee proved by a witness that he met appellee about the center of the railroad track; that as their horses' heads came near together both of them shied at the same time from the caboose; and the testimony was objected to by appellant on the ground that it was "irrelevant, immaterial, and prejudicial to the defendant." We think the evidence was clearly admissible. The act of McAllister's horse shying, being contemporaneous with the shying of appellee's horse at the same place, was a part of the transaction, and as such was relevant and proper.

The propriety of the admission of such testimony has been considered by this court, and it was held: "Upon the question as to whether the natural tendency of the object is to frighten horses of ordinary gentleness, evidence that other horses of the same character have been frightened at the same object is admissible." *San Antonio Edison Co. v. Beyer (Tex. Civ. App.) 57 S. W. 851.* We do not think the force of this rule would be destroyed by the fact that one horse was going in a different direction from the other, as contended by appellant. No objection was urged to the testimony, because the character of the horse of witness was not shown.

In the fourteenth assignment of error two propositions are presented—the first that appellant was not guilty of negligence in stopping its cars on the crossing; and, second, that appellee was guilty of contributory negligence in attempting to cross in such proximity to the cars. Only the latter contention is presented by the proposition under the assignment and urged in the argument. The evidence showed that appellee was driving his horse attached to a wagon along the public highway in the town of Pearsall, when a train belonging to appellant was stopped in the road in front of him in such a manner as to cover about one-half of it. Appellee stopped, and then attempted to drive around the car. To do that he pulled his horse in a half circle around the end of the car. There was room to pass around the car by careful driving. Just as the horse passed around the car he ran off up a bank and threw appellee out. The horse was accustomed to railroads and was gentle. He had run away four years before the accident, but had never shown any fear of cars before. He became frightened at the end of the car. There was no necessity for the train being stopped

so as to leave the rear car on the crossing. It was proved by appellant that there was ample room for a vehicle to pass around the end of the rear car on the crossing. The evidence presented a question of fact to be determined by a jury. It cannot be said, as a matter of law, that appellee was guilty of contributory negligence, and the jury was justified in exonerating him from negligence. *Railway v. Locke* (Tex. Civ. App.) 67 S. W. 1082.

The only doctor who testified as to the injuries stated that in his opinion they were permanent, and that appellee was not able to do any physical labor. This testimony was given more than a year after the injuries were inflicted. Appellee swore that he was confined to his bed for 23 days, and then hobbled about the house for 3 weeks; that every time he does the least physical labor it brings great pain to his side, which was hurt in the fall from the wagon; that he is restless, and sleeps poorly, and has great pain in his kidneys and bladder, and that he has a pain and ringing in his head all the time. We cannot hold that a verdict for \$7,000, under the circumstances, is excessive.

The judgment is affirmed.

BLANK v. ROBERTSON.

(Court of Civil Appeals of Texas. Jan. 30, 1904.)

DISMISSAL OF ACTION—PLEA IN RECONVENTION—REFUSAL TO PERMIT AMENDMENT.

1. *Sayles' Ann. Civ. St. art. 1260*, provides that, where a defendant has filed a counterclaim seeking affirmative relief, the plaintiff shall not be permitted by a discontinuance to prejudice defendant's right to be heard; and section 1301 provides that plaintiff may not take a nonsuit, so as to prejudice the right of an adverse party to be heard on his claim for affirmative relief. *Held*, that it was error, after granting plaintiff a nonsuit, and sustaining a demurrer to defendant's plea in reconvention, to refuse him leave to amend, and thereupon dismiss the action.

Appeal from District Court, Stonewall County; H. R. Jones, Judge.

Action by John E. Robertson against S. A. Blank. From a judgment dismissing the entire cause after refusing defendant permission to amend his plea in reconvention, he appeals. Reversed.

W. J. Arrington, J. W. Crudgington, and Theodore Mack, for appellant. H. G. McConnell, for appellee.

SPEER, J. Appellee, John E. Robertson, filed this suit in the district court of Stonewall county, Tex., in trespass to try title, against S. A. Blank, the appellant, for the recovery of four sections of public school land in said county. The appellant answered by general denial and a plea of not guilty; and further, by way of reconvention, he sought to recover both actual and exemplary damages for the wrongful issuance and service of a writ of sequestration in the case. When the

case came on for trial, the plaintiff applied to the court for leave to take a nonsuit, which was granted, and on the same day, and later in the day, as he contends, interposed a general demurrer to the defendant's plea in reconvention, which was by the court sustained. Afterward the appellant asked leave of the court to amend his said plea in reconvention, which permission being denied, the action was thereupon dismissed.

We deem it unnecessary to discuss the question of the sufficiency of the plea in reconvention as against a general demurrer, inasmuch as we are clearly of the opinion that appellant should have been permitted to amend such plea upon the court's sustaining appellee's general demurrer. Appellee relies upon the case of *Hoodless v. Winter*, 80 Tex. 683, 16 S. W. 427, but clearly that case asserts no such doctrine as contended for by appellee here. In that case it was held error to refuse the plaintiff permission to dismiss the entire cause of action, for the reason that the defendants had interposed no pleading asking for affirmative relief of any character whatever. Everything set out in their special answer could have been proved under their general denial. The language of that decision indicates the true rule, which is that, where a defendant has by his pleadings sought some affirmative relief, the right of the plaintiff to discontinue the entire cause is forbidden. *Sayles' Ann. Civ. St. 1897, arts. 1260, 1301; French v. Groesbeck* (Tex. Civ. App.) 27 S. W. 43 (writ refused); *Akard v. Western M. & I. Co.* (Tex. Civ. App.) 34 S. W. 139; *Short v. Hepburn*, 89 Tex. 622, 35 S. W. 1056.

For the error of the district court in not allowing appellant to amend his pleading, and in dismissing the entire cause, the judgment is reversed and the cause remanded.

TYLER v. BLANTON et al.

(Court of Civil Appeals of Texas. Jan. 30, 1904.)

PETITION—CITATION—JUDGMENT BY DEFAULT.

1. The proceedings are insufficient to sustain a judgment by default, where the petition does not set out the residence of defendant, as required by Rev. St. 1895, art. 1191, so that under articles 1212, 1214, there is no authority for issuance of the citation for him to the sheriff of another county; and it is not shown that, as required by articles 1215, 1219, a copy of the petition was delivered to defendant, with the citation served on him out of the county.

Error from Sherman County Court; S. T. Fagan, Judge.

Action by J. W. Blanton and others against S. C. Tyler. Judgment for plaintiffs. Defendant brings error. Reversed.

Browning, Madden & Trulove, for plaintiff in error.

CONNER, O. J. S. C. Tyler prosecutes this writ of error from a judgment by default

against him in favor of the defendants in error in the county court of Sherman county for the sum of \$300 as damages upon the cause of action stated in the petition therefor. The petition in the county court fails to state the residence of plaintiff in error. Citation, however, was issued by the county clerk of Sherman county directed "To the Sheriff or Any Constable of Hansford County," commanding the presence of plaintiff in error before the county court of Sherman county at its next regular term to be held on the first Monday in February, 1903. It does not appear that a certified copy of the petition accompanied the citation, and the return upon the citation is as follows: "Came to hand the 14th day of January, A. D. 1903, at 7 o'clock p. m., and executed the 19th day of January, A. D. 1903, by delivering to the following named defendant, S. C. Tyler, in person, a true copy of this citation. [Signed] Bert O. Cator, Sheriff, Hansford County, Texas." One of the requirements of a petition is that it "shall set forth clearly the names of the parties and their residences if known." Rev. St. 1895, art. 1191. Article 1212, Id., provides that "when a petition shall be filed with the clerk * * * it shall be his duty to issue forthwith a writ of citation for the defendant." Article 1214, Id., provides that "such citation shall be directed to the sheriff or any constable of the county where the defendant is alleged to reside or be." No authority, therefore, for the issuance of the citation by the clerk is found in the petition, and it is well settled that when served without the county in which the suit is pending "the officer shall also deliver" to the defendant in person a certified copy of the petition which it is provided shall accompany the citation. See Rev. St. 1895, arts. 1215, 1219; *Lauderdale v. Ennis Stationery Co.*, 80 Tex. 496, 16 S. W. 308; *King v. Goodson*, 42 Tex. 153; *Crawford v. Wilcox*, 68 Tex. 109, 3 S. W. 695; *Pruitt v. State*, 92 Tex. 434, 49 S. W. 366.

We conclude that the proceedings are insufficient to support the judgment by default, and the judgment is accordingly reversed, and the cause remanded.

EDDY v. BOSLEY et al.*

(Court of Civil Appeals of Texas. Dec. 23, 1903.)

TRESPASS TO TRY TITLE—INTERVENTION—PETITION—ADMISSION—WAIVER—COMMUNITY PROPERTY—SURVIVORSHIP—SALE—WITNESSES—HUSBAND AND WIFE—CONFIDENTIAL COMMUNICATIONS—DEEDS—CONSTRUCTION—INSTRUCTIONS—EVIDENCE—BURDEN OF PROOF—APPEAL.

1. In trespass to try title against a husband and his second wife, a petition in intervention by children by a former marriage of the husband, claiming that the property in controversy was purchased by the husband with the proceeds of community property of the first marriage, and had once been set aside to inter-

veners as their share of the community property, without further alleging their title, or the vice, if any, in the title of the second wife, who had purchased from the husband, was in the form of trespass to try title, and was sufficient to permit evidence tending to show superiority of title over the second wife, and a demurrer by her was properly overruled.

2. The admission in the petition of intervention that the husband had qualified as survivor of the community estate of himself and deceased wife brought that issue into the case, and cured the failure of the answer of the second wife to allege that fact.

3. If the administration of a community estate had lapsed, or a conveyance of the property by the one who had qualified as survivor was not executed in pursuance of the power conferred by the community statute on such survivor, his purchaser would acquire only the interest which the survivor had as an individual, subject to the protection afforded her by the asserted defenses of limitation, innocent purchaser, and estoppel.

4. As between a surviving husband, who sells a part of the community estate, and his children, who are entitled to the community interest of their mother, such a conveyance is a partition, and the survivor who so sells will be estopped from asserting any title to the part unsold, if it does not exceed in value the part previously conveyed by him.

5. The rule that a husband is incompetent to testify to confidential communications made to his wife does not apply so as to prevent a husband who had married a second time, and conveyed to his second wife community property of the first marriage, from testifying that prior to the conveyance he told her about the existence and interest of the children of the first marriage.

6. The construction of a deed is for the court, and its legal effect should not be submitted to the jury.

7. It was error to give one instruction that uncontradicted evidence showed that a certain transfer was for a valuable consideration, and another instruction that the question as to whether a valuable consideration was given was for the jury.

8. The legal title to community property being in the husband, who had qualified as survivor, a purchaser from him was invested with the same character of title, and the burden of proof was on the children of the marriage to establish that the purchase was with notice of their interests, or was not for value.

9. Where, in trespass to try title, judgment is rendered in favor of interveners, and defendants alone appeal, the judgment might be affirmed as against the plaintiffs.

Appeal from District Court, Travis County; George Calhoun, Judge.

Trespass to try title by Martha Bosley and another against Julius Quast and Elizabeth Quast Eddy, in which Amanda Hill and others intervene. From a judgment in favor of the interveners, the defendant Elizabeth Quast Eddy appeals. Judgment affirmed as to plaintiffs, and reversed as to appellant.

W. D. Hart and Kemp & Hart, for appellant. Walton & Hill and Wm. Brueggerhoff, for appellees.

FISHER, C. J. Martha Bosley, joined by her husband, Wm. Bosley, on October 3, 1902, brought this suit in trespass to try title against Julius Quast and his wife, Eliz-

*Rehearing denied February 10, 1904.

† See Deeds, vol. 16, Cent. Dig. § 255.

abeth Eddy Quast, for the recovery of 10 acres of land out of survey No. 1, abstract 72, in the name of William Brown, situated in Travis county; also to recover lots 5, 6, 7, and 8 in outlot 36, block 6, Division B, of the city of Austin, Travis county. Amanda Hill, joined by her husband, S. B. Hill, and Teresa Quast, children of Julius Quast by his first marriage, intervened, and claimed that the land in controversy was purchased with the proceeds from the sale of the community property of their deceased mother and the defendant Julius Quast, and that the defendant Julius Quast had sold one-half of block 6 in outlot 36, Division B, city of Austin, which was his interest in said property, and that they were entitled to all the property in controversy, except one-half of the 10 acres. Julius Quast, in answer to the demand of the plaintiff Bosley, filed a plea of not guilty. The defendant Mrs. Elizabeth Quast Eddy, who in the meantime had been divorced from her husband, Julius Quast, and resumed her former name of Elizabeth Eddy, answered by plea of not guilty and the three, five, and ten years' statutes of limitation; and specially pleaded that for a valuable consideration, and without notice of the claims of the plaintiff and of the interveners, she had purchased the property by deed from her co-defendant Julius Quast, and pleaded that the interveners were estopped from asserting any action to recover from her the property in controversy. The trial below before the court and a jury resulted in a verdict and judgment in favor of the interveners against the plaintiffs Bosley and against the defendant Julius Quast and Elizabeth Quast Eddy. Judgment was rendered in favor of interveners for all of the 10 acres in controversy. In this respect it went beyond the number of acres claimed in their petition for intervention, as they only sued for an undivided one-half of the 10 acres. However, this error in the judgment has been cured by a remittitur filed by the interveners in this court.

The evidence in the record shows that the property in controversy was acquired with the community funds of Julius Quast and his first wife, the mother of the interveners. Their mother, Mrs. Quast, died in 1880. There is evidence to the effect that besides the two interveners there was another child of this marriage, but there is evidence which tends to show that she had received her share of the community estate left by her deceased mother. About 1884 Julius Quast married the second time, and it was during this marriage that the property in controversy was acquired, the title to which was finally taken in his name; but the evidence is clear to the effect that it was purchased by the proceeds of community funds arising from the sale of community property owned by Julius Quast and his first wife. Julius Quast and the appellant, Eliz-

abeth Eddy Quast, married on the 9th day of June, 1900. After this last marriage, and before the divorce, Julius Quast conveyed the property in controversy by deed to the appellant, Elizabeth Quast Eddy. The recited consideration for this conveyance is one dollar and natural love and affection; but there is in the record evidence of a valuable and different consideration other than that recited on the face of the deed. There is evidence to the effect that at the time that this conveyance was made to the appellant she did not know of the existence of the interveners, or their claim to the property in controversy; and she testifies that Julius Quast informed her that the property in controversy was bought with money earned by himself after his first wife had died. On the other hand, there is evidence to the effect that she knew of the first marriage and the existence of the interveners as the children of that marriage, and before the conveyance was made to her she was informed that the interveners had a right and interest in the property in controversy. It appears from the evidence that Julius Quast bought the entire block No. 6, outlot 36, Division B, City of Austin, and that after that time, and before his marriage with the appellant, he sold and conveyed that half of the block not in controversy to Galen Crow; and there is evidence to the effect that by that sale he intended to accomplish a partition of the block, and that the remainder unsold—that portion in controversy in this suit—should be the property of the interveners. The plaintiffs Bosley have not appealed.

The interveners, in their petition and supplemental petition, in effect allege and admit that Julius Quast, after the death of his first wife, qualified under the statute, by giving the bond, etc., required as survivor of the community estate; but do not admit, nor do they plead, that the property in controversy, when sold and conveyed by him to the appellant, Elizabeth Quast Eddy, was by virtue of his capacity and authority as survivor of the community. The appellant, Elizabeth Quast Eddy, does not, in her answer, plead that the sale to her was made by Julius Quast under his authority and power as the qualified survivor of the community estate. We are of the opinion that there was no error in the court's overruling the general demurrer of the appellant, Elizabeth Quast Eddy, to the interveners' plea of intervention. The interveners' position in the case, as to her, is that of plaintiffs, and we are of the opinion that their petition is in the form of trespass to try title, which is predicated upon two grounds: First, that the property in controversy was bought with community funds of their father and deceased mother, and that as to that portion of block 6 that is in controversy the same was, in effect, set aside to them by their father as their portion and share of

the entire block, which he had formerly purchased with the community funds. It was not necessary that they should set out their title, or should allege the vice, if any, that existed in the title of the appellant, Mrs. Eddy. Their petition was in the form of trespass to try title, and, in our opinion, they could introduce evidence tending to show the superiority of their title over that asserted by the appellant, Mrs. Eddy.

It is contended in appellant's second and fourth assignments of error that the court erred in not setting aside the verdict of the jury and rendering judgment for the appellant, Eddy, on the ground that the uncontradicted evidence showed that Julius Quast had qualified as survivor of the community estate of himself and his deceased wife, the mother of the interveners, prior to the time that the property was conveyed to the appellant, Mrs. Eddy. This defense was not presented by Mrs. Eddy in her answer. She had a plea of not guilty and special defenses asserting the fact that she purchased the property for value, and thereby she was an innocent purchaser, and alleged an estoppel against the claim of the interveners. It may be that under the authority of *Railway Co. v. Whitaker*, 68 Tex. 632, 5 S. W. 448, and *Long v. Gray*, 13 Tex. Civ. App. 179, 35 S. W. 32, she would be confined to the defenses specially pleaded, and could not, under the plea of not guilty, introduce proof establishing the fact that Julius Quast conveyed the property to her as survivor of the community estate of himself and his first wife; but the defect in her answer, in our opinion, is cured by the averments and admissions made in the pleadings of the interveners. It is there alleged, and in fact admitted, that Julius Quast, after the death of his first wife, did qualify as survivor of the community estate. These averments and admissions stated in the petition of the interveners in effect brought this issue into the case, and will cure the defect of the pleadings of Mrs. Eddy upon this subject. *Grimes v. Hagood*, 19 Tex. 249; *Bourke v. Vanderlip's Ex'rs*, 22 Tex. 223; *Henry v. Sneed* (Mo. Sup.) 12 S. W. 666, 17 Am. St. Rep. 580; *Houston & T. C. R. Co. v. Chandler*, 51 Tex. 420; *Hudson v. Willis*, 65 Tex. 701; *Lyon v. Logan*, 68 Tex. 524, 5 S. W. 72, 2 Am. St. Rep. 511; *Burnett v. Waddell*, 54 Tex. 275. But the conveyance executed by Julius Quast to Mrs. Eddy does not show, nor is there any evidence in the record showing, that at the time of this conveyance Julius Quast sold or conveyed by virtue of the authority conferred upon him as the qualified survivor of the community, or whether he merely sold and conveyed his individual interest, if any. The subject of the execution of a power, and whether a conveyance will or will not be referred to it, is fully discussed in the case of *Hill v. Conrad*, 91 Tex. 342, 43 S. W. 789. If the administration of the estate of Julius Quast and his first wife still continued and

was in existence under the community survivorship statute at the time that he executed the conveyance to the appellant, Mrs. Eddy, and that conveyance was executed under the power conferred by him as survivor, then it is clear that the absolute and superior title passed to Mrs. Eddy, and she would not have to rely on the defense of estoppel, innocent purchaser, or limitation in order to prevail over the claims of the interveners. But, on the other hand, if the administration of the estate under the community statute had lapsed, or the conveyance was not executed in pursuance of a power conferred by that statute upon Julius Quast by reason of his qualification as survivor, then Mrs. Eddy would acquire only the interest that Julius Quast had in the property as an individual, subject, however, to the protection afforded her by the defenses asserted in her answer, if the evidence is of a character to support the same. The evidence in the record, as before stated, being silent on the question as to whether the administration of the community estate under the survivorship statute was in existence at the time of the execution of the deed to the appellant, and it not appearing that the conveyance was executed by virtue of the power conferred upon Julius Quast as the qualified survivor under that statute, we conclude that no error is pointed out by these assignments; but we have stated our views upon this subject in view of the fact that the question may arise upon another trial.

The second proposition under the second assignment of error is not in accord with our views of the facts and the issues raised by the pleadings. The point here presented is that, if the interveners are entitled to recover, they are limited to two-thirds of a one-half interest in the land in controversy. The facts in the record with reference to block 6 indisputably show that as between Julius Quast and the interveners there was, in law, a partition of this block; and, if the claim of the interveners is to prevail, they are entitled to recover all of the half of the block that is now in controversy. The evidence is obscure upon the subject as to whether or not this property was set aside by Julius Quast to the interveners as the community interest of their mother's estate that they were entitled to; but the fact is clear and without contradiction that long prior to the sale and conveyance by Julius Quast to the appellant, Mrs. Eddy, he had sold and conveyed a half of the block to Galen Crow, which left remaining the half in controversy. As between him, as the surviving parent, who sells a part of the community estate, and his children, who are entitled to the community interest of their mother, such a conveyance is held to be a partition, and the survivor who so sells will be estopped from asserting any title to the part unsold, if it does not exceed in value the part previously conveyed by him; which

does not appear to be the case here. This principle is decided in *Bass v. Davis* (Tex. Civ. App.) 38 S. W. 269, and *Wilson v. Helms*, 59 Tex. 683, and other cases decided by the courts in this state, which are unnecessary to mention.

The conveyance to Galen Crow by Julius Quast in law operated as a partition between him and the surviving children of his first marriage. It is also clear from the evidence that, if the two interveners are entitled to recover from the appellant, Mrs. Eddy, they are entitled to recover that half of block No. 6 in controversy, together with an undivided half of the 10 acres in controversy. There is evidence to the effect that the other child of the marriage of Julius Quast and his first wife is not asserting any claim to the property in controversy, and that she has received her proportionate share of the community estate of her deceased mother.

The point raised in the third proposition under the second assignment of error is obviated by the remittitur filed in this court.

The third assignment of error complains of the action of the trial court in admitting the evidence of Julius Quast to the effect that he, previous to the conveyance to his then wife, Mrs. Eddy, and during the time of the marriage, told her about the existence and the interest of his children the interveners in the property in controversy. There is an objection to this evidence on the ground that this statement was made by Julius Quast to his then wife after the date of the conveyance to her. This contention is not borne out by the record. It appears from the evidence upon this subject that the statement informing her of the interest of his children in the property in question was made before the conveyance.

The next objection is to the effect that the husband cannot be permitted to testify as to confidential communications made to his wife during marriage. This proposition of law is correct, but it only prohibits communications that are of a confidential nature. *Mitchell v. Mitchell*, 80 Tex. 116, 15 S. W. 705. A sale by the surviving husband of the interest of his children in the community estate of his deceased wife without authority is a fraud upon the children, and a purchaser with notice participates in the fraud. *Worst v. Sgitcovich* (Tex. Civ. App.) 46 S. W. 72. It is not believed that it is the spirit of the law to regard a communication of the husband to the wife of the existence of a right of third parties which he is attempting to convey to her, and which, if accomplished, would operate as a fraud upon such parties, as privileged, on the ground that such communication is confidential. *Edwards v. Dismukes*, 53 Tex. 612; *Henry v. Sneed* (Mo.) 12 S. W. 665, 17 Am. St. Rep. 580; *Moeckel v. Heim* (Mo.) 36 S. W. 226. In our opinion, the evidence complained of was admissible, its bearing and relevancy is apparent. The effect of it, if believed by the jury, was to

charge the appellant, Mrs. Eddy, with notice of the claim and interest of the appellees, the interveners, or, to say the least of it, it was sufficient to excite her inquiry as to the extent of their claim. We cannot agree with appellant in her fourth assignment of error. The facts, in our opinion, do not warrant the contention asserted by appellant.

The fifth assignment of error is not well taken. Two theories are presented by the pleadings and evidence. One is that the interveners are entitled to recover the property in controversy by reason of the fact that community funds were invested in its purchase, and the other ground is that there was, in legal effect, a partition of the property between them and their father Julius Quast.

The majority of the court are of the opinion that the sixth assignment of error is well taken; that the requested instruction by the interveners numbered 9 should not have been given. But, however, this is not made a ground for reversal, but is disposed of with the cautionary statement that the court upon another trial will not repeat this charge.

The validity of the deed from Julius Quast to Elizabeth Quast Eddy was a matter of legal construction, and its legal effect should not have been submitted to the jury, except the inquiry as to what was the consideration for that conveyance. The court on that subject peremptorily instructed the jury that the extrinsic evidence showed that the conveyance was executed for a valuable consideration.

Appellant's seventh assignment of error is well taken. We do not mean to say that the proposition of law there announced was not correct, but the charge there given conflicts with the special charge No. 25 given at the request of defendant Eddy. This special charge is to the effect that the jury were instructed that the uncontradicted parol evidence showed that the property in controversy was transferred by Julius Quast to Elizabeth Eddy Quast for a valuable consideration. The charge given by the court which is complained of in the seventh assignment of error leaves the question of consideration to the jury. In view of the peremptory instruction upon this subject just noticed, there was no question of consideration left for determination by the jury.

There is no merit in appellant's eighth assignment of error.

The point raised in the ninth assignment of error has, in effect, been disposed of by what has been said concerning the effect of the deed of Julius Quast to Crow.

We overrule appellant's tenth assignment of error. Upon the question there raised there was a conflict of evidence.

The majority of the court are of the opinion that the charge complained of in the eleventh assignment of error should not have been given. The writer confesses that he is not able to state a good reason why this

charge is erroneous, and disposing of it in the way pointed out is in accord with the views of the majority of the court.

In view of the peremptory instruction on the subject of consideration, there was no error in refusing the charges requested as set out in the sixteenth, seventeenth, and twentieth assignments of error.

There was no error in refusing special charge No. 13, as set out under appellant's fourteenth assignment of error. There is no evidence in the record tending to show that the children gave consent to Julius Quast to execute the conveyance to the appellant Mrs. Eddy.

It would not have been error for the trial court to give Mrs. Eddy's special instruction No. 16, as set out under the appellant's sixteenth assignment of error.

It was error for the court to refuse the appellant's special charge No. 9, as set out under the twelfth assignment of error, on the subject of the burden of proof, and for this error the judgment of the trial court will be reversed, and the cause remanded. The legal title to the property in question was in Julius Quast, and when he conveyed by deed to the appellant, Mrs. Eddy, she was invested with the same character of title. *Patty v. Middleton*, 82 Tex. 586, 17 S. W. 909; *Saunders v. Isbell*, 5 Tex. Civ. App. 515, 24 S. W. 307; *Burleson v. Alvis* (Tex. Civ. App.) 66 S. W. 236; and *Edwards v. Brown*, 68 Tex. 329, 4 S. W. 380, 5 S. W. 87. The title of the interveners was equitable, and the burden rested upon them to establish the fact that the holder of the legal title either purchased with notice of their claim or interest or was a purchaser without value. Authorities just cited.

As the Bosleys do not appeal, and are not complaining of the judgment of the trial court, the judgment in favor of interveners as against them is affirmed; but for the reasons stated in the opinion the judgment against the appellant, Mrs. Elizabeth Quast Eddy, is reversed and remanded as to the interveners and as to the plaintiffs William and Martha Bosley.

Affirmed in part, and reversed and remanded in part.

STATE v. CANTWELL et al.

(Supreme Court of Missouri, Division No. 2.
Feb. 1, 1904.)

TITLES OF ACTS—SPECIAL LEGISLATION—HOURS OF EMPLOYMENT IN MINES—POLICE POWER—HEALTH AND SAFETY OF EMPLOYEES—EXPERT TESTIMONY.

1. Const. art. 4, § 28, providing that an act shall contain but one subject, which shall be clearly expressed in the title, does not require the title to designate the purpose of the act.

2. Act March 23, 1901 (Laws 1901, p. 211), making it unlawful for persons engaged in mining, or making excavations beneath the surface

of the earth, while searching for minerals or other valuable substances, to work their employes at such labor more than eight hours a day, is not special or class legislation because applicable only to those engaged in searching for minerals or other valuable substances beneath the surface of the earth.

3. Such act is a proper exercise of the police power of the Legislature to enact a reasonable regulation to secure the health and safety of the employes.

4. Expert testimony that a certain employment is not attended with danger to the health of those engaged in it is not admissible to prove that a statute enacted in the exercise of the police power to preserve the health and safety of the employes engaged therein is not necessary.

Appeal from Circuit court, Madison county; R. A. Anthony, Judge.

Harry J. Cantwell and others were convicted of a violation of the statute regulating hours of employment in mines, and appeal. Affirmed.

Harry J. Cantwell, E. D. Anthony, and Edward D'Arcy, for appellants. The Attorney General and Bruce Barnett, for the State.

FOX, J. "The defendants were jointly tried, convicted, and fined twenty-five dollars each, in the circuit court of Madison county, in March, 1903, for working their employes in mines longer than eight hours a day, in violation of the act of March 23, 1901, designated as sections 8793 and 8794 of the statutes, and found on page 211 of the Session Acts of 1901. The prosecution was by information, which charges the offense to have been committed in July, 1902. The defendants admitted that they were in charge of and operating the mine of the Catherine Lead Company (defendant Cantwell being president; Magenau, superintendent; and Edwards, mine captain), and admitted that they had knowledge at the time that their employes were working underground longer than eight hours out of twenty-four, in shafts 100 feet and 150 feet in depth. The defense produced evidence to the effect that the employes worked in excess of eight hours a day under a contract entered into voluntarily by them, and not under force or compulsion from defendants. The state proved by witnesses Frank Graham, William Lawes, George Dellinger, and Monroe Smith that the men worked in the mine, taking out mineral, ten hours a day, at the time charged in the information. The defense questioned the constitutionality of the above-mentioned statute by an objection to the introduction of any evidence and by a motion in arrest. The objection to the introduction of evidence was as follows: By defendants' counsel: 'For the purpose of preserving the record, we want to object formally to the introduction of any evidence in this cause, for the reasons: First, that the act upon which this prosecution is based is unconstitutional, in this: that the title does not express the object of the act; that the object of the act, if within the proper exercise of the powers of the legisla-

¶ 2. See Constitutional Law, vol. 10, Cent. Dig. § 654.

tive body, should be entitled "An act to conserve public health"; that, if such an act cannot be upheld as calculated to conserve public health, then it is unconstitutional and void, as violative of the federal and state Constitutions and the Bill of Rights, in this: that it denies the right to contract; second, that it does not provide for contracts already existing, and may be construed retrospectively in its operation; third, that it denies the right to gains of industry; fourth, that it arbitrarily limits the right to contract; and, fifth, it denies the equal protection of the laws as guarantied by the Bill of Rights; and, sixth, it is obnoxious as a special law, as it is intended to oppress one particular line of industry, and is not equal in its operations.' The defense offered to prove by witnesses N. A. Bliss and G. L. Dines, physicians of experience in practice in mining regions, and by R. D. O. Johnson, an experienced mining engineer, I. J. Pirtle, an experienced mine foreman, and H. L. Baker, who had worked thirty-four years in mines, that underground work in mines is not more injurious to the public health, or to the health of the class of men engaged, than working the same number of hours in the ordinary employments on the surface, and offered to prove by Dr. Dines that underground work in excavating minerals is no more injurious than underground work of any other kind or for any other purpose; and, on cross-examination of the state's witness George Dellinger, the defense offered to show by the witness that under the ordinary rules of employment, in any occupation on the surface, ten hours was required as a day's work; stating that the purpose of the testimony offered was to show that the statute amounts to a discrimination against the mining industry. All evidence along these lines was excluded."

The information filed in this cause, which was duly verified, is as follows: "Thomas Hollday, prosecuting attorney within and for the county of Madison, in the state of Missouri, informs the court that Harry J. Cantwell, William Magenau, and Jasper Edwards on the — day of July, 1902, at the said county of Madison, had charge of and operated certain mines, situate in said county of Madison, known as the 'Catherine Lead Mines,' and that they were then and there engaged in mining in said mines for minerals and valuable substance, and did then and there have in their employ and under their control, for wages, and to whom wages were paid for their labor, certain hands and employes, to wit, William Lawes, Rufus Skaggs, John Hampton, George Dellinger, Monroe Smith, Bud Vaughn, and others whose names are unknown to your informant, to labor, work, and search in said mines in excavating beneath the surface of the earth for minerals and valuable substance, and did then and there unlawfully work said hands and employes, to wit, William Lawes, Rufus Skaggs, John Hampton, George Dellinger,

Monroe Smith, Bud Vaughn, and others whose names are unknown to your informant, in said mines, to mine, search, work, and labor in excavating for minerals and other valuable substance beneath the surface of the earth, at such labor and industry, longer than eight hours in that said day of twenty-four hours, to wit, longer than eight hours in the said — day of July, 1902; against the peace and dignity of the state."

The court declared the law as follows:

"(1) You are instructed that you may find one or more of the defendants guilty, or not guilty, accordingly as you may believe the evidence will warrant.

"(2) If you believe from the evidence, beyond a reasonable doubt, that the defendants, Harry J. Cantwell, William Magenau, and Jasper Edwards, at the county of Madison and state of Missouri, on any day within one year prior to September 1, 1902, the day on which the information in this cause was filed, had charge of and operated certain mines, known as the 'Catherine Lead Mines'; that they were then and there engaged in mining in said mines for minerals and valuable substance, and, as such, did then and there have in their employ and under their control, for wages, and to whom wages were paid for their labor, certain hands and employes, mentioned in the information, or any of them, to work, labor, and search in said mines in excavating beneath the surface for minerals and valuable substance; and that the defendants did then and there work said hands and employes mentioned in the information, or any of them, in said mines, to mine, search, work, and labor in excavating for minerals and other valuable substance beneath the surface of the earth, longer than eight hours in a day of twenty-four hours—then you will find the defendants guilty, and assess against each a fine of not less than twenty-five nor more than five hundred dollars; but, unless you find the above facts from the evidence, you will find the defendants not guilty.

"(3) The court instructs the jury that the defendants are presumed to be innocent, and it devolves upon the state to prove their guilt beyond a reasonable doubt; and unless the state has established the guilt of the defendants, as charged in the information, to your satisfaction, beyond a reasonable doubt, you should give the defendants the benefit of such doubt, and return a verdict of not guilty. But such a doubt, to authorize an acquittal on that ground alone, should be a substantial doubt of guilt, arising from the evidence in the case, and not a mere possibility of innocence."

The defendants prayed the court to instruct the jury as follows:

"(1) The court instructs the jury that if they find from the evidence that the working of men beneath the surface of the earth, while searching for minerals, coal, or any valuable substance, is not more injurious to health and life than the working of men in

other occupations upon the surface of the earth, then the act of the General Assembly of the state of Missouri repealing sections 8793 and 8794 of the Revised Statutes of the state of Missouri of 1899, and enacting two new sections in lieu thereof, to be known as sections 8793 and 8794, approved March 23, 1901 [Laws 1901, p. 211], is unconstitutional and void, and in contravention of the Constitutions of the United States and of the state of Missouri, and the jury are instructed to find the defendants not guilty.

"(2) The court instructs the jury that the act of March 23, 1901, does not operate or apply to persons engaged in working more than eight hours per day in making excavation beneath the surface of the earth for other purposes than 'while searching for minerals, coal or any valuable substances'; that therefore said act is not intended to conserve the public health, nor the health of persons engaged in making excavations beneath the surface of the earth, but is an act abridging the right to contract for the gains of one's industry in a lawful industry, and to prevent the performance of said contract, and is unconstitutional and void, because it is a special law, because the title does not express the subject, and because it denies the equal protection of the laws, and denies the right to the enjoyment of gains of one's industry, and the defendants must be acquitted.

"(3) The court instructs the jury that the act of the General Assembly of the state of Missouri entitled 'An act to repeal sections 8793 and 8794 of chapter 133 of article 2 of the Revised Statutes of Missouri of 1899, and enact in lieu thereof two new sections to be known as sections 8793 and 8794, and to prevent persons and corporations from working laborers under ground more than eight hours in a day of twenty-four hours, and fixing eight hours as a day for such laborers,' approved March 23, 1901 [Laws 1901, p. 211], under which this prosecution is brought, is unconstitutional and void, and in contravention of the Constitutions of the United States and of the state of Missouri, for the following reasons: First. It seeks to deprive persons of liberty and property without due process of law. Second. It fails to recognize that 'all constitutional government [is] intended to promote the general welfare of the people; that all persons have a natural right to life, liberty, and the enjoyment of the gains of their own industry; that to give security to these things is the principal office of government; and that, when government does not confer this security, it fails of its chief design.' Third. It seeks to arbitrarily and unlawfully abridge the rights of the people in disposing of their lawful property, and the jury is therefore instructed to find the defendants not guilty.

"(4) The court instructs the jury that the act of the General Assembly of the state of Missouri entitled 'An act to repeal sections 8793 and 8794 of chapter 133 of article 2 of

the Revised Statutes of Missouri of 1899, and enact in lieu thereof two new sections, to be known as sections 8793 and 8794, and to prevent persons and corporations from working laborers under ground more than eight hours in a day of twenty-four hours, and fixing eight hours as a day for such laborers,' approved March 23, 1901 [Laws 1901, p. 211], is unconstitutional and void, and in contravention of the Constitutions of the United States and of the state of Missouri, for the following reasons: First. It is a special law 'regulating labor, trade, mining, or manufacturing.' Second. It is a special law in a case where a general law can be made applicable. Third. It is arbitrary and unlawful class legislation. Fourth. It unjustly and arbitrarily singles out a class of persons, and imposes upon them restrictions from which others similarly situated are exempt. Fifth. It seeks to deny to persons within the state of Missouri the equal protection of the laws. And the jury is therefore instructed to find the defendants not guilty.

"(5) The court instructs the jury that the act of the General Assembly of the state of Missouri entitled 'An act to repeal sections 8793 and 8794 of chapter 133 of article 2 of the Revised Statutes of Missouri, 1899, and to enact in lieu thereof two new sections, to be known as sections 8793 and 8794, and to prevent persons and corporations from working laborers under ground more than eight hours in a day of twenty-four hours, and fixing eight hours as a day for such laborers, approved March 23, 1901' [Laws 1901, p. 211], under which this prosecution is brought, and by virtue of which plaintiff must recover, if at all, is unconstitutional and void, and in contravention of the Constitutions of the United States and of the state of Missouri, for the following reasons: First. Said act seeks to impair the obligation of contracts. Second. It seeks to arbitrarily and unlawfully limit and destroy the right of the citizen to enter into contracts relating to legal and lawful business. Third. Because it is an unwarrantable interference with and infringes both the right of employer and employees to make contracts relating to lawful business, and is obnoxious to the provisions of our Bill of Rights, which guaranties to all persons their natural and inalienable right of personal liberty, and acquiring, possessing, and protecting property. And the jury are therefore instructed to find the defendants not guilty.

"(6) The court instructs the jury that, no evidence having been introduced that the working of men more than eight hours per day of twenty-four hours in making excavations beneath the surface of the earth while searching for minerals, coal, or any valuable substance, is more injurious to health and life than the working of men the same hours while engaged in making similar excavations for other purposes than searching for minerals, coal, or any valuable substance,

then the act of the General Assembly of the state of Missouri repealing sections 8793 and 8794 of the Revised Statutes of Missouri of 1899, and enacting two new sections in lieu thereof, to be known as sections 8793 and 8794, approved March 23, 1901 [Laws 1901, p. 211], is unconstitutional and void, and in contravention of the Constitutions of the United States and of the state of Missouri, and the jury are instructed to find the defendants not guilty.

"(7) The court instructs the jury that no evidence having been introduced that the working of men more than eight hours per day of twenty-four hours in making excavations beneath the surface of the earth while searching for minerals, coal, or any valuable substance is injurious to the health or morals of the general public, then the act of the General Assembly of the state of Missouri repealing sections 8793 and 8794 of the Revised Statutes of the state of Missouri, 1899, and enacting two new sections in lieu thereof, to be known as sections 8793 and 8794, approved March 23, 1901 [Laws 1901, p. 211], is unconstitutional and void, and in contravention of the Constitutions of the United States and of the state of Missouri, and the jury is instructed to find the defendants not guilty.

"(8) The court instructs the jury that sections 8793 and 8794 of the Revised Statutes of the state of Missouri, under which this prosecution is brought, can be sustained only as a regulation concerning the public health, and that, as this object is not stated in the title of the bill, even though said act might be within the authority of the Legislature in the exercise of its police powers, yet the title of said act does not fairly embody or express such purpose, and the act is therefore unconstitutional and void, as in contravention of article 4 of section 28 of the Constitution of the state of Missouri, and the defendants must be acquitted.

"(9) The court instructs the jury that sections 8793 and 8794 of the Revised Statutes of the state of Missouri, under which this prosecution is brought, are unconstitutional and void, and in contravention of the Constitutions of the United States and of the state of Missouri, because said act is retrospective in its operation.

"(10) The court instructs the jury that even though they may find from the evidence that the employees of the defendants worked more than eight hours in a day of twenty-four hours in mining for minerals, coal, or other valuable substances, yet if they shall further find from the evidence that said work was voluntarily performed by said employees, and that no compulsion or coercion, by contract or otherwise, was used by the defendants to compel them to so work more than eight hours, then the defendants must be acquitted."

Which instructions asked by the defendants were by the court refused.

The cause being submitted to the jury, they returned a verdict finding each of the defendants guilty, and assessing their punishment separately at a fine of \$25. In proper time and form, defendants filed motions for new trial and in arrest of judgment, which were by the court overruled, and the cause is now before us on appeal for review.

Opinion.

This prosecution is predicated upon sections 8793 and 8794, Sess. Acts 1901, p. 211, which provide as follows:

"Sec. 8793. It shall be unlawful for any person or corporation engaged in mining for minerals, coal, or any valuable substance, or making excavations beneath the surface of the earth while searching for minerals, coal or any valuable substance, to work their hands or employees at such labor or industry longer than eight hours in a day of twenty-four hours, and it is hereby declared that eight hours shall constitute a day for all laborers or employees engaged in the kind of labor or industry aforesaid.

"Sec. 8794. Any person or persons or corporation who shall violate any of the provisions of the preceding section shall on conviction, be fined in a sum not less than twenty-five nor more than five hundred dollars."

This cause practically involves but one proposition: Are sections 8793 and 8794, supra, a valid exercise of the police power of the state, or are they invalid and void, for the reason that they are in conflict with the organic law of this state, or of the Constitution of the United States?

Doubtless the Legislature, by the enactment of the provisions upon which this prosecution is based, proceeded on the theory that the public has an interest in the preservation of the health of all laborers engaged in work beneath the surface of the earth in search of minerals or other valuable substances. It was not necessary for the lawmaking power, in the title of the act, to designate the purposes of it. The evils it intended to remedy may be deduced from the provisions of the act itself. That the title should contain but one subject, and it should be clearly expressed, by no means can be construed to mean that the title must designate the purposes of the act. The object to be obtained by the provision of the Constitution that there shall be but "one subject and it shall be clearly expressed" (article 4, § 28) was "to prevent surprise upon the law-makers by the passage of bills, the object of which is not indicated by their titles, and also to prevent the combination of two or more distinct and unconnected matters in the same bill." "There is nothing in the title to this act which is calculated to surprise or mislead any one who may read it. The body of the act treats of the subject indicated by the title." The provisions of this act

are applicable to a particular class of persons and corporations engaged in the business of mining and searching for minerals and other valuable substances beneath the surface of the earth, and to prevent them from working their hands and laborers, in the prosecution of such work, longer than eight hours in a day. No one can read this act, and escape the conclusion that the purpose of its provisions is to protect the health of those engaged in that particular kind of work, as well as to lessen the danger which usually attends it. Accidents are less apt to occur in the performance of a dangerous work where the hours of labor are reasonable, than where the men are tired and exhausted from long hours of labor.

In the determination of the constitutionality of the act, now in judgment before us, we start out with that familiar and well-recognized principle so clearly and aptly stated in *State ex rel. v. Aloe*, 152 Mo. 477, 54 S. W. 496, 47 L. R. A. 398: "When the validity of a statute is drawn in question, the court approaches the subject as one involving the gravest responsibility, and to be considered with the greatest caution. The General Assembly is presumed to have been as careful to observe the requirements of the Constitution in enacting the statute as the court in applying it. Every presumption is to be indulged in favor of the validity of the act, and that presumption is to continue until its invalidity is made to appear beyond a doubt."

We are not left without light on the questions involved in this cause. In our investigations, we have been materially aided by the able, fair, and exhaustive presentation of this subject. All the authorities upon the controverted proposition have been collated, as well as those remotely bearing upon the subject. Will say, at the outset, that we shall not undertake to reconcile the apparently conflicting opinions, and the reasonable limits of this opinion will not permit of a review of all the cases cited by either appellant or respondent. We must be content with a discussion of the leading cases, and then reach a conclusion in harmony with sound reason, and in keeping with the advancement and development of this great commonwealth.

Our first inquiry must necessarily be as to the power of the Legislature to enact a reasonable police regulation which secures the health and safety of the employes. This court has indicated, in no doubtful expressions, its views upon this subject. In *State v. Loomis*, 115 Mo., loc. cit. 315, 22 S. W. 350, 21 L. R. A. 789, Black, J., in speaking for the court, unqualifiedly announced this rule: "There can be no doubt but the Legislature may regulate the business of mining and manufacturing, so as to secure the health and safety of the employes, but that is not the scope of the two sections of the statute now in question." While that case

did not present the question before us, it did involve, in a general way, the power of the Legislature to enact laws regulating the business of mining. The same learned and esteemed judge who wrote the opinion in the *Loomis* Case also inferentially indicates the views of the court on this subject in the case of *Durant v. Lexington Coal Mining Co.*, 97 Mo., loc. cit. 65, 10 S. W. 484. In discussing an act of the Legislature of March 23, 1881 (Laws 1881, p. 165), in respect to regulations of operating coal mines, it was said by the learned judge in the course of the discussion: "Now, the statute in question, in its many provisions, seeks to protect the health and safety of persons employed in and about mines, and whilst going in and out of them. This is its general scope and purpose, and to that end many detailed provisions and regulations are made. Among others, the cage must be furnished with guides to conduct it on slides, and with spring catches, and there must be a brake on every drum. These regulations are for the protection of persons while at work in the shaft, as well as when going up and down." One of the highest and most important duties of the state is the preservation of the health and safety of its people. The Constitution of Missouri (article 12, § 5) provides: "The exercise of the police power of the state shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well-being of the state." That the Legislature has the power to make all needful regulations in the conduct and management of a business which is attended by danger to health or safety to the employes is no longer an open question. To hold otherwise would be but a humiliating confession that the framers of our Constitution had so hampered and limited the lawmaking power as to render it helpless and powerless in the discharge of its most important duty to the public. This view is fully sustained by all the authorities to which our attention has been called by both appellant and respondent. It is recognized in one of the leading cases cited by appellant (*Ritchie v. People*, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79, 46 Am. St. Rep. 315), where the court very clearly and correctly declares the law. It will be observed, in that case, there is a full and unqualified recognition of the right of the state, by proper enactments, to exercise its police power. The court in that case said: "The police power of the state is that power which enables it to promote the health, comfort, safety, and welfare of society. It is very broad and far reaching, but is not without its limitations. Legislative acts passed in pursuance of it must not be in conflict with the Constitution, and must have some relation to the ends sought to be accomplished; that is to say, to the comfort, welfare, or safety of society. Where the ostensible object of an

enactment is to secure the public comfort, welfare, or safety, it must appear to be adapted to that end. It cannot evade the rights of person and property under the guise of a mere police regulation when it is not such in fact; and where such an act takes away the property of a citizen, or interferes with his personal liberty, it is the province of the courts to determine whether it is really an appropriate measure for the promotion of the comfort, safety, and welfare of society." It is apparent that if the act before us is reasonably adapted to the end and purpose for which it was enacted, and was not enacted under the guise of a mere police regulation, when it is not such in fact, then the validity of the act should be upheld. The fact that this act is applicable to only that class of persons or corporations searching for minerals or other valuable substances beneath the surface of the earth does not render it offensive to the provision of the Constitution directed against special or class legislation. If the legislation operate equally upon the class distinguished, it is not obnoxious to the Constitution. It is well settled that "legislation is not open to the charge of depriving one of his rights without due process of law if it be general in its operation upon the subjects to which it relates." *Dent v. West Virginia* (1888) 129 U. S. 124 [9 Sup. Ct. 231, 32 L. Ed. 623]. The same court has held that statutes creating a different rule of liability, as applied to one class of persons, from that generally in force, do not infringe the right to 'due process of law.' *Railroad v. Humes* (1885) 115 U. S. 512 [6 Sup. Ct. 110, 29 L. Ed. 463]; *Railroad v. Mackey* (1888) 127 U. S. 205 [8 Sup. Ct. 1161, 32 L. Ed. 107]. And the Supreme Court of this state has determined that 'a statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special.' *State ex rel. Lionberger v. Tolle* (1880) 71 Mo. 650."

It is insisted that this act makes a distinction between those working underground in search of minerals and those working underground not in search of minerals. This act only applies to the class searching for minerals. As to that class, it makes no distinction. The Legislature doubtless realized the necessity of the provisions of this act, being made applicable to those in search of minerals. The operation of mines is a permanent business, lasting frequently for many years. On the other hand, the digging of a well or the running of a tunnel is not to be classed as a business. It is work that is completed in a comparatively short time. Hence there was absolutely no reason or necessity for including in the act those who might, in the construction of railroads or other work, incidentally be required to work beneath the surface of the earth.

The crucial test as to the validity of this act is narrowed down to the simple question, is the business of operating mines and search-

ing for minerals beneath the surface of the earth, in this state, of that character which would reasonably justify the lawmaking power in distinguishing this class in such business, for the purposes of preservation of the health and safety of the employes engaged in such work? In the determination of this question, it is not inappropriate to refer briefly to the history of the growth of the mining industries in this country, and the tendency of the Legislatures of the various states to enact appropriate and reasonable laws for the preservation of the health and safety of those engaged in the operation of such work. This state stands in the front rank in the progress and advancement made in the development of its mining industries. In harmony with the proportions to which our mining business has grown, we find full proof and recognition of this wonderful growth in the various acts of the Legislature surrounding the operatives with all reasonable safeguards for the preservation of their health and safety.

In the Utah case, Mr. Justice Brown, speaking for the Supreme Court of the United States, in support of the reasons for sustaining the Utah act, which is similar to the one before us, very appropriately refers to the history and progress in the mining industries of this country. He says: "While the business of mining coal and manufacturing iron began in Pennsylvania as early as 1716, and in Virginia, North Carolina, and Massachusetts even earlier than this, both mining and manufacturing were carried on in such a limited way and by such primitive methods that no special laws were considered necessary, prior to the adoption of the Constitution, for the protection of the operatives; but, in the vast proportions which these industries have since assumed, it has been found that they can no longer be carried on with due regard to the safety and health of those engaged in them, without special protection against the dangers necessarily incident to these employments. In consequence of this, laws have been enacted in most of the states designed to meet these exigencies, and to secure the safety of persons peculiarly exposed to these dangers. Within this general category are ordinances providing for fire escapes for hotels, theaters, factories, and other large buildings, a municipal inspection of boilers, and appliances designed to secure passengers necessarily incident to these methods of transportation. In states where manufacturing is carried on to a large extent, provision is made for the protection of dangerous machinery against accidental contact; for the cleanliness and ventilation of working rooms; for the guarding of wellholes, stairways, elevator shafts; and for the employment of sanitary appliances. In others, where mining is the principal industry, special provision is made for the shoring up of dangerous walls; for ventilation shafts, bore holes, escapement shafts, means of signaling the surface; for

the supply of fresh air, and the elimination, as far as possible, of dangerous gases; for safe means of hoisting and lowering cages; for a limitation upon the number of persons permitted to enter a cage; that cages shall be covered; and that there shall be fences and gates around the top of shafts; besides other similar precautions. * * * These statutes have been repeatedly enforced by the courts of the several states, their validity assumed, and, so far as we are informed, they have been uniformly held to be constitutional." *Holden v. Hardy*, 169 U. S. 393, 18 Sup. Ct. 388, 42 L. Ed. 780.

So far as Missouri is concerned, it is but common knowledge that thousands of men are engaged in labor in mining shafts, from 100 to 500 feet beneath the surface of the earth. These facts were presumably in the minds of the lawmakers when the act involved in this proceeding was adopted.

With this brief reference to the history of the mining industry, and in view of the peculiar conditions surrounding employes who perform the labor in the mines of this state, we are confronted with the question which is very aptly stated in the Utah case: "Whether the Legislature has adopted the statute in exercise of a reasonable discretion, or whether its action be a mere excuse for an unjust discrimination, or the oppression or spoliation of a particular class." In *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780, the act involved is nearly identical with the one before us in this cause. The validity of that act was sustained, and the court, in discussing the principle applicable to such legislation, said: "The enactment does not profess to limit the hours of all workmen, but merely those who are employed in underground mines, or in the smelting, reduction, or refining of ores or metals. These employments, when too long pursued, the Legislature has judged to be detrimental to the health of the employes; and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the federal courts. While the general experience of mankind may justify us in believing that men may engage in ordinary employments more than eight hours per day without injury to their health, it does not follow that labor for the same length of time is innocuous when carried on beneath the surface of the earth, where the operative is deprived of fresh air and sunlight, and is frequently subjected to foul atmosphere and a very high temperature, or to the influence of noxious gases generated by the processes of refining or smelting." It was also, during the course of the opinion in the *Holden and Hardy* Case, very clearly announced as to whom this law was made applicable, and the reasons are fully given for such distinction of a class, and the application of the law to that particular class. It was said: "The law in question is confined to the protection of that class of people en-

gaged in labor in underground mines, and in smelters and other works wherein ores are reduced and refined. This law applies only to the classes subjected by their employment to the peculiar conditions and effects attending underground mining and work in smelters and other works for the reduction and refining of ores. Therefore it is not necessary to discuss or decide whether the Legislature can fix the hours of labor in other employments. Though reasonable doubts may exist as to the power of the Legislature to pass a law, or as to whether the law is calculated or adapted to promote the health, safety, or comfort of the people, or to secure good order or promote the general welfare, we must resolve them in favor of the right of that department of government." It was further very aptly stated in support of the reasons why acts of this character are to be maintained as a valid exercise of legislative power: "The Legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employes, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules, and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the Legislature may properly interpose its authority." The court also made this very appropriate suggestion: "It may not be improper to suggest in this connection that although the prosecution in this case was against the employer of labor, who apparently, under the statute, is the only one liable, his defense is not so much that his right to contract has been infringed upon, but that the act works a peculiar hardship to his employes, whose right to labor as long as they please is alleged to be thereby violated. The argument would certainly come with better grace and greater cogency from the latter class. But the fact that both parties are of full age and competent to contract does not necessarily deprive the state of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. The state still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the state must suffer."

It is very earnestly insisted—in fact, the very able presentation of this case by counsel for appellants is principally predicated upon the contention—that the law upon which

this prosecution is founded infringes upon the liberty of the citizen to contract. This contention is very clearly answered by the court in *Holden v. Hardy*, supra, where the principle is forcibly and unqualifiedly announced that even the right to contract is subject to reasonable limitations, when the public interests demand it. This principle was thus clearly stated: "This right of contract, however, is itself subject to certain limitations which the state may lawfully impose in the exercise of its police powers. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental to the health of employes as to demand special precautions for their well-being and protection, or the safety of adjacent property. While this court has held, notably in the cases of *Davidson v. New Orleans*, 96 U. S. 97 [24 L. Ed. 616], and *Yick Wo v. Hopkins*, 118 U. S. 356 [6 Sup. Ct. 1064, 30 L. Ed. 220], that the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety, or morals, or the abatement of public nuisances, and a large discretion 'is necessarily vested in the Legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests.' *Lawton v. Steele*, 152 U. S. 183, 136 [14 Sup. Ct. 499, 38 L. Ed. 885]." It is argued by appellants that this case is not a controlling one, for the reason that it is based upon the peculiar provisions of the Constitution of that state. No one can read the case, and escape the conclusion that it is a clear, full, and exhaustive discussion of the principle involving the exercise of police power by the enactment of a law in all respects similar to the one before us for consideration. While, it is true, reference is made to the express provisions of the Constitution of Utah in respect to the operation of mining industries, yet the principles announced are applicable to any state where, under the Constitution, laws may be enacted in the exercise of the police power of the state. When it is once conceded that, under the Constitution of Missouri, the state may, in the exercise of its police power, enact laws for the preservation of the health and safety of its citizens, then the principles announced in the Utah case must, beyond dispute, be equally applicable to the Constitution and laws of this state. The principles announced in the Utah case, as well as the conclusions reached, are sanctioned by the appellate courts of New York; and in the recent case of *In re Ten Hour Law for Street Railway Employes*, by the Supreme Court of Rhode Island, it was quoted approvingly, in sustaining the validity of an act limiting the hours of labor for

street railway employes. 54 Atl. 602, 61 L. R. A. 612. While the question was not involved, yet in the case of *Atkins v. State of Kansas* (by the Supreme Court of the United States, not yet officially reported) 24 Sup. Ct. 124, 48 L. Ed. 207, Mr. Justice Harlan, in delivering the opinion of the court, involving the validity of the eight-hour law of the state of Kansas in respect to the performance of labor for the state, county, township, or any municipality, quoted approvingly what was held in the *Holden and Hardy Case* as to the limitations upon hours of labor in all underground mining, etc.

The recent case of *People of New York v. Joseph Lochner* (N. Y.) 69 N. E. 373, furnishes a very clear, full, and logical discussion of the question presented in this case. The act involved a similar question, and was assailed by the defendant upon the same grounds as those urged in the case at bar. To fully appreciate the application of the principles announced in that case, we here quote the statute assailed. "No employe shall be required or permitted to work in a biscuit, bread or cake bakery or confectionery establishment more than sixty hours in any one week or more than ten hours in any one day, unless for the purpose of making a shorter work day on the last day of the week; nor more hours in any one week than will make an average of ten hours per day for the number of days during such week in which such employe shall work." The court, in discussing this statute, said: "The statute authorizes the employment of men to labor in biscuit, bread, or cake bakeries, or confectionery establishments, not more than sixty hours in any one week, or more than 10 hours in any one day. This section of the statute merely declares that ten hours' labor performed within twenty-four hours shall constitute a day's work, and no employe shall be required or permitted to work a greater number of hours for such employer. The constitutionality of this act must be determined by the citizen's right to pursue a lawful employment. If the restriction is arbitrary, and does not pertain to the welfare and health of the people, it cannot be upheld. It was remarked by Judge Gray in *People v. Ewer*, 141 N. Y. 132 [36 N. E. 4], that 'it is difficult, if not impossible, to define the police power of a state, or, under recent judicial decisions, to say where the constitutional boundaries limiting its exercise are to be fixed.' The police power of the state is the power which enables it to promote the health, comfort, safety, and welfare of society. It is very broad and far-reaching, but it is not without its limitations. The line between a valid exercise of the police power and the invasion of private rights is clearly drawn by Judge Earl in his opinion in *Matter of Application of Jacobs*, 98 N. Y. 110 [50 Am. Rep. 636]. He says: 'Generally it is for the Legislature to determine what laws and regulations are needed to protect

the public health and secure the public comfort and safety, and, while its measures are calculated, intended, convenient, and appropriate to accomplish these ends, the exercise of its discretion is not subject to review by the courts. But they must have some relation to these ends. Under the mere guise of police regulations, personal rights and private property cannot be arbitrarily invaded, and the determination of the Legislature is not final or conclusive. If it passes an act ostensibly for the public health, and thereby destroys or takes away the property of a citizen, or interferes with his personal liberty, then it is for the courts to scrutinize the act, and see whether it really relates to, and is convenient and appropriate to promote, the public health.' " Finally, in that case, as will be observed in the course of the opinion, the court takes the broad position that the statute does not restrict or prohibit any of the rights of the citizen to contract and conduct his business, but simply regulates it. The court says on that subject: "The statute in question does not restrict the right of the defendant to carry on his business, or to engage as many persons as he sees fit in such business, but it simply prohibits him from requiring or compelling his employes to work more than ten hours in any one day, or more than sixty hours in any one week. In other words, the statute does not prohibit any right, but regulates it; and there is a wide difference between regulation and prohibition—between prescribing the terms by which the right may be enjoyed, and the denial of that right altogether. The defendant is not deprived of any right or privilege which is not denied to others in a similar business. The provisions of the statute in question are directed to all persons engaged in the bakery business. It neither confers special privileges, nor makes unjust discrimination. All who are engaged in that business are entitled to its benefits and subjected to its restrictions. It is open to any citizen to engage in that business, and the privileges conferred belong equally to all. It is very important for the health of the community that bakers should supply people with wholesome bread and pure food. The people are interested in the business. It is of so much public interest that the Legislature, under the police power of the state, may control the business by any regulation which is necessary to secure the public health. The regulations instituted by this statute were for the purpose of protecting the health of the employes, and giving the public pure and wholesome bread and other articles of food sold by bakers."

In *Commonwealth v. Hamilton Manufacturing Co.*, 120 Mass. 383, the validity of a statute predicated upon the same principle as the one involved in this controversy was assailed. The statute ruled upon in that case prohibited the employment of all persons under the age of 18 and of all women, in la-

boring in any manufacturing establishment, more than sixty hours per week. This statute was held valid, and in so holding the court very clearly announced its views upon statutes of this character. It said: "The law, therefore, violates no contract with the defendant, and the only other question is whether it is in violation of any right reserved under the Constitution to the individual citizen. Upon this question, there seems to be no room for debate. It does not forbid any person, firm, or corporation from employing as many persons or as much labor as such person, firm, or corporation may desire; nor does it forbid any person to work as many hours a day or a week as he chooses. It merely provides that in any employment which the Legislature has evidently deemed, to some extent, dangerous to health, no person shall be engaged in labor more than ten hours a day or sixty hours a week. There can be no doubt that such legislation may be maintained either as a health or police regulation, if it were necessary to resort to either of those sources for power. This principle has been so frequently recognized in this commonwealth that reference to the decisions is unnecessary."

It will be observed that in *In re Morgan*, 26 Colo., loc. cit. 433, 58 Pac. 1071, 47 L. R. A. 52, 77 Am. St. Rep. 269, it is contended by the learned judge rendering that opinion that the conclusion reached in *Commonwealth v. Hamilton Manufacturing Co.*, supra, is in conflict with the later case by the same court in *Commonwealth v. Perry*, 155 Mass. 117, 28 N. E. 1126, 14 L. R. A. 325, 31 Am. St. Rep. 533. A careful analysis of the *Perry* Case makes it clearly apparent that there is no such conflict. It neither refers to, nor in any manner criticises, the correctness of the conclusions reached in the *Hamilton* Case. The same or a similar question was not involved. In the announcement of the constitutional rights of the citizen to contract and enjoy his property, we can all agree. These principles are not out of harmony with those announced in the *Hamilton* Case. Hence we must most respectfully withhold our concurrence in the view of the learned judge as to this conflict in the cases of the *Massachusetts Supreme Court*.

This court, in no uncertain terms, has indicated its views as to the situation and condition of miners in the performance of labor beneath the surface of the earth. In sustaining the validity of the law which provided for the recovery by the widow and children of a miner killed by the negligence of his employer a greater amount of damages than is provided for under the general damage act, *Burgess, J.*, in *Hamman v. Cen. Coal & Coke Co.*, 156 Mo., loc. cit. 241, 58 S. W. 1093, very tersely and clearly announced the views of this court on that subject. He said: "It is of common knowledge that no class of laborers are so much exposed to danger as miners, and that none, in proportion to

the number engaged, meet with so many fatal disasters; and the Legislature, doubtless for that reason, in order to protect human life, and to prevent such occurrences as far as possible, thought that the necessity for increasing the maximum amount of damages over that fixed by law in other cases existed, in order to stimulate operators of such mines to all needful and proper precautions for their protection. Moreover, 'class legislation is not necessarily obnoxious to the Constitution. It is a settled construction of similar constitutional provisions that a legislative act which applies to and embraces all persons "who are or who may come into like situations and circumstances" is not partial.' *Humes v. Railroad*, 82 Mo., loc. cit. 231 [52 Am. Rep. 369.]"

The New York Court of Appeals, in *People v. Havnor*, 149 N. Y. 195, 43 N. E. 541, 31 L. R. A. 689, 52 Am. St. Rep. 707, clearly and correctly announces the true doctrine of the interest that the state should manifest in its people. The court in that case was treating of a statute prohibiting the carrying on the business of barbering on Sunday. While that case does not involve the precise question before us, it clearly indicates the importance which should be attached by the state to the preservation of the proper physical condition of its citizens, and the court very aptly announced in that case: "It is to the interest of the state to have strong, robust, healthy citizens, capable of self-support, of bearing arms, and of adding to the resources of the country. Laws to effect this purpose, by protecting the citizen from overwork, and requiring a general day of rest to restore his strength and preserve his health, have an obvious connection with the public welfare. Independent of any questions relating to morals or religion, the physical welfare of the citizen is a subject of such primary importance to the state, and has such a direct relation to the general good as to make laws tending to promote that object proper under the police power, and hence valid under the Constitution, which 'presupposes its existence, and is to be construed with reference to that fact.' *Village of Carthage v. Frederick*, 122 N. Y. 268, 273 [25 N. E. 480, 10 L. R. A. 178, 19 Am. St. Rep. 490]. The statute under discussion tends to effect this result, because it requires persons engaged in a kind of business that takes many hours each day to refrain from carrying it on during one day in seven. This affords an opportunity, recurring at regular intervals, for rest needed both by the employer and the employed; and the latter, at least, may not have the power to observe a day of rest without the aid of legislation. As Mr. Tiedeman says in his work on *Police Powers*: 'If the law did not interfere, the feverish, intense desire to acquire wealth, * * * inciting a relentless rivalry and competition, would ultimately prevent not only the wage earners, but likewise the capitalists and employers themselves, from yielding to the warnings of nature, and obeying the in-

stinct of self-preservation by resting periodically from labor.' *Tiedeman's Lim. Police Powers*, 181. As barbers generally work more hours each day than most men, the Legislature may well have concluded that legislation was necessary for the protection of their health." This principle is supported and fully sanctioned in *Ex parte Northrup*, 41 Or. 489, 69 Pac. 445; *State v. Petit*, 74 Minn. 376, 77 N. W. 225; and numerous other cases.

The tendency of the holdings of all the courts upon this question, after a full review of all the cases, is very aptly stated by the author in *Tiedeman on State & Federal Control of Persons & Property*, vol. 1, page 336. He says: "While it would seem to be the settled judicial opinion that it is unconstitutional for the Legislature to regulate the hours of labor by taking away all liberty of contract in the matter where the object is merely the protection of the employé against the exaction of a disproportionate amount of work for the wages paid, the courts are disposed to hold otherwise where the statutory regulation is intended to protect the safety of the public, or the health of the individual employé, from the dangers threatened by the excessive and exhaustive labor of the workman."

Our attention is earnestly directed by appellant to the case of *In re Morgan*, supra. It must be conceded that it is a well-considered case. It is a thorough, able, and clear presentation of the question involved. It must be observed, however, that it is distinguished from the case at bar in this: that the statute of which it treats and holds invalid is addressed to the regulation of the action and conduct of the individual, whereas the law with which we are dealing is directed to the regulation and management of a business. It, however, indicates clearly, from the discussion of the proposition, that the result of the conclusion reached would not be different, even though the statute assailed was similar to the one presented to us for consideration. It is unnecessary to give expression to our disapproval of the principles announced in that case until the conclusion is finally announced upon the law involving the question as contained in our statute upon which this prosecution is based.

In *Ritchie v. People*, supra, to which our attention has been directed, it will be noted that the court does not deny the right of the state, under proper conditions, to exercise its police power by the enactment of laws applicable to a particular class; but the question in that case was, as it is in every case of that character of legislation, was the law an arbitrary distinction of a class, without sufficient grounds for distinguishing the class? It was said by the court in that case: "But there is nothing in the nature of the employment contemplated by the act which is in itself unhealthy or unlawful or injurious to the public morals or welfare." To the same effect is the case of *In re Jacobs*, 98 N. Y.

98, 50 Am. Rep. 639. The act assailed in that case was one "prohibiting the manufacture of cigars and preparation of tobacco in tenement houses" in certain cases. It was ruled by the court in the Jacobs Case that the law was unconstitutional, because it was apparent that the act did not tend to promote public health, and that was not the end actually aimed at. An examination of that case will demonstrate that it in no manner conflicts with the subsequent New York cases which so clearly announce the principles contended for by the state. In *People v. Havnor*, supra, the principles announced in the Jacobs Case are fully recognized. Then it proceeds to make clear the right of the state to protect its citizens from overwork in a character of business which is attended with danger to their health and safety.

The proposition is not disputed that legislation for the promotion of public health must have a reasonable relation to the end to be accomplished. If the act is a mere pretense, under the guise of police regulation, to invade the constitutional rights of the citizen, it cannot and should not be upheld. But that is not this case. The Legislature of Missouri presumably had before them the conditions surrounding the prosecution of the work in the mining industries of this state—the rapid and unparalleled development of that industry, the immense amount of labor required to perform the work, the nature and character of the underground work, the depth of the mineral shafts, and the danger to the health of the employes by reason of being confined beneath the surface of the earth. In view of this situation, we have reached the conclusion that the lawmakers of Missouri, fully recognizing the duty of the state to its citizens, were reasonably justified in recognizing the necessity for additional precautions in the preservation of the health and safety of those in the performance of work beneath the surface of the earth in search of minerals or other valuable substances. Doubtless the Legislature deemed it wise, for the protection of the numerous citizens of this state engaged in that class of work, to fix the limitation as was designated in the act; but, if it was clearly apparent that this limitation was unreasonable and arbitrary, this court would not and should not hesitate to so declare. The General Assembly is a co-ordinate branch of the state government, and, while its unauthorized acts should not be sanctioned, yet the high sense of propriety would require that proper and appropriate deference to its judgment as to the necessity of legislation of this character should be recognized.

We cannot agree with learned counsel for appellant that the performance of work in underground mines is not attended with danger to health. To maintain that it is equally healthy in a deep mineral shaft, full of smoke and necessarily damp, as it is in the ordinary pursuits in the open, fresh air and light, is

simply a position opposed to all the natural laws of health.

This act of the General Assembly is valid, and the trial court properly refused the instructions prayed for by defendants.

There is but one remaining question. Defendants sought to introduce testimony of expert witnesses tending to show that the underground work contemplated by this act of the Legislature was not attended with danger to the health of those engaged in the performance of such work. This testimony was excluded by the court, and, in our opinion, correctly so. The validity of laws enacted in the exercise of the police power of the state cannot be made dependent upon the views of experts as to the necessity of such enactment. If the constitutionality of all laws enacted for the promotion of public health and safety can be assailed in this manner, truly and sadly would it be declared that our laws rest upon a very weak and unstable foundation.

We have thus given expression to our views upon the constitutionality of the act of the Legislature involved in this cause. We fully recognize the solemn duty of courts to guard the constitutional rights of the citizens against merely arbitrary power, but, on the other hand, it must be remembered, as was so aptly stated by Mr. Justice Harlan in the *Atkins Case*: "Indeed, the public interests imperatively demand that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution."

The judgment of the trial court should be affirmed, and it is so ordered. All concur.

MEYER BROS. DRUG CO. v. BYBEE et al.
(Supreme Court of Missouri, Division No. 2.
Feb. 1, 1904.)

HOMESTEAD—EXEMPTION—ESTOPPEL—FINANCIAL STATEMENTS—EXECUTION—MOTION TO QUASH—PROOF—WAIVER—ADMISSIONS.

1. Where, on a motion to set aside a levy, plaintiff filed an answer reciting that plaintiff, for answer to defendant's motion to quash a levy made "on the execution levied on plaintiff's judgment against" defendant, denies that said real estate seized and levied on by said sheriff under and by virtue of said execution is or was defendant's homestead, such answer constituted an admission of the issuance and levy of the execution, relieving defendant from the obligation of proving the same.

2. Where, on a motion to quash an execution levy, counsel for the execution creditor, in an objection to a question asking the debtor how he acquired the land levied on, stated, "It stands admitted that he acquired the land prior to the time that this debt accrued," such admission relieved the debtor from proving the date of the filing of his deed under which he claimed the land levied on.

3. A cause will be determined on appeal to the Supreme Court on the same theory that was presented in the trial court.

4. Defendant purchased two tracts of land which had previously constituted a single farm, but which were divided by a small stream. The

original buildings on the land were located on the larger tract, and, some years after his purchase, defendant erected a new house on a smaller tract, intending to make the same his home. He removed his parents, whom he supported as part of his family, to the new house, and himself occupied the old buildings, except temporarily during his residence in town on two occasions, during which, however, he received supplies from both tracts. He thereafter sold the larger tract, and returned to and occupied the house built on the smaller. *Held*, that a finding that he had not abandoned the smaller tract as his homestead was proper.

5. Rev. St. 1899, § 3616, provides that the homestead of every head of a family specified, etc., shall be exempt from execution, and prohibits the husband from alienating the same without his wife joining in the conveyance; and section 4835 authorizes a married woman to invoke the exemption specified by such sections. *Held*, that where defendant, who was the head of a family, executed a financial statement as a member of a firm, including his homestead as a part of his assets, and failed to claim any part of the land as his homestead, he was not thereby estopped to subsequently claim his homestead exemption therein.

Appeal from Circuit Court, Benton County; W. W. Graves, Judge.

Motion by J. W. Bybee and others to quash an execution levied on a judgment recovered against J. W. Bybee & Co. by the Meyer Bros. Drug Company. From an order granting the motion, the drug company appeals. Affirmed.

Thurman, Wray & Timmonds, for appellant. W. F. Wright, W. S. Jackson, and G. W. Barnett, for respondents.

FOX, J. This proceeding originated from a levy of an execution in the hands of the sheriff of Benton county, Mo., upon certain land of respondent J. W. Bybee. In respect to the levy, it is claimed by respondent that the land levied upon constituted the homestead of respondent, and hence was exempt from the levy under the execution. This proceeding is based upon the following motion filed by respondent: "Now comes the defendant J. W. Bybee, and moves the court to quash the levy of the execution heretofore levied in this cause, as far as the same pertains to the land of defendant J. W. Bybee which has been seized under said execution, because said real estate is exempt from execution, the same being the homestead of the said J. W. Bybee, and because the sheriff, in levying said execution, failed to advise said Bybee of his rights to homestead, and failed to set off his homestead to him, as the law requires the sheriff to do in such cases." While, technically, appellant was not required to file an answer to this motion, yet one was filed, which is substantially as follows: "Comes now the plaintiff, and for answer to defendant J. W. Bybee's motion to quash levy made by the sheriff of Benton county on the execution issued on plaintiff's judgment against said J. W. Bybee, and denies that said real estate so seized and levied on by said sheriff of Benton county,

Missouri, under and by virtue of said execution, is or was defendant's homestead, and denies that defendant is entitled to homestead in said real estate, and avers the fact to be that if said real estate ever constituted the homestead of defendant, or any part thereof, which fact the defendant denies, the same was abandoned by the defendant long before contracting the debt for which plaintiff's said judgment was rendered, and said defendant, after contracting said debt with plaintiff on the faith of the fact that said homestead, if any ever existed, had been by defendant abandoned, for the purpose of fraudulently depriving this defendant of his remedy in collecting his said debt, went into the possession of said real estate, and now sets up his pretended claim of homestead. Further answering defendant's said motion to quash said levy, plaintiff says that defendant ought not to be permitted to claim said real estate as a homestead, and exempt from sale on said execution, in this: That long before defendant contracted the debt for which plaintiff's judgment was rendered against him, and upon which judgment the execution in this case was issued, defendant had removed from the neighborhood of said real estate—never having actually occupied the same—to the city of Warsaw, Benton county, Missouri, and had become a resident thereof, and engaged in the mercantile business in said city. That said defendant, while so engaged in the mercantile business in said city of Warsaw, for the purpose of procuring credit and inducing this plaintiff to sell him goods, wares, and merchandise on credit, and to induce him to contract the debt for which this judgment was rendered, by his conduct, claim, and representations, led this plaintiff to believe that said real estate was assets in his hands subject and liable for the payment of debts, and especially the debt which he (the defendant) was endeavoring to contract with plaintiff, and for which debt this judgment was rendered, and that said real estate was not homestead. That this plaintiff had no knowledge or information that said real estate was homestead, or that said real estate was not subject to the payment of the debt about to be contracted with defendant, and believed and relied on such conduct, claim, and representation as true—that said real estate was assets in defendant's hands subject to the payment of this as well as other debts of defendant, and not homestead—and, so relying on said conduct, claim, and representation of defendant, extended defendant credit, and contracted the said debt for which said judgment was rendered. That this plaintiff would not have extended said defendant credit, and sold him goods, wares, and merchandise, or contracted said debt, if it had not believed and relied upon the said conduct, claim, and representation that said real estate was assets belonging to defendant, subject to the payment of said debt, and not homestead, as now claimed

¶ 5. See Homestead, vol. 25, Cent. Dig. § 344.

by him. That defendant well knew all of the facts in relation to the said real estate at the time he, by his conduct, claim, and representations, induced said plaintiff to extend him credit, through and by which said debt was contracted on the faith of his said conduct, claim, and representations that said real estate was assets in his hands, and not homestead, and subject to the payment of said debt. That to permit defendant now to assert his claim that said real estate is homestead operates as a fraud on this plaintiff, and wholly deprives it of any remedy or means by which it is able to collect its debt so contracted and reduced to judgment. That this defendant is insolvent, and without any other property subject to execution on said judgment, so that plaintiff says that defendant ought to be estopped from now asserting his said claim that said real estate is homestead, exempt from execution, after so inducing plaintiff to extend him credit, and contracting said debt for which said judgment was rendered, on the faith of the fact that said real estate was subject to execution for the payment of defendant's debts."

The trial court heard the testimony on the motion, which was substantially as follows: "In 1892 defendant Bybee purchased a farm of 225 acres about 14 or 15 miles from Warsaw, and, with his family, took immediate possession thereof, or, rather, he was living on the farm at the time he bought it. He bought this farm in two parts from different persons. One hundred and fifty acres was purchased from his father; and about two months later he purchased 75 acres, adjoining the 150, of one Bird, for the purpose and with the intent of making the two tracts one farm, which he intended to use and occupy as his home. The 75 and 150 acres had formerly been one farm, and belonged to the same person, but had been sold in two parts to two different persons, and defendant purchased both pieces, and used them together as one farm. The two pieces were already inclosed under one fence as one tract, and there was no fence dividing them, but there was a small stream or branch running between the 75 and 150 acre pieces. During all the time that defendant owned this land, up to the time he sold the 150 acres, he used the entire 225 acres together as his home place or homestead. When Mr. Bybee bought this land, the house or residence building was situated on the 150 acres, and hence defendant, with his family, resided on this part where the building was, as there was no building on the 75 acres; yet it formed a part of the entire tract which defendant was occupying as a homestead. In 1894 or 1895 defendant built a new dwelling house on this 75 acres, with a view and the purpose, as he testifies, of making that new house his permanent dwelling house on said farm, but did not at that time remove from his old house into the new; but, as his father and

mother lived with him, were dependent on him, and in fact constituted a part of his family, he placed them in this new house, but with the intent of making this new house his own, as well as his parents,' dwelling house. The entire 225 acres was farmed together as one place, and defendant testified that he built the new house to live in. In 1896 defendant, with his family (except his father and mother, who remained on the place occupying this new house), removed to a little place called 'Durock,' near by, and engaged in the mercantile business; leaving his father there in charge of the farm for him. He says he went to Durock to engage for a time in mercantile business in addition to his farming operations, but with the intent of holding and retaining this farm as his homestead, and with the intent of returning to it. He purchased some lots in Durock, which he lived on about one year during the year and a half he lived there, but, he testifies, without any intent of making them his home, but only intended them for temporary use while engaged in mercantile business. During all the time that defendant was at Durock, as well as while at Warsaw, defendant testifies that he kept agricultural implements and personal property on his said farm, and received supplies for himself and family from the products thereof. He always spoke of and regarded this farm as his home. After remaining at Durock for something over a year, he returned to his home on the farm; going into the same house he had left, as his parents occupied the other one. He further states that, after staying on there one season, he with his family removed to Warsaw, in the same county, to furnish his children better school advantages, and engaged in mercantile business, and remained there about 18 months, leaving his farm in the care of his father and mother. During this time he received supplies from his farm, as before stated, and still retained it as his homestead, with the intention of returning to same, and without any intent of abandoning it as a home. Some time in 1897 or 1898 he sold the 150-acre part of his said farm, as his circumstances became such that he could not afford to keep all his land; but he retained the 75 acres in dispute, for the purpose, as he stated, of keeping this remnant of his home place as his permanent homestead. In the spring of 1900 he, with his family, returned to this 75 acres, and occupied this new house, which he had years ago built on said land for his permanent residence, and he still resides there. This land is worth probably \$800—much less than the amount exempt as a homestead. The debt in question was contracted in 1899 and 1900, and the judgment was rendered and execution thereon issued and levied on the 75 acres in the early part of 1900."

Appellant offered in evidence the account upon which the judgment is predicated. Rola Bruce testified in behalf of appellant. His

testimony simply related to the identification of the financial statement made by the respondent, and, further, that credit was given the firm on the faith of the statement. To the same effect was the testimony of witness Geo. Meyer. Appellant offered in evidence the financial statement as identified by the witness Bruce. It was as follows:

Name of firm: J. W. Bybee & Co.
 Town: Warsaw, Mo. Date: July 31st, 1899.
 Names of members of firm. Age. Married. Single.
 J. W. Bybee..... 37 Yes —
 James Watts..... 33 Yes —
 Capital in business: \$3,000.
 Contributed by: J. W. Bybee & James Watts.
 Value of stock: \$2,800.
 Value of fixtures: \$200.
 Insurance of stock and fixtures: \$2,000.
 Mortgage on stock or fixtures, and amount: None.
 Cash on hand and in bank: \$50.
 Outstanding accounts, good: \$600.
 Real estate, consisting of what, and value: \$5,500.
 Two good bottom farms and one good brick business house on Main street, Warsaw, Mo. Held in name of: Business house in name of Jas. Watts; farms, J. W. Bybee.
 Encumbrance on same, \$2,400.
 Homestead, or real estate exempt, included in above, consisting of what, and value: \$——.
 Have borrowed: \$600.
 Lenders are secured by personal security.
 Amount of total indebtedness: \$3,000.
 Remarks: The two farms are good bottom land and belongs to J. W. Bybee, encumbrance on the two farms is \$1,100, and the business house and lot belongs to Jas. Watts, encumbrance \$1,300. Total of both \$2,400.
 Signature: J. W. Bybee & Co.
 Stamped on face: "Received Aug 1, 1899, Meyer Bros. Drug Co."

At the close of the evidence the cause was submitted to the court, and judgment was rendered sustaining the motion to quash levy of execution. From this judgment, plaintiff prosecutes its appeal to this court.

There are four propositions presented upon this appeal for solution: First, it is urged that the failure to introduce the execution, in pursuance of which the levy was made, must result in the reversal of this cause; second, the similar insistence is made that the failure to introduce the date of the filing of the deed under which the land was claimed is fatal to the judgment; third, that the facts as developed show that respondent was not entitled to a homestead in the premises, and, if so, he had abandoned it; fourth, that, by the statement introduced in evidence, respondent is estopped from claiming homestead.

As to the first proposition, will say: Ordinarily it is true that it is incumbent upon the party against whom the execution is issued, and upon whose property it is levied, to establish the fact of the issuance and levy of the execution by the introduction of it. However, the proceeding upon this motion presented a question of fact, to be determined like any other similar question. The facts necessary to be shown upon this motion by respondent in order to warrant the court in sustaining it are no exception to the well-recognized and ordinary rule "that the facts may be admitted, or their formal proof waived." While the answer filed by appellant was unnecessary, and is no pleading recognized in proceedings of this character, still, if a statement is made and filed, in which

certain facts are admitted, we see no reason for the necessity of proof of such facts. If counsel for appellant had, in open court, orally admitted that the execution was issued and levied, this certainly would have avoided the necessity of proof of such facts, and we take it that the allegations in the answer before us are of equal force with the oral statements, admitting the facts necessary to be proven. The first allegation in the answer is a broad admission that the execution was issued and levied. It states: "Comes now the plaintiff, and for answer to defendant J. W. Bybee's motion to quash levy made by the sheriff of Benton county on the execution issued on plaintiff's judgment against said J. W. Bybee, and denies that said real estate so seized and levied on by said sheriff of Benton county, Missouri, under and by virtue of said execution, is or was defendant's homestead." It is apparent from this statement that the appellant conceded that the execution was issued and levied, and was not contesting that fact in the trial of this proceeding; hence it was unnecessary to introduce the execution. The trial court could not escape the conclusion that the execution was issued and levied, from the allegations in the answer.

The same may be said upon the second proposition, as to the failure to introduce the deeds indicating the date of their filing for record. In the record before us, as furnished by appellant, we find that it is admitted that the respondent acquired the land in dispute prior to the time that this debt accrued. This admission by appellant was made in connection with an objection to a question propounded to respondent, while on the witness stand. The question propounded to respondent and objection are as follows: "Q. Just tell the court, Mr. Bybee, about how you acquired this land, how you paid for it, etc.? Mr. Lay: I object to that question, for the reason it is wholly immaterial. It stands admitted that he acquired the land prior to the time that this debt accrued." It is apparent, from objection and admission, that appellant was not contesting the fact as to whether respondent had a deed to the land, or the date of the filing for record. It is said expressly by appellant, in the objection to a question as to how he acquired the land, that it was immaterial, and then it made the admission, as stated. It is but a fair presumption that, had not the objection and admission been made, respondent would have, in answer to the question as to how he acquired the land, exhibited his deed to the premises in dispute. Again, it will not be presumed that appellant was intending to make a useless admission, and unless the admission be construed as meaning that he acquired the land by deed, which was duly filed before the debt was created, then it amounts to nothing. For if it was only intended to admit that he acquired the land, and not the filing of the deed, the admission could serve

no purpose, for the deed would have to be introduced to show its filing.

It is apparent from the entire record in this cause that the appellant did not try this case on the theory that defendant's deed was not filed in due time to entitle him to claim a homestead, if in fact the land constituted his homestead. Doubtless the court accepted the admission on the theory that appellant was conceding that respondent acquired the land by deed duly recorded before the accruing of the debt, and that the contested questions were as to his occupancy of the land as a homestead, his abandonment of it, and his estoppel from claiming it by reason of his conduct. In the trial of a proceeding of this character, when the date of acquiring the land depends upon the date of filing the deed for record, an admission in the form of the one before us should be construed most strongly against the party making it; and, in the absence of anything indicating a limitation of the admission, it will be taken as meaning that the land was acquired by deed duly filed for record before the debt accrued. This court, in the disposition of causes upon appeal, should determine them on the theory presented in the trial court. Litigants should not and will not be permitted to contest a proceeding upon one theory, and then, when it reaches this court, shift their position by demanding the formal proof of facts which were practically admitted in the court below. *Farrar v. R. Co.*, 162 Mo. 469, 63 S. W. 115; *Goodman v. Crowley*, 161 Mo. 657, 61 S. W. 850.

It is next insisted that the respondent had two separate tracts of land—one of 150 acres, and the other, which is in dispute, of 75 acres; that his dwelling house was on the 150-acre tract and hence he was not entitled to claim the 75-acre parcel as his homestead. The testimony in this cause, as disclosed by the record, shows that these two tracts of land constitute one farm, which was occupied by respondent as a home until he sold the 150-acre tract. It was occupied as one tract, and, had this execution been levied on the whole 225 acres, respondent, under the statute, would have had the right to designate the part of it to which the exemption should apply. Rev. St. 1899, § 3617. The mere fact that his residence was on one of the tracts did not confine his homestead exemption to that particular tract. His use and cultivation of the entire tract, in contemplation of the homestead act, made his occupancy of the 75-acre parcel just as full and complete as the one upon which his residence was located. The separation of these two tracts by a stream did not destroy the right of respondent to claim his homestead exemption on any portion of the entire tract, if it was used as a whole, and used in connection with each other. Tracts of land occupied as a homestead need not be contiguous, but frequently are long distances apart; and, if they are used as a whole and in con-

nection, the homestead exemption may be selected and claimed from any portion of it. *Grimes v. Portman*, 99 Mo. 229, 12 S. W. 792; *Perkins v. Quigley*, 62 Mo. 498. The testimony in this cause clearly indicates that respondent occupied the entire tract of 225 acres as a home for himself and family. He sold the 150-acre tract, and built a new house on the 75 acres, and placed his parents there, who, as he testifies, were a part of his family; and, unless the testimony shows that he abandoned it, there was ample testimony to authorize the trial court in holding that the homestead exemption of respondent was applicable to the 75-acre tract.

This leads us to the proposition, contended for by appellant, that respondent abandoned this homestead. To support this contention, appellant must rely solely upon the testimony of respondent J. W. Bybee. His testimony, briefly summarized, is that he built the new house on the land in dispute for the purpose of preserving a home; that his parents were old, and he kept them as a part of his family, and placed them in this new building; that he never left the occupancy of this land with the intention of not returning, but the reverse; that his leaving it was temporary; and that he always expected to return to it as his home, claimed it as his home, kept part of his farming implements on the place, and kept his father and mother on the place, as he claimed, as members of his family. If the testimony of the respondent is true, it fully authorized the trial court in reaching the conclusion that there was no abandonment. The court had the witness before it, and, doubtless, in weighing his testimony, applied the usual and ordinary tests of the credibility of witnesses and the weight to be attached to their testimony; and we are unwilling, in view of the recognized rule as to the deference to be paid to the findings of the trial court, to disturb this judgment on that account.

This leads us to the consideration of the only remaining proposition involved in this proceeding; that is, the question of estoppel by reason of the statement made by the respondent. Conceding, for the purposes of this case, that the failure to state the amount of farm property exempt from execution must be construed as a declaration on the part of respondent that none of his farm lands were exempt from execution, we are confronted with the proposition, does this statement operate as an estoppel upon the respondent, and prevent him from asserting his claim to homestead exemption? In the consideration of this question, it is highly important to keep in view the policy and the purposes sought to be accomplished by the homestead act. In treating of the principle upon which the homestead laws are predicated, Mr. Thompson, in his work on Homesteads, says: "The law," said the Supreme Court of Iowa, in an early case, "is based upon the idea that, as a matter of public policy,

for the promotion of the property of the state, and to render independent and above want each citizen of the government, it is proper he should have a home—a homestead—where his family may be sheltered and live beyond the reach of financial misfortune and the demands of creditors who have given credit under the law.' And this policy is characterized as 'liberal' and 'benevolent.' And we find scattered through the cases which involve the construction of these laws such expressions as these: "This beneficent provision for the protection and maintenance of the wife and children against the neglect and improvidence of the father and husband." "That the homestead exemption was founded upon principles of the soundest policy, cannot be questioned. Its design was not only to protect citizens and their families from the miseries and dangers of destitution, but also to cherish and support in the bosoms of individuals those feelings of sublime independence which are essential to the maintenance of free institutions. These are noble objects." "It was an enlightened public policy, looking to the general welfare, as well as to that of the individual citizen, which dictated the passage of the homestead act; and the obvious intent of the act is to secure to every householder or head of a family a home—a place of residence—which he may improve and make comfortable, and where the family may be sheltered and live beyond the reach of those financial misfortunes which even the most prudent and sagacious cannot always avoid." This being a clear and correct announcement of the purposes of the homestead provisions, is it not made apparent that the ordinary rules of estoppel should not be made applicable to heads of families who are entitled to claim it? If the mere statement of a pressed debtor can operate as, and is, a bar to the claim of homestead rights, then we confess that "the wise and benevolent policy which dictated the enactment of these provisions has been absolutely destroyed." The homestead laws were never primarily enacted for the benefit of the father or husband. Their true spirit is the protection of the wife and children against a careless and improvident father and husband.

We have reached the conclusion that the statement made by respondent as to his financial condition does not operate as an estoppel or waiver of his right to claim his homestead exempt from the levy of the execution issued in this proceeding. This conclusion is supported by practically all the courts that have had occasion to give expression to their views upon the principle involved in this contention. In *Carter's Administrators v. Carter et al.*, 20 Fla. 558, 51 Am. Rep. 618, the Supreme Court of that state, in an able and exhaustive review of all the authorities, announced very forcibly and clearly the doctrine that there can be no waiver of the right to claim exemption, by

agreement or statement in writing, in advance of the time when the right is to be exercised. While, in the discussion of the question by the different courts, it is treated of under the head of the doctrine of waiver, it is apparent that the same principle is involved, whether it be called estoppel or waiver. In *Case v. Dunmore*, 23 Pa. 94, it was ruled that a party, at the time of contracting the debt, might agree to waive the benefit of his exemptions under the law. It will be observed that this rule was afterwards, by the same court, regretted, as is indicated in the expressions of Woodward, J., in *Shelly's Appeal*, 36 Pa. 373-380. He said: "Perhaps it would have been well if the court had set out by denying the capacity of the debtor to waive the statutory exemption in favor of any creditor. It might have been urged in support of such a view that the Legislature intended a benefit to the family of the debtor, rather than to the debtor himself, and that his caprice or will, tempted as they might be by the creditor, should not defeat the legislative benefaction in favor of those who were dependent upon him." In *Kneetle v. Newcomb*, 22 N. Y. 250, 47 Am. Dec. 186, the rule is very clearly announced. The question involved in that case was the enforcement of an agreement contained in a note to waive all claims of exemption. The court said: "The statute which allows a debtor, being a householder, and having a family for which he provides, to retain, as against the legal remedies of his creditors, certain articles of prime necessity, to a limited amount, are based upon views of policy and humanity, which would be frustrated if an agreement like that contained in these notes, entered into in connection with the principal contract, could be sustained. A few words contained in any note or obligation would operate to change the law between those parties, and so far disappoint the intention of the Legislature. If effect shall be given to such provisions, it is likely that they will be generally inserted in obligations for small demands, and in that way the policy of the law will be completely overthrown. Every honest man who contracts a debt expects to pay it, and he believes he will be able to do so without having his property sold on execution. No one worthy to be trusted would therefore be apt to object to a clause subjecting all his property to levy on execution in case of nonpayment. It was against the consequences of this overconfidence, and the readiness of men to make contracts which may deprive them and their families of articles indispensable to their comfort, that the Legislature has undertaken to interpose." In *Recht v. Kelly*, 82 Ill. 147, 25 Am. Rep. 301, "a note had been given expressly waiving the benefit of all laws exempting real or personal property from levy and sale. The court says: 'The exemption created by the statute is as much for the benefit of the family of the debtor as for

himself, and for that reason he cannot, by an executory contract, waive the provisions made by law for their support and maintenance. Such contracts contravene the policy of the law, and hence are inoperative and void. The owner may, if he chooses, sell or otherwise dispose of any property he may have, however much his family may need it, but the law will not aid him in that regard, nor permit him to contract in advance that his creditor may use the process of the courts to deprive his family of its benefit and use, when an exemption has been created in their favor. Laws enacted from considerations of public concern, and to subserve the general welfare, cannot be abrogated by mere private agreement.' In the Florida case, *supra*, after reviewing all the authorities, the court, in conclusion, by way of emphasis to its research, says: "We have been unable to find in reports, text-books, or digests that it has been held anywhere, except in Pennsylvania, that a written agreement, contained in a note, to waive the right to claim an exemption of personal property from levy and sale to satisfy a judgment rendered on the note, has been sustained. And even in that state the court has expressed regret that a contract of that kind had ever been sustained, and that such rule had become established as the law by the repetition of a bad precedent." To the same effect are the conclusions reached by the courts of Kentucky, Louisiana, North Carolina, Iowa, and many other states. *Moxley v. Ragan*, 10 Bush, 158, 19 Am. Rep. 61; *Phelps v. Phelps*, 72 Ill. 548, 22 Am. Rep. 149; *Branch v. Tomlinson*, 77 N. C. 388; *Levicks v. Walker*, 15 La. Ann. 245, 77 Am. Dec. 187; *Curtis v. O'Brien*, 20 Iowa, 376, 89 Am. Dec. 543. While *Tapley v. Ogle*, 162 Mo., loc. cit. 197, 62 S. W. 481, did not involve the precise question now being discussed, the forcible and clear expressions by Burgess, J., in discussing the subject of homestead, indicate clearly the views of this court in respect to waiver of the right to claim the same under the exemption laws of this state. In the course of the opinion in that case he said: "The most positive parole promise to sell the land, or not claim it as a homestead, would have been void, in law, even though the consideration may have been ample. And if plaintiff had been assured by Ware at the time he purchased the land that he would not claim it as a homestead, he would not have been estopped to make it, for the obvious reason that the statute makes void all efforts to transfer interest in land, except by some instrument in writing." The principle so thoroughly discussed and correctly announced in the cases herein cited is specially applicable to the question involved in this case, as to the estoppel or waiver of right to claim homestead. It is so apparent, from the provisions of our homestead law, that its purpose is the protection of the wife and children or other members of the fam-

ily, and not the father or husband alone, that it is hardly necessary to cite authorities to support the position that the father or husband who contracts a debt cannot, by a simple declaration, either in writing or orally, render nugatory the wise provisions of the homestead law, and deprive those whom the lawmakers specially had in view at the time of its enactment of the protection that was so clearly contemplated by its provisions. The conclusion reached by this court upon this proposition is emphasized by the provisions of our statute upon this subject. As indicative of the great value attached to the homestead rights by the lawmaking power of this state, and how earnestly it is sought to guard the interests of those entitled to its benefits, we point to section 3616, Rev. St. 1899, which prohibits the husband from mortgaging, selling, or alienating the homestead without being joined by his wife in the conveyance. We find additional interest manifested by the provisions of section 4385, Rev. St. 1899, which authorizes married women to invoke exemption under homestead laws now in force. These provisions indicate the true spirit of our homestead law, and, after a careful consideration of this proposition, we have reached the conclusion that the action of the trial court in declining to hold that the statement of respondent introduced in evidence operated as an estoppel or waiver of his homestead rights was manifestly correct.

We have given the assigned errors complained of by appellant in this proceeding our most careful attention and consideration, and, finding no reversible error, the judgment should be affirmed, and it is so ordered. All concur.

STATE v. CHAPPELL.

(Supreme Court of Missouri, Division No. 2
Feb. 1, 1904.)

CRIMINAL LAW — ENTICEMENT — BURGLARY — WITNESSES — DEFENDANT — CREDIBILITY — PREVIOUS CONVICTION — POLICE COURTS — JURISDICTION — INSTRUCTIONS.

1. Where in a prosecution for burglary a witness testified to a conversation had with defendant with respect to the stolen property, it was proper to charge the jury as to the rules governing their consideration of any statements made by defendant.

2. In a prosecution for burglary, an instruction that the jury should consider the evidence which had been introduced that the defendant had been convicted of petit larceny before a police judge for the purpose of discrediting him as a witness, was not objectionable as assuming the fact of former conviction as proven.

3. Where, in a prosecution for burglary, there was no evidence that a witness whom defendant solicited to sell the stolen property had anything to do with the breaking, an instruction that if the scheme to break and take the goods was conceived by such witness and communicated to defendant, and that defendant acted only on the suggestion of the witness, and carried the scheme into execution, and if such witness was a detective, acting under the direction of a

police officer for the purpose of entrapping defendant into the commission of the offense that he might be prosecuted therefor, defendant should be acquitted, was properly refused.

4. Under Rev. St. 1899, § 5798, providing that a city police judge shall be ex officio a justice of the peace within the limits of the city, with jurisdiction as to crimes and misdemeanors, etc., a police judge had jurisdiction to try a person arrested for petit larceny within the city, and to render a judgment convicting him of such offense.

5. In a prosecution for burglary a previous judgment of a city police judge, regular on its face, convicting defendant of petit larceny, was admissible for the purpose of affecting defendant's credibility as a witness.

Appeal from Criminal Court, Greene County; Jas. J. Gideon, Judge.

Jean Chappell was convicted of burglary, and he appeals. Affirmed.

Wear & McGregor and P. T. Allen, for appellant. The Attorney General and Sam B. Jeffries, for respondent.

FOX, J. Defendant, together with one Harry Conway, was indicted in Greene county upon a charge of feloniously and burglariously breaking into a freight car belonging to the St. Louis & San Francisco Railroad Company, and stealing therefrom 24 pairs of shoes of the value of \$50. The venue of the crime is laid in Greene county, and August 3, 1902, stated as the date of its commission. After the indictment was found and defendants arrested, a severance was called for and granted. It appears that soon after Conway was arrested he entered a plea of guilty, and was sentenced to the Reform School, he being at that time but 17 years of age.

The testimony on the part of the state was substantially as follows: On the evening of the 1st day of August, 1902, a freight car, loaded with miscellaneous merchandise from St. Louis, to be delivered at various points beyond and west of Springfield, was attached to a freight train leaving Newburg about 6 o'clock in the afternoon. The doors of this car had been fastened and sealed in the manner usually employed by the railroad company. It arrived in Springfield the following morning, and upon its arrival the doors were still closed and sealed. It was "cut out" on a side track to await the departure of a west-bound local freight train in the afternoon of that day. Some time during the forenoon of the 2d day of August the defendant broke the seal on the door and opened the car, and, together with Conway, removed therefrom four boxes of shoes. These boxes were closely guarded from public view until the following evening. During the day of the 2d of August the defendant went to the second-hand store run by a man by the name of Smith located at 300 East Commercial street, Springfield, and asked W. B. Fleener, one of the employees of the store, if he could not handle some shoes. Fleener told him that he could, and asked where they were. Defendant then asked the witness if he would go with him to get them. Witness said he

would, and defendant then said that they had best not go until night. Defendant told witness to hire a rubber-tired buggy, and meet him at Kelly's saloon about 8 o'clock. At the proper time Fleener obtained a buggy, and went to Kelly's saloon, and found the defendant, and drove with him to Robberson avenue, near the railroad. Fleener held the horse a few moments, when the defendant and Conway approached the buggy with two boxes of shoes. They then took them to the secondhand store, where they were placed in the cellar. In the meantime the police officers were notified by Fleener, and defendant and Conway arrested.

On the part of the defendant evidence was introduced for the purpose of contradicting some of the police officers who were introduced by the state. Also testimony tending to show that a detective was connected in some way with inciting the commission of the burglary. Defendant testified in his own behalf, denied the commission of the burglary, and also denied conversations spoken of by a witness for the state.

At the close of the evidence the court instructed the jury, the cause was submitted to them, and they returned a verdict of guilty as charged, assessing the punishment of defendant at five years in the penitentiary. Motions for new trial and in arrest of judgment were filed, and by the court overruled, and the defendant now presents the cause to this court for review upon his appeal.

The instructions complained of and the admission and rejection of evidence offered will be given attention in the course of the opinion.

The errors complained of in the trial of the cause disclosed by the brief of counsel for appellant are: First, that the court erroneously instructed the jury; second, that the court improperly refused instructions prayed for by appellant; third, that the court erroneously admitted the judgment of former conviction of the defendant in the police court of Springfield. Treating the contentions in the order in which they are stated, will say that it is first urged that the court erred in giving the instruction guiding the jury in the consideration of any statements made by the defendant. The form of the instruction is not assailed; hence it will serve no purpose to burden this opinion by inserting it. Appellant does, however, urge that there was no testimony upon which to base it; in other words, it is contended that the testimony fails to disclose any statements by the defendant, and the giving of the instruction operated to his prejudice. As to this contention will say we have read in detail the testimony in this case as disclosed by the record, and find that witness W. B. Fleener testified very fully as to a conversation he had with defendant in respect to preparations for going down after the shoes, and it may be appropriately said that this instruction was based upon this testimony. Aside from

this, if the contention of appellant is correct that there was no testimony upon which to base it, we are unable to conceive how it could operate to the injury of the defendant. If the defendant made no statements, it is to be presumed that the jury knew it, and that they did not consider any facts except those in evidence before them. They were directed by the instruction, if they found he made any statements as to any facts connected with burglary, to give such statements the consideration to which they were entitled. This instruction was doubtless predicated upon the testimony of witness Fleener, and this contention must be ruled against appellant.

It is next urged that instruction No. 14, which told the jury that they were only to consider the judgment of former conviction of the defendant for petit larceny as affecting his credibility, was erroneous in this: that it assumed the fact of former conviction as proven. That instruction is as follows: "You are instructed that you are to consider the evidence which has been introduced in this case that the defendant has been convicted of the crime of petit larceny before Police Judge Burks solely for the purpose of discrediting defendant as a witness." The objection to this instruction is without merit. The judgment of conviction was introduced, and, while it was objected to on the ground that it was void for want of jurisdiction in the court to render it, there was no denial of the truth of its recital. If the judgment was properly admitted (which will be discussed later), then it is apparent that the instruction of the court was appropriate and correct.

The next assigned error to which our attention is directed is the refusal of the court to give the following instruction, prayed for by the appellant: "The court instructs the jury, although you may believe from the evidence that the defendant, in company with Conway, broke into and entered said car, and stole, took, and carried away therefrom the shoes mentioned in the indictment, yet if you further find and believe from the evidence that the scheme and purpose to so break and enter and to take said goods, or any goods, from said car, originated with and was conceived by witness Fleener and communicated to the defendant, and that the defendant acted only upon the suggestion and solicitation of said Fleener, and adopted said scheme and purpose and carried the same into execution, and you further find that said Fleener was a decoy or detective, and acting under the direction of one Hinckley, a police officer of Springfield, and for the purpose of entrapping defendant into the commission of the offense charged in the indictment, in order that he might be prosecuted therefor—you will acquit the defendant." To support the contention of appellant that this instruction was erroneously refused, we are cited to the following cases: *State v. Hayes*, 105 Mo. 76, 16 S. W. 514, 24

Am. St. Rep. 360; *Saunders v. People*, 38 Mich. 218; *Speiden v. State*, 3 Tex. App. 156, 30 Am. Rep. 126; *Allen v. State*, 40 Ala. 334, 91 Am. Dec. 476; *Connor v. People* (Colo. Sup.) 33 Pac. 159, 25 L. R. A. 341, 36 Am. St. Rep. 295. A careful examination of those cases will clearly demonstrate that they are not applicable to this contention, and fall far short of supporting it. In *State v. Hayes*, supra, the defendant Hayes was charged with burglary and larceny. A party by the name of Hill did the breaking of the warehouse charged to have been burglarized in the presence of the defendant. The court instructed the jury that if the defendant Hayes was present, aiding and abetting Hill in such breaking, then he was guilty of burglary. The evidence disclosed that Hill was related to the owners of the warehouse, and his sole purpose in engaging in the burglary was to enable the parties on guard to capture Hayes. The instruction was condemned for the reason that Hill, who performed the acts of the actual breaking, did not intend to commit the offense of burglary; hence there could be no aiding and abetting him in the commission of the offense. That is not this case. The facts are entirely different. There is no pretense that Fleener, who is denominated the detective, had anything to do with the breaking open of the car. The mere fact that a person is solicited or encouraged in the commission of an offense furnishes no defense in the event he yields to such solicitations and actually perpetrates the crime. In *Saunders v. People*, supra, it was simply announced that a witness who encouraged or schemed to bring about the commission of a crime with the view of capturing the perpetrator of it should be subjected to a searching cross-examination, and great latitude should be indulged in such examination for the purpose of affecting his credibility. In *State v. Speiden*, supra, the proposition decided may be briefly summarized thus: "Certain bankers, apprehending an attempt by one S. to rob their bank, employed detectives, who, by authority of the bankers, decoyed him into the bank. Held, that the consent of the detectives to the entry of S. was the consent of their employers; and therefore, however guilty his intent and purpose, his conviction for burglary is not sustained by the evidence or warranted by the law." This case has no application to the facts disclosed in the record before us. There is an entire absence of any testimony indicating in the remotest way any consent on the part of the railroad to the breaking and entry of the car burglarized. To the same effect are the cases of *State v. Allen* and *People v. Connor*, supra. None of these cases sanction the principle announced in the instruction sought to be given by the trial court. The court was clearly right in refusing the instruction.

This leads us to the only remaining question presented by appellant for our consider-

ation. The defendant was introduced as a witness in his own behalf. The state, for the purpose of lessening his credibility, introduced in evidence a judgment of his conviction for petit larceny rendered by the police judge of the city of Springfield. It is insisted that this was error, for the reason, it is asserted, that the police judge had no jurisdiction of the case. To this insistence we cannot give our consent. Section 5798, Rev. St. 1899, clearly confers jurisdiction upon the court presided over by the police judge. It provides: "The police judge shall be *ex officio* a justice of the peace within the limits of the city, with jurisdiction as to crimes and misdemeanors, but shall have no jurisdiction to hear or determine civil matters. The marshal, or in his absence the assistant marshal or any regular policeman, shall be *ex officio* a constable to wait upon the police judge when acting as a justice of the peace." The police judge had jurisdiction of the subject-matter (which was petit larceny) by virtue of the terms of the statute. He also had jurisdiction of the person of the defendant. "By jurisdiction of the subject-matter is meant jurisdiction of causes of the general class to which the action belongs." *Livingston v. Allen*, 88 Mo. App. 294; *Postlethwaite v. Ghiselin*, 97 Mo. 424, 10 S. W. 482. It may be that the information or affidavit was defective; but that was a matter that defendant could have remedied by appeal, and this court will not now stop in this collateral proceeding to pass upon and determine the errors complained of in a cause unappealed from before the police judge. The judgment of conviction was regular upon its face, was admitted simply for the purpose of affecting the credibility of the defendant, who had testified in his own behalf, and the court by proper instruction confined the purpose of the testimony to its legitimate scope, and there was no error in its admission.

We have carefully considered all the testimony disclosed by the record. It fully supports the verdict of the jury. The instructions of the court were full and fair, covering every feature of this case developed during the progress of the trial. The judgment should be affirmed, and it is so ordered. All concur.

STATE v. ADAMS.

(Supreme Court of Missouri, Division No. 2.
Feb. 1, 1904.)

ENTICEMENT — CONCUBINAGE — STATUTES —
CONSTRUCTION — DIFFERENT OFFENSES —
JOINDER — COMMON-LAW MARRIAGE — EVIDENCE.

1. Rev. St. 1899, § 1842, provides that any person who shall take away any female under the age of 18 years from any person having legal charge of her person, either for the purpose of prostitution or concubinage, shall be punished, etc. *Held*, that the terms "prostitution" and "concubinage" were not used synonymously, but that the statute created separate offenses, which could not be joined in the same count of an indictment.

2. Defendant induced an unmarried female, 15 years of age, to leave her father's house with him at night, by offering to give her \$200. They drove to a railroad station, and thence went to a city, where defendant took the girl to a rooming house, and there remained, occupying the same room with her, over night and until the following day, when they went to the house of a friend of the girl in another town, where she remained until the next day, when she visited another friend alone, where she remained for five days, when defendant called for her, and took her to a rooming house, where they stayed all night, occupying the same bed, and on the next day went to another rooming house, where defendant introduced her as his wife. They remained there four days and four nights, living together as man and wife, until they were arrested. Defendant claimed that he intended to marry the girl, but that she kept putting it off; but she testified that she never intended to marry defendant. *Held*, that such facts justified a finding that the girl was not defendant's common-law wife, and that he was therefore guilty of taking her away from her father for the purpose of concubinage, in violation of Rev. St. 1899, § 1842.

Appeal from Circuit Court, Cass County;
Wm. L. Jarrott, Judge.

Joseph J. Adams was convicted of taking a female under the age of 18 years away from her father for the purpose of concubinage, and he appeals. Affirmed.

W. D. Summers, C. H. Ennis, and A. A. Whitsett, for appellant. The Attorney General and Sam B. Jeffries, for the State.

BURGESS, J. Defendant was convicted in the circuit court of Cass county, and his punishment fixed at two years' imprisonment in the penitentiary, under an information filed by the prosecuting attorney of said county charging him with having at said county, on the 8th day of May, 1903, taken away from her father one Della May Oram, a female under the age of 18 years, to wit, of the age of 15 years, for the purpose of concubinage, by having illicit intercourse with her. After unsuccessful motions for new trial and in arrest, defendant brings the case to this court by appeal for review.

The facts, briefly stated, are about as follows: On February 8, 1902, defendant formed the acquaintance of Della May Oram, who was then about 14 years of age. Shortly thereafter he went to the home of her father to work, and continued to work there until the following May. During this time the defendant and Della May became engaged to be married in May, though she testified that she never intended to marry him, and that the engagement was broken off in March, and was never thereafter renewed. It was proven that defendant admitted that while living at the home of the father of Della May Oram he had connection with her, but said he was not to blame, as she came to his bed. Defendant denied, however, making such statement, or that it was true in fact. He bought her an engagement ring, but she refused to exhibit it on her finger at any time, declaring always that she did not recognize it as an engagement ring, as

she did not intend to marry him. This agreement was never communicated to the girl's parents, Della May informing defendant that her parents were opposed to his paying attention to her. On the 8th day of May, 1903, defendant, as shown by the girl's testimony, promised, and she accepted the promise, to give her \$200 if she would leave with him. This money was never paid. According to the plans previously made between them, defendant secured a livery team and vehicle at Harrisonville, some miles from where the prosecutrix's father lived, and proceeded to the Oram home, arriving there about 11 o'clock in the evening. The girl met him at the barn, with her clothing, according to the understanding previously formed. The girl's father and mother knew nothing of her intention or of her leaving home until after she had gone. She drove with him to Pleasant Hill, where they took the train for Kansas City, arriving there about 6 o'clock the next morning. They went to a rooming house, where they remained until the next morning, when she went across the state line to Sheffield, Kan., so that she might visit some friends, former neighbors of her family in Cass county, Mo. Defendant went with her to Sheffield, but returned immediately to Kansas City. He visited her but once while she was in Kansas, though she remained there about three days. She left the home of her friends in Kansas, and returned with defendant to Kansas City. They engaged a room in some rooming house, and remained there one night, then going to a rooming house on Mulberry street where the defendant had arranged for a room, and where the defendant introduced the girl to the landlady as his wife. In this room they cooked their meals and slept until the following Tuesday, when defendant was arrested by a police officer upon a telegram from the sheriff of Cass county. While they were at the Mulberry street house the defendant had intercourse with the prosecutrix several times. When he took her to this house he stated to the housekeeper that she was his wife. Before he had intercourse with her, they had arranged to be married the day following defendant's arrest. The defense was a common-law marriage.

Over the objection and exceptions of defendant the court instructed the jury as follows:

"(1) The jury are instructed that if you find from the evidence that at the county of Cass and state of Missouri, at any time within three years next before the filing of the information herein, the defendant did take away Della May Oram from her father, Henry Oram, for the purpose of concubinage, and that the said Della May Oram was a female under the age of eighteen years, you will find him guilty, and assess his punishment at imprisonment in the penitentiary not less than two years nor more than five years. Even should you believe from the evidence

that the said Della May Oram was of easy virtue, or had previously had sexual intercourse with defendant, or had consented to go away with defendant, or that she consented to have sexual intercourse with the defendant, yet none or all of these facts would constitute any defense to this prosecution.

"(2) The jury are instructed that by the word 'concubinage,' as used in the information and instructions, is meant the act or practice of a man cohabiting in sexual intercourse with a woman to whom he is not married. If the jury believe from the evidence that the defendant, Joseph J. Adams, did take the witness Della May Oram away from her father, and that said Della May Oram was at the time a female under the age of eighteen years, for the purpose of cohabiting with her as a man and woman in sexual intercourse for any length of time, but for more than a single act of sexual intercourse, without the authority of a marriage, it would be sufficient to constitute the offense charged in the information.

"(3) The law presumes the innocence of the defendant, and this presumption continues with him until it has been overcome by evidence which establishes his guilt to your satisfaction and beyond a reasonable doubt; and the burden of proving his guilt rests with the state. If, however, this presumption has been overcome by the evidence, and the guilt of the defendant established to a moral certainty and beyond a reasonable doubt, your duty is to convict. If you have a reasonable doubt of the defendant's guilt, you should acquit; but a doubt, to authorize an acquittal on that ground, ought to be a substantial doubt touching the defendant's guilt, and not a mere possibility of his innocence.

"(4) The court instructs the jury that in considering the weight of the evidence given by the defendant they may take into consideration the fact that he is the defendant, and you may consider his interest in this case in passing on the credibility and weight to be given his testimony.

"(5) The court instructs the jury that marriage is the civil status of one man and one woman capable of contracting, united by contract and mutual consent for life, for the discharge to each other and to the community of the duties legally incumbent on those whose association is founded on the distinction of sex. If the jury believe that the parties J. J. Adams and Della May Oram did not intend to enter into the agreement of matrimony, but simply agreed to abide together for the purpose of illicit sexual intercourse, then there was no marriage between them."

Thereupon the defendant asked the court to instruct the jury by giving instructions "a" and "b," as follows:

"(a) A reasonable doubt is that state of mind which, after a full comparison and consideration of all the evidence, both for the

state and defense, leaves the mind of the jury in that condition that they cannot say that they feel an abiding faith amounting to a moral certainty, from the evidence in the case, that the defendant is guilty of the charge as laid in the information. If you have such a doubt, if your conviction of defendant's guilt as laid in the information does not amount to a moral certainty from the evidence in the case, then the court instructs you that you must acquit the defendant.

"(b) The court instructs the jury that in law marriage is a civil contract, and that it is not necessary to its validity that it should be solemnized by a minister of the gospel, or a judge of the court of record, or by any one else authorized by law to solemnize marriage, or to procure a marriage license to marry. You are instructed that if you find from the evidence that the defendant and Della May Oram agreed to live together as husband and wife, as instruction No. — defined, you will acquit the defendant."

The court refused to give instructions "a" and "b" as asked by the defendant, to which refusal the defendant at the time excepted, and does now except. Thereupon the court gave, at the instance of the defendant, the following instructions:

"(1) The jury are instructed that, although you may believe from the evidence that the defendant, J. J. Adams, did take Della May Oram from her father, yet if you further believe from the evidence that Adams' object and purpose in taking said Della May Oram was to marry her, and not for the purpose of concubinage, as in other instructions defined, you will find the defendant not guilty; and this is true even though the jury should further believe that, after taking the girl as above stated, if he did so take her, he had sexual intercourse with her at the house on Mulberry street referred to in the evidence.

"(2) The court instructs the jury that under the law it is not necessary that a marriage ceremony be performed, or that a license be obtained, in order to constitute marriage, but that any agreement between the parties entered into and declared in the presence of one or more persons, and a living together as husband and wife in pursuance thereto, would constitute a legal marriage; and in this case, if the defendant and Della May Oram were together in May, 1903, and in accordance to and with an agreement and understanding that they should get married at said date, and that they went together in pursuance and with the understanding that such marriage was to be entered into by them, and they contracted and agreed between themselves to become husband and wife, and in fulfillment thereof announced that fact and said marriage to one another, and did live together as husband and wife from about the 16th day of May until about the 20th day of May, 1903, on Mulberry street, at the rooming house of Mrs. Smith, and that such living together and intentions

were in good faith, meaning thereby to declare themselves husband and wife, then such taking was not unlawful nor felonious, and the jury will find the defendant not guilty.

"(3) The court instructs the jury that this is not a civil case, but a criminal prosecution, and that the rules as to the amount of evidence in this case, and a mere preponderance of the evidence will not warrant the jury in finding defendant guilty; but, before the jury can convict the defendant, they must be satisfied of his guilt beyond a reasonable doubt, and, unless so satisfied, the jury should find the defendant not guilty.

"(4) The court instructs the jury that in this case, to justify a conviction of the defendant, the burden is on the prosecution to prove by credible evidence, to the satisfaction of the jury, beyond a reasonable doubt, that such defendant is guilty as charged in the information; that he, the said defendant, at the county of Cass and state of Missouri, on or about the 7th day of May, 1903, did one Della May Oram, a female under the age of eighteen years, to wit, fifteen years, take from one Henry Oram, her father, the said Henry Oram then and there having the legal charge of the person of the said Della May Oram; and that said taking was for the purpose of concubinage.

"(5) In determining the credibility of any witness and the weight to be given to his or her testimony you may consider his or her manner on the witness stand, his or her interest, if any, in the result of the trial, his or her relation to or feelings for or against the defendant, the probability or improbability of his or her statements, as well as the facts and circumstances in evidence. In this connection you are further instructed that if you shall believe that any witness has willfully and knowingly sworn falsely to any material fact in the case, you are at liberty to reject the whole or any portion of such witness' testimony."

The statute under which the information was drawn (section 1842, Rev. St. 1899) provides that any person who shall take away any female under the age of 18 years from her father, mother, guardian, or other person having the legal charge of her person, either for the purpose of prostitution or concubinage, shall upon conviction thereof be punished by imprisonment in the penitentiary not exceeding five years. The statute is leveled at both "prostitution" and "concubinage," which are entirely separate and distinct offenses, and cannot be joined in one count. In *State v. Gibson*, 111 Mo. 92, 19 S. W. 980, Sherwood, C. J., in speaking for the court, said: "Thus contrasted, it is easy to see that the two words 'concubinage' and 'prostitution' have, and were intended to have, a widely different meaning. To hold otherwise would be to say that the two words mean the same thing, and that, therefore, the Legislature, in framing the section under discussion, employed a useless and meaningless

word—which is a supposition not to be indulged, as abundant authorities show. The section in question levels its denunciation against two separate and distinct offenses; offenses which, therefore, cannot be joined in one count, but, if charged, according to a familiar rule, must be charged in separate counts." The prosecution is for concubinage, which is defined by Mr. Webster to be "the cohabiting of a man and a woman who are not legally married; the state of being a concubine; a woman who cohabits with a man without being married." It is defined by law dictionaries as "species of loose informal marriage which took place among the ancients, and which is yet in use in some countries." Black's Law Dictionary; Wharton's Law Dictionary; Bouvier's Law Dictionary. The gravamen of the offense is the purpose or intent with which the female is taken away from her parents or guardian or person having legal charge of her, to be gathered from all the facts and circumstances connected with the taking; and while the defendant testified that his purpose and intent in taking the girl away from the custody of her father was to marry her, and make her his wife, his story does not very well comport with the fact that he never asked the consent of her father; that he had agreed to give her \$200 to run off with him, that he took her to a rooming house in Kansas City upon their arrival there on Friday morning, and remained there occupying the same room until about 12 o'clock on the following day (being Sunday), when they went to the house of a friend of the girl at Sheffield, Kan., where she remained until Monday, when she visited another friend of hers, accompanied by defendant, arriving there at about 12 o'clock on Monday, and remained there until the following Friday evening at about 7 o'clock, when the defendant called for her, saying he was going to take her back to Sheffield, but instead of doing so took her to a rooming house in charge of a woman whom she did not know, where they stayed all night, when they again occupied the same room, which had but one bed in it; then went from there to another rooming house on Mulberry street, in charge of a Mrs. Smith, when for the first time he introduced her under the name of Adams, telling Mrs. Smith she was his wife. They remained there from Saturday about 3 o'clock until Wednesday morning, remaining there four nights, and until they were arrested occupying the same room and bed and copulating together as man and wife, during all of which time defendant, in so far as disclosed by the record, made no effort or attempt to get a license to marry the girl and to make her his wife, but, as an excuse therefor, testified that when he would propose to her to get license and be married she would put it off, and insist upon waiting a while. If defendant's intent in taking the girl away from her father was for the purpose of concubinage, as herein defined, as the evidence

tended to show, then whatever he may have said thereafter with respect to marrying her, or any agreement that he may have entered into with her to live together as man and wife, is no defense to this action. The intent of the defendant could only be arrived at by the facts and circumstances in evidence, in respect to which they were somewhat at variance. It is also true that the prosecuting witness' testimony was not strictly in accord with her testimony given in her deposition taken in this case prior to the time of the trial, but the weight of the testimony and the credibility of the witnesses were for the consideration of the jury. The instructions covered every phase of the case, and were very fair to the defendant.

Finding no reversible error in the record, we affirm the judgment. All concur.

STATE v. NEIGHBORS.

(Supreme Court of Missouri, Division No. 2.
Feb. 1, 1904.)

CRIMINAL LAW—TRIAL—PRESENCE OF DEFENDANT.

1. By the express provision of Rev. St. 1890, § 2610, the record showing that defendant was present when his trial began, it will be presumed in the absence of evidence in the record to the contrary, that he was present when the verdict was rendered.

Appeal from Circuit Court, Wayne County; J. L. Fort, Judge.

John Neighbors appeals from a conviction. Affirmed.

V. V. Ing and R. L. Ward, for appellant. Edward C. Crow, Atty. Gen., and Sam B. Jeffries, Asst. Atty. Gen., for the State.

BURGESS, J. Defendant was convicted in the circuit court of Wayne county, and his punishment fixed at 2 years' imprisonment in the penitentiary, under an information filed by the prosecuting attorney of said county charging him with defiling one Maud Crandall, a female under the age of 18 years, to wit, of the age of 12 years, who was confined to his care and protection. He appeals.

"The defendant conducted a small country store in Chaonia, Wayne county. The prosecuting witness, Maud Crandall, is an orphan; her mother and father having died in 1893 and 1899, respectively. She was born in 1889, and was therefore about thirteen years of age. About five years before the crime is charged to have been committed, the girl's father sent her to defendant's home to live. Defendant is sixty-one years old, has been twice married, and is now living with his second wife. He has four children by his first wife, but none by his second. His oldest child is about forty years of age. The prosecutrix lived with defendant as a member of his family from the time she

¶ 1. See Criminal Law, vol. 15, Cent. Dig. § 3037.

was placed in his charge by her father until shortly after the alleged offense, when she left his home and went to live with her uncle. On the evening of August 4, 1902, defendant, after eating his supper, went to his store, entering at the back door. His residence was situated but a short distance from his storeroom. Soon after going to the store, defendant's wife and the prosecutrix followed him. His wife remained but a few minutes, returning to her home. There is a barber shop adjoining defendant's store, with an ordinary pine board partition, one inch in thickness, separating them. This barber shop was occupied by a man by the name of Nat Jines, who happened to be alone in his shop on the night in question. He heard two young men go in defendant's store, and leave in a few moments. He heard the prosecutrix and defendant talking; heard her shame him; heard them having, as he thought, sexual intercourse. The next morning defendant went in the shop to get shaved. He held his hands to his back, and complained of not feeling well. Jines told him he was not surprised, after what happened the night before. Defendant seemed surprised that Jines knew anything about his improper relations with the prosecutrix, and requested him to say nothing about it. The prosecutrix stated on the witness stand that defendant had been having intercourse with her frequently for one year prior to August 4, 1902."

Defendant is not represented in this court, but, in his motion for new trial and in arrest, several errors are complained of, only a few of which seem worthy of consideration.

The first of these is that the verdict is against the evidence. The evidence was all one way, no evidence at all being offered by the defendant. It conclusively showed his guilt. The child certified positively to defendant's connection with her at the time alleged in the information, and in this she was corroborated by another witness. It was also shown that she was less than 13 years of age at the time, and had some 5 years previously been confided by her father to the care and custody of defendant.

The instructions presented every phase of the case to the jury, and were free from objections.

One of the assignments in the motion for new trial is that the court permitted the jury to report their verdict, and the court received the same, and had it entered of record, at a time when defendant was not present in court, but the record does not support this assertion. But it shows the presence of the defendant when the trial was begun, and the cause submitted to the jury, and, in the absence of all evidence to the contrary, as the record shows that the trial was had and the verdict rendered on the same day, it will be presumed that he was present during the whole trial. Section

2610, Rev. St. 1899; State v. Lewis, 69 Mo. 92; State v. Yerger, 86 Mo. 33.

The information is well enough.

Finding no reversible error in the record, we affirm the judgment. All concur.

STATE v. HELMS.

(Supreme Court of Missouri, Division No. 2
Feb. 1, 1904.)

BURGLARY—CHICKEN HOUSE—WHAT CONSTITUTES BREAKING—SUFFICIENCY OF EVIDENCE—ACQUITTAI OF LARCENY—RIGHT TO COMPLAIN.

1. Rev. St. 1889, § 3526, provided that every person convicted of breaking and entering any building, within the curtilage of a dwelling house and not forming a part thereof, or any shop, booth, etc., in which there should be goods or other valuable thing kept, with intent to steal, etc., should be adjudged guilty of burglary in the second degree. By Act May 31, 1899 (Rev. St. 1899, § 1886), this section was repealed, the Legislature enacting that every person who shall be convicted of breaking and entering into any building, in cases not considered burglary in the first degree, or any booth, tent, etc., shall be guilty of burglary in the second degree. *Held*, that breaking into a chicken house constituted burglary in the second degree, whether the chickens therein were kept for the purpose of trade and commerce or for the owner's own use, and whether they were driven into the chicken house at night or went voluntarily.

2. Unbuttoning the outside door of a chicken house and removing the slat fastening the inner door constitute a burglarious breaking.

3. Evidence, in a prosecution for burglary, *held* sufficient to sustain a finding of a breaking into the building.

4. A defendant in a prosecution for burglary cannot complain that he is acquitted of the accompanying larceny.

5. A person may be convicted of a burglary and acquitted of the accompanying larceny.

Appeal from Circuit Court, Andrew County; A. D. Burns, Judge.

Lewis H. Helms was convicted of burglary, and appeals. Affirmed.

Jno. W. Stokes, for appellant. The Attorney General and C. D. Corum, for the State.

GANTT, P. J. On the 20th day of September, 1901, the prosecuting attorney of Andrew county filed an information, duly verified in the circuit court of that county, charging the defendant with feloniously and burglariously breaking into a certain chicken house belonging to Charles Trampe and his wife, Anne E. Trampe, and stealing therefrom 11 chickens, of the value of \$2.75, which belonged to Anne E. Trampe, who, it was alleged, was a joint owner with her husband of the property. The evidence showed that on the night of September 11, 1901, the defendant was observed in the vicinity of the home of the prosecuting witnesses; that he was traveling in a wagon suitably adapted for the purpose of transporting chickens; and that he was seen to stop near the residence of the prosecuting witnesses, leave his wagon, and

¶ 2. See Burglary, vol. 2, Cent. Dig. § 2.

go towards the premises which he was charged with burglarizing. He was not gone long until he returned, carrying with him a sack containing about one dozen chickens belonging to the prosecuting witness, Anne E. Trampe. The chickens were identified by her; indeed, there is no conflict in the testimony in this case, except in relation to the burglary. The defendant admitted that he stole the chickens. The only issue of fact is whether or not he opened the doors which inclosed the chicken house. The testimony on behalf of the state tends to show that there were two doors of this chicken house, one on the inside of the other. The prosecuting witness testified that the inside door was closed by her on the night that the chickens were stolen, and that it was fastened by her with the slat near the top of the door. She states that she also closed and fastened the outside door with a button, and that the following morning she found the doors of the chicken house open. The defendant testified in his own behalf, admitting the larceny of the chickens, but stated that the door was partially open at the time that he visited the hen roost, and that it was sufficiently ajar so as to permit his entrance into the chicken house without removing the latch or even touching the door. He stated that he only saw one door, and his testimony tends to show that there was only one door to the chicken house. The trial resulted in his conviction and sentence to three years in the penitentiary, from which he appeals to this court.

1. The information is sufficient. Prior to 1899, section 3526, Rev. St. 1889, provided that "every person who shall be convicted of breaking and entering, first, any building within the curtilage of a dwelling house but not forming a part thereof, or second, any shop, booth, etc., in which there shall be at the time some human being or goods, wares, merchandise or other valuable thing kept or deposited, with intent to steal or commit any felony therein, shall be adjudged guilty of burglary in the second degree," but the General Assembly of this state on May 31, 1899, repealed said section, and adopted a new section by the same number (now section 1886, Rev. St. 1899), which provides that "every person who shall be convicted of breaking and entering into any building the breaking and entering of which shall not be declared by any statute of this state to be burglary in the first degree or any booth, or tent, etc., shall be guilty of burglary in the second degree." This change in the statute was probably made on account of the construction given to section 3526 of the Revision of 1889 in *State v. Schuchmann*, 133 Mo. 111, 33 S. W. 35, 34 S. W. 842, wherein it was held that, unless the indictment charged that the building (other than the dwelling house) in which the burglary was committed was within the curtilage of the dwelling house, it was fatally defective, overruling *State v. Hecox*, 83 Mo.

531, in that respect. We think that the words of the statute, and the history of the change in it from the Revision in 1889, make it clear that a chicken house in which goods and wares and valuable chickens are kept is now a building in which burglary can be committed within the meaning of section 1886 of the Revision of 1899, and as enacted May 31, 1899. The statute clearly intends to enlarge the common-law doctrine of burglary, and it is our duty to effectuate the intention of the Legislature as far as the language and purpose of the act will permit.

The distinction urged by the learned counsel for defendant between chickens confined and kept in a building for the purpose of trade and commerce and chickens kept in a building by the owner for his own use and food is not tenable, in our opinion. The same reasoning would make it burglary to break into a house in which watches were kept for sale, but would exonerate the burglar who breaks into the house of a citizen to steal the watch which he uses as a timepiece for his own convenience, and which is not for sale. Nor does it make the slightest difference that the chickens are driven or voluntarily go into the chicken house at night to roost, and are then locked or fastened in, instead of catching them and putting them in by force. The language of the statute is, "in which goods, wares, merchandise or other valuable thing kept or deposited." The poultry product of Missouri is to-day one of its chief sources of wealth, and chickens locked up in a henhouse at night are kept therein as much as wheat deposited in a granary or storehouse, and the intention of the Legislature is to protect one as much as the other from prowling thieves such as the evidence tends to show defendant was. The recent act of the Legislature approved March 18, 1903 (Laws 1903, p. 161), making the stealing of any domestic fowl from the premises on which any dwelling house is situated grand larceny, irrespective of its value, strongly enforces the intention of the Legislature to eradicate this offense.

There is absolutely no dispute as to the larceny. Defendant admitted that on the stand when sworn in his own behalf. The only serious contention is that the evidence does not make a case of burglary. Mrs. Trampe, one of the owners of the chickens stolen by defendant, testified that they had five chicken houses, and on the night of the theft only one of these—the one in which there were no chickens—was left unfastened. She testified that the chicken house in which the stolen chickens were kept that night had two doors, an outer and an inner door, and both were fastened. The inside door was fastened on the top with a slat, and the outside door was fastened with a button. It was necessary to remove these fastenings before defendant could get into the chicken house. In *State v. Woods*, 137 Mo., loc. cit. 10, 38 S. W. 722, it was ruled that moving the bolt or raising the latch was a sufficient

breaking in law to constitute burglary. *State v. Tutt*, 63 Mo. 595; *State v. Moore*, 101 Mo. 316, 14 S. W. 182. It was therefore a sufficient breaking in this case when it was shown that the defendant removed the slats and buttons with which the door was fastened. While the defendant testified in his own behalf that the door was not fastened, that issue was determined against him in favor of the testimony of Mrs. Trampe. The jury only convicted defendant of the burglary, and, while it is difficult to see how the jury could fail to find defendant guilty of the larceny, which he admitted, he is in no position to complain on that score, and our decisions abundantly settle that a party may be convicted of the burglary and acquitted of the larceny, as they are distinct offenses. *State v. Woods*, 137 Mo. 6, 88 S. W. 722.

We have carefully examined the instructions, and they are in harmony with the views herein expressed, and no exceptions were taken to them.

The judgment is affirmed.

BURGESS and FOX, JJ., concur.

STATE v. DREW.

(Supreme Court of Missouri, Division No. 2.
Feb. 1, 1904.)

LARCENY—POSSESSION OF STOLEN GOODS—ARTICLES FOUND IN ANOTHER'S HOUSE.

1. The mere finding of stolen goods in the house of one having a wife and daughter discloses in him only a constructive possession, and not an exclusive possession which will raise a presumption of his guilt.

2. On a trial for larceny, goods found in the house of another also charged with the crime are not admissible against defendant, no confederacy or conspiracy between them being shown.

Appeal from Circuit Court, Chariton County; Jno. P. Butler, Judge.

Hamp Drew was convicted of burglary and larceny, and appeals. Reversed.

J. C. Wallace, for appellant. The Attorney General, for the State.

GANTT, P. J. The defendant and one Frank Gamble were charged, in an information filed by the prosecuting attorney of Chariton county, with burglary and larceny of the store of Joseph Miles, in the town of Dalton in said county, on the 19th of May, 1901. A severance was granted, and the defendant duly arraigned at the September term, 1901. At the February term, 1903, defendant was put upon his second trial for this offense, and convicted of both the burglary and larceny, and sentenced to the penitentiary for a term of five years. His motions for new trial and in arrest of judgment were overruled, and exceptions duly saved, and an appeal granted to this court.

The evidence on which this conviction rests is substantially as follows: Mr. Miles, the

prosecuting witness, had a general merchandise store in the town of Dalton, Chariton county, on Sunday, the 19th of May, 1901. When he left the store Saturday night the doors were locked and fastened, but the windows had no fastenings. On Monday morning, when Mr. Miles returned to his store, he found a big light in the front door broken, and a lot of empty shoe boxes on the floor, and a lot of dry goods gone. He testified he missed some shoes, worsted goods, tobacco, and some meat. The shoes were branded "V. G." on the box and the shoes. The worsted dress goods were of two colors, brown and of a greenish color. Some percales, red and white striped, were also missing. The goods taken were worth between \$50 and \$100. A piece of percale was shown the witness, and he testified he "thought" that was taken that night, but on objection this answer was excluded. Other dry goods were exhibited to the witness, but counsel for defendant objected to the identification of these unless the state first established that these were found at the house of defendant. The objection was overruled, and defendant excepted, and Mr. Miles answered they came out of his store and were his goods. Some shoes were also shown the witness, and he said they looked like his, and had the same marks and brands. He testified he got all of the foregoing goods, except the one remnant of percale, out of the house of Gamble. Thereupon defendant by his counsel moved the court to strike out all of the evidence as to the goods obtained from Gamble's house, which motion the court overruled, and defendant duly excepted. He testified he got these goods under a search warrant from the houses of Gamble and defendant some two or three weeks after the burglary was committed. He further testified that defendant said he (Miles) would have to show where defendant got the goods found at his house; that they had got it from Mrs. Cook, who also had a store in the town. On cross-examination Mr. Miles admitted he had testified on a former trial of this case that his store was burglarized on Saturday night. Instead of Sunday night as he now stated. That he could not identify the one piece of percale found in defendant's house by any mark, but only by its general appearance. He would not positively say this was a piece of his goods. That he could not state that the goods in his store were exactly like this piece. It was simply a piece of red and white percale he had in his store at that time. When he went to defendant Drew's house he also found a little piece of white goods there. He did not take that at the time, neither did he take this piece of percale. He did not take the percale, because defendant said he got it from Mrs. Cook, and he thought he would see her before taking it. Defendant said he got the white goods also from Mrs. Cook. This piece of white goods and this piece of percale were all he found

in defendant's house. He did not claim the white goods, which the evidence of Mrs. Cook and defendant's wife conclusively established came from Mrs. Cook's store. Mrs. Cook testified she sold defendant's wife the white goods on Saturday before the burglary, but did not sell defendant or his wife the percale; that she never had a piece like it in her store. Mr. Veatch, the sheriff, testified he served the search warrant and got the piece of percale at defendant's house. The trunk was locked, and defendant's daughter brought her mother the key to the trunk, and he found this piece of percale in that trunk. Defendant was not present at the time. Witness says that there was a piece of white goods and the percale in his hands when defendant and his wife said they got the goods from Mrs. Cook. Does not think they said either piece particularly. After Mrs. Cook said they did not get the percale from her, an officer went back to defendant's house and got it. Until then Mr. Miles was uncertain that it was his. On the part of defendant the evidence tended to prove that Mrs. Gamble used Mrs. Drew's sewing machine, and as a recognition of their kindness gave the piece of percale to Julia Drew, the 15 year old daughter of defendant, and that it, with the white goods purchased from Mrs. Cook, was in an unlocked bureau drawer at defendant's house when the officer found and afterwards took it. Mrs. Gamble gave this piece to Miss Drew on Saturday before the defendant was arrested—about the middle of June, 1901. There was also evidence that Mrs. Gamble's father bought the goods in Kansas City and gave it to his daughter. Various errors are assigned for reversal of the judgment.

1. Among other instructions, the court gave the following: "(2) The court instructs the jury that if you believe from the evidence beyond a reasonable doubt that on or about the 19th day of May A. D. 1901, at the county of Chariton, in the state of Missouri, some one did feloniously and burglariously break into and enter the storehouse and building of Joseph Miles and steal therefrom goods and chattels mentioned in the information, or any of said goods and chattels, and that soon thereafter said goods and chattels, or any part thereof, were found in the exclusive possession of Hamp Drew, then and in that event the law presumes that the defendant is guilty of both burglary and larceny, and unless the defendant has accounted for the possession of said goods to your reasonable satisfaction, or rebutted the presumption arising from the recent possession of said goods, as defined in these instructions, you should find him guilty as charged in the information; but the court instructs you that the defendant may rebut the presumption of guilt arising from recent possession of stolen property, or explain his possession by either direct evidence or attending circumstances or the character or habits of himself by some other

mode equally satisfactory as to the innocence of the accused." This instruction is challenged because counsel for defendant insists that the testimony does not show an actual possession by defendant of any of the stolen goods, but a mere constructive possession by reason of the fact that one piece of percale, which the prosecuting witness thought was his because it resembled that which he had in his store, was found in a trunk in the house of defendant, which his daughter testified was given to her only a day prior to the burglary by Mrs. Gamble.

This court, in *State v. Castor*, 93 Mo. 242, 5 S. W. 906, adopted Greenleaf's statement of the law on this point (3 Greenl. Evid. §§ 32, 33) wherein he says: "But to raise the presumption of guilt from the possession of the fruits of the crime by the prisoner, it is necessary that they be found in his exclusive possession. A constructive possession, like constructive notice or knowledge, though sufficient to create a civil liability, is not sufficient to hold the party responsible to a criminal charge. He can only be required to account for the possession of things which he actually and knowingly possessed; as, for example, where they are found upon his person, or in his private apartment, or in a place of which he keeps the key." In *Castor's Case* the evidence showed the stolen goods were found in his trunk, but it was shown that his employer had access to the trunk; that he had lent the key to another to get some blacking and a brush, and the key remained in the hands of the borrower for four days. And it also appeared that the trunk was often left unlocked in the house of the owner of the stolen goods, and the trunk could be unlocked by a cupboard key, and could have been unlocked by another familiar with the locus in quo. In these circumstances it was ruled that defendant's possession was not exclusive. That decision has been approved by this court. *State v. Baker*, 144 Mo., loc. cit. 329, 46 S. W. 194.

In *State v. Belcher*, 136 Mo., loc. cit. 137, 37 S. W. 800, it was said: "The recent possession of stolen property raises a presumption of guilt, but what constitutes recent possession which will justify this instruction is a preliminary question for the court. It is the settled law of this court that, to raise this presumption, the stolen goods must be found in the exclusive possession of the prisoner." *State v. Castor*, 93 Mo. 242, 5 S. W. 906; *State v. Warford*, 106 Mo. 55, 16 S. W. 886, 27 Am. St. Rep. 322; *State v. Scott*, 109 Mo. 226, 19 S. W. 89; *State v. Owsley*, 111 Mo. 450, 20 S. W. 194. In *Belcher's Case*, as in this, the larger part of the goods were found in the possession of another, one Edwards, and the remainder found in the home of the defendant's mother, and there was no evidence to indicate that defendant had any other possession than that shared by the family in common, save and except

as to a pair of overalls and a pair of shoes, and it was a question whether these were a part of the stolen goods, and it was held not to be exclusive or recent enough to justify this instruction.

In *State v. Warford*, 108 Mo. 68, 16 S. W. 886, 27 Am. St. Rep. 322, it was said by Judge Macfarlane: "It would be pushing the rule too far to require of one accused of a crime an explanation of his possession of the stolen property when such possession could also with equal right be attributed to another."

In this case there was no evidence that defendant knew of the possession by his daughter or wife of this piece of dress goods. The fact that it was in the house of which he was the head was at most merely a constructive possession, especially when the character of the goods (an article of female attire of whose existence the father might well be and generally is ignorant until made up) is taken into consideration. The father was not at home when the search was made and the piece of goods was found in the trunk or the drawer of a bureau. There was also independent evidence that this piece of goods was in defendant's house prior to the burglary. It is evident that the state's case rested upon the fact that this one piece of percale was found in defendant's house some three weeks after the burglary of Miles' store. Although there was a large amount of dress goods, tobacco, meat, shoes, etc., stolen, and defendant's premises were carefully searched by the officer under the search warrant, no part of the stolen goods were found there except this piece of percale, if it be conceded that it was a part of the stolen goods, and no other evidence connecting him with the crime. While it is true Mr. Miles testifies that defendant said they got the percale from Mrs. Cook, the officer who was present and who testified for the state says he had both the white goods and the percale in his hands when defendant said they got the goods from Mrs. Cook, and did not particularize which piece. It was shown that as to the white goods this statement was true.

One proposition, then, is presented. Was the possession of the wife or daughter, in the circumstances detailed, such an exclusive possession in defendant as justified this instruction? Was it anything more than that constructive possession which every head of a family is presumed to have of property in his house or on his premises? In *Regina v. Pratt*, 4 Fost. & F. 315, Chief Baron Pollock, whose learning and immense experience give great weight to his judgments, laid it down that the mere fact of the goods being on the prisoner's premises, which might be without his knowledge or assent, does not prove possession, much less receiving, by him, for another might have put the goods on the premises without his knowledge, and he directed the jury to acquit. So in *State*

v. Owaley, 111 Mo. 450, 20 S. W. 194, in which two stolen revolvers were found in the possession of Mrs. Owaley, the wife of the defendant, but he was not at that time living with her, it was ruled that the possession of the wife could not be regarded as the exclusive possession of the husband. While the possession of the wife was the possession of the husband at common law for the purposes of civil liability, that law also recognized and held the wife as a criminal agent for crimes committed by herself not in the presence of her husband, and even in his presence when she alone was the active and inciting party to the offense. *State v. Ma Foo*, 110 Mo. 7, 19 S. W. 222, 33 Am. St. Rep. 414. In our opinion the mere fact of finding stolen articles on the premises of a man of a family, without showing his actual conscious possession thereof, discloses only a prima facie constructive possession, and is not such a possession as will justify a presumption of guilt by reason thereof. It is within the common experience that many honest and worthy men have dishonest children and servants, and to indulge in the presumption that because goods are found on their premises which turn out to have been stolen, without going further and showing an actual conscious and exclusive possession of such goods in the head of the family, would result oftentimes in punishing the innocent for the guilty. There is no occasion for pushing the presumption to any such length. Kept within its proper limitations it is a salutary principle and reasonable, but given a latitudinous constructive interpretation it is unreasonable, and would work grave injustice. *People v. Hurley*, 60 Cal. 74, 44 Am. Rep. 55; *Cowen & Hill's Notes to Phillips on Ev.* 530; *Wharton's Crim. Evidence*, § 758, and cases cited; *Turbeville v. The State*, 42 Ind., loc. cit. 495; *Roscoe's Crim. Ev.* 18; *Field v. The State*, 24 Tex. App. 422, 6 S. W. 200; *Burrill on Cir. Ev.* 450; *Lehman v. The State*, 18 Tex. App. 174, 51 Am. Rep. 298. In our opinion, there was no such actual, conscious, exclusive possession of this piece of percale by the defendant as would justify the giving of instruction No. 2 on behalf of the state.

2. As there was a total failure to show any confederacy or conspiracy between the defendant and Gamble, the court erred in admitting in evidence the goods taken under the search warrant from Gamble's house. It could not fail to have a prejudicial effect on defendant. In the absence of evidence tending to prove a conspiracy, this evidence threw no light on the guilt or innocence of defendant, but was irrelevant and incompetent. As the case may be retried, it may be remarked that if the jury should find that Mrs. Gamble gave defendant's daughter the piece of percale three weeks after the burglary, and that prior to such gift defendant had no possession of the percale, such a second-hand possession by the daughter would

not create a presumption of guilt. *State v. Warford*, 106 Mo. 55, 18 S. W. 886, 27 Am. St. Rep. 322; *State v. Scott*, 109 Mo. 229, 19 S. W. 89. Having explained his possession, it devolved upon the state to show his explanation was false or improbable.

3. The fifth instruction is open to the criticism of defendant that it assumes that defendant had made statements adverse to his interest, and that it should have been limited to conversations proved on the trial. These defects can be readily remedied, however, if it shall be deemed advisable to further prosecute the case.

For the errors noted, the judgment is reversed, and the cause remanded for a new trial in accordance with the views herein expressed. All concur.

SPENCE v. RENFRO.

(Supreme Court of Missouri, Division No. 2.
Feb. 1, 1904.)

TAXATION—SALE OF LAND—HOLDER OF RECORD TITLE—ESTOPPEL.

1. Where plaintiff, who held the record title to land sold for taxation, though not a party to the proceedings, attended the sale, and, without giving notice of his title, bid for the property, and thereby induced defendant to believe that he did not own the land, and to bid higher and purchase the property, and after the sale stated that he owned the property and that he bid in order, "to beat the taxes," he was thereby estopped from asserting his title as against defendant.

Appeal from Circuit Court, Butler County; J. L. Fort, Judge.

Action by William A. Spence against William E. Renfro. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

L. D. Groves and Phillips & Phillips, for appellant. Thos. J. Murray, for respondent.

BURGESS, J. In 1896 John N. Lacks, collector of the revenue of Butler county, instituted suit in the circuit court of that county to enforce the state's lien for taxes, on the lands described in the petition which was filed in this cause, for the years 1894 and 1895. The Poplar Bluff Lumber & Manufacturing Company and W. I. Hooper were made parties defendant, and at the May term of said court, 1899, judgment was obtained, upon which a special execution was duly issued and the land levied upon and advertised for sale, and on the 5th day of October, 1899, all of said lands were sold to the defendant for the sum of \$57, he being the highest bidder at said sale. At the time of the institution of the suit for delinquent taxes the defendants thereto had no title to said land, but plaintiff was the owner of the record title, having acquired the title by deed from Ben F. Turner and wife on the 8th day of July, 1895, which deed was duly

recorded in the recorder's office of said county on the 8th day of May, 1897, but he was not made a party to said suit. He was present, however, at the sale of the land, and was next to the highest bidder therefor, but gave no intimation that he owned it or claimed title to it. A short time after said sheriff's sale plaintiff began this suit for the purpose of having it adjudged and decreed that the sheriff's deed to defendant passed no title, and for an injunction prohibiting him from placing it upon record, and thereby creating a cloud upon plaintiff's title. Defendant answered, in which it is alleged that the plaintiff well knew that the taxes herein referred to were due and unpaid, and that judgment had been rendered in the circuit court for said taxes, and that the sheriff had advertised said lands for sale under the special execution aforesaid, and the plaintiff well knew that the taxes were just, due, and unpaid, and negligently permitted said land to be offered for sale, without offering to pay said taxes. For a further defense the defendant says that at said sale the plaintiff was present and a bidder; that he made a number of bids on said land, being the next highest bidder to this defendant; that plaintiff made no claim of title to said land until after it had been sold by the sheriff to this defendant, when the plaintiff, for the first time, informed this defendant that the defendants in the tax suit had no title to the land; that he, the plaintiff, owned the land, and had let it go to sale, expecting to buy it in for less than the taxes. Defendant says that by the plaintiff's conduct in bidding on said land this defendant was led to believe that the plaintiff regarded the defendants in the tax suits as the owners of the land; defendant bought said land believing that the defendants in the tax suit owned the land, and without any knowledge until after said sale that the plaintiff made any claim to said land. Defendant says that by reason of the conduct of the plaintiff at said sale as a bidder, and his failure to disclose his claim of title, this defendant was misled and deceived into buying said land, and the plaintiff should be estopped from asserting or claiming title as against this defendant; wherefore defendant prays that plaintiff's petition be dismissed. Upon a trial had, judgment was rendered for defendant, dismissing plaintiff's petition, and against him for costs. He appeals.

The evidence was substantially as follows: Plaintiff knew before the sale that the taxes on this land were delinquent, and that the collector had instituted suit to enforce the state's lien. He testified as follows: "I never had any conversation with Mr. Renfro about who owned the lands until after the lands were stricken off to him." "I never offered to pay the taxes." Defendant Renfro testified as follows: "I was present at the sale of the lands mentioned in plaintiff's petition, and bid on the same; being the high-

¶ 1. See Estoppel, vol. 19, Cent. Dig. § 230.

est bidder, the lands were stricken off to me by the sheriff making the sale. At the time of the sale the plaintiff was also present and bid against me on said lands, he being the next highest bidder to me. During the bidding the plaintiff made no announcement that he had any interest in the lands, nor did he indicate in any way that he claimed any interest in the lands. After my purchase, however, he came to me, and said, 'You have got no title; I own the land, and I am not a party to the suit; I just let it sell to buy it in and beat the taxes.' I did not know that any one claimed any interest in the lands except the defendants in the execution. I was principally encouraged to bid by the brisk bidding of the plaintiff, and relied most confidentially upon his judgment, knowing that he had some experience as a real estate man, and that he owned and had access to a set of abstract books. I was deceived by the plaintiff's bidding, and knowing that he had claimed an interest. If he had disclosed it I should not have bid at all." Joseph Berner testified: "I was present at the sale of those lands, and heard the plaintiff and defendant both bidding on the land; did not hear Spence say he owned the land until after the sale; he then said he was bidding on it to get it for less than the taxes; that he thought he could buy it in for a less amount than the taxes."

It is insisted by plaintiff that although he was present and bid on the property at the sale, and entered into the competition without in any way indicating that he owned the land or had any interest in it, as his deed was of record he is not estopped by his action in now setting up claim to it. "The important and primary ground of estoppel by matter in pais is that it would be fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others have acted." *Rice v. Bunce*, 49 Mo. 231, 8 Am. Rep. 129; *Campbell v. Johnson*, 44 Mo. 247; *Chouteau v. Goddin*, 39 Mo. 229, 90 Am. Dec. 462; *Taylor v. Zepp*, 14 Mo. 482, 55 Am. Dec. 89; *Newman v. Hook*, 37 Mo. 207, 90 Am. Dec. 878. The element of fraud, though essential in order to amount to an estoppel, may result from the acts and conduct of a person as to whom invoked, although no actual fraud was in fact intended by him. It has been said, if a person induce another to purchase property, he will not thereafter be permitted to assert title thereto in himself, even though he was ignorant of his rights, when he held out the inducement, for, although there may have been the absence of a fraudulent intent, the assertion of title to the property would operate as a fraud upon the purchaser, and be just as hurtful to him as if the fraudulent intent had in fact existed. In some cases a person will even be estopped by his silence

from claiming property afterwards. But if no injury has resulted to any person by his silence or conduct, the doctrine of estoppel will not apply. So, if the facts be known by both parties, or if they have equal means of ascertaining them, there can be no estoppel. "And it has been ruled that silence does not estop when the party's deed is on record. But it should not be forgotten that there is a wide difference between silence and encouragement. A person whose deed is on record might be permitted to remain silent, but if his land is put for sale, and without any notification he enters the list of bidders and induces or encourages others to bid and expend their money in its purchase, he ought not to be allowed to set up anything to the detriment of those who have been guided in their action by his consent." *Rice v. Bunce*, supra. As plaintiff's deed was upon record, which disclosed his title, he had the right to remain silent—although he was present at the time the land was sold—had he chosen to so do, and done nothing to mislead other bidders. But the mere fact that the title was of record did not justify him to enter into competition with other bidders, and thereby mislead them, and especially the defendant, as the evidence clearly shows was the case. By concurring in the sale by participating in it, he made it his own act. ² *Herman on Estoppel*, § 964; *Olden v. Hendrick*, 100 Mo. 533, 13 S. W. 821. In the case last cited there is quoted with approval from *Faxton v. Faxton*, 28 Mich. 159, the following: "There is no rule more necessary to enforce good faith than that which compels a person to abstain from asserting claims which he has induced others to suppose he would not rely on. The rule does not rest on the assumption that he has obtained any personal gain or advantage, but on the fact that he has induced others to act in such a manner that they will be seriously prejudiced if he is allowed to fall in carrying out what he has encouraged them to expect." The evidence clearly shows that defendant was induced to bid on and buy the land by reason of plaintiff entering into the competition and bidding upon it at the sale, and that he would not have done so but for his acts in so doing. In fact, there was no evidence to the contrary, and to now permit plaintiff to assert title to it would be a fraud upon defendant which the law will not permit. He ought to have remained silent, or made it known at the sale that he claimed the land, but having failed to do so, and entered into the competition, and thereby induced defendant to believe that he did not own or claim it, he should now be estopped by his acts from asserting title thereto.

For these intimations the judgment should be affirmed. It is so ordered. All of this Division concur.

STEALEY v. KANSAS CITY.

(Supreme Court of Missouri, Division No. 2.
Feb. 1, 1904.)

**MUNICIPAL CORPORATION—CITY LIMITS—OUT-
LYING STREETS—JUDICIAL NOTICE—SIDE-
WALKS—DEFECTS—INJURY TO PEDESTRIAN—
ULTRA VIRES ORDINANCE—DUTY TO REPAIR—
ESTOPPEL.**

1. Under Kansas City Charter, § 1, subd. 5, giving the city council exclusive control of the sidewalks of the city, and article 9, § 2, providing that the city shall have power to construct and reconstruct all sidewalks within the city limits, the city has no jurisdiction over sidewalks without the city limits, and is not liable for injuries caused by defects therein.

2. Rev. St. 1889, § 7846, provides that it shall be lawful for cities to work, grade, or macadamize roads or highways leading to and from such cities in such manner as may be provided by ordinance, but that such privilege shall not extend to a greater distance than five miles from the corporate limits of the city. *Held*, that such section conferred a mere license on cities, which was confined to working and macadamizing such roads, and did not authorize the city to construct sidewalks along the same, nor render it liable for injuries arising thereon.

3. While courts will take judicial notice of the streets of a city within the state, and their relation to each other, and the direction in which they run, they will not take judicial notice that a particular street is within five miles of the limits of a city.

4. Where, at the time a city ordinance was passed directing the improvement of a street and the construction of sidewalks along the same, such street was not within the city limits, the ordinance was ultra vires, and hence the construction of a sidewalk thereunder did not estop the city from contending that it was not liable for injuries by defects in such sidewalk on the ground that it was not required to repair the same.

Appeal from Circuit Court, Jackson County; James Gibson, Judge.

Action by Lois Stealey against Kansas City. From a judgment in favor of defendant, plaintiff appeals. *Affirmed*.

Henry J. Latshaw, Jr., for appellant. R. J. Ingraham and L. E. Durham, for respondent.

BURGESS, J. This is an action for \$10,000 damages, for which plaintiff, a minor, sues by her next friend, alleged to have been sustained by her on a plank sidewalk on a street in Kansas City. The petition alleges that in the evening of July 9, 1898, the plaintiff, Lois Stealey, then a girl about 14 years old, was walking with several other persons south upon a plank sidewalk on the west side of Denver avenue, when she stepped with her right foot into a hole in the sidewalk, caused by a broken board, and received severe bodily injuries. The answer was a general denial. On the trial plaintiff was nonsuited on the ground that the evidence failed to show that Denver avenue was a public street in Kansas City at the time of the accident. In due time plaintiff filed motion to set aside the nonsuit and for new trial, which being overruled she saved her exceptions, and

brings the case to this court by appeal for review.

The hole in the sidewalk had existed for several months prior to the accident. On December 4, 1899, Denver avenue was, and for some time prior thereto had been, a public highway in Jackson county, outside of Kansas City at that time. On that day the city undertook to annex certain territory, including Denver avenue. On January 19, 1891, this court held the extension illegal. In the meanwhile, viz., in October, 1890, the sidewalk on which plaintiff was injured was laid by respondent pursuant to Ordinance No. 2,345 of Kansas City, approved September 10, 1890. The extension having been declared illegal, Denver avenue remained outside the city until December 2, 1897, when the city again extended its limits and again took in Denver avenue. The sidewalk where plaintiff was injured was on the date of her injuries open to general public travel, and had been so used for a number of years continuously prior to said accident. There were no signs or warnings of any kind to notify the public that said sidewalk was not on a street or avenue in said city, and the sidewalk where plaintiff was injured was at all of said times used by the general public for the purpose of travel in the ordinary manner. From the time that the Supreme Court held the ordinance extending the limits of Kansas City invalid, and up to and including the date of plaintiff's injury, defendant city did not attempt to exercise any control over said street. Plaintiff contends that the passage of the ordinance by defendant city providing for the laying of a sidewalk on Denver avenue was a recognition by the city of such street as a public street which it was bound to keep in repair. It seems to be well settled that where a city, by ordinance, has required a street within the city limits to be improved by the construction of a sidewalk therein, and that in pursuance of such an ordinance a sidewalk is constructed, the city is bound to keep it in repair, and is liable in damages for injuries occasioned by its failure to do so. *Hill v. Sedalla*, 64 Mo. App. 494; *Golden v. City of Columbia*, 54 Mo. App. 100; *Byerly v. Anamosa*, 79 Iowa, 204, 44 N. W. 359; *Seymour v. Salamanca*, 137 N. Y. 364, 33 N. E. 304. But it is clear from the record that at the time of the injury complained of Denver avenue was not within the corporate limits of defendant city. By section 1, subd. 5, of the city charter of Kansas City, the common council is given exclusive control and power over the streets and sidewalks of the city. By section 2 of article 9 the city is given power to cause to be graded all streets and to construct and reconstruct all sidewalks within the city limits, but no power is conferred by the charter upon the city to grade or improve roads or streets, or to construct sidewalks beyond or outside of the city limits. *City of St. Louis v. St. Louis*

University, 88 Mo. 155, was an action of ejectment for the possession of a street, which was dedicated by the owner to the public in 1821. In 1882, by the charter of the city, its limits were fixed so as to lease the street in question outside of the city limits. While it was thus outside the limits, the city surveyor was, by the proper authorities, ordered to and did make and return a plat to the board of aldermen of the city, showing the street on the map as a public highway open for travel. This act of the city, it was contended by plaintiff, constituted an acceptance of the street. The court says: "The city had no jurisdiction. It could, then, no more accept a dedication of this street than of one mile distant from the city limits. * * * The map made by Paul and its approval by the board of aldermen of the city have no legal significance whatever, for it is a conceded fact that when it was made and approved the land was not within the limits of the city. The approval of the map was an act of the most equivocal character, so far as it relates to that portion of the land included in it beyond the city limits. But, even if it was as clear as sunlight that the board meant by that approval to accept on behalf of the city the dedication made by Conner, it was a matter not within their jurisdiction, and in which the city then had no concern." But plaintiff insists that, whether Denver avenue was within the corporate limits of the city or not at the time of her injury, as it was within five miles of the city, and was recognized by the ordinance providing for laying the sidewalk in question upon it, courts will take judicial notice that the street was within five miles of the corporate limits at the time the injury occurred, and that by the provisions of section 7846, Rev. St. 1889, defendant was bound to keep the sidewalk in reasonable repair in order to prevent injury to pedestrians traveling along and upon it, just as if in fact it was within the corporate limits of the city. Said section reads as follows: "It shall be lawful for the municipal authorities of cities, towns and villages in this state to work, grade or macadamize roads, streets and highways leading to and from such cities, towns, or villages, in such manner as may be provided by ordinance by the proper authorities of any such city, town or village; but this privilege shall not extend to a greater distance than five miles from the corporate limits of such city, village or town, and shall not be construed so as to allow any obstruction to or interfere with the free use of any such road, street or highway by the public, except so far as may be necessary while working, repairing or grading such road or highway." Even conceding, for sake of the argument only, that the statute quoted applies to all cities, it only confers upon them the right to "work, grade or macadamize, roads, streets and highways leading to and from such cities, towns or villages." No con-

trol whatever of them, otherwise than for the purposes indicated, is conferred upon such cities, and they cannot be held to respond in damages for injuries sustained by reason of their failure to keep them in repair. The power conferred by the act is a mere license to work, grade, or macadamize thoroughfares leading to and from such cities, towns, or villages, and they are not responsible for the manner in which such work is done, or for failure to keep any such thoroughfare in good condition, unless the action is given by statute. *Reardon v. St. Louis County*, 36 Mo. 555, and subsequent cases; *Clark v. Adair Co.*, 79 Mo. 536. Nor do we think this court can take judicial notice that Denver avenue is within five miles of the city limits. While this court will take judicial notice of the streets of Kansas City, and their relation to each other, and the direction in which they run (*Brady v. Page*, 59 Cal. 52), it will not take judicial notice that a road or public highway outside of the corporate limits of said city is within five miles thereof.

Plaintiff also contends that, although Denver avenue was not a public street, defendant is estopped from denying that on July 9, 1898, the walk was a public sidewalk. Upon this point plaintiff relies upon *O'Malley v. City of Lexington* (Mo. App.) 74 S. W. 890, and *Village of Mansfield v. Moore*, 124 Ill. 133, 16 N. E. 246, but both of those cases were with respect to sidewalks within the limits of the municipalities, and were correctly decided. In the case of the Mayor, etc., of the City of Albany v. *Simon Cunniff*, 2 N. Y. 165, it was ruled that, where the officers and agents of the city assumed to build a bridge under the authority of a statute not constitutionally passed, and the bridge fell in consequence of the negligent construction thereof, the corporation was not liable in an action at the suit of a person injured by the accident. In the case at bar, however, the sidewalk was not at the time of the accident within the city limits; hence the ordinance directing it to be constructed was ultra vires of the city, and it is not, therefore, estopped in any manner by the passage of said ordinance and the construction of the walk. In *State ex rel. v. Murphy*, 134 Mo. 548, 31 S. W. 788, 34 L. R. A. 369, 56 Am. St. Rep. 515, it was said: "There is no doubt that the doctrine of estoppel is, as a general rule, alike applicable to corporations and individuals. It cannot, however, be applied to validate a contract which the corporation had no power to make. The doctrine is thus declared: 'Where a municipal corporation enters into a contract which it has the power to make, the doctrine of estoppel applies to it with the same force as to individuals.' *Union Depot Co. v. St. Louis*, 76 Mo. 893. The rule is thus given by *Bigelow*: 'If the act undertaken was in and of itself ultra vires of the corporation, no act of the body can have the effect to estop it to allege its want of power to do

what was undertaken.' Bigelow on *Estoppel* (5th Ed.) pp. 466, 467. See, also, *Scovill v. Thayer*, 105 U. S. 143, 23 L. Ed. 938; *Thomas v. Railroad*, 101 U. S. 86, 25 L. Ed. 950; *Penn. R. R. Co. v. Railroad*, 118 U. S. 317, 6 Sup. Ct. 1004, 30 L. Ed. 83."

Finding no reversible error in the record, the judgment is affirmed. All of this division concur.

STATE v. BOYER.

(Supreme Court of Missouri, Division No. 2.
Feb. 1, 1904.)

HOMICIDE—APPEAL—ABSENCE OF BILL OF EXCEPTIONS—QUESTIONS PRESENTED.

1. On appeal from a conviction of homicide, where there is no bill of exceptions, there is nothing before the court but the record proper, and errors occurring during the trial are not presented for review.

Appeal from Circuit Court, Wayne County; F. R. Dearing, Judge.

William L. Boyer was convicted of manslaughter in the fourth degree, and appeals. Affirmed.

The Attorney General, for the State.

FOX, J. On the 19th day of August, 1901, the prosecuting attorney of Wayne county, Mo., filed in the office of the clerk of the circuit court of said county an information charging the defendant with murder of the first degree. On the 11th day of February, 1902, defendant was put upon his trial upon the charge in the information. The trial resulted in a verdict of guilty of manslaughter of the fourth degree, and his punishment assessed at two years in the penitentiary. Motion for new trial was filed, and by the court overruled, and the cause is here upon appeal.

Whatever errors appellant may have complained of during the progress of the trial, they have not been preserved for review by this court. There is no bill of exceptions; hence nothing before us, except the record proper. We have examined the record. The information is in due form. The defendant was properly arraigned, and entered his plea of not guilty.

The verdict of the jury is in proper form, finding the defendant guilty of one of the grades of homicide included in the charge as contained in the information; and, finding no error in the record before us, the judgment of the trial court should be affirmed, and it is so ordered. All concur.

STATE v. HYATT.

(Supreme Court of Missouri, Division No. 2.
Feb. 1, 1904.)

ROBBERY — EVIDENCE — ADMISSIBILITY—SUFFICIENCY—IDENTIFICATION—APPEAL—DISTURBANCE OF VERDICT.

1. The identification of defendant as the perpetrator of a robbery is a question of fact for the jury.

2. In a prosecution for robbery, evidence held sufficient to identify defendant as one of the robbers.

3. A verdict of the jury will not be disturbed on appeal when there is substantial evidence to support it.

4. In a prosecution for robbery, where it was shown that when the officer arrested defendant and his partner on January 7th, the night of the robbery, they locked their place of business, and it remained locked until the officer returned to search the same on February 12th, evidence that the officer on the latter date went into the cellar, and found the stolen property in a pile of dirt and debris, was admissible.

Appeal from St. Louis Circuit Court; W. B. Douglas, Judge.

Frank Hyatt was convicted of robbery in the first degree, and appeals. Affirmed.

Chas. J. Maurer, for appellant. The Attorney General and Sam B. Jeffries, for the State.

GANTT, P. J. At the February term, 1903, of the circuit court of the city of St. Louis, criminal division No. 8, the defendant, Frank Hyatt, was convicted of robbery in the first degree, and his sentence assessed at seven years in the penitentiary. From that conviction he appeals.

The indictment is in the usual and approved form, and it is unnecessary to set it out at length. The defendant was duly arraigned, and entered his plea of not guilty. The evidence tends to prove that the defendant was the proprietor of a saloon at the northeast corner of Ninth and Walnut streets in the city of St. Louis. The alleged robbery took place on the 7th day of January, 1903, on Walnut street, between Seventh and Eighth streets, in said city, near 10 o'clock on the night of that day. About 10 o'clock of that night, Lum Webb, of Ft. Smith, Ark., went into defendant's said saloon, having on his person at the time a gold watch and chain and about \$80 in money. The defendant introduced himself to Webb, and asked him to take a drink. Webb declined to drink, but took a cigar. Webb then invited the defendant, Hyatt, to drink with him, but Hyatt refused to drink because Webb had refused to drink with him. About that time a woman—one Maud Coffey—came in, and took a seat at a table in the saloon, whereupon Hyatt and Webb also sat down at the same table. The party then took one or two drinks together, when Webb got up and started to the St. James Hotel on Broadway, where he was stopping. The woman followed him out of the saloon. He had gone but a short distance when the defendant, Hyatt, and one Hildebrandt overtook him and threw him down, the defendant striking him in the face and kicking him after he was down. They then forcibly took from him his watch and money, but did not get the chain.

The principal point urged for a reversal is the insufficiency of the evidence to identify defendant as one of the robbers. The evidence on this point was as follows: Webb testified: "He (meaning defendant) made

himself acquainted, and we conversed for some time. The conversation was general. I do not remember all that occurred, but a little of everything. I believe the first time I took another cigar, and put it in my pocket, and when I asked him what he would take he said, 'I don't like to drink with a man who will not drink with me.' 'Well,' I says, 'I can take a little glass of beer,' and he drank whisky, and this woman came up. She was there sitting down at a table just in the back of the room. I do not know her name. I have seen her. She is out there in that room. She came up and took a drink. They both drank whisky, and in the meantime the music kept on playing, and we sat down at a table in the back end of the room, and I believe she ordered drinks and paid for them. I took a small glass of beer at that time, and got kinder strangled from some cause or other. I then got up and went to the back of the room, and then started out at the front door, and she followed me. I started up Walnut street towards the hotel, and she started along with me. I wanted to go to the hotel, as I had been up all the night before, losing sleep. I had on an overcoat buttoned up at the collar. It was a chilly, raw night, and just as I left this woman I heard something on the sidewalk, and I turned and looked over my shoulder and this fellow Hildebrant came along and kinder jumped on me, and pinioned his arms around me, and Hyatt, the defendant, which I took to be Hyatt, passed around me, and hit me across the head with something. I jerked my right hand loose, and made a struggle, and he hit me again. I had on a kind of a plush cap, a railroad cap, and he commenced going through my pockets. This fellow Hyatt kept telling him, 'Inside vest pocket, inside vest pocket,' and when they got into the pocket Hildebrant said, 'Get his watch,' and when they broke and ran off I started out to find the police. They got me down on my right side, and my cap was pushed over my eyes until I could not see. There was another man there besides Hyatt and Hildebrant. I do not know who he was. I never seen him. I cannot identify him. The only party I can identify that I got a look at while I was being robbed are these two men, the defendant Hyatt and Hildebrant. They succeeded in taking my watch and money from my inside pocket. As soon as they got the watch and money, they ran away, towards the saloon, I think. I cannot say how many blows I was hit. He hit me twice, with two hard blows, and then this fellow Hyatt, he was standing over on the right, and he kicked me several times." On cross-examination the prosecuting witness testified as follows: "Q. Who hit you? A. That man right there, Hyatt. He stepped around on my right and hit me. Q. But you said a moment ago you took him to be Hyatt. You do not know it was Hyatt? You took him to be Hyatt? A. It was Hyatt. Q. You now say

it was Hyatt? You are certain about that, are you? A. Well, yes. Q. Why did you hesitate if you are certain. A. Well, he was the man that was standing there. They all rushed around, and I thought some of the rest of them might hit me. Hyatt hit me all right, and then kicked me, and stood punching me with his toe." The witness identified the defendant among 40 persons at Police Headquarters. Maud Coffey testified that she lived at 1452 College avenue, St. Louis; that she was in the saloon kept by the defendant on the night of January 7th. She said she had been sent for twice before she came. That Hyatt, defendant, came down to get her, and told her that some gentleman was up there. That she could get something off of him if she would go. She went with him to the saloon about 10 o'clock, and when she got there she found the prosecuting witness. Hildebrant introduced her to him. "Hildebrant is a partner of the defendant. I stayed in the saloon until some time between ten and twelve o'clock, when Webb and I left. We went east on Walnut street. When we got down between Seventh and Eighth on Walnut, these three fellows came up, and Hildebrant threw his arm around Webb, and pulled him down, and then Hyatt kicked him. Hyatt was standing, and he kept hollering, 'Inside vest pocket, inside vest pocket.' Hyatt kicked him once."

The defendant insists the foregoing evidence will not support the verdict. The identification of the defendant as one of the perpetrators of the robbery was a question of fact for the determination of the jury. The jury saw and heard the witnesses on this point, and, if they believed the evidence of Webb (as they obviously did), it was sufficient to show he was one of the robbers. Again and again he stated defendant was one of the men who assailed and robbed him. He had seen the defendant just prior to the robbing in his saloon. Had drank with him, and sat at the table with him, and had a good opportunity to observe him, and the robbing occurred so soon after he left the saloon there is nothing improbable in his evidence that he recognized defendant as one of the party who robbed him. Moreover, he was corroborated by Maud Coffey. While it is true she testifies to her own bad character for lewdness, the defendant's evidence shows she was in defendant's saloon that night, and went out of the saloon at the same time that the prosecuting witness did, and was in a position to hear and see the matters which she detailed on the witness stand. The jury saw her, and observed her demeanor, and it was their province to believe her and Webb or reject their evidence. If they believed them, there was no reason to doubt the identification of defendant as one of the robbers. The rule is firmly established that the verdict of the jury will not be disturbed where there is substantial evidence to support it.

State v. Kinney, 81 Mo. 101; *State v. Green*, 117 Mo. 298, 22 S. W. 952; *State v. Howard*, 118 Mo. 127, 24 S. W. 41.

2. It is insisted that error was committed in permitting the state to prove that on the 12th of February following the 7th of January, 1903, the night of the robbery, Officer Lawton took a lantern and went down into the cellar of the saloon, and found Webb's watch, of which he had been robbed, in a pile of dirt and debris. To understand this objection, it should be stated that on the night of the robbery the policeman arrested both Hildebrant and Hyatt, the proprietors of the saloon, and closed the saloon, and Hildebrant locked the doors of the saloon, and put the key in his pocket, and the saloon remained locked up until Lawton made the search in the cellar and found the watch. The evidence further disclosed that there was a trapdoor behind the bar leading down some steps into the cellar, under which the watch was found. The court did not instruct on the possession of the stolen property, but simply admitted the evidence of the finding of the watch in the cellar of defendant's saloon along with the other testimony tending to show that the premises had remained in statu quo from the night of the robbery until the watch was found, and that the defendant was in the saloon and in charge of it after the robbery. The evidence was clearly admissible in such circumstances. It was a pregnant circumstance which the jury were at liberty to consider in connection with all other evidence in the case. Among other things, it strongly tended to establish the principal fact that Webb was actually robbed of his watch that night, as the watch was fully identified by Webb as the one taken from him by force that night.

Our conclusion is that there was no error committed in the trial court, and the judgment is therefore affirmed. All concur.

STATE v. WOODSON et al.

(Supreme Court of Missouri, Division No. 2.
Feb. 1, 1904.)

BAIL—RECOGNIZANCE—JUDGES—POWERS IN CHAMBERS—COURTS—ADJOURNMENT.

1. Rev. St. 1899, § 2543, provides that, when a defendant is in custody or under arrest for a bailable offense, the judge of the court in which the indictment or information is pending may let him to bail, and take his recognizance. Section 2545 declares that a recognizance taken in a court of record in term time shall be entered of record, and all recognizances taken in vacation shall be in writing and signed by the parties. Section 4160 provides that, whenever any act is authorized to be done in vacation, the words "in vacation" shall be construed to include any adjournment of the court for more than one day. *Held*, that section 4160 did not limit the power of the judge in admitting a prisoner to bail and taking bond under section 2543, and hence a judge of the court in which an indictment was pending had power to let defendant to bail and take his recognizance in cham-

bers after the court had adjourned on that day until the day following.

Appeal from St. Louis Circuit Court; O'Neill Ryan, Judge.

Scire facias by the state against Harrison Woodson and another for forfeited recognizance. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Chas. P. Johnson and David Murphy, for appellants. The Attorney General and Sam B. Jeffries, for the State.

Statement.

FOX, J. "This is a proceeding by scire facias to enforce the forfeiture of a recognizance entered into by Harrison Woodson, as principal, and John H. Vette, as surety. On the 19th day of June, 1902, the grand jury of the city of St. Louis returned an indictment against Harrison Woodson and Richard McKenna, charging them with burglary at the city of St. Louis on the 17th day of April, 1902. On the same day a capias was issued, and returned by the sheriff as executed by arresting the defendants; and Harrison Woodson entered into a recognizance before Judge Douglas, of Division No. 8 of the circuit court of the city of St. Louis, on the 19th day of June, 1902—the same day that the indictment was returned. A severance was called for, a separate trial granted, and the case of *State v. Woodson* was set for trial on September 4, 1902, when the defendant was three times called, and failed to answer to the indictment; and, so failing, neglecting, and refusing to answer, the surety upon the bond of the defendant, being also called three times, failed to respond, but made default. The bond was thereupon declared forfeited by the court, and scire facias ordered, and also a capias issued for the defendant Vette, returnable October 6, 1902."

The bond executed by defendants, which is the basis of this controversy, is as follows:

"Circuit Court of the City of St. Louis, Division No. 8. State of Missouri, City of St. Louis—ss.: Be it remembered, That on the 19th day of June, in the year nineteen hundred and two, personally came before Walter B. Douglas, Judge of the Circuit Court of the City of St. Louis, Division No. 8, within and for the said City of St. Louis, Harrison Woodson (as principal) and John H. Vette (as surety), and acknowledged themselves, jointly and severally, to owe to the State of Missouri, the sum of One Thousand Dollars, to be levied of their respective goods and chattels, lands and tenements; yet upon condition that if the said Harrison Woodson shall personally appear before the Circuit Court of the City of St. Louis, Division No. 8, from day to day during the present term, and on the first day of any future term, thereof, to which this cause may be continued, then and there to answer to an indictment preferred by the Grand Jurors of said City, against said Harrison Woodson for the

¶ 1. See *Bail*, vol. 5, Cent. Dig. § 177.

offense of Burglary, second degree, and Larceny and shall not depart the said court without leave thereof, then this recognizance to be void, else to remain in full force and effect. Harrison Woodson. [Seal.] John H. Vette. [Seal.] Witness: A. Carr.

"Taken and certified the year and day aforesaid. Walter B. Douglas, Judge of the Circuit Court of the City of St. Louis, Division No. 8."

The controverted questions in this cause are fully disclosed by the answer of the defendants, which is as follows:

"Defendant John H. Vette, answering to the writ of scire facias herein, states that there is no record of any recognizance entered into by him during the June term, 1902, as set forth in the writ of scire facias or otherwise. And said defendant, showing cause why the state of Missouri should not have execution against him, states that there is no judgment against him so far, nor can there be judgment entered against him in this proceeding, because there is no record of any recognizance having been entered on the minutes of the circuit court, city of St. Louis, No. 8, although said court was in session, holding its June term for the year 1902, on the 19th and 20th days of June, 1902. And said defendant, further showing cause why the state of Missouri should not have judgment and execution against him, states that the pretended bond on file in the case of state of Missouri v. Harrison Woodson, charged with burglary and larceny, appears upon its face to have been taken and approved by Hon. Walter B. Douglas, judge of said circuit court, on the 19th day of June, 1902, but defendant says that on said date said Hon. Walter B. Douglas had no power nor authority to take and approve such bond, for the reason that on the said date (the 19th day of June) and on the 20th day of June, 1902, said court was in its June term, and on said date there had been nor was there any adjournment of said court for more than one day; hence said bond, having been taken and approved in manner not in accordance with the statute in such cases made and provided, has no savor of validity, and is void. And said defendant, having fully answered and responded to said writ of scire facias, prays to be discharged, with his costs."

There is no dispute about the facts in this case. They may be briefly summarized as follows: The defendant Woodson was indicted by the grand jury of the city of St. Louis, charged with burglary and larceny. During the June term of court he was arrested, and on the 19th day of June, 1902, before Judge Douglas, in chambers, defendant Woodson, as principal, and John H. Vette, as surety, executed the recognizance herein set forth, and which was filed in the general office of the clerk of said court. This recognizance was taken by Judge Douglas, who was the then judge of the court in which said indict-

ment against Woodson was pending, and the recognizance was taken during the recess of the court. Court adjourned on the 19th to the 20th of June. It was after the adjournment on the 19th that this recognizance was executed, taken, and approved by Judge Douglas. There was no record entry as to the taking of this bond.

Opinion.

It is apparent from the record before us that but one legal proposition confronts us in the disposition of this cause: Was the judge of the court in which the indictment against defendant Woodson was pending authorized to take the recognizance upon which this judgment is predicated? Or, to more clearly state the proposition, the court adjourned on the 19th of June to the next morning, the 20th of June, 1902 (not being an adjournment for more than one day), and during the recess of the court, on the 19th of June, this bond was taken by the judge of the court and filed in the clerk's office, and no entry of record made in respect to the taking of it. Does this state of the record render such recognizance void and of no effect?

The proper construction of the statute which provides for the taking of recognizances in criminal cases must be the solution of this proposition. Section 2543, Rev. St. 1899, provides upon this subject that, "when the defendant is in custody or under arrest for a bailable offense, the judge of the court in which the indictment or information is pending may let him to bail and take his bond or recognizance." Section 2545, Rev. St. 1899, provides: "All recognizances taken in a court of record in term shall be entered of record, and all recognizances required or authorized to be taken in vacation in any criminal case, or proceeding of a criminal nature, shall be in writing, and signed by the parties to be bound thereby."

It is earnestly contended and very ably argued that, the court not having adjourned for more than one day, Judge Douglas was not empowered to take this bond on the 19th day of June, 1902. It is claimed that the bond should have been taken in open court, and entered of record, unless the court was adjourned for more than one day, in which event the judge would be authorized to take the recognizance. We are unable to agree to this contention, and are of the opinion that the position of counsel for appellant fails to find support upon a fair and reasonable construction of our statute. Section 2543, *supra*, in plain and unambiguous terms, vests the power of letting to bail and taking recognizance in the judge of the court in which the indictment or information is pending. This power is not limited by any terms expressed in the section. The evident purpose of authorizing the judge in which the indictment is pending to admit to bail was to furnish facilities for all persons who might be char-

ged with a criminal offense, and arrested upon such charge, for promptly securing their liberty by giving bond. It was to avoid the unnecessary confinement in jail of those persons under arrest for a bailable offense who were ready and able to give the required bond. Take this case. The court adjourned until the 20th of June. After adjournment the defendant was ready to give his bond. Must he wait and be held in custody until the next morning, when the court is in session, before his release can be secured? We think not. The statute must be construed to mean what it says—that the judge of the court in which the cause is pending may take the bond and release the prisoner from custody. This statute is broad enough to empower the judge to admit to bail and take bond in any bailable offense pending in the court of which he is judge at any time when the court is not in actual session. The conclusion reached as to the scope of the authority granted by section 2543, *supra*, in no way conflicts with the provisions of section 2545, *supra*. When the court is in session, no one will dispute that all bonds taken must be entered of record, and that is the meaning of the terms used in section 2545: "All recognizances taken in a court of record in term shall be entered of record." The very terms used, "taken in court of record in term," indicate clearly the application of the terms to those cases in which bonds are taken in open court, and should not be construed as prohibiting the judge, during the recess of the court, from exercising the power so clearly granted by section 2543.

It is insisted, however, that the power of the judge to admit to bail in pursuance of the provisions of section 2543, *supra*, is limited by the terms of section 4160, Rev. St. 1899, which provides, in one of its subdivisions: "Whenever any act is authorized to be done by or any power given to a court, or judge thereof in vacation, or whenever any act is authorized to be done by or any power given to a clerk of any court in vacation, the words 'in vacation' shall be construed to include any adjournment of court for more than one day." This section was never intended to limit the power of the judge in admitting to bail and taking bond under section 2543, and it is apparent that the lawmaking power never contemplated such a result by the enactment of it. It will be observed that section 2543 deals with the subject in judgment before us, and its provisions are plain and unambiguous. Section 4160 very appropriately provides that "the construction of all statutes of this state shall be by the following additional rules, unless such construction be plainly repugnant to the intent of the Legislature, or of the context of the same statute." It will be noted that section 2543, authorizing the judge to admit to bail and take bond of prisoners in custody, does not contain the terms "in vacation"; hence the rule of construction as designated in section 4160 has

no application to that section. It is significant that the terms "in vacation" were omitted from section 2543, and it must be taken to indicate that the power vested in the judge of the court in which the cause is pending is not restricted, and that he may, in harmony with the spirit and intent of that section, admit to bail and take recognizances during any recess of the court over which he presides. Both sections 2543 and 4160 may stand in perfect harmony. Wherever the terms "in vacation" are used in a statute, the rules of construction as provided are applicable; and doubtless the Legislature had in mind the numerous provisions of the Code in which those terms are expressly used, and to those provisions such rules of construction were intended to be made applicable. For instance, section 3627, Rev. St. 1899, provides that the judge of the court may grant injunctions, but it is followed with the express provision that he may do so "in vacation." To the same effect, sections 4449 and 4451, in respect to the power of the judge in vacation to issue preliminary writs of prohibition. He may order change of venue in civil cases; appoint appraisers in cases of assignment; order sale of attached property; grant writs of habeas corpus; appoint successor to assignee; appoint receiver of attached property. All of these powers are vested in the judge, and each section conferring the power adds the terms "in vacation." To these provisions of the statute it is apparent the construction of the terms "in vacation," as provided by section 4160, are applicable, and not to a section of the statute specially applicable to taking recognizances in which those terms are not used. In *State v. Eyermann*, 172 Mo., loc. cit. 304, 72 S. W. 542, a similar contention was made to the one in the case at bar. Burgess, J., very clearly announced the rule as applicable to section 2543, *supra*. He said: "Defendant, however, says that the bond was taken by the judge of the court after its adjournment for the day, and is therefore void, and relies upon the case of *State v. Caldwell*, 124 Mo. 509 [28 S. W. 4], as sustaining that contention; but that case is clearly distinguishable from the case at bar, in this: In that case the bond was taken by the clerk, who had no authority to do so, and was therefore void, while in this case the bond was taken by the judge of the court before whom the case was pending, and therefore had the same binding effect, in law, as if it had been taken in open court, and spread upon the minutes of the clerk." This is decisive of the controversy involved in this proceeding.

We have thus given expression to our views upon the interpretation of the sections of this statute before us concerning the subject in dispute, which results in the final conclusion that there was no reversible error in the determination of this cause by the trial court. The judgment should be affirmed, and it is so ordered. All concur.

STATE v. RIDDLE.

(Supreme Court of Missouri, Division No. 2.
Feb. 1, 1904.)

MURDER—DISCHARGE BY DELAY OF TRIAL—
IMPANELING JURY—SWEARING SHERIFF
AND DEPUTIES—APPEAL—PRESUMPTION—
CONTINUANCE—EVIDENCE—DILIGENCE—
REMARK OF COURT—EVIDENCE ON PRIOR
PROCEEDINGS—INSTRUCTIONS—EXCEPTIONS—
INFORMATION—ADJOURNMENT OF TERM.

1. Under Rev. St. 1899, § 2642, providing that, if one indicted and on bail is not brought to trial before the end of the third term held after the indictment is found, he shall be discharged, the term at which the indictment is referred or the information is filed is not included in such three terms.

2. Under Rev. St. 1899, § 3766, providing that, before any jury shall be impaneled, the sheriff and his deputies shall be sworn as to what they have done and will do, the oath, having been administered at a regular term, need not be administered at an adjourned term thereof.

3. The record being silent as to whether the clerk swore a certain deputy sheriff who summoned jurors, it will be presumed that, as required by Rev. St. 1899, § 3766, he did so.

4. The statutes with respect to summoning jurors in criminal cases being directory, merely, disregard thereof is not ground for new trial, in the absence of a showing of facts from which it will be presumed that defendant was prejudiced.

5. One is not incompetent as a juror in a murder case because he heard part of the evidence of a witness when defendant was released on bail, he showing on his voir dire that he had no opinion.

6. Refusal of continuance for absence of a witness whose evidence would have been merely cumulative is not ground for reversal.

7. Refusal of continuance for absence of witnesses will not be disturbed; defendant not having availed himself of the order allowing him to compel their attendance by attachment, and not showing diligence otherwise to obtain their presence.

8. The remark of the court, after defendant in a murder case had got through cross-examining a witness as to deceased having been in a penitentiary, that he supposed that line of questioning would be objected to some time, will not be held prejudicial.

9. Defendant, on his trial for murder, cannot use testimony of a witness taken on his application for bail, on the ground that he could not be found after diligent search; he merely showing in an application for continuance that he heard that witness was in St. Louis, and that seven days before the trial he caused a subpoena for him, directed to the sheriff of that city, to be issued, but that said sheriff failed to return it; it not appearing that defendant made any other effort to find the witness, and it not even being shown that the subpoena was delivered or mailed to said sheriff, or that the defendant asked for a rule on the sheriff to return the subpoena.

10. Defendant may not complain of an instruction as to murder in the first degree, he having been convicted of a lower degree.

11. The giving of an instruction by the court, of its own motion, after the argument of counsel, not having been excepted to at the time, cannot be considered on appeal.

12. An information for murder, alleging that defendant did shoot and strike L., giving to him, "then and there being," and with the dangerous and deadly weapon, etc., does not fail to charge the offense with certainty, because of the words "then and there being," they referring both to the time and place, and to the person of deceased, as alleged.

13. After the regular term of court had been continued to July 6th, the time fixed for the trial of defendant, and when he was tried, there was a June special term called and held for the special purpose authorized by Rev. St. 1899, §§ 1805, 1806, having no connection with the regular terms. *Held*, that the adjournment of the special term to court in course (that is, to the next regular term) did not adjourn the adjourned term of the regular term.

Appeal from Circuit Court, Stoddard County; J. L. Fort, Judge.

Fred Riddle was convicted of murder, and appeals. Affirmed.

Mozley & Wammack, for appellant. The Attorney General, Sam B. Jeffries, and K. C. Spence, for the State.

BURGESS, J. Defendant was convicted of murder in the second degree, and his punishment fixed at 10 years' imprisonment in the penitentiary, under an information filed by the prosecuting attorney of Stoddard county in the circuit court of said county, charging him with having, at said county, on the 6th day of March, 1902, feloniously, willfully, deliberately, premeditatedly, and of his malice aforethought, shot and killed with a pistol one Gus Laws. The case is before us upon defendant's appeal.

The facts connected with the homicide are but few, and, briefly stated, are substantially as follows: The defendant, a young man about 20 years of age, worked in his father's saloon, in the city of Dexter. The deceased was a man of mature years, dissipated, turbulent, and dangerous. Bad blood had existed between them for some time, and deceased had threatened to do violence to the defendant. On the day of the homicide, when defendant was in the act of leaving the city, deceased was heard to say of him, "If that damned cuss comes back here to-night, there will be hell in town." Defendant did return that evening at 6:16 o'clock, and, in company with Arthur Hammerly, went direct to his father's saloon. After they had gone into the saloon, the deceased entered, and applied to defendant an insulting epithet, which it is unnecessary to repeat. About this time defendant and Hammerly walked up to the bar and called for drinks, and, while they were standing there, the deceased stepped up by the side of the defendant, and remarked to him, "Who in hell are you?" or words to that effect, whereupon defendant asked him if he was trying to insult him? Laws then turned toward the defendant and said, "You can take it any God damn way you please," and thereupon defendant picked up the whisky bottle and hit the deceased over the head with it. The deceased then grabbed hold of the defendant and began striking him, when defendant drew his pistol and began striking deceased over the head with it, when it was discharged; the ball taking effect in deceased's head, killing him instantly. Defendant testified that the pistol was discharged accidentally; that he had no

intention of shooting Laws, but was only using the pistol to keep him off of him. The court instructed for murder in the first and second degrees, manslaughter in the fourth degree, excusable homicide, and self-defense.

The first assignment of error is with respect to the action of the court in overruling a motion filed by defendant for his discharge upon the ground that three terms of court had been permitted to pass, without his consent, without his having been brought to trial. The information was filed on the 8th day of March, 1902, during the regular March term of the circuit court of Stoddard county. The record does not show how the case was continued at this term, nor is it material, for, in order to entitle defendant to his discharge on this ground, the term of court at which the indictment is preferred, or the information filed, is not included. Sections 2841, 2842, Rev. St. 1899; *State v. Wear*, 145 Mo. 162, 46 S. W. 1099. At the regular September term, 1902, and on the 9th day of that month (being the second day of the term), the case was called and set for trial on the 30th day of said month. But this was not a continuance, within the meaning of the statute. It was then passed, for want of time to try the same, to October 20, 1902, when, upon application of the state, it was continued to the next regular March term, 1903. As the October adjourned term was but a continuation of the regular September term, this was the first continuance by the state after the information was filed. At the March term, 1903, and on the 7th day of July, defendant was placed upon trial. There are two terms of court each year in Stoddard county, fixed by statute. As the defendant was on bail, he was not, under the statute (section 2842, *supra*), entitled to be discharged of the offense unless he was not brought to trial before the end of the third term of the court after the information was filed, and it is perfectly plain from the record that such was not the case. He was therefore clearly not entitled to be discharged of the offense. *State v. Steen*, 115 Mo. 474, 22 S. W. 461; *State v. Wear*, *supra*.

In proper time, defendant filed his motion to quash the array of jurors upon the ground that the sheriff and his deputies who summoned them, from which the panel of 40 were afterwards selected, were not sworn as provided by section 3766, Rev. St. 1899, in that the array was not selected by an officer first duly sworn as provided by said section, but was summoned by more than one person, and by persons not authorized by law to summon them; also because he had not been furnished with a panel of 40 unprejudiced and qualified jurors, and that Miles Morgan, one of the panel of 40, had heard a part of the evidence taken by the court on defendant's application for bail, and therefore would be more or less influenced. The evidence adduced in support of this motion showed that at the March term, 1903, there was admin-

istered by the clerk of the court to the sheriff and two of his deputies the oath prescribed by section 3766, *supra*, with respect to summoning jurors; and as the adjourned term at which the 40 jurors were impaneled was but a continuation of that term, and the form of the oath prescribed applies to jurors summoned after the oath is administered, as well as before, there was a substantial compliance with the statute, in so far as the jurors summoned by them were concerned. As to the other deputy, Adam Johnson, who summoned part of the jurors, the record does not show that he was not sworn as required by the statute, in the absence of which it will be presumed that the clerk did his duty, and administered to him the prescribed oath. It is not claimed that the sheriff or any of his deputies were guilty of any partiality or improper conduct in summoning the jury, and, as the statutes with respect to the impaneling juries in criminal cases are directory, merely, even if they are disregarded that will not be a ground for a new trial, in the absence of circumstances from which it can be inferred that some prejudice resulted to defendant by reason thereof. *State v. Bleekley*, 18 Mo. 428; *State v. Pitts*, 58 Mo. 556; *State v. Breen*, 59 Mo. 413; *State v. Ward*, 74 Mo. 253; *State v. Gleason*, 88 Mo. 582.

The objection to Miles Morgan as a juror is without merit. He had only heard part of the evidence of one witness when testifying in the habeas corpus proceeding, and stated upon his voir dire that he did not have any opinion, much, at all, and was clearly a competent juror.

It is said for defendant that his application for a continuance was improperly overruled. At the regular March term, 1903, on motion of the prosecuting attorney, the case was continued generally. On the 25th day of May next thereafter, and at the same March term, on motion of the prosecuting attorney, the case was reinstated upon the docket, and the cause set for trial on the 6th day of July, 1903, thus giving the defendant 47 days in which to prepare for trial, and an order made granting the defendant attachments for absent witnesses.

In the application for a continuance on account of the absence of the witness Rolla Gunter, it is stated that he now resides at Caruthersville, in the county of Pemiscot, Mo.; that he is a young man who formerly resided in this (Stoddard) county, from where he moved to Cape Girardeau county; and that defendant only learned of his change of residence to Caruthersville a couple of weeks theretofore. The application shows that there was a subpoena issued by the clerk of the court for this witness on the 29th day of June—seven days before the trial was had. With respect to this witness, we therefore think proper diligence was used by defendant in order to procure his attendance upon the trial; but it is shown in the application for continuance that the facts which

could be proven by this witness, if present, were with respect to threats of violence made by deceased against defendant a few hours before the homicide, while the record discloses that threats of this character were proven by defendant upon the trial by several other witnesses, so that his evidence, if he had been present and testified, would have been merely cumulative, and the judgment should not be reversed upon that ground. *State v. Tettaton*, 159 Mo. 854, 60 S. W. 743.

As to witness John H. Harper, there seems to have been no subpoena issued for him until after the 25th day of May, 1903, which the motion recites was the last sitting of the court with reference to this case prior to the filing of the application for a continuance, up to which time said witness had been in attendance, and was in attendance on said day. The application also fails to show that a subpoena had been issued for witness Finney until June 28, 1903. If these witnesses had theretofore been in attendance as witnesses in this cause, as alleged in the application for continuance, in obedience to subpoena, it was their duty to continue to be so at any and all times until the case was finally tried, without further notice; and, for failure to do so, defendant had the right to compel their attendance by attachment, which the court ordered to be issued, but it does not appear that defendant availed himself of this order. In fact, no diligence whatever is shown upon the part of the defense in obtaining the presence of these witnesses at the trial on the 6th day of July. While there is no record showing that the case was taken up by the court on the 25th day of May, other than the showing made with reference to its reinstatement, yet, by the application for a continuance, it will be observed that some time prior thereto defendant was notified to be ready for trial on the said 25th day of May, as the case would then be called up for trial. The record does show that on the 25th day of May the court gave the defendant the right to obtain a writ of attachment against any witnesses who were then absent, requiring them to appear and testify on the 6th day of July. At no time does it appear that defendant used that diligence required by law to secure the attendance of the last-named witnesses in question, so as to entitle him to a continuance.

It has always been ruled by this court that the granting or refusing of a continuance rests largely in the discretion of the trial court, and, unless it is manifest that such discretion has been abused, this court will not interfere. *State v. Webster*, 152 Mo. 87, 53 S. W. 423; *State v. De Witt*, 152 Mo. 76, 53 S. W. 429; *State v. Tettaton*, 159 Mo. 354, 60 S. W. 743. And it does not seem to us that we would be justified, under the facts, in holding that such discretion was unwisely exercised in this instance.

During the cross-examination of a witness by the name of Smith, he was being ques-

tioned by one of defendant's attorneys with respect to the deceased having been in the penitentiary, when the court observed, "I suppose that line of questioning would be objected to some time." The attorney then announced that those were all the questions he desired to ask the witness, and then excepted to the language of the court. The exception to the observation of the court was not taken until after the witness was excused. It is claimed for defendant, however, that the remark was untimely, and prejudicial error; but we are unable to see how or in what way it could have possibly prejudiced the defendant's case, or have influenced in the slightest manner the verdict of the jury, nor do we think it did.

Defendant offered in evidence the testimony of Will Finney, taken and transcribed by the official stenographer of the court on defendant's application for bail, but this was rejected, and it is now charged that the court committed error in excluding it. It will be observed that Will Finney was one of the witnesses mentioned by the defendant in his application for a continuance. The contention is that this testimony was admissible upon the ground that the witness could not be found after diligent research. In speaking of this character of evidence, Greenleaf says: "It is also received if the witness, though not dead, is out of the jurisdiction, or cannot be found after diligent search, or is insane or sick, and unable to testify, or has been summoned, but appears to have been kept away by the adverse party." 1 Greenleaf on Evidence (14th Ed.) p. 218. The same rule is announced in the case of *Shackelford v. State*, 38 Ark. 539. The question here is as to the right of the defendant to reproduce the testimony of a living witness taken upon the application of the defendant for bail in the case under consideration, upon the ground alone that "he could not be found after diligent search." And "inasmuch as this species of testimony is admitted as a sort of judicial necessity, the proof of the facts which constitute the necessity for the departure from general rules ought to be clearly established before the testimony is admitted—as that the witness is dead, that diligent inquiry has been made for him where it is most likely he would be found, or that the defendant had caused his absence. The proof on this subject should be complete and satisfactory, as the question of the sufficiency of this proof would necessarily be confided largely to the discretion of the judge, and not be revisable on appeal when properly exercised." *Sullivan v. State*, 6 Tex. App. 319, 32 Am. Rep. 580. Defendant, in his application for a continuance, alleged that he had reason to believe that said witness was then in the city of St. Louis, in this state, and that he believed he could procure his testimony to be used on the trial of said cause at the next term of said court; that he had heard that said witness was then in said city; and that

on the 29th day of June, 1903, he caused the clerk of said court to issue a subpoena for said witness, directed to the sheriff of said city, but that said sheriff had failed and neglected to return said subpoena as required by law. Do these facts show that such diligent search was made for said absent witness, Finney, and his absence sufficiently accounted for at the trial, as to authorize the introduction in evidence of his testimony taken in the habeas corpus proceeding? We think not. It was not even stated in the application for continuance that the subpoena issued to the sheriff of the city of St. Louis for the witness was delivered to said sheriff, or mailed to him; nor did defendant ask for a rule upon said sheriff, as he had the right to do, to return said subpoena. Beside, it does not appear that any other effort was made by defendant to find the witness in that city. We are of the opinion that the showing, taken in its entirety, did not show that diligent effort required of defendant to learn the whereabouts of the witness Finney, or to show the inability of the defendant to produce him in person on the trial, in order to entitle him to read in evidence the testimony of Finney in the habeas corpus proceeding.

The instructions are unchallenged, with the exception of an objection to part of the first; but, as this instruction is with respect to murder in the first degree, and defendant was not convicted of murder in that degree, he is in no condition to complain. *State v. Alfrey*, 124 Mo. 393, 27 S. W. 1097.

The action of the court in giving an instruction of its own motion after the argument of counsel is complained of, but, as no exception was taken at the time, it cannot be considered on this appeal.

It is said for defendant that the information is invalid, in that it alleges that defendant "did shoot and strike him, the said Gus Laws, giving to him, the said Gus Laws, then and there being, and with the dangerous and deadly weapon," etc. The contention is that the information should have read "then and therewith," and that, as it does not do so, it fails to charge the offense with that certainty required in a criminal prosecution; but we think the words "then and there being" refer both to the time and place, and to the person of the deceased, as alleged, and cover the objection urged against it.

A final contention is that the court was not legally in session, and was therefore without jurisdiction to try the cause. This contention is based upon some supposed proceedings had by the court on the 13th day of June, 1903, at a special term of the court, at which time the record shows that the court was adjourned to court in course. It is true, in support of his motion for a new trial, defendant introduced a record entry purporting to have been made on Saturday, June 13, 1903, and showing a convening of the court at a special June term upon an order of the judge of said court, and the adjournment thereof to court

in course. Sections 1605 and 1606 provide that special terms of the circuit court may be held for the purpose of trying any person who is charged with an offense and confined in the jail two months before the regular term of court. The record in this case shows that in June, 1903, a special term of court was held for the purpose authorized by the provisions of the above section, and that on the 13th day of June the special term adjourned, and the record shows an adjournment to court in course. This was nothing more than an adjournment of the special term, and not an adjournment of the regular term, which had been continued until the 6th day of July. The term of court held in June, 1903, was called and held for a special purpose authorized by statute, and was independent of, and had no connection whatever with, the regular terms fixed by law. Nor could any other business than that for which the special term was called have been transacted at such term, unless by agreement of parties. Our conclusion is that the adjournment of the special term to court in course, or to the next regular term, had no effect whatever upon the adjourned term of the regular term of the court to the time fixed for the trial of defendant, when the case was in fact tried—in other words, that the adjourned term was not adjourned by the adjournment of the special term.

Finding no reversible error in the record, the judgment is affirmed. All of this division concur.

VAILE et al. v. SPRAGUE et al.

(Supreme Court of Missouri, Division No. 2.
Feb. 1, 1904.)

WILLS—CONTESTS—PARTIES—MINORS—GUARDIAN AD LITEM—NEXT FRIEND—APPOINTMENT—JURISDICTION—APPEAL—RIGHT TO ALLEGE ERROR—PREJUDICE.

1. Where certain minors were made parties to a will contest by scire facias duly served, on which the plaintiffs then had the right to make such minors parties defendant, but instead, on motion of the defendants, the court appointed a guardian ad litem and next friend for them, who made them complainants, and the guardian adopted the petition of the plaintiffs, and after judgment in favor of defendants prosecuted an appeal to the Supreme Court, neither plaintiffs nor defendants could object on such appeal to any irregularity in the appointment of such guardian and next friend.

2. Where certain minors were made parties to a will contest by scire facias, the court, in the exercise of its chancery powers, in the absence of a statutory enactment to the contrary, had incidental power to appoint a guardian ad litem and next friend for them.

3. Under Rev. St. 1899, § 865, prohibiting the Supreme Court from reversing a judgment for immaterial errors, a judgment in a will contest could not be reversed on appeal for errors in proceedings for the appointment of a guardian ad litem for minor parties brought in on scire facias which did not result in any injury to appellants.

Appeal from Circuit Court, Jackson County; W. B. Teasdale, Judge.

¶ 2. See *Infants*, vol. 27, Cent. Dig. § 211.

Action by John J. Valle and others against Olivia Sprague and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

S. W. Hilt and C. C. Madison, for appellants. Warner, Dean, McLeod & Holden, Carey May Carroll, and Paxton & Rose, for respondents.

BURGESS, J. This is a statutory contest of the will of Harvey M. Valle, deceased, who died on the 4th day of June, 1894. The suit was begun by heirs of the testator against the legatees and devisees under the will on June 5, 1899. One of the original plaintiffs, namely, J. J. Valle, died in Jackson county, Mo., on April 16, 1901, leaving as his heirs at law five minor children, viz., Ann, Mary, Andrew R., John J., Harriet L., and Thomas S. Valle, and his widow, Ella Valle. On the 20th day of April, 1901, defendants Olivia Sprague and Flora C. Willised filed written suggestion of the death of plaintiff J. J. Valle, and asked that the cause be continued in the names of his widow and children, and that the process of the court issue to bring said parties in for the June term, 1901, of said court. In pursuance of said order there was thereafter, on the 30th day of April, 1901, duly issued by the clerk of the circuit court of said county a scire facias against said heirs and widow, requiring them to appear at the next June term of said court to be begun and held on the first Monday in said month, and to show cause, if any they had, against the revival of said suit. This process was duly served by personal service upon each of the parties named therein on the 14th day of May, 1901, by the sheriff of said county, and, as they failed to show cause against the revivor during the first four days, the court appointed Jesse J. Vineyard guardian ad litem for these infant plaintiffs, and also appointed him as their next friend. He filed an indorsement of the petition of the other plaintiffs. Plaintiffs' attorney made an oral application for a continuance without any affidavit on the ground that certain beneficiaries under the will, viz., the children of Mrs. Sarah E. Brooks, of Horseheads, N. Y., were not made parties, alleging that they had not learned of the whereabouts of these parties till 8:30 a. m. on June 9, 1901. They also made oral objection to the appointment of Mr. Vineyard, because none of the friends or relatives of these children had come forward and asked to be appointed. The case was tried, and the jury found in favor of the will. Plaintiffs appealed on two technical points alone—that the court failed to grant a continuance on such oral application for the cause stated and that the court failed to sustain their oral objection to the appointment of Mr. Vineyard. No pretense is made that there was any injury to the minors or any one else.

Plaintiffs complain of the action of the

court in appointing Vineyard guardian ad litem and next friend of the infant children and heirs of J. J. Valle, deceased, who thereafter, in his capacity as next friend, adopted the petition of the other plaintiffs herein as their petition, upon which the case was thereafter prosecuted. While under our statute (sections 550, 559, 560, Rev. St. 1899) suits may be begun and prosecuted by infants by general guardian or curator, or by next friend duly appointed for the purpose, we have no statute authorizing the appointment of a guardian ad litem for an infant plaintiff. And unless the power to appoint such a guardian, or the power to appoint a next friend, was incident to the court, or, if irregular, the irregularity was waived, the order appointing Vineyard guardian ad litem and next friend was void. "A guardian ad litem has been defined to be a person appointed by a court of justice to prosecute or defend for an infant in any suit to which he may be a party." 10 Encyc. Pleading & Practice, 616; 2 Stephen's Com. 343; Black's Law Dic. tit. "Guardian Ad Litem." It is said in *Garvin's Adm'r et al. v. Williams et al.*, 50 Mo. 206: "Proceedings in reference to the establishment or invalidating of a will stand on a different foundation from ordinary actions at law or causes of action. They are of the nature of a proceeding in rem, and simply amount to a revival of the same matter in the circuit court which has been previously had in the county court. The same legal rules that govern the investigation in the county court apply in the circuit court. The heirs at law and devisees are made nominal parties, but in truth the proceeding is ex parte, and all are competent witnesses. See *Dickey et al. v. Malechi*, 6 Mo. 177, 34 Am. Dec. 130. "Although this is technically a proceeding at law, yet in many respects it partakes of the nature of a proceeding in chancery; and the rule recognized in courts of equity with respect to the persons necessary to be made parties to a bill we think is to a great extent applicable to a case of this kind. The general rule in equity is that all persons should be made parties to a bill who are materially interested, either legally or beneficially, in the subject-matter of the suit. The general rule at law is more restricted, confining it to such as have a direct and immediate interest. Story, in his *Commentaries on Equity Pleadings*, p. 74, refers to this rule as necessary to enable the court to make a complete decree between the parties and prevent future litigation, by taking away the necessity of a multiplicity of suits, and to make it certain that no injustice is done either to the parties before it, or to others who are interested in the subject-matter, by a decree which might otherwise be grounded upon a partial view only of the real merits." *Eddie v. Parke's Ex'r*, 31 Mo. 513. The infants being necessary parties to the proceedings, when brought in by scire facias, they

become, as it were, wards of the court, who is said by Mr. Story in his work on Equity (section 1352) to be a person who is under a guardian appointed by such court, and this includes guardians ad litem, which every court has the power to appoint. 2 Kent, 229. And when a suit is instituted in a court of chancery relative to the person or property of an infant, though he may not be under any general guardian appointed by the court, he is treated as the ward of the court, and as being under its especial cognizance and protection.

The authorities hold that there is no substantial difference between a guardian ad litem or a *prochein ami*. The former denomination is usually applied when the representation is for an infant defendant, and the latter where it is for an infant plaintiff. But in either event the person who represents the infant is regarded as an officer of the court. In *Sharp, Administrator, et al., v. Findley et al.*, 59 Ga. 722, the devisees of one Coleman G. Goodwyn filed what purported to be a bill in the circuit court, in which they prayed the chancellor to grant to them a decree directing a sale of the lands of the testator. One Pye, who was administrator of the estate, and guardian ad litem for three of the heirs who were minors, was a party to the suit in his respective capacities of administrator and guardian ad litem. Judge Bleckley, speaking for the court, said: "It would seem from the authorities that there is no substantial difference between a *prochein ami* and a guardian ad litem. The former denomination is usually applied when the representation is for an infant plaintiff, and the latter when it is for an infant defendant. But in either case the representative of the infant is regarded as an officer of court. Story's Eq. Pl. §§ 57, 58 note 2; 1 Am. L. C. 263 to 267; 7 M. & W. 400; 13 M. & W. 640. In 2 Edw. Ch. R. 113, one who was both a joint owner of the property and a creditor of the infant was allowed to act, he being a person of excellent character. Is there any real incompatibility between the office of administrator and that of guardian for the legatees or devisees? When the court appointed the administrator guardian ad litem for the minors, was he not thereby commissioned as guardian for the conduct of that proceeding, and did he not thenceforth act in the double character of party and officer of the court?" Moreover, the authority of the circuit court to appoint a guardian ad litem for an infant plaintiff during term time was recognized by this court in *Colvin v. Hauenstein*, 110 Mo. 575, 19 S. W. 948.

But, however irregular the proceeding in respect to the appointment of Vineyard guardian ad litem and next friend of said infants may have been, are plaintiffs in a position to avail themselves of it? The infants prosecute this appeal in this court just as the suit was prosecuted in the circuit court

—that is, by their next friend, Vineyard—which would seem to be inconsistent with the idea that such appointment was void. If they could not prosecute it in the court below by Vineyard as guardian ad litem or next friend, it is inconceivable how they can prosecute this appeal in that way. The minors were brought into court by *scire facias* duly served, upon which the then plaintiffs had the right to make them parties defendant had they seen proper to do so, but instead, upon motion of defendants the court appointed a guardian ad litem and next friend for them, who made them coplaintiffs; and certainly defendants are in no condition to complain of the irregularity of the proceedings in this regard, even if irregular (*Harper v. Morse*, 114 Mo. 517, 21 S. W. 517; *Johnson Brinkman Co. v. Bank*, 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615; *Dice v. Hamilton* [Mo. Sup.] 77 S. W. 299), nor should plaintiffs be heard, under the circumstances disclosed by the record, to do so. The provisions of the statute referred to were not, we think, intended to deprive courts when proceeding in rem, or when in the exercise of chancery powers, of such powers as are incidental to such courts. It would therefore seem, in the absence of statutory enactment to the contrary, that the action of the court in having brought in as necessary parties plaintiff to this proceeding said minor infants may be justified upon the ground that it was the proper exercise by the court of its incidental power, which, as has been said, is incidental to all courts. After the infants were brought in by *scire facias*, and a guardian ad litem had been appointed for them, they adopted, or rather their guardian ad litem did for them, the petition of the coplaintiffs, and their rights duly protected. It is clear from the record that they were not in any way prejudiced, or that they suffered any injury whatever by the procedure adopted, and under such circumstances we are forbidden by statute from reversing the judgment. Section 865, Rev. St. 1899.

The judgment should be affirmed. It is so ordered. All of this division concur.

STATE v. BERRY.

(Supreme Court of Missouri, Division No. 2.
Feb. 1, 1904.)

GRAND JURIES—SELECTION—EMBEZZLEMENT—IRRESISTIBLE IMPULSE—INSTRUCTIONS.

1. Rev. St. 1899, § 3769, provides that the county court shall select the names of not less than 100 persons having the qualifications of jurors, and shall determine how many grand jurors shall be selected from each township; and section 3770 requires the clerk of that court to draw the names of such persons to the required number from each township, until he has selected 12 who shall constitute the grand jury at the next term of court. Laws 1901, p. 192. § 3770a, provides that no grand jury shall be convened except on an order of the judge of a court having jurisdiction of felonies, and whenever a judge of such a court deems it nec-

essary to cause a grand jury to be convened he shall make an order, which shall specify whether the grand jury shall be selected by the county court or by the sheriff, and if it shall require the selection to be made by the sheriff the clerk shall issue a special venire and deliver it to the officer, etc. An indictment was returned before Laws 1901, p. 192, § 3770a, went into effect, by a grand jury selected by the county court conformably to sections 3769, 3770. *Held*, that the fact that the circuit court, anticipating Laws 1901, p. 192, § 3770a, had made an order on the sheriff to summon a grand jury, the sheriff summoning the same jurors that the county court had already selected, was not a ground for quashing the indictment.

2. Where a person indicted for embezzlement retained the intellectual power to perceive right and wrong, the fact that his will power was so impaired that he could not resist the impulse to do wrong is no defense.

3. Where, in a prosecution for embezzlement, defended on the ground of insanity, there is no evidence that defendant used cocaine or morphine to cure alcoholism, an instruction that if defendant's mind was impaired from chronic drunkenness and attempts to cure alcoholic disease, or from the use of cocaine and morphine, etc., is properly refused.

Appeal from Circuit Court, Boone County; Jno. A. Hockaday, Judge.

William F. Berry was convicted of embezzlement, and appeals. Affirmed.

S. Turner, J. S. Banks, and Gillespy & Conley, for appellant. The Attorney General and C. D. Corum, for the State.

GANTT, P. J. At the February term of the Boone county circuit court the defendant was indicted by the grand jury for embezzlement of \$132.60, the money and property of F. P. Mitchell, which money came to and was collected by said defendant by virtue of his official position as constable within and for Columbia township, Boone county, Mo. The defendant having no counsel, the court appointed two members of the bar, Messrs. Haydon and Conley, to defend him. He was duly arraigned, and pleaded not guilty. The cause was continued at the February and June terms, and at the October term the defendant by leave of the court withdrew his plea of not guilty, and filed a motion to quash the indictment, which motion the court overruled. This motion was properly overruled, because the sole ground of the motion was that the indictment was not found and returned by a grand jury selected according to law. We have not been favored with either oral argument or brief on the part of defendant, but we glean from the bill of exceptions that it was his contention that the act of March 19, 1901, was in force, and that the county court could not select a grand jury for the February term, 1901, without an order of the circuit court, or the judge thereof in vacation; but it is obvious this was a misapprehension. The Revised Statutes of 1899, §§ 3769, 3770, were in force when the grand jury was selected by the county court, in January, 1901.

While it is true the circuit court did make an order on the sheriff to summon a grand jury at the February term, it appears he summoned the same jurors which the county court had already selected. This action of the circuit court in no way affected any right of defendant. Indeed, it seems to have been merely a precaution to comply with the act probably then pending, which ripened into the act of 1901, p. 192, § 3770a. In no event was the action of the court in ordering the grand jury any ground for quashing the indictment. It was a substantial compliance with the law, both in form and spirit.

After the motion to quash was overruled, a demurrer was filed alleging that the indictment was insufficient because it failed to allege that the money embezzled was the property of anybody whomsoever. The demurrer was properly overruled, because the indictment specifically charges the money so embezzled was "the money and property of F. P. Mitchell." Thereupon, defendant declining to plead further, the court ordered a plea of not guilty to be entered, which was done, and the cause was ordered to proceed.

A jury was duly impaneled, to which no exception was taken. The state then introduced the papers in the case of P. Mitchell against D. C. Berry and Price J. Berry, before J. C. Gillespy, justice of the peace, Columbia township, Boone county, Mo., suit on a note to Miss Pearl Mitchell, dated April 26, 1896, for \$100, and payable one day after date, with interest from date, and the filing by J. C. Gillespy thereon for suit, September 8, 1900, and the summons thereon. It was then shown that defendant W. F. Berry was constable of said township at the time, and the summons placed in his hands, and service on both of the defendants in the case. There was evidence that the defendant reported to the justice in his court that the defendants paid the note on the day of service of the summons. It was shown by one of the defendants that he paid the note and interest to the defendant as constable to the amount of \$132.60. Proof of demand on the constable for the money was then made, and his failure to pay it over. He said he did not have it—was up against it—but did not say what he had done with it. Miss Mitchell's brother testified he had the note of his sister in his hands for collection and had authority to collect it. B. M. Anderson testified he paid the money to the constable, having collected the check which P. F. Berry gave the constable to pay the note in suit. It was also shown that the defendant's bondsman was compelled to pay the amount of the note for defendant after his default. The defendant then offered much evidence to show he was insane at the time he collected the note and failed to pay over the money, and the state offered evidence in rebuttal.

¶ 2. See Criminal Law, vol. 14, Cent. Dig. § 62.

The court instructed fully on all points of law arising in the record. Only one instruction, No. 13, prayed by defendant, was refused, to which exception was taken. As the instructions given are such as have often met the approval of this court, it is not necessary to incur this opinion with them. The thirteenth instruction asked by defendant was properly refused. In substance, it requested the court to declare that if the mind and memory of defendant was impaired from chronic drunkenness and attempts to cure alcoholic disease, or from the use of cocaine or morphine, but that he still retained intellectual power to perceive right and wrong, yet his will power was so impaired and weakened that he could not resist the impulse to do wrong, then the jury must acquit him. This is but the old defense of irresistible impulse which this court has refused to recognize as a defense. If the defendant knew the right from the wrong of the act he was committing he was responsible for his act, and the court properly refused the instruction. Moreover, there was no evidence of his having used cocaine or morphine to cure his alcoholism.

The instructions on insanity were as favorable to defendant as our laws permit. Under these instructions the jury found against his plea of insanity, and the evidence on the part of the state amply supports their finding.

The instruction on the main proposition, the embezzlement of the money collected by defendant as constable, fully meets the requirement of our decisions. *State v. Schlib*, 159 Mo. 140, 60 S. W. 82.

We find no error in the record, and the judgment is affirmed. All concur.

HEMAN CONST. CO. v. LOEVY.*

(Supreme Court of Missouri, Division No. 1.
Dec. 23, 1903.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—ORDINANCE—CONTRACTS—DIVISION OF WORK—TAX BILLS—EXECUTION—OFFICERS—DELEGATION OF DUTY—DELAY—PENALTIES—RIGHTS OF PROPERTY OWNERS—PERSONAL JUDGMENTS—APPEAL—OBJECTIONS.

1. In an action on a special tax bill for street improvement, which did not include the laying of sidewalks, the fact that the ordinance under which the improvement was made did not prescribe the width of the sidewalks, nor the size, kind, and quality of the bricks of which the sidewalk was to be constructed, was immaterial.

2. Where it was not shown that there was no general ordinance in the city adjusting the width of sidewalks to the width of the streets, and at the time of the passage of an ordinance for the improvement of a street there was only one kind of paving brick for sidewalks known and used in the city, the ordinance was not void for failure to prescribe the width of the sidewalks, and the size, kind and quality of the bricks.

3. St. Louis City Charter, art. 6, § 15 (Rev. St. 1899, p. 2511), requires all ordinances rec-

ommended by the board of public improvements to specify the character of the work, its extent, the materials to be used, etc., and then authorizes such board to annually let contracts for the grading, constructing, reconstructing, and repairing of sidewalks, etc., during the year. An ordinance for street improvements provided that the cost of constructing a street and the sidewalk should be charged as a lien on the adjoining property, and that "when the work under any one contract was completed the president of the board should compute the cost and levy and assess a special tax therefor." Held that, where the board had let an annual sidewalk contract, the fact that the contract for street improvement did not require the construction of a sidewalk, which was constructed under such annual sidewalk contract, did not invalidate a tax bill for the street improvement.

4. Where, on the completion of a contract for street improvement, the clerk of the president of the board of public improvements figured the tax bill to be levied against each lot, and after making out the bill handed the same to the president, who signed it, such signing made the bill the act of the president, within an ordinance requiring the latter to compute the cost of the improvement, and levy and assess the same as a special tax.

5. Where a street improvement contract was not completed within the time prescribed, but the owner of property assessed therefor made no demand in the trial court for a proportionate deduction of the penalty for which the contractor was liable for his failure to complete within the time, but claimed that the tax bill for the improvement was void by reason of such delay, he could not claim such deduction on appeal.

6. Where, in an action on a special tax bill, there was no evidence as to when the work for which the tax was laid was completed, an objecting property owner was not entitled to a deduction for an alleged delay.

7. Where an ordinance providing for the improvement of a street contemplated that the sidewalk should be laid by a contractor other than the one improving the street, and expressly provided that when the work covered by any one contract was completed the tax bills for such work should be issued, an objection that the tax bill issued for the street improvement was issued before the sidewalks were laid was untenable.

8. In an action on a special tax bill, a personal judgment cannot be rendered against the owner of the property and the surety on his appeal bond, since the tax is a lien on the property benefited, and does not constitute a personal debt against the owner.

Appeal from St. Louis Circuit Court; Franklin Ferris, Judge.

Action by the Heman Construction Company against H. A. Loevy. From a judgment in favor of plaintiff, defendant appeals. Modified.

H. A. Loevy, in pro. per. Hickman P. Rodgers, for respondent.

MARSHALL, J. This is an action to enforce a special tax bill for \$127.35, against parts of lots 20 and 28, in city block No. 4-571, in the city of St. Louis, owned by the defendant, issued for the improvement of Morgan street between Sarah street and Newstead avenue, pursuant to Ordinance No. 15,785, approved August 21, 1890, under Contract No. 2,748. This case is here upon a

*Rehearing denied February 10, 1904.

†8. See *Municipal Corporations*, vol. 38, Cent. Dig. § 1284, 1304.

short transcript. The abstract of the record does not set out the pleadings or their substance. It speaks of a petition that was filed in a "justice's court," and quotes one allegation therefrom, but it does not show whether an answer was filed or not. The character of the defense interposed in the circuit court can only be ascertained by reference to the objections that were made upon the trial and to the instructions asked.

At the beginning of the trial the defendant objected to the introduction of any evidence upon two grounds: "First, that the tax bill sued on does not show any levy and assessment on its face; and, second, objections raising constitutional questions decided since the trial adversely to contention of appellant." The court overruled the objections, and defendant excepted. What those constitutional questions were is not stated in the abstract of the record, but it appears from the files in the case that the case was appealed to the St. Louis Court of Appeals, and that the appellant filed a motion in that court to transfer the case to this court because a constitutional question is involved, and that respondent's attorney conceded, in writing indorsed on the motion, that a constitutional question was raised, to wit, "the validity of special assessments for street improvements under the charter of St. Louis," and that the Court of Appeals ordered the case transferred to this court. In this way the jurisdiction of this court in this case is ascertained.

The case made is this: August Heman testified that he is the president of the plaintiff company. He testified to the signatures of the president of the board of public improvements and of the comptroller on the tax bill. On cross-examination he said that the plaintiff is the contracting party with the city in Contract No. 2,748, dated October 4, 1890, and did the work called for by that contract; that the defendant's property lies in the second granitoid district of St. Louis; that the work mentioned in this tax bill was begun about the middle of April, 1891, but he did not remember at what time it was completed; that plaintiff did not lay any brick sidewalks under Contract 2,748 or under Ordinance 15,785, and did not at any time lay any brick sidewalks in front of the defendant's property; that there is a granitoid sidewalk in front of defendant's property; that after plaintiff finished the work under its contract it was inspected and accepted by the city, and a special tax bill was issued therefor; that after plaintiff's suit on that tax bill was dismissed that tax bill was canceled, and a new tax bill was issued, being the special tax bill sued on in this case. The plaintiff then offered the special tax bill in evidence. The defendant objected thereon to the ground that the bill does not on its face contain any levy or assessment by the president of the board of public improvements, as required by the city charter. The

objection was overruled, the defendant excepted, and the tax bill was read in evidence. The tax bill shows that the total cost of the work done under the contract was \$19,328.65; that the total frontage taxed was 4,932.57 feet; that the rate per front foot was \$3.918.58; that the front of defendant's property taxed was 32.50 feet; and that the amount charged against the defendant's property was \$127.35. The certificate of the president of the board of public improvements is that the rates, prices, and amount are correct; that the person named as owner is liable for the bill; that the work was done and the materials furnished by the contractor; and that the special tax assessed against defendant's property does not amount to 25 per cent. of the assessed value of the property. Thereupon the plaintiff rested. The defendant demurred to the evidence, the court overruled the demurrer, and the defendant excepted.

To sustain his case the defendant adduced the following evidence: He proved by Charles Varrelman, assistant street commissioner, that the plaintiff was given notice to begin the work on April 14, 1891, and he supposed it began about one week thereafter, and that ordinarily the entire work is finished about two weeks before it is measured. J. H. Scott, an inspector in the street department, testified that he inspected the work every day; that on August 18, 1891, he reported to the department that he had inspected the work, and found it to be in accordance with the contract, and that it was ready for measurement; that it takes ten days to two weeks as a rule to measure work after it is accepted; that plaintiff did not lay any brick sidewalks under his contract. The defendant then offered in evidence the final measurement of the work, but the date thereof is not stated in the abstract. The defendant then offered in evidence Ordinance No. 15,785, the first, second, and fourth sections of which are the only sections that are material to the determination of this case, and they are as follows:

"Section 1. The board of Public Improvements is hereby authorized and directed to cause Morgan street between Sarah street and Newstead avenue to be graded, curbed, guttered, a Telford pavement, with a binding material and top dressing, laid on the roadway, the crosswalks and the sidewalks to be constructed, and all proper connections and intersections with other streets and alleys to be made.

"Sec. 2. The curbing, guttering, crosswalks and Telford pavement shall be of limestone, the binding material shall be of sand, and a top dressing of gravel shall be used to cover the surface of the roadway. The material for the sidewalks shall be 'paving brick.' The lateral and cross gutters, the crosswalks and the sidewalks shall be laid on a bed of clean, coarse sand."

"Sec. 4. The cost of curbing, guttering,

Telford pavement, binding material, top dressing, rolling, sidewalk paving, and all proper connections and intersections required, shall be charged as a lien upon the adjoining property fronting or bordering on the improvements herein provided for, and shall be paid by the owners thereof, except as hereinafter provided. When the work under any one contract is completed, the president of the board of public improvements shall compute the cost thereof, and levy and assess the same as a special tax against each lot of ground chargeable therewith, in the names of the owners thereof, respectively, in the proportion that the linear feet of each lot fronting or bordering on said improvement bears to the total number of linear feet of all the property chargeable with the special tax aforesaid, and shall make out and certify to the comptroller, on behalf of the contractor, bills of such costs and assessment accordingly, as required by law."

The defendant then introduced Ordinance No. 16,630, approved March 25, 1892, establishing the western granitoid sidewalk district. The defendant then called as a witness Robert E. McMath, the president of the board of public improvements, who testified that he did not make out the special tax bill; did not make the calculations on which it is made out; did not know the cost of the work or the frontage to be taxed; did not figure out how much the defendant's property was liable for, but that all such work was done by one of his appointees in his office who had charge of special tax bills; and that the tax bill in question came to him in the usual course of business, in his office, and he signed it.

The defendant testified that he had a granitoid sidewalk laid, under private contract, in front of his property, after Ordinance 16,630 went into effect; that there are no brick sidewalks in the block on which he lives nor in the one south of it. The abstract recites that the defendant then read in evidence Contract No. 2,748, under which the work in question was done. The contract is not set out in full or in substance. It is stated that the plaintiff agreed thereby to do "the work of grading, curbing, guttering, construction of Telford with top dressing of sand and gravel, and rolling, and also constructing sidewalks of Morgan, between Sarah and Newstead, as by said ordinance specified," etc. Two sections or paragraphs of the contract are then reproduced, the first of which denies to the contractor any damages for delay or hindrance on the part of the city, but allows an extension of time in case of delays caused by the city, and the second of which provided that the plaintiff should not be required to begin work until April 14, 1891, and then only after one week's notice so to do, and that when commenced the work should be continued uninterruptedly, and should be completed within 2½

months, and that the time of beginning, rate of progress, and time of completion were essential conditions of the contract, and that if plaintiff did not complete the work within the time specified the sum of \$20 a day should be deducted from the moneys payable under the contract. The abstract of the record then recites: "Nothing is said in the contract that plaintiff is required to construct sidewalks." So that the abstract of the record, in speaking of the sidewalks, recites, first, that the plaintiff contracted to construct sidewalks; and, second, that "nothing is said in the contract that plaintiff is required to construct sidewalks." The defendant then rested.

In rebuttal the plaintiff called C. C. Hartman, who testified that the defendant's sidewalk was laid on or before March 15, 1892 (which was before the approval of the granitoid ordinance No. 16,630, as that ordinance was not approved until March 25, 1892); that at the time of the adoption of Ordinance 15,785 (for the improvement of Morgan street) there was but one kind of sidewalk paving brick known; that sidewalks on both sides of Morgan street, between Sarah and Newstead avenue, had been fully laid before the tax bill sued on in this case was issued. The plaintiff also called as a witness L. Olthius, a draftsman in the street commissioner's office, who verified a plat of Morgan street between Sarah street and Newstead avenue, which showed a number of brick pavements laid at that place "by the annual contractor for brickwork with the city, and special tax bills were issued in his favor for the work." The abstract of the record then recites that the witness testified as follows: "The city did not make any contract with the plaintiff or any one else under Ordinance 15,785 to lay brick sidewalks as provided for in Ordinance 15,785. There are no brick sidewalks on Morgan street in the block in which defendant's property lies, nor in the block directly south of it. All the granitoid sidewalks on Morgan between Newstead and Sarah were laid by the owners themselves. This book does not show when the annual contractor laid the brick sidewalks shown by this plat." This was all the evidence in the case, according to the abstract of the record.

At the instance of the plaintiff the court declared the law to be that if all the sidewalks on Morgan street between Sarah street and Newstead avenue were laid before Ordinance 16,630 was approved, on March 25, 1892, then that ordinance has no bearing on this case, and the plaintiff is entitled to a special judgment, with interest.

The defendant asked 10 instructions, and the court refused to give them, and defendant excepted. They need not be reproduced in full, as the propositions of law contained therein are the points relied on here by the defendant, and they will be discussed in the opinion. The court found for the plaintiff, and the defendant appealed.

1. The first contention of the defendant is that Ordinance 15,785 is void because it does not prescribe the width of the sidewalks, nor the size, kind, or quality of the bricks. Two sufficient answers suggest themselves to this contention: First, it is wholly immaterial in this case, because this is not a suit to recover for making sidewalks; and, second, the width of sidewalks is ordinarily established by general ordinances adjusting the width of the sidewalks to the width of the streets, and it is not shown that there was no such general ordinance in St. Louis, and the undisputed testimony is that at the time this ordinance was adopted there was only one kind of paving brick for sidewalks known or used in St. Louis. Aside from this, it is conceded by defendant, and made a point against the validity of the contract, that the plaintiff's contract did not require it to contract any sidewalks. Hence as to the plaintiff's right to recover the sidewalks cut no figure.

2. The second contention of the defendant is that the contract is void because it does not conform to the ordinance, in that it fails to require the construction of a sidewalk, and hence the tax bill is void. Section 15 of article 6 of the charter of St. Louis (Rev. St. 1899, p. 2511) provides that all ordinances recommended by the board shall specify the character of work, its extent, the materials to be used, etc., and then concludes: "And provided further that nothing in this article shall be so construed as to prevent the board of public improvements through the proper officer thereof, from annually letting and entering into contracts on the first day of July, of every year, for the grading, constructing, reconstructing and repairing of sidewalks, and repairing street, alley and gutter paving and such other similar work, which may be ordered by ordinance, or may become necessary to be done during the year."

The evidence in this case shows that there was such an annual contract outstanding when the contract was made with the plaintiff for the construction of the street, and that the contractor thereunder laid some of the sidewalks on Morgan street. There being such an annual contract, the contractor thereunder had a right to lay the sidewalks ordered by this ordinance, and it would have been manifestly illegal and improper for the city to have included the sidewalks in the plaintiff's contract. This easily accounts for the omission of the sidewalks from the contract in question here.

The ordinance itself shows on its face that the municipal assembly knew there was such an annual sidewalk contract, and intended that the contractor thereunder should lay the sidewalks ordered by this ordinance, and also contemplated that the work to be done by the plaintiff should be paid for as soon as completed, and that the work done by the annual sidewalk contractor should be paid for as soon as contemplated, and that the payment under each contract should be made

irrespective of whether the work covered by the other contract was completed or not. This is made certain by section 4 of the ordinance, which provides that the cost of constructing the street and the sidewalk shall be charged as a lien on the adjoining property, and then saying: "When the work under any one contract is completed, the president of the board of public improvements shall compute the cost thereof and levy and assess the same as a special tax," etc.

This can mean nothing else than that the work shall be done by two contractors, one for the street, and the other, the annual contractor, for the sidewalks, and that each shall be paid for his work as soon as it is completed, without regard to whether the other has completed his contract or not. There is no room to doubt that such was the intention of the lawmakers, and none as to their power to so ordain.

This feature of the ordinance was not called to the attention of the St. Louis Court of Appeals when it decided the case before it, and held that the tax bill to the plaintiff was prematurely issued because the sidewalks had not been laid at the date the tax bill was issued. *Heman Construction Co. v. Loevy*, 64 Mo. App., loc. cit. 437. If that court's attention had been directed to this provision of the ordinance, it would not have held that the plaintiff's tax bill was prematurely issued. For these reasons the defendant's second contention is untenable.

3. The defendant's third contention is that the tax bill is void because the president of the board of public improvements did not personally compute, levy, or assess the cost of the work. In support of this contention the defendant relies principally on *City, to Use, v. Eddy*, 123 Mo. 546, 27 S. W. 471. In that case it was held that the power conferred upon cities of the third class to order construction of streets was vested in the city council, and that it must be exercised by ordinance, and not by resolution, and that the power to assess the cost of such improvements was vested in the city council, and must be exercised by ordinance, and could not be delegated by the council to the clerk of the council. In that case the work was ordered by resolution, and by resolution the clerk was ordered to assess the cost and issue the tax bills, which he did.

That case is not decisive of, or pertinent to, the contention here made. Here the tax bills were signed and issued by the president of the board of public improvements, the officer charged with that duty and vested with that power. It is true that the president of the board did not make the computation, and that the figuring and the physical act of writing the tax bills was done by his appointee. But when the president attached his name to the tax bill, that became the consummate act of computing, assessing, and levying the tax. What the clerk did became merged in the act of the pres-

dent, and the whole thing was then the same in law as if the president had himself done every act in connection with the matter. The president could not be heard to say it was not his act, nor could he evade any responsibility arising out of it, by saying his clerk did the figuring and writing.

The work that was done by the clerk was not an unlawful delegation of power of the president to the clerk. The work done by the clerk consisted of the physical act of writing the tax bill and the doing of a very simple sum in arithmetic. The sum required to be done was this: The cost of the work, amounting to \$19,328.65, was to be distributed against each lot of property abutting the improvement in the proportion that the frontage of each lot bore to the total frontage of all the property abutting the improvement. The ordinance itself prescribed that the cost should be so distributed. The total frontage of all the property abutting the improvement was 4,932.57 feet, and the total frontage of the defendant's property was 32.50 feet. Hence the sum to be done was what is $32.50 \div 4932.57$ of \$19,328.65? Any school boy could do that sum. When the clerk did the figuring and wrote out the result on a sheet of paper it did not constitute a special tax bill. But the instant the president of the board signed his name to the paper it became a special tax bill, and everything written above his name became his official act, no matter who had written it.

In the very nature of things this must be true, especially as to an office like that of president of the board of public improvements in a large city like St. Louis, where, in addition to his other manifold duties, he has to issue annually more special tax bills than he could write out by himself. To illustrate: In addition to all improvement tax bills, section 29 of article 6 of the city charter (Rev. St. 1899, p. 2515) provides for sprinkling all the streets of St. Louis, and assessing the cost thereof against all property fronting or bordering on the streets sprinkled in the proportion that each lot bears to the total frontage of all lots that border upon the streets sprinkled. Practically this requires a special tax bill to be issued every year against every lot in the city. It is apparent that no officer could reasonably be expected to compute, assess, and levy and make out all the tax bills that are necessary for this purpose alone, even if he had no other duties to perform. The framers of the law knew no man could do all such work personally, and they must have intended a sensible and rational and practical construction to be placed upon the law, and to have anticipated that the courts would not follow the letter of the law if it made the law impossible of execution, but would construe the law according to its spirit and purpose. The elements constituting the basis of calculation were all known, and the act done by the clerk was a mere clerical act, and was no

part of the discretionary or judicial or quasi judicial duty or personal trust vested in the president.

In the Eddy Case, 123 Mo. 546, 27 S. W. 471, the clerk of the council signed the tax bills. It did not even purport to be the act of the council. If the clerk had made the computations, and had written out the tax bills and submitted them to the council, and the council had adopted them, and by ordinance ordered them to be issued, it would not have been held that they were void. This would have made that case a parallel case to the case at bar. Without this the two cases are entirely unlike.

To illustrate further: Section 19 of article 5 of the charter of St. Louis (Rev. St. 1899, p. 2504) provides that, after the district assessors of general taxes have completed their assessments, the president of the board of assessors "shall make up the assessment books in proper alphabetical order from the plats and returns made by said district assessors, from the return of property holders to the assessor's office, and from the best information he can otherwise obtain, so that said assessment books shall be as nearly as possible a full and complete assessment of all taxable property in the city, the same to be completed on or before the third Monday in March of each year." It admits of no doubt that it would be a physical impossibility for the president of the board of assessors in St. Louis to personally make up such complete assessment books of all the property in St. Louis and have it completed by the third Monday in March of each year.

In addition to this, section 26 of article 5 (Rev. St. 1899, p. 2505) provides that after the president of the board of assessors has so made up his assessment books, and after the board of equalization has corrected and equalized his assessment books, "the president of the board shall make out a fair copy of the same, and shall make an abstract of said books, showing the amount of the several kinds of property assessed, and specifying the amount of value of all property within the present boundary line of the city, and the aggregate valuation of all property in the extended limits, and the aggregate value of all property within the city limits as established by the charter, and add thereto his certificate that the same contains a true and correct list of all taxable property in the city of St. Louis, so far as he has been able to ascertain the same." No one would for a moment believe that the lawmakers intended or expected that the president of the board of assessors should personally accomplish such an impossible amount of work, and that the assessment and levy of general taxes would be void because the president of the board of assessors did not personally do all the work of computing the amount of each assessment, and of actually writing all the assessment books, abstracts, etc., so required; yet the letter of the law says the president

of the board of assessors shall do it, and, if the defendant's contention here is true, then every assessment of general taxes in St. Louis is void, because the president of the board of assessors does not personally do all the acts and things that finally culminate in his signing his name to the assessments. No court would place such a construction upon the law as to the duty of the president of the board of assessors or the president of the board of public improvements. The defendant's third contention is therefore untenable.

4. The defendant's fourth contention is that the work was not completed within two and one-half months, as required by the contract, and was not completed until one and one-half months after the time limited by the contract, and that no deduction for delay was made, and hence that the tax bills are void. In *Heman v. Gilliam*, 171 Mo. 258, 71 S. W. 163, it was held that delay in completing the work did not make the tax bill void, but that the property owner was entitled to have the proportion of the penalty properly apportionable to his lot deducted from the tax bill against the property. The defendant is not in a position to claim such a deduction in this case, for two reasons: First, because he made no such demand for a deduction in the trial court, but, on the contrary, as shown by his tenth instruction, tried the case in that court upon the theory that the delay rendered the tax bill void; and, second, because there is no substantial evidence in the record that there was any delay whatever. The evidence shows that the notice to begin work was dated April 14, 1891, and that the plaintiff was required to begin work within a week thereafter, and that it did so begin. But there is absolutely no evidence as to when the work was completed. The record shows that the inspector reported on August 18, 1891, that the work was ready for measurement, but there is no evidence whatever that the work was not completed until August 18, 1891. The defendant lived on the street improved. He was a witness in the case, and neither he nor any one else fixed the date when the work was completed. This contention must therefore also fail.

5. The defendant's fifth contention is that the tax bill is void because it was issued before all the work ordered by the ordinance was done; that is, before the sidewalks were laid. This is evidently an oversight, for the evidence contained in the defendant's abstract shows, without contradiction, that all the sidewalks on both sides of Morgan street between Sarah and Newstead had been fully laid before this tax bill was issued. But, aside from this, there is no merit in the contention; for, as above pointed out, the ordinance itself contemplated that the work should be done by two different contractors, and expressly provides that when the work covered by any one contract is completed the tax bills for such work shall issue. It is only in cases where the work to be done is ordered

to be done as a unit, by one contractor, that the rule that requires the entire work to be completed before the tax bill may issue applies.

6. The defendant's sixth point is that the judgment is erroneous because it is personal against the owner and the surety on the appeal bond as well as special against the property. The tax is a lien on the property benefited, and does not constitute a personal debt due by the owner. So much of the judgment as is personal against the defendant and the surety on the appeal bond is without authority of law, and the judgment is hereby modified by striking out of the judgment the words, "of the defendant and Samuel Epstein, surety on the appeal bond herein." After being so modified, the judgment of the circuit court is affirmed. All concur.

**PEOPLE'S NAT. BANK OF ROCK ISLAND
v. CENTRAL TRUST CO. OF KANSAS CITY.***

(Supreme Court of Missouri, Division No. 1.
Dec. 23, 1903.)

**DECEIT — MISREPRESENTATIONS — WANT OF
KNOWLEDGE—ACTIONS—TRIAL BY COURT
—INSTRUCTIONS—REVIEW.**

1. Where an action at law was tried by the court, and the only instruction asked was in the nature of a demurrer to the evidence, which the court refused to give, the court on appeal would only review the weight of the evidence to determine whether the ruling on such instruction was correct.

2. Plaintiff bank, which had had extensive transactions in discounting cattle notes secured by mortgage, knew of the custom of banks engaged in such business to purchase such notes on the reputation of commission houses and cattle raisers making them, without sending a messenger to verify the statements made in the mortgages as to the existence, condition, and description of the cattle. Plaintiff purchased certain cattle notes from defendant trust company, executed by persons who had previously been in good credit, secured by mortgages on cattle. It thereafter transpired that the mortgages had been executed and recorded on cattle which never existed, by the fraud of the maker's son-in-law, without defendant's knowledge. Defendant, prior to the sale of the notes to plaintiff, represented them to be first-class securities, and offered to indorse the notes for 1 per cent., which plaintiff declined. *Held*, that defendant was not liable for deceit on the ground that it represented that it had knowledge that the notes were secured by cattle when in fact it had no knowledge on the subject.

Appeal from Circuit Court, Jackson County; J. H. Slover, Judge.

Action by the People's National Bank of Rock Island, Ill., against the Central Trust Company of Kansas City, Mo. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Garland M. Jones and Scarritt, Griffith & Jones, for appellant. Wollman, Solomon & Cooper, for respondent.

*Rehearing denied February 19, 1904.

VALLIANT, J. This is a suit for damages, founded on alleged fraudulent misrepresentations. It is what is commonly called an action for deceit. Plaintiff is a national bank at Rock Island Ill., the defendant a Missouri corporation located at Kansas City, and engaged in the business generally conducted by trust companies, which includes the buying and selling of promissory notes. The transaction out of which this suit arises was the sale by the defendant to the plaintiff of a promissory note purporting to be secured by a mortgage on 200 head of cattle in Marion county, Kan. The transaction was conducted by letter correspondence through the mail.

The first letter in point of date introduced in evidence by the plaintiff was from the cashier of the American National Bank to the cashier of the plaintiff, which was as follows:

"American National Bank. Kansas City, Mo., Aug. 20th, 1898. Mr. C. Hellpenstell, Cashier, Rock Island, Ills.—Dear Sir: I told you yesterday I would write you in regard to cattle commission firms. Before giving you a list I will say, while we do not discount the value of a good endorsement, in a good stiff firm, we figure more particularly on the value of the cattle actually covered by the mortgage in each case, and the general reputation and standing of the farmer or feeder who makes the paper. As you know this business is not a new thing and the business is as well established in this section as loaning on stocks and bonds in the east. The different commission houses have their regular line of customers in these farmers and feeders as a bank has in its correspondents; and in this way, being regular customers, we local banks become to know in some measure the value of these individuals, knowing many of them, personally. As regard to the different firm's endorsement we would say that the larger firms are usually on the back of a proportionally larger amount of paper than the firms of smaller capital, so that, in many cases, the paper of the smaller firms are as much in demand as the larger, because the security (number and grade of cattle for a given loan) is as good or better. However, the mere endorsement of some of the firms here is within itself perfectly good. [Here follows a list of names of fourteen commission firms in which is A. J. Gillespie & Co.] We local banks get a great deal of first class cattle paper from our corresponding banks in the country, especially Kansas, Missouri, Texas, Indian Territory and Oklahoma, bearing their endorsement, which is good paper. There is plenty of this paper out here for us all, so I will be pleased to do anything for you I can at anytime, by way of advice, selection of it, or even the purchase of it for you, for there are about a half dozen eastern banks that I now buy paper for, and have done so in some cases two or

three years. However, as I told you yesterday, I am a stockholder and director in the Central Trust Co. of this city, which is making a business of handling this paper, buying it for itself and also for its connections, and I would be pleased for you to deal with them, unless you have some preference elsewhere. I will have them write you and submit you offerings, if agreeable. Yours, etc. J. R. Dominick."

The first two letters from the defendant were in the nature of solicitations for the plaintiff's custom, and were as follows:

"Kansas City, Mo., Aug. 22, 1898. Mr. C. Hellpenstell, Cashier People's National Bank, Rock Island, Ills.—Dear Sir: Mr. Dominick, Cashier of the American National Bank, says you buy considerable cattle paper in this market, and suggests that we correspond with you in regard to it. We handle a great deal of this paper. In fact we make a speciality of it, buying it for our own use and placing it with our connections. We buy it outright and carry it until it is sold, and when sold we either endorse it or not, as is preferred by the purchaser, making a difference of one per cent. in the discount rate where we endorse it. We are familiar with the standing of the different commission firms here at the stock yards and are in touch with them and examine carefully all papers taken. Since we have commenced business we have never had a note to run past due a day. Our company is now increasing its capital stock to \$100,000.00, \$85,000.00 of which has been paid in. We carry accounts which the Produce Exchange Trust Company, New York City, American Trust & Savings Bank, Chicago and American National Bank, Kansas City, to whom we respectfully refer. At the present time, our discount rate to you would be six per cent. without indorsement, or five per cent. with it. All paper could be sent to you, subject to inspection, and if not found satisfactory you could return it. When paper matures we would like for it to be sent to us for collection, and remittance would be made free of charge, either direct to you or placed for your credit wherever you direct. We enclose statement of the company from April 11th to June 30th, showing progress made during that time. Since then our business has been equally satisfactory. Yours very truly, The Central Trust Company of Kansas City, by J. C. Hill, President."

"Kansas City, Mo. Oct. 17, 1898. People's National Bank, Rock Island, Ills.—Gentlemen: We own and offer for sale some choice, well secured cattle paper. Said paper is well secured by mortgage on cattle, given by good parties and endorsed by Live Stock Commission Houses of this place. We offer these notes with or without our endorsement, making a difference in rate of one-half per cent. We buy the paper on the Stock Exchange here and use our own capital, investing in

none but that which we think is perfectly safe; hence, we are willing to back the paper with a slight difference in rate. In case you wish any investments of this character we will take pleasure in submitting some to you. Should you accept any of our offerings, you can do so with the understanding that if upon investigation you find any of the paper unsatisfactory we will replace same with other paper satisfactory to you, or we will reimburse you in full relieving you of the paper and allowing you interest for the time you carried it, at rate you take it from us. Would be glad to do some business with you in this way. Hoping to have a favorable reply, I am, Yours truly, R. K. Wooten, Jr., Secy. and Treas."

Plaintiff made no reply to either of these letters.

On November 14, 1898, defendant wrote the following:

"Kansas City, Mo., November 14, 1898. We submit below a list of papers and securities which we offer at six and one-half per cent. without our guarantee and at six per cent. with our guarantee, subject to previous sale. * * * No. 6. Note of J. S. Baumbaugh, due March 2nd, 1899. Endorsed by A. J. Gillespie Com. Co., secured by a mortgage on 200 head of 3 year old Panhandle steers, average weight 800 lbs; 600 bu. corn and 300 tons of cane and kaffir corn; cattle are on full feed in Marion county, Kansas. Amount of note \$5,200. Yours respectfully, R. K. Wooten, Jr., Secretary and Treasurer."

Without answering that letter, the plaintiff had the following correspondence with Mr. Dominick, cashier of the American National Bank, with whom the plaintiff's cashier was personally acquainted:

"Rock Island, Ill., November 16, 1898. Mr. J. R. Dominick, Cashier, Kansas City, Mo.—Dear Sir: We are in receipt of an offering sheet from The Central Trust Company which I enclose herewith. Should you be able to give the papers No. 2 and No. 6 your moral endorsement we would ask you to have the same forwarded to us for discount. Please let us know if you are personally acquainted with any of these, and if not, you are perhaps in the position to recommend to us some good and desirable papers. Yours very truly, C. Hellpenstell, Cashier."

"Kansas City, Mo., Nov. 17th, 1898. Mr. C. Hellpenstell, Cashier, Rock Island, Ill.—Dear Sir: Yours of the 16th is received. I consider the loans selected by you on the enclosed list perfectly good—in fact, I think all the paper offered on the list good. I would not be afraid to accept it myself. I have, therefore, told the Central Trust Company to forward the paper to you. I think you will find the Central Trust Company nice people to deal with. I know them to be straight and conservative. At any time you want paper and will write either to them or to me, stating the amounts, the order will be carefully and painstakingly looked after.

I am sure I would try to do so. Yours etc, J. R. Dominick, Cashier."

Mr. Dominick, besides being cashier of the American National Bank, was a stockholder and director in the defendant trust company, and the plaintiff knew it.

The following letters, which closed the transaction, next passed:

"Kansas City, Mo. Nov. 17, 1898. People's National Bank, Rock Island, Ills.—Gentlemen: We are instructed by Mr. J. R. Dominick, Cashier of the American National Bank that you accept our number 2 and 6 of Nov. 14 offering. We enclose the two notes as ordered, and have discounted the St. Amand & Wyatt note, \$7,395.93 at 6½ per cent for 164 days, amount \$219.00, leaving net \$7,176.93. The J. S. Baumbaugh note for \$5,200.00 at 6½ per cent for 104 days \$97.64 leaving net \$5,102.36. The \$5,102.36 and \$7,176.93 make a total balance due us of \$12,279.29. To cover same please remit Commercial National Bank, Chicago, Ills., for our credit, notifying us of the amount. If it is not convenient for you to remit Chicago, Kansas City Exchange will do us just as well. We think you will find both nice pieces of paper. We will forward your recorder's certificate against the mortgage of St. Amand & Wyatt as soon as received by us. Both of the original mortgages were filed with the Recorder of Deeds in the different counties and have the required amount of revenue stamps upon them. We thank you very kindly for this order and hope to merit a continuation of your favors in this line in the future. We investigate all paper taken by us thoroughly; invest our own money and do not take anything except that which is well secured and endorsed by good parties. We will send you our offerings from time to time, and at any time you see fit to accept any of them, you can do so with the understanding that you are to take and pay for same, and are to have a reasonable time within which to investigate and if after thorough investigation you are not satisfied, we will furnish you other paper instead or reimburse you in full, relieving you of the paper, allowing you interest for time carried at rate you take it from us. Would be glad if you would investigate us that you may know with whom you are dealing. Our correspondents are Produce Exchange Trust Company, New York; Commercial National Bank, Chicago, Ills.; American National Bank, this city. Yours very truly, R. K. Wooten, Jr., Sec. and Treas."

"Rock Island, Ill., Nov. 19, 1898. Central Trust Co., Kansas City, Mo.—Gentlemen: I acknowledge receipt of your favor of the 17th inst., with note of St. Amand & Wyatt \$7,395.93; also note of J. S. Baumbaugh for \$5,200.00 which we have discounted according to your figures. As per instructions we remitted to-day to the Commercial National Bank of Chicago the net proceeds of the same, which was \$12,279.29. If you have

some extra good papers to offer kindly submit them to us. Yours very truly, C. Hellpenstell, Cashier."

The whole transaction is contained in those letters. It turned out that the maker of the chattel mortgage, J. S. Baumbaugh, had never owned any cattle filling the description, and the mortgage was therefore worthless. The maker and indorser of the note became insolvent, and therefore the note became worthless. The evidence showed that notes of this kind, that is, purporting to be secured by mortgages on cattle then in Kansas and other cattle-raising states, were handled in great quantities by the banks and banking concerns in Kansas City. Such paper, called "cattle paper," usually came to the banks through the cattle commission merchants of that city. The commission merchants had their transactions usually directly with the cattle raisers, and the banks with the commission merchants. The commission merchants, being brought into personal relation with the farmers and the men who raised cattle and brought them to market, came to know the business character and financial standing of their customers. In like manner the banks in their dealings with the commission merchants came to know them and to form an estimate of their business characters. When paper of this kind was offered to the banks for discount, they took into consideration the character of the commission merchant who offered it, and, that being satisfactory, inquired of him concerning the character of the farmer or cattle owner whose note was offered. If the information received from that source was satisfactory, the paper was accepted by the bank. In such transactions the banks did not send inspectors out in the county to find the cattle and verify the recitals in the mortgages. The plaintiff bank had been in the habit for some time before of buying this kind of paper from the banks in Kansas City, and handled a considerable quantity of it. In this case the note in question, accompanied by a duly certified copy of the mortgage, was offered for discount to the American National Bank by the A. J. Gillespie Commission Company, a concern with a paid-up capital stock of \$100,000, then in good credit, and well known to the bank. The president of that company, who was also well known to the bank, and who had formerly been a banker in Kansas, near where Baumbaugh, the maker of the note and mortgage in question, lived, and who knew him, informed the bank that he was a farmer, and a man of good standing and good character. On the faith of that representation and the indorsement of the note by the commission company, the bank discounted it. There was a very close relation between the American National Bank and the defendant, the Central Trust Company, all the officers of the bank being directors in the trust company. The bank sold the note to the trust

company, and the trust company sold it to the plaintiff. The copy of the mortgage was delivered with the note to the plaintiff. The evidence showed that Baumbaugh was, as represented, a reputable farmer owning a farm of 160 acres in Kansas, and up to this time his name was untarnished. But he had a son-in-law named Gillett who was a courageous speculator in cattle, and in whom Baumbaugh seemed to place great confidence. About November 2, 1898, Gillett told Baumbaugh that he was purchasing 5,600 head of cattle in Oklahoma, a part of which he was going to bring to his farm in Kansas and feed them there for market, and requested Baumbaugh to execute certain notes and mortgages securing the same on these cattle to be so placed on his farm. Baumbaugh did as requested, without waiting for the cattle to arrive. Gillett took the notes and mortgages, and, after having had the mortgages registered according to the law of Kansas, went to Kansas City and placed the notes, with copies of the mortgages, in the hands of the Gillespie Commission Company to sell, representing to that company that the cattle called for by the mortgages were in place as represented. Gillett was then well known in the trade, and up to that time no imputation rested against his name. But Gillett never bought the 5,600 head of cattle, and therefore there was never anything for the mortgages to take effect upon. The officers of the plaintiff bank testified that in buying the note they relied solely on the representation made in the letters of defendant in relation to the security. As against that evidence defendant referred to the letter of plaintiff to the cashier of the American National Bank dated November 17, 1898, and the reply thereto, and the letter of the cashier of the American National Bank to plaintiff's cashier dated August 20, 1898, which were introduced in evidence by the plaintiff. It was also shown that the plaintiff had received from Mr. Dominick the Dun and Bradstreet reports of the standing of the Gillespie Commission Company. The case was tried by the court, jury waived. At the close of the plaintiff's case, the defendant asked an instruction in the nature of a demurrer to the evidence, which the court refused, and defendant excepted. After all the evidence was in, the court rendered judgment for the plaintiff for the amount of the note and interest. From that judgment the defendant has appealed.

1. The first point presented in the brief of the respondent is that the record shows nothing for this court to review, because, since it is an action at law tried by the court without a jury, and no instructions asked or given, this court cannot say on what theory the judgment of the trial court rested; citing *Miller v. Breneke*, 88 Mo. 163; *Bethune v. Ry.*, 139 Mo. 574, 41 S. W. 213; *Wischmeyer v. Richardson*, 153 Mo. 556, 55 S. W. 74. The decisions in those cases are

to the effect, that in an action at law tried by the court without a jury, the appellate court will not weigh the evidence as in an equity case, but will review only questions of law. There was no instruction asked in this case, except one in the nature of a demurrer to the evidence, which the court refused. Exception to that ruling was duly preserved. Therefore the ruling of the court on that instruction is properly before us for judgment.

2. To judge whether there was any evidence in the case to sustain the cause of action stated in the petition, it will be necessary to bear in mind what the gravamen of the action is. It is thus stated in the petition: "Plaintiff further states that each and all of said written statements and representations regarding the security behind said note were wholly untrue, and were falsely and fraudulently made and communicated to plaintiff by defendant without any knowledge on the part of defendant as to the truth thereof, and in utter and reckless disregard of the truth thereof, and with the knowledge on the part of the defendant that it did not know the same to be true, and with knowledge on the part of defendant that the same were untrue." The plaintiff does not bottom its case on the mere fact that the representations as to the security were not true, as it would have done in a case arising out of a contract of guaranty, but upon the wrongful conduct of the defendant in making a positive statement which was not only untrue, but of the truth or falsity of which the defendant had so little, if any, information, that its act in making the statement was reckless and in utter disregard of whether it was true or false; and not only that, but that it was made while the defendant was conscious that it did not know that it was true; and, finally, that it was made with a knowledge that it was untrue. In the brief for respondent it is said: "We direct attention to the evidence showing (1) the defendant made the misrepresentations knowing it was without knowledge of their truth or falsity, and (2) that it had no information sufficient to justify a belief in their truthfulness, and (3) that defendant did not in fact believe the representations to be true." That is the plaintiff's case. If, therefore, beyond showing that the statement was untrue, the evidence goes no farther than to show that the defendant bought the paper in the market at the usual banking discount, having first taken the care that a bank accustomed to handle such paper usually took to satisfy itself that the security was as represented, and then, without further investigation or further information, sold it to the plaintiff, describing it as it appeared on its face to be, offering to indorse it for a half of 1 per cent. If the plaintiff so preferred, then can it be said that the defendant's conduct in the transaction is correctly described in the language of the petition above quoted, or in that of the counsel for respondent in

their brief? Plaintiff charges not a breach of contract, but fraud and deceit. Fraud is a willful wrong. Some writers have undertaken to draw a distinction between fraud in fact and fraud in law, but fraud, under any definition, implies the doing of a wrong willfully. Sometimes without proof of an actual evil purpose the law will imply fraud, but only so in a case where one has been so oblivious of his duty, showing such a disregard for the rights of others, as to make his conduct as bad as if actuated by a desire to do wrong. If it were not necessary in an action of this kind to prove fraud, but only to prove that the representation was untrue, and from that fact alone to draw the presumption of fraud, then there would be no difference in the character of proof required to sustain an allegation of the breach of a contract of guaranty and that required to sustain an allegation of the breach of the duty to deal honestly, and in a case like this the averments in the petition above quoted would be unnecessary. But the plaintiff did not risk its case on a statement of facts which would leave the inference of fraud to be drawn only from the making of a false representation. There were other statements to the effect that the representation was made fraudulently with knowledge on defendant's part that it was untrue, or with such willful ignorance that it was as bad as guilty knowledge. Those were necessary averments in the petition, and it is necessary to the plaintiff's case that they be proven. Yet, according to the plaintiff's view of the law, the allegations of fraud are sustained chiefly by a presumption to be drawn from the fact that defendant made the statement without knowing it to be true. The plaintiff's legal proposition is stated in its brief in this form: "To state what is not known to be true is just as criminal in the eye of the law as to state what is known to be false." If the proposition is to be literally applied, then every statement not true is criminal, because one cannot know a statement to be true unless it is true; therefore, if a statement is not true, the man who makes it is guilty, however strong his belief in its truth may be, and however much reason he may have had for believing it to be true. The plaintiff's proposition, therefore, cannot be adopted as an invariable rule. Under some circumstances it is as criminal to state what is not known to be true as it is to state what is known to be false, but under other circumstances it is not so.

The language above quoted in the brief for respondent is from the opinion in *Buford v. Caldwell*, 3 Mo. 477. In that case the defendant had sold some land to the plaintiff, and had during the negotiations pointed out to the plaintiff certain houses and other improvements, and represented that they were on the land he was offering to sell, which proved to be untrue. The court said: "It may be reasonably presumed that Caldwell, before he built his house or cleared his field, ascer-

tained the lines of the survey, and should have been trusted in representing that they had been made upon the tract, and were included within the lines of the tract sold to Buford. A man of ordinary prudence would have ascertained the truth, and the law will presume that he had done so. Under such circumstances, to state what is not known to be true is just as criminal in the eye of the law as to state what is known to be false; * * * but of a thing equally known to both parties, or about which both parties had equal means of information, and in regard to which they are equally negligent, neither law nor equity will afford relief." What is said in that case cannot be construed to mean any more than that, if the facts are of such a nature as that a man is presumed to have personal knowledge of them, and is presumed to know that the person with whom he is dealing relies on him for information, he is as guilty if he makes a false representation concerning the matter, when he is conscious that he knows nothing about it, as he would be if he should state what he knows to be untrue. The wrong in such case consists in willfully pretending to know, and leading one to believe that he does know and to trust in such belief. Such conduct is fraudulent. But to bring this defendant within the doctrine of the case, the evidence must show that the nature of the transaction was such that the defendant would be presumed to have personal knowledge of the truth or falsity of the statements contained in the mortgage, and that the plaintiff had a right to believe that the defendant had such knowledge. The evidence showed that paper like this, cattle paper, was handled in large quantities by the banking concerns in Kansas City, that they took it on the faith of the names it bore and of the men who offered it for sale, and never sent out messengers to Kansas, Texas, and elsewhere to round up the cattle and verify the statements in the mortgages. In its very nature the cattle business could not be handled by the banks in any other manner. If every note of this kind offered for discount had to wait until a messenger could be sent to the distant states to verify the mortgage, the business would cease. The banks did not conduct this business in that way. The plaintiff bank must have known how the business was conducted, because it dealt largely in such paper in that market. Therefore, when the defendant in its offering sheet described the Baumbaugh note as secured by mortgage on 200 head of cattle, the nature of the case forbade the presumption that the defendant was undertaking as of its own knowledge to verify the truth of that statement, and no one knew better than the plaintiff that no such personal knowledge was implied and no such verification intended. The offering sheet was only designed to describe the paper as it purported to be, and the plaintiff presumably knew it.

In *Dulaney v. Rogers*, 64 Mo. 201, relied on

by respondent, the defendants had given an insolvent and irresponsible man a certificate to be by him used in soliciting credit in business, in which certificate it was said that the bearer was in every way responsible and a good business man. This court approved an instruction which directed the jury to find for the plaintiff if they found that the defendants represented that they knew the man to be responsible when they were aware of the fact that they did not know whether he was solvent or insolvent. The representation in that case was of a character that indicated that the defendants were speaking of their own knowledge, and the certificate was designed to be presented to strangers. The court there says that when a man gives a certificate of that kind, either knowing it to be false, or not knowing whether it is true or false, the scelerity is established. But the court in that connection said: "An innocent misrepresentation made through mistakes, without knowledge of its falsity and with no intention to deceive, cannot justify a personal action for damages."

Hamlin v. Abell, 120 Mo. 188, 25 S. W. 516, is also relied on as a support for plaintiff's proposition. But the facts of that case distinguish it from this. The representation there made was that the notes offered for sale were well secured by collaterals when in fact there were no collaterals. The usual mode of business of banks and brokers handling commercial paper secured by collateral is that the collateral accompanies the paper offered for discount and is delivered with it when accepted. The personal knowledge, therefore, that a bank or broker would naturally be presumed to have in regard to collateral securing such paper, is very different from that which a bank would be presumed to have in regard to the actual existence of cattle in a distant locality called for in a mortgage.

We have nothing to take back from what was said by this court in those cases. The law was correctly declared as applied to the facts then being considered, but this case does not fall in the same category. The defendant was offering for sale commercial paper of a character well known in the market, offering it to a concern that was accustomed to buying that kind of paper in that market, and that knew or is presumed to have known the custom of the trade in relation thereto. Under those conditions the plaintiff had no right to think that defendant knew anything more about the mortgage than that it purported to cover 200 head of cattle, and that it came into defendant's possession in the usual way, bearing names that gave it credit; that defendant had exercised the care that a prudent and experienced banker under the same circumstances would have exercised, had in good faith invested its own money in it, and had offered it for sale without any suspicion that it was not as it purported to be. The law has never placed the brand of fraud and

deceit on such conduct. There is nothing in the conduct of this defendant as shown by the evidence that was not straightforward, honest, and businesslike.

The court erred in refusing the instruction asked by defendant in the nature of a demurrer to the evidence. The judgment is reversed. All concur.

DAVIDSON et al. v. DOCKERY et al.*

(Supreme Court of Missouri, Division No. 1.
Dec. 23, 1903.)

**FRAUDULENT CONVEYANCE—SETTING ASIDE—
RIGHTS OF CREDITOR—DEVISEE
—PURCHASER.**

1. In order to enable a creditor to attack a conveyance of his debtor as fraudulent, he must either have reduced his claim to judgment, have a legal, equitable, or attachment lien on the land, or must show that, although but a general creditor, he has no adequate remedy at law.

2. A devisee under a will has no standing in equity to have set aside a fraudulent conveyance of testator, as he takes under the testator, and is in no better position in that regard than he.

3. Under Rev. St. 1899, § 3398, rendering void conveyances made to defraud creditors and purchasers, a subsequent purchaser cannot attack a conveyance as in fraud of creditors, but to enable him so to do the fraudulent intent must have been entertained towards him.

Appeal from Circuit Court, Adair County; N. S. Shelton, Judge.

Action by Margaret Davidson and others against Thomas J. Dockery and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

W. C. Hollister, J. M. McCall, and O. D. Jones, for appellants. H. F. Milan and Reiger & Reiger, for respondents.

MARSHALL, J. This is a bill in equity to remove an alleged cloud on the title to 248 acres of land in Adair county. The circuit court sustained the demurrers of certain of the defendants to the petition. The plaintiffs refused to plead further. Judgment was entered for the defendants, and the plaintiffs appealed.

The plaintiff Margaret Davidson is a daughter of John Howk, deceased, and the plaintiff James R. Davidson is her husband. There are about 40 defendants. The defendant Thomas J. Dockery is the administrator of the estate of said John Howk. The defendant Charles L. Lewis is the administrator of the estate of Elizabeth Howk, deceased, who was the wife of said John Howk. The other defendants are the other children and grandchildren of John and Elizabeth Howk, and their husbands or wives, and the creditors of said John Howk who have proved up their claims against his estate. The petition charges that John Howk owned the land in controversy, which was worth \$35 or \$40 an acre; that all of the children are of age, and living in homes of their own; that 15 or 20 years before their death said

John and Elizabeth Howk became too old and feeble to care for or feed and clothe themselves, and that at their request the plaintiff Margaret Davidson took them to her house in Knox county, and cared for them, fed and clothed them, nursed them, furnished them medicines, etc., upon the express agreement that she should be paid therefor, and all which is alleged to be of the value of \$3,000; that by a deed bearing date October 1, 1894, but which it is alleged was in fact signed and acknowledged 30 days later, and which was recorded on March 5, 1895, said John and Elizabeth Howk conveyed said land to their son Francis M. Howk for an alleged consideration of \$8,000, but which it is averred was without consideration, and was intended to hinder, delay, and defraud the creditors of the said John Howk, and especially the plaintiff Margaret Davidson; that on November 5, 1895, said Francis M. Howk and wife conveyed said land to Elizabeth Howk, the wife of said John Howk, for a pretended consideration of \$9,000, but that in reality there was no consideration therefor, and that such conveyance was made with the fraudulent intent to hinder, delay, and defraud the creditors of John Howk, and especially the plaintiff Margaret Davidson; that Elizabeth Howk died on April 19, 1895 (there is some mistake in the dates, for the deed from Francis to Elizabeth is alleged to have been made November 5, 1895, and therefore it could not be also true that Elizabeth died on April 19, 1895); that on January 16, 1896, John Howk executed a quitclaim deed to the land to the plaintiff in consideration of \$2,000, in part payment for work and labor, board, clothing, nursing, and medical aid furnished by her to him and his said wife, and in consequence of this deed the plaintiff claims to be a purchaser of the land; that on March 2, 1896, "in confirmation" of said deed, and in full consideration of said board, clothing, nursing, and medical aid so furnished, said John Howk made his will, whereby he devised the sum of one dollar to each of his other children and grandchildren, and then devised the land in question to the plaintiff Margaret Davidson, and appointed her sole executrix, without bond, whereby she became the devisee of the land; that by virtue of the care, support, nursing, and medical aid furnished as aforesaid under said express promise to pay for the same the plaintiff Margaret Davidson became a creditor of the said John Howk in the sum of \$3,000; that John Howk died on March 19, 1896; that the defendant Dockery, the administrator of the estate of John Howk, has published a notice that he will apply to the probate court for an order to sell the land to pay the debts of the estate of John Howk, and that the court will make such an order; that such a sale by the administrator will cast a cloud upon plaintiff's title to the land; that John Howk did not die seized of said land, but that long before his death he

*Rehearing denied February 10, 1904.

conveyed all right, title, and interest in the land to the plaintiff, and that she is now the innocent and bona fide owner thereof, and the probate court has no jurisdiction over it; that she (Margaret Davidson) is ready and willing to pay all the just debts of John Howk, and offers, if necessary, to bring the money into court; that defendant Lewis, the administrator of Elizabeth Howk, is now, and ever since his appointment has been, in possession of the property, and has collected about \$600 in rent, which the petition asks that he be required to pay into court, to be applied by the court to the payment of the just debts of John Howk. The prayer of the petition is that the defendant Dockery, administrator of the estate of John Howk, be enjoined from selling the land; that the deeds from John and Elizabeth Howk to Francis M. Howk and from Francis M. Howk to Elizabeth Howk be canceled; that the court ascertain the debts due by the estate of John Howk; and that the land be decreed to the plaintiff Margaret Davidson, subject to the payment of said debts, or so much thereof as remains due after applying thereto the \$600 in the hands of defendant Lewis, administrator of Elizabeth Howk, and for general relief.

Certain of the heirs demurred to the petition on the ground that they were not necessary parties. Other heirs demurred generally and specially, and also answered by a general denial. Other heirs answered, and denied that the will pleaded by the plaintiff was the will of John Howk, and averred that he was not of sound and disposing mind, but that the alleged will was procured by the undue influence of the plaintiff, and asked that the plaintiff be required to present it to the court for probate in solemn form, and that it be declared not to be the will of John Howk. The administrators of John and Elizabeth Howk filed separate answers, in which they admitted their appointments, but denied generally the other allegations of the petition. Two of the creditors, parties defendant, and who had proved up their claims against the estate, demurred generally and specially. The court sustained the demurrer filed by the creditors, and also the demurrer filed by certain of the heirs. The plaintiffs refused to plead further. A judgment was entered dismissing the bill, and the plaintiffs appealed.

1. The plaintiffs contend that Margaret Davidson is both a creditor and subsequent purchaser of John Howk, and is therefore entitled to have the prior conveyances of John Howk to Francis Howk and of Francis Howk to Elizabeth Howk set aside on the ground that they are fraudulent, and were made to hinder, delay, and defraud the creditors of John Howk, and especially the plaintiff Margaret Davidson. As a creditor the plaintiff is in no position to challenge the alleged fraudulent deeds, for she is a mere general creditor, and has not reduced her

claim to judgment, and does not show that she has no adequate remedy at law. In *Mullen v. Hewitt*, 108 Mo., loc. cit. 650, 15 S. W. 924, this court, per Gantt, J., said: "It is a general rule that a creditor, before obtaining a judgment and execution, has no certain claim upon the property of his debtor, and has no concern with conveyances of any kind affecting their property, for the very good reason that he may never obtain a judgment, and, if he does not, he cannot be injured by any disposition of the property. *Orim v. Walker*, 79 Mo. 335; *Fisher v. Tallman*, 74 Mo. 39, and cases cited. 'And before resorting to chancery a creditor must first exhaust his legal remedies, whatever they may be. In doing so he may create a lien upon the property sought to be subjected.' *Merry v. Fremont*, 44 Mo. 518." The doctrine announced in that case was reaffirmed in *Reyburn v. Mitchell*, 106 Mo., loc. cit. 377, 16 S. W. 592, 27 Am. St. Rep. 350, and it was supplemented with the remark, "This rule, of course, applies to claims which are purely legal, and for the satisfaction of which the creditors have no lien or equitable claim upon specific property." In *Mellier v. Bartlett*, 106 Mo., loc. cit. 390, 17 S. W. 295, this court was asked to review and overrule *Mullen v. Hewitt*, 108 Mo. 639, 15 S. W. 924, and the court did review the rule there laid down, and called attention to the fact that in *Scott v. Neely*, 11 Sup. Ct. 712, 35 L. Ed. 358, the Supreme Court of the United States had also reviewed the question, and reached the same conclusion that was reached by this court in *Mullen v. Hewitt*, and so refused to overrule that case. In *Atlas National Bank v. Moran Packing Co.*, 138 Mo., loc. cit. 94, 89 S. W. 71, this court, per Burgess, J., quoted the language of Black, J., in *Humphreys v. Atlantic Milling Co.*, 98 Mo. 542, 10 S. W. 140, as follows: "This succinct statement of the law is in accord with the prior rulings of this court. Whilst it is not necessary in all cases that the creditor's demand shall be first put in judgment, it is essential for him to make out a case which shows that he has no adequate remedy at law"—citing *Reyburn v. Mitchell*, *Mullen v. Hewitt*, *Crim v. Walker*, and *Mellier v. Bartlett*, supra, and added, "This is unquestionably the general rule." In *Implement Co. v. Jones*, 143 Mo., loc. cit. 278, 45 S. W. 41, this court, per Burgess, J., said: "Defendants contend that the petition states no cause of action in that it does not allege the insolvency of either of the judgment debtors, that any effort was made to collect the judgment by execution, or that the plaintiff has no remedy at law. It may be conceded that 'one seeking aid in a court of equity must, as a general rule, first exhaust his remedies at law.' *Merry v. Fremont*, 44 Mo. 518; *Alnutt v. Leper*, 48 Mo. 319; *Martin v. Michael*, 23 Mo. 50, 66 Am. Dec. 656; *Crim v. Walker*, 79 Mo. 335; *Thlas v. Siever*, 106 Mo. 314, 15 S. W. 772; *Mullen v. Hewitt*, 108 Mo. 639, 15 S. W. 924; *Mellier*

v. Bartlett, 106 Mo. 351, 17 S. W. 295. Under this well-established rule the petition in the case in hand states no cause of action, for it does not show that plaintiff had exhausted its remedies at law, and unless section 571, Rev. St. 1889, furnishes an exception to the general rule, the petition must be held to be insufficient." It is then pointed out that said section permits an attaching creditor to maintain an action to set aside a fraudulent conveyance, and that the plaintiff was an attaching creditor, and had acquired a lien on the property, and therefore could maintain the action. In *Ready v. Smith*, 170 Mo., loc. cit. 170, 70 S. W. 484, this court, per Gantt, J., again stated the rule that mere general creditors, who have not reduced their claims to judgment, and have no lien on the property, either legal, equitable, or statutory, cannot maintain an action to set aside a fraudulent conveyance. The case of *Atlas National Bank v. Packing Co.*, 138 Mo. 59, 39 S. W. 71, was referred to as bearing on another proposition, but the statement therein adopting the rule laid down by Black, J., in *Humphreys v. Milling Co.*, that "whilst it is not necessary in all cases that the creditor's demand shall be first put in judgment. It is essential for him to make out a case which shows that he has no adequate remedy at law," was not referred to.

The rules deducible from these cases may fairly be said to be as follows: The general rule of law is that a mere general creditor cannot maintain an action to set aside a fraudulent conveyance, and the reason for the rule is that he may never get a judgment, and therefore may have no rights which were injuriously affected by the conveyance. Judgment creditors, and those who have a legal or equitable lien on the property, and under the statute of this state creditors who have commenced attachment suits against the property, can maintain an action to set aside a fraudulent conveyance. But all creditors must allege and show that they have no adequate remedy at law, because, if they have, the aid of a court of equity is unnecessary, and will be denied. It is thus manifest that when it is said that a creditor must show that he has no adequate remedy at law before he can be heard to attack a fraudulent conveyance in equity only a fundamental rule of equity is announced, and that it applies to all sorts of creditors alike. But when it is said it is not essential that in all cases the claim be reduced to judgment, that statement applies only to creditors who already have a lien on the land, legal, equitable, or as attaching creditors by virtue of the statute, or to general creditors where they allege and show that they have no adequate remedy at law—as, for instance, where the defendant is wholly insolvent, and a judgment at law would be fruitless, and where their rights in equity would be prejudiced by the delay caused by the time consumed in procuring a judgment

at law. A creditor must reduce his claim to judgment, or secure a lien on the property, or attach the property, or show that the law affords no adequate remedy, before he can be heard in equity to challenge a conveyance for fraud. The petition shows that the plaintiff has done none of these things in her capacity of creditor, and therefore, as creditor, she has no standing in a court of equity to have the deeds from her father, John Howk, to Francis Howk, and from Francis Howk to Elizabeth Howk, set aside for fraud. As devisee under the will of John Howk she cannot be heard to ask the aid of a court of equity to set aside an alleged fraudulent conveyance of the testator, for she takes under the testator, and if he could not have the deed set aside, the devisee is in no better position. A devisee in this regard is in the same position as an heir, and the rule is that an heir cannot maintain an action to set aside a fraudulent conveyance of his ancestor. *Ober v. Howard*, 11 Mo. 425; *Criddle's Adm'r v. Criddle*, 21 Mo. 522; *Thomas v. Thomas*, 107 Mo. 459, 18 S. W. 27.

Lastly, the plaintiff claims the right under the statute (section 3398, Rev. St. 1899) to attack the conveyance on the ground that she is a subsequent purchaser, and that, notwithstanding the deeds attacked were on record at the time (not of the payment of the purchase money, but when the deed was made to her) she can maintain the action, because the grantee or person to be benefited by the conveyance was a party or privy to the fraud intended. The principle invoked is correct, but the petition does not state a case that falls within the principle. It is well settled that a subsequent purchaser cannot attack a prior conveyance on the ground that it was made with intent to hinder, delay, or defraud creditors, but that "a subsequent purchaser can only defeat a deed for fraud by showing that the fraudulent design was entertained toward him." *Bonney v. Taylor*, 90 Mo. 63, 1 S. W. 740; *Evans v. David*, 98 Mo. 405, 11 S. W. 975; *Reynolds v. Faust* (not yet officially reported) 77 S. W. 855. In 14 A. & Eng. Enc. Law (2d Ed.) p. 464, it is said: "It has been generally held in the United States that the fact that a conveyance is made for the purpose of defrauding creditors of the grantor will not, under the statute of 27 Elizabeth, render it void against a subsequent bona fide purchaser for valuable consideration." The petition does not bring this case within this rule, and does not even attempt to do so. On the contrary, the alleged deeds are distinctly charged to have been intended to defraud creditors, and there is not a word said about any intention to defraud subsequent purchasers. The petition therefore does not state a cause of action, and the court properly sustained the demurrers.

The judgment of the circuit court is right, and is affirmed. All concur.

ELLIOTT et al. v. SHEPPARD et al.
(Supreme Court of Missouri, Division No. 2.
Feb. 1, 1904.)

QUIETING TITLE—DEEDS—FORGERY—EVIDENCE
—ANCIENT DOCUMENTS—PRESUMPTIONS—DIARIES.

1. Where a deed and certificate of acknowledgment was regular on its face, and purported to have been executed 27 years before it was assailed as a forgery, the instrument was prima facie genuine and the burden of establishing its invalidity was on the persons alleging such fact.

2. Where, on an issue as to the forgery of a deed after the grantor's death, plaintiffs offered in evidence a diary kept by the grantor for the purpose of showing that he was not present at the place where the deed was purported to be signed and acknowledged according to its recital, but there was no evidence to identify the diary as being in the grantor's possession at the place or on the day the statements contained therein were purported to have been written, such diary was inadmissible.

3. In an action to quiet the title to certain real estate, evidence reviewed, and held insufficient to justify a finding that a deed under which defendants claimed title was a forgery.

Appeal from Circuit Court, Shannon County; W. N. Evans, Judge.

Action by Mary G. Elliott and others against M. A. Sheppard and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

J. W. Chilton and John C. Brown, for appellants. O. L. Haydon, W. P. Clarakton, and Orchard & Livesay, for respondents.

FOX, J. This is an action to settle and determine the title to the east half of section 27, township 29, range 1 west, in Shannon county, Mo., under an act of the Legislature approved March 15, 1897 (section 650, p. 261, 1 Rev. St. Mo. 1899). This case was returnable to the March, 1901, term of the circuit court of said Shannon county.

That we may fully comprehend the issues in this cause, we here insert the petition and answer, as follows:

"Plaintiffs state that defendants are non-residents of the state of Missouri, so that the ordinary process of law cannot be served upon them. For cause of action plaintiffs state that they own and claim to have the title in fee simple to the following described real estate in the county of Shannon and state of Missouri: The east half of section twenty-seven (27), township twenty-nine (29), range one (1) west, containing 320 acres, more or less, and that the defendants claim some title, estate, or interest in said real estate adverse to the estate of the plaintiffs therein. Whereupon plaintiffs pray the court to try, ascertain, and determine the interests of plaintiffs and defendants, respectively, to the real estate hereinbefore described, and by its decree to adjudge, settle, and define whatever interest the several parties, plaintiffs and defendants, may have in and to the said real estate."

Defendants' answer: "Now come defendants as named above, and for answer to

plaintiffs' petition admit that they claim to own in fee all the real estate described in plaintiffs' petition. Defendants, for further answer to plaintiffs' petition, deny each and every allegation therein contained and not above admitted."

The appellants claim title as heirs at law of Vincent Hamilton, deceased, and the respondents claim title through a general warranty deed executed by Vincent Hamilton, conveying the lands to M. A. Sheppard, dated the 12th day of January, 1873, and acknowledged before S. Ray, notary public, St. Louis county, Mo., on same day, and by and through sheriff's deed under a suit and judgment for back taxes (the state of Missouri, at the relation of F. M. Chilton, collector of the revenue of Shannon county, Mo., plaintiff, against M. A. Sheppard, defendant), which said judgment was rendered in the circuit court of Shannon county, Mo., at the November term, 1880, for the taxes of 1878, amounting to \$15.45 and costs of the suit, upon which judgment execution was issued and the lands sold thereunder at the May term of 1881 of said court. At said sale Logan D. Dameran became the purchaser thereof on the 5th day of May, 1881, and received a sheriff's deed therefor in regular form, which was duly recorded May 6, 1881, in Deed Record Book R, at page 369, and defendants Lillie M. Clarke, Henry Wagner, Joshua Manwarring, Elijah Bartlett, and Andrew J. Tomlinson claim title through mesne conveyances from Logan D. Dameran to them, and it was admitted on the trial, as shown by the record, that defendants aforesaid had acquired all the title which Dameran acquired by sheriff's deed conveying the interest of Sheppard.

The controversy is over the warranty deed from Vincent Hamilton to M. A. Sheppard, dated the 12th day of January, 1873, recorded in Deed Record Book J, at page 625, which said deed is as follows:

"General Warranty Deed. This indenture, made on the twelfth day of January, A. D. one thousand eight hundred and seventy-three, by and between Vincent Hamilton, of Paducah, Kentucky, party of the first part, and M. A. Shepherd of the county of St. Clair, in the state of Illinois, party of the second part, witnesseth, that the said party of the first part in consideration of the sum of five hundred dollars to him paid by the said party of the second part, the receipt of which is hereby acknowledged, do by these presents grant, bargain and sell, convey and confirm unto the said party of the second part, his heirs and assigns, the following described lots, tracts or parcels of land, lying, being and situate in the county of Shannon, and state of Missouri, to-wit: The east half of section twenty-seven (27) township twenty-nine (29) north of range one (1) west, containing three hundred and twenty acres, more or less, according to the United States survey. To have and to hold the premises aforesaid, with all and singular the rights,

privileges and appurtenances, immunities and improvements thereto belonging or in anywise appertaining, unto the said party of the second part and unto his heirs and assigns forever, the said Vincent Hamilton hereby covenanting that himself and his heirs will warrant and defend the title to the said premises, unto the said party of the second part and to his heirs and assigns forever against the lawful claims and demands of all persons whomsoever. In witness whereof, the said party of the first part has hereunto set his hand and seal, the day and year first above written. Vincent Hamilton. [Seal.] Signed, sealed and delivered in presence of M. K. Cone.

"State of Missouri, County of St. Louis—ss.: Be it remembered, that on this twelfth day of January, A. D. 1878, before the undersigned, a notary public within and for the county of St. Louis aforesaid, personally came Vincent Hamilton, who is personally known to me to be the same person whose name is subscribed to the foregoing instrument of writing as party thereto, and acknowledged the same to be his act and deed for the purposes therein mentioned, and the said Vincent Hamilton further declares himself to be single and unmarried. In testimony whereof, I have hereunto set my hand and affixed my official seal at my office in St. Louis, Mo., the day and year above written. S. Ray, Notary Public. [L. S.]"

"Filed for record and duly recorded January 2nd, 1874. Jno. M. Daugherty, Ex Officio Recorder."

Appellants claim that the deed from Hamilton to Sheppard was a forgery. This was the vital controverted question in the trial of this cause. Plaintiffs, to sustain their position and show that the deed was a forgery, introduced the following evidence, all of which was over the objection of defendants:

Deposition of Laura E. Griffith, who testified that she was a daughter of Vincent Hamilton, deceased. "(1) That he died in the year 1878, and was buried in Bracken county, Ky., and as to the heirs he left surviving him, who are the plaintiffs in this case. (2) That all his deeds, tax receipts (excepting receipts for the years 1870 and 1871), and title papers relating to the lands which he owned in Missouri, were accidentally destroyed by fire, so that the witness cannot procure them. (3) That the said Vincent Hamilton resided in Bracken county, state of Kentucky, all his life, and that he never lived in St. Louis or any other point in Missouri, and to the best of affiant's knowledge was not in Missouri in January, 1878, and that he talked freely in his family about his business affairs; that witness knew that he owned land in Missouri, but never heard him mention having sold it. (4) That he kept a diary many years, and during the year 1878, of his daily life, beginning with January 1 and ending December 31, 1873, and that said diary is filed herein, and mark-

ed 'Exhibit A,' and she is very positive that the handwriting therein is that of Vincent Hamilton, and it is made a part of the deponent's testimony.

"Diary. Diary referred to by Laura E. Griffith was then introduced over objection of defendants, and the following extracts read therefrom, to wit: Entries under date January 12, 1878:

"'In Sunday, January 12th, 1878.

"'Warm and thawing the ice and snow. Mrs. Langarie Lozie Emrick and hired man in buggy and Enrick G. Riley and self go to Jacksonburg 4 miles to church and Sabbath school. Br. Riley preach a good sermon, address the Sabbath School. Took dinner among the friends in town, back to Br. Emrick to supper. Preaching at night by Emrick in West Middleton at night. A Jener good time day and sleep with clean conscious.

"'Emrick children.

"'I sone Simon married and settled 10,000.

"'I daughter married possession 10,000.

"'Caty single 35 years old full of business. Lizzie 28 full of music plays on piano and organ and sings."

D. C. Reed, introduced, testified substantially as follows: Mr. Hamilton was at his place. Stayed three days in either 1869 or 1870. Mr. Hamilton sent him money in 1871 to pay taxes. He identifies letter which he wrote Mr. Hamilton the 24th of November, 1876, acknowledging receipt of money, and mailing to Hamilton tax receipts for taxes of 1876 for \$21.82; balance, \$3.68; check, \$25.00. The letter shows it was for lands in section 27, township 29, range 1, but does not show whether it was the land in question, and he says he does not know whether it was the land or not.

Defendants introduced record of warranty deed purporting to have been executed by Vincent Hamilton, of Paducah, Kentucky, to M. A. Sheppard, of St. Clair county, Ill., dated January 12, 1873, acknowledged January 12, 1873, before S. Ray, notary public, St. Louis, Mo., conveying the land in controversy. Defendants then introduced sheriff's deed dated May 6, 1881, for taxes, conveying the interest of M. A. Sheppard in said land to L. D. Dameran. Plaintiffs admit that defendants have whatever title L. D. Dameran obtained by said tax deed.

Thereupon the court gave the following instructions:

"The court instructs the jury that the record of patent read in evidence vested in Vincent Hamilton the title to land in controversy, and if you believe and find from the evidence that the plaintiffs are the legal heirs of said Vincent Hamilton, mentioned in said patent, your verdict will be for the plaintiffs, unless you further find that said Vincent Hamilton sold and conveyed the said land in controversy to one M. A. Sheppard on January 12, 1873.

"The court instructs the jury that the record of the deed as introduced in evidence

purporting to be from Vincent Hamilton (the patentee) to M. A. Shepherd is *prima facie* evidence of its validity, and that it devolves upon the plaintiffs to prove by a preponderance of the testimony that said deed was not executed by the said Vincent Hamilton, and unless you find from such preponderance of the testimony that said deed from Hamilton to Shepherd is fraudulent you should find the issues for defendants. Preponderance, as herein used, means the greater weight of the evidence."

The cause was submitted to the jury upon the evidence introduced and the instructions given, and they returned a verdict for the defendants. Judgment was rendered in behalf of defendants upon the verdict returned. Motion for new trial, in due time and form, was filed, and by the court overruled, and this cause is now before us for review upon appeal.

There is but one question involved in this cause, and that is, was the verdict of the jury so manifestly contrary to all the evidence in the case as would warrant this court in reversing the judgment for that reason? The contention of appellants is that the deed from Hamilton to Sheppard, conveying the land in controversy, was a forgery. The record discloses that the evidence relied upon to establish the forgery of this deed is the notes made in the diary offered in evidence, purporting to have been made by Vincent Hamilton, together with the testimony as contained in the deposition of Laura E. Griffith and the evidence of D. C. Reed.

We have searched in vain for the rule of evidence which renders admissible the statements as contained in the diary of Vincent Hamilton. Suppose he had made the statements to a third party, and this third party was offered as a witness to prove his statement, would it be contended seriously that this testimony would be competent? This diary does not belong to that class of documentary evidence which is admissible. It is not in the nature of a book account, which, upon showing that it was correctly kept, would render it admissible. It is merely a statement purporting to be made by Hamilton, and is of no more force or effect than if he had made such statements to some witness the day before he died. Again it is inadmissible because it falls within that class of testimony denominated self-serving statements.

These plaintiffs are claiming through their ancestor, Vincent Hamilton. Mere declarations of the ancestor, under whom plaintiffs claim, in his own interest, are not admissible. If Vincent Hamilton had stated in this diary that the deed offered in evidence by the defendants was a forgery, it certainly would not be contended that it was competent. There is an entire absence of any foundation for the admission of this diary. No one identifies it; no one pretends to say that it was written at the place and on the day it

purports to be written. Titles to real estate would rest upon extremely weak foundations if the precedent is to be made that the party who executes a deed could make a statement in a memorandum book which would destroy its validity, and after the death of the grantor this book is to be sanctioned by the courts as evidence of what it recites. This certainly cannot be the law.

It may be that the deed is a forgery, and that Vincent Hamilton was at the place at the time as designated in the diary; but it would be a very unsafe and dangerous rule to hold that the statements made in the diary are to be taken as evidence establishing the fact recited in the statements in the absence of any showing that the book was at the place it purports to have been at the time the statements were written in it. It may be said that a person registering at a hotel on a certain day, that the register may be introduced as evidence to show his presence at the hotel on that day. This may be true; but before this can be done the proper foundation must be laid. It must be shown that the register was at the hotel on that day, and that the handwriting was that of the person registered. That is not this case. It is true a witness, Laura E. Griffith, does say that he kept a diary many years, and during the year 1873; but she does not pretend to identify the diary introduced in evidence as being in the possession of Vincent Hamilton at the place on the day the statements are purported to have been written. This testimony was clearly inadmissible.

This leaves the question of forgery of the deed resting alone upon the deposition of Laura E. Griffith and the evidence of D. C. Reed. We have quoted from the record substantially the testimony of these two witnesses. That their testimony is insufficient to establish the forgery of this deed is too plain for discussion. The deed and certificate of acknowledgment in this cause by the defendants was regular upon its face, and purports to have been executed 27 years before it was assailed in this action. This being true, the instrument was *prima facie* true and genuine, and the burden of establishing its forgery rested upon the appellants.

This court in a number of cases has spoken in no uncertain terms as to the nature and character of the testimony which will warrant the overthrow of the force and effect of a deed duly acknowledged, all of which appears regular upon its face. The expressions of this court as well as the other appellate courts are uniform that to warrant the finding that such deed and certificate of acknowledgment is untrue the evidence must be clear and satisfactory. *Barrett v. Davis*, 104 Mo. 549, 16 S. W. 377; *Webb v. Webb*, 87 Mo. 540; *Riecke v. Westenhoff*, 10 Mo. App. 358; *Morrison v. McKee*, 11 Mo. App. 504; *Brookings v. Straat*, 17 Mo. App. 296.

The principle announced in *Bohan v. Casey*, 5 Mo. App. 111, is equally applicable to

this case. It was said in that case, in substance, "that there should be concurring circumstances in addition to the testimony of the grantor supporting his statements. In the absence of such circumstances, and of any evidence indicating fraud or collusion, a certificate duly made and conforming to the statute cannot be attacked in the hands of the grantee by the unsupported testimony of a grantor. *McPherson v. Sanborn*, 88 Ill. 152; *Russell v. Baptist Union*, 73 Ill. 337; *Lickmon v. Harding*, 65 Ill. 506; *Louden v. Blythe*, 27 Pa. 25, 67 Am. Dec. 442. A less stringent rule than this would be inconsistent with that security which is essential in cases of title to real estate." If competent evidence is still to guide the courts in the rendition of judgments, there was no error in the trial of this case which operates prejudicially to the rights of the appellants, and the judgment should be affirmed. It is so ordered. All concur.

STATE v. HEADRICK.

(Supreme Court of Missouri, Division No. 2.
Feb. 1, 1904.)

TRIAL ON TWO COUNTS—ACQUITTAL ON ONE
COUNT BAR TO CONVICTION ON THE OTHER.

1. The first count of an indictment charged an assault on H. with a deadly weapon, a knife, with intent to kill; concluding that defendant then and there with such deadly weapon stabbed and cut H., with intent to kill. The second count charged that defendant, with a deadly weapon, a knife, made an assault, and cut and disabled the hand and arm of H., with intent to kill. *Held*, that the essence of the offense charged in the two counts was the same, so that the acquittal of the defendant on the first count was a bar to his conviction on the second, though at the same time a verdict of guilty on that count was returned.

Appeal from Circuit Court, Cape Girardeau County; H. O. Riley, Judge.

Elijah Headrick appeals from a conviction. Reversed.

Wilson Cramer, for appellant. The Attorney General and C. D. Corum, for the State.

FOX, J. Appellant was convicted upon the second count of the indictment in the circuit court of Cape Girardeau county, and his punishment assessed at imprisonment in the penitentiary for the term of five years. The indictment, containing two counts, is as follows:

"The grand jurors of the state of Missouri, duly impaneled, sworn, and charged to inquire within and for the county of Cape Girardeau, state aforesaid, on their oath, present and charge that Lige Headrick, of said county and state, on or about the 23d day of June, A. D. 1901, in and upon the body of one August Holliday, then and there being, feloniously, on purpose, willfully, and of his malice aforethought, with a deadly weapon, to wit, a knife, which he, the said Lige Headrick, then and there in his

hand had and held, did then and there make an assault, with intent, then and there, him, the said August Holliday, feloniously, on purpose, willfully, and of his malice aforethought, to kill and murder, and he, the said Lige Headrick, with deadly weapon aforesaid, him, the said August Holliday, then and there, willfully, feloniously, on purpose and of his malice aforethought, did stab, strike, cut, penetrate, bruise, and wound, with the intent, then and there, with the deadly weapon aforesaid, him the said August Holliday, willfully, on purpose, and of his malice aforethought, feloniously to kill and murder, contrary to law and against the peace and dignity of the state.

"And the grand jurors aforesaid, impaneled, sworn, and charged as aforesaid, on their oath aforesaid, do further find, present, and charge that Lige Headrick, at the county of Cape Girardeau, state of Missouri, on or about the 23d day of June, A. D. 1901, in and upon one August Holliday, on purpose and feloniously, did make an assault, and the said Lige Headrick, with a deadly weapon, to wit, with a knife, the right hand and arm of the said August Holliday on purpose and of his malice aforethought, unlawfully and feloniously, then and there did cut and disable, with the intent him, the said August Holliday, then and there and thereby, on purpose and of his malice aforethought, unlawfully and feloniously to kill and murder, contrary to law and against the peace and dignity of the state."

The facts shown by the evidence are substantially as follows: Both the defendant and the prosecuting witness, August Holliday, are boys; the one being in his nineteenth, and the other in his seventeenth, year at the time of the difficulty, on June 23, 1901. They were entire strangers to each other, and met for the first time on the afternoon of Sunday, June 23, 1901, at a sawmill situated a short distance southeast of the city of Jackson. This mill was between the railroad which runs north in the valley, and a public road running parallel with the railroad, and crossing it a short distance north of the mill, where it connects with a street. Starting at the mill, and going north along the track of the railroad the objects mentioned in the testimony are as follows: After passing the point where the public road just mentioned crosses the track, the first object is the office of the tiling factory, on the right-hand or east side; next, the water tank, on the left; a little beyond this, the crossing of the Jackson Gravel Road, which comes from the east; next, on the right, the flouring mill; and immediately opposite, on the left, the elevator. Some distance further, on the same side, the house spoken of as the "Obermiller House"; and beyond this, on the right, the beer depot, which is a considerable distance north of the mill. The railroad has a side track, which leaves the main track somewhere north of the flouring

mill, and, passing on the east side of the mill, going south, crosses the Jackson Gravel Road between an iron bridge on that road and the residence of Mr. Al. Rice, situated on the south side of the gravel road, and but a short distance from it. After the gravel road crosses the railroad track, just north of the water tank, it turns to the right, going up an incline, and connects on the ridge with a street running north, parallel with the railroad; and on the east side of this street, between it and the railroad, is the elevator. At the intersection of this street with one running west, and nearly opposite the elevator, is the residence of Dr. Koehue; immediately opposite Dr. Koehue's is the Turners' Hall; and going west on the street just mentioned the Catholic church is passed two blocks from Dr. Koehue's corner. From this corner to Sibley's Restaurant it is nearly four blocks. On Sunday afternoon, June 23, 1901, there was a beer-drinking at the sawmill, at which a number of young men and boys had congregated. Among them were the defendant and the prosecuting witness, August Holliday, who participated in the festivities of the occasion. Some time late in the afternoon defendant and Dan Peyton were in the water-closet together, and were talking about John Headrick, the brother of defendant, who was executed for murder about two years before. About this time Holliday came into the closet, and made the remark, "Yes; John was all right, but he got his damned clock fixed." Defendant said to him that he should not "throw up his brother John to him; that he did not like to hear it." It seems, Holliday kept on talking, and finally defendant told him that, if he did not shut up, he would make him do so. About this time they stepped out of the water-closet, and defendant drew from his pocket a knife and struck at Holliday; but whether the knife was open or closed, does not appear. The prosecuting witness himself says he does not know. At all events, no wound was inflicted. The lick merely grazed the side of Holliday, who jumped away, and, arming himself with a club, was about to enter into active operations, when others ran in and separated the boys. Mr. Loos, the owner of the sawmill, put Holliday out into the public road, on the east side of the mill, and directed defendant to go away. Holliday stood out in the road, challenging defendant to come out and settle the matter. Defendant, however, did not go, but remained at the mill about half an hour, when he and two other boys—Wm. Niblack and Sherman Daly—started to go up into the city. They got outside of the mill inclosure onto the railroad track, walked north on the track past the tiling factory and the water tank, and then went uptown, passing between Dr. Koehue's and the elevator, past the Catholic church, to Sibley's Restaurant. They remained there a short time, and then

defendant and Wm. Niblack started home. Niblack lived a mile east of town, immediately on the gravel road; and defendant, on the Bainbridge Road, which enters the gravel road at the Niblack residence. The proof tends to show that after the defendant and his companions, Niblack and Daly, had gone up the railroad track on their way uptown, Holliday, as he passed the tiling factory, going north on the railroad, made the remark that he intended to kill the damned son of a bitch. As stated, defendant and Niblack started home from Sibley's Restaurant. They came down the way they had gone up, and when they got to Dr. Koehue's they met Holliday, who was coming up toward town. Holliday renewed the difficulty with defendant, and seemed determined to fight. Defendant told him he did not want any trouble with him; that he should go away and leave him alone. Holliday was heard to say, "You drew your knife on me, but I am not afraid of you," and was seen to draw back his club in a striking attitude, and defendant was noticed patting his pocket with his hand. About this time, Wm. Cunningham, who was down on the railroad track, called to defendant to come to him, and defendant immediately went to where Cunningham was. Niblack and Holliday also went down to the railroad track. Cunningham told defendant to leave Holliday alone, and go on up the railroad track and go home. He immediately started north on the railroad track, and got as far as the beer depot, where he met and talked to a negro, Bud Thomas. Holliday was seen coming up the railroad towards the beer depot, still carrying his club. Defendant then went around the beer depot, got on a side track, and walked south towards the mill, and, without stopping, passed on to the gravel road, which was his direct route home; getting on the gravel road just in front of Al. Rice's house. By the time he got there, Holliday, who had turned and followed as soon as he saw defendant going south, and was seen running, caught up with defendant, and renewed the difficulty. Mr. Rice came out, and ordered them away. Defendant and Niblack, who had come up with Charley Daly, another boy, started east on the gravel road towards home, and crossed the bridge. Daly, who was behind with Holliday, tried to keep him from following, and wanted him to go back, but he would not do so. He still had his club, and insisted on going; and he and Daly then started east on the gravel road. Defendant and Niblack were about 75 or 100 yards ahead of Holliday and Daly—had gone some distance when the latter two caught up with them. Holliday again renewed the difficulty. Daly interfered, and told them not to fight, but Holliday insisted that the matter must be settled then and there. Daly then suggested that they should give up their weapons and fight a fair fight, to which defendant readily assented, and offer-

ed to give up his pocketknife, the only weapon he had. Holliday, however, said he would "fight no man fair," and refused to lay down his club. At this Daly turned away, and started back towards town. The difficulty then began. Defendant says that Holliday struck him on the arm with the club, and continued to advance upon him with his club raised, as he backed away, and that he then ran in and cut him with his knife. Holliday denies striking him, but admits that he had his club raised, and that defendant backed away from him. Mr. Alfred Green, who was on his porch, some distance off, saw Holliday with his club raised, and defendant backing away. Directly after this, he saw both were down, but could not tell what was going on. Daly, who had gone but a short distance, immediately turned, on hearing the disturbance, and, going back, placed his hand on the shoulder of defendant, who at once got up and started off towards home. He was arrested before he had gone more than a quarter of a mile, and lodged in jail. Holliday received many wounds—one of them on the right arm, about three inches above the elbow, which injured the nerve and caused paralysis of the extensor muscles. There was testimony that Holliday was drunk, and it was claimed by the state that he was so drunk that he fell down. On the other hand, there was testimony that he was able to follow defendant around from place to place, and even to run in order to catch up with him. Holliday stated on cross-examination that he followed the defendant with the intention of whipping him.

At the close of the evidence, the court instructed the jury, and the cause was submitted to the jury, and they returned the following verdict: "We, the jury, find the defendant guilty upon the second count of the indictment, and do assess his punishment by imprisonment in the penitentiary for a term of five years; and we find him not guilty upon the first count of the indictment." Judgment was pronounced in accordance with the verdict, and, after unsuccessful motions for new trial and in arrest of judgment, defendant prosecutes his appeal to this court, and the record is now before us for review.

It will be observed that the jury, by their verdict, affirmatively stated that the defendant was not guilty as charged in the first count of the indictment, and, on the other hand, expressly stated that he was guilty as charged in the second count. The question confronting us in this cause, which overshadows all others, involves the correctness of the verdict as returned upon the two counts in the indictment. Can both these findings, as made by the jury in the verdict, stand, or did the acquittal of the defendant of the charge as contained in the first count operate as a bar to his conviction in the second count? This is the vital question presented, and its solution, maintaining the contention

of appellant, ends this case, and renders it unnecessary to pass upon the other assigned errors complained of. We have reached the conclusion that the acquittal of the defendant upon the first count of the indictment operates as a bar to his conviction upon the second count. The first count of this indictment is predicated upon section 1847, Rev. St. 1899—what is ordinarily termed the "bloody section." The second count is based upon section 1846, Rev. St. 1899, which defines the offense of "mayhem." It will be observed that the allegations in the second count of the indictment charges the cutting and disabling of the right hand and arm of the prosecuting witness, with the intent to kill and murder, and not with the intent to maim or disfigure, as might have been very appropriately charged in the second count. The first count of this indictment, after charging the assault upon August Holliday with a knife with intent to kill, concludes with this allegation: "And he, the said Lige Headrick, with the deadly weapon aforesaid, him, the said August Holliday, then and there, willfully, feloniously, on purpose, and of his malice aforethought, did stab, strike, cut, penetrate, bruise, and wound, with the intent, then and there, with the deadly weapon aforesaid, him, the said August Holliday, willfully, on purpose, and of his malice aforethought, feloniously to kill and murder, contrary to law and against the peace and dignity of the state." We take it that it will not be seriously denied that the charge in the first count, as quoted herein, includes the infliction of every wound, of whatever nature or character, that was inflicted in the assault made by the defendant upon the prosecuting witness. The second count of the indictment, after making the formal allegations, concludes with this charge: "And the said Lige Headrick, with a deadly weapon, to wit, with a knife, the right hand and arm of the said August Holliday, on purpose and of his malice aforethought, unlawfully and feloniously, then and there did cut and disable, with the intent him, the said August Holliday, then and there and thereby, on purpose and of his malice aforethought, unlawfully and feloniously to kill and murder, contrary to law and against the peace and dignity of the state." The essence of the offenses charged in both counts of the indictment was the same. The assault as charged in the first count was with the intent to kill, and the charge in the second count, of the cutting and disabling of the right arm of the prosecuting witness, was with the same intent. The jury, in order to convict on either count, were compelled to find that the assault was made with intent to kill. We are unable to conceive how the jury, upon the first count in the information, which includes all the wounds inflicted, could say that the defendant is not guilty of an assault with intent to kill, and upon the second count say that the cutting and disabling of the right arm of Holliday (which wounds, we repeat,

were included in the first count) was done with the intent to kill him. It is not the disabling of the right arm of the prosecuting witness, as charged in the second count of the information, which constitutes the offense. That is simply one of the aggravating ingredients of the offense. But, on the contrary, it is the disabling of the arm, with the specific intent to kill, that constitutes the offense. It may be said that the disabling of the right arm of the prosecuting witness was not alleged, and hence not involved in the first count of the indictment. That may be true. But the wounds which resulted in the cutting and disabling of the arm were alleged, and were involved, and were proven, and the jury, by an affirmative verdict upon the first count, in passing upon the identical wounds, inflicted with the same weapon, included in the second count, said defendant was not guilty as charged in that count; and we repeat our inability to ascertain upon what theory the jury, in the second count, upon the same wounds, by the same weapon, charged in the first, said they were inflicted with intent to kill.

Our attention is directed in the brief of respondent to the case of *State v. Whitton*, 68 Mo. 91, as maintaining the position that both these verdicts may legally stand. A careful examination of that case, together with the record in the cause, will make it apparent that it by no means can be construed as sustaining the contention of respondent in the case at bar; nor does it, in the announcement of any principle, conflict with the conclusions reached by this court upon the record before us. While the opinion in the *Whitton* Case does not disclose the nature and character of the counts contained in the indictment, the record on file in this court, which we have before us, furnishes this information. There were two counts in the indictment. The first count charges the stealing of one head of neat cattle on the 11th day of July, 1876, of the value of \$16. The second one charges the stealing of two head of neat cattle on the 20th day of July, 1876, of the value of \$20 per head. It will be observed in that case that the defendant was convicted upon the first count, and the jury failed to make any finding at all on the second count. In other words, defendant was found guilty of stealing the one head of neat cattle as charged in the first count, but there was no affirmative finding of not guilty on the second count; but, even if there had been, the verdicts would not have been, as they are in this case, inconsistent. Note what the learned judge, in the opinion in that case, says: "In reference to this, it may be observed that the second count was practically abandoned at the trial; no evidence being introduced or instructions given respecting it." The jury may have very appropriately and consistently said that "there being no evidence offered upon the second count tending to show that defendant stole two head of cattle, and the

court declining to further consider the charge, by failing to give any instructions on it, we will find the defendant not guilty on the second count." But, on the other hand, there was testimony sustaining the charge as contained in the first count, for stealing one head of neat cattle; and the court, by its instructions, confined the jury to the consideration of that count alone, and they found the defendant guilty. We repeat, there would have been no inconsistency in the two verdicts, even had there been an affirmative finding upon each count. That is not this case. Here we have two counts in the indictment; evidence introduced to support both of them; instructions covering both charges; the same wounds charged in the second count are included in the first; the same character of weapon charged in the second is alleged in the first; the essence of the offense is identical in both counts (that is, the wounds were inflicted with intent to kill); two affirmative verdicts upon identically the same state of facts—one of not guilty on the first count, and one of guilty upon the second. With commendable frankness, the counsel for the state admit that it is difficult to assign a reason for employing more than one count in the indictment; but, in his argument to sustain the consistency of the two affirmative verdicts, he says: "At this distance we are unable to assign the reason of the prosecutor for employing more than one count, but a reason may have existed nevertheless. It may have been a doubtful question as to whether the weapon used by the defendant was, as a matter of fact, a deadly weapon, and the state may have hesitated to have rested its case upon the section of the statute which levels its penalties against those persons who make an assault with a deadly weapon. From the wounds of the prosecuting witness, it would seem that the weapon was of a deadly character; but the character of the weapon was a question for the jury, and not a question for this court or the trial court to pass upon." The record fully answers this argument. Counsel for the state, in assigning a reason for the acquittal of the defendant upon the first count, says "that the jury may have found that the weapon as charged in that count was not a deadly one." This only adds emphasis to the inconsistency of the two verdicts. If they found that it was not a deadly weapon upon the first count, they clearly made a contrary finding upon the second, for the second count charges that the assault was made with the same knife, and expressly charges that it was a deadly weapon. Upon this count they found the defendant guilty as charged; hence the finding necessarily means that the assault was made with a deadly weapon, which is absolutely inconsistent with the theory of the finding of the jury upon the first count.

We fully recognize the well-settled rule of criminal pleading that permits, in the same indictment or information, separate counts

covering the intents with which an act is done. For illustration, take this case. A count charging the cutting and disabling of the arm of the prosecuting witness, with the intent to maim and disfigure, or a count charging the maiming, wounding, or disfiguring, could have been included, and an acquittal on the first count would not be a bar to a conviction on one of the other counts. In that case the verdict would not be inconsistent, for the jury may have found in the first count that he did not intend to kill, and on the other count that he did intend to maim or disfigure, or did maim, wound, and disfigure. Again, a defendant charged in one count with an assault with intent to kill, under section 1847, *supra*, may be convicted of a felonious assault, without malice, or there may be included in the same indictment or information two separate counts for an assault with intent to kill—one charged to have been done "on purpose and of malice aforethought," and the other omitting those aggravative elements of the offense. In that case an acquittal on one count would not bar a conviction on the other. They are simply counts making a distinction in the degrees of the offense. On the other hand, it is not permissible to include in the same indictment or information, as was done in this case, a charge in one count of an assault with intent to kill, under section 1847, *supra*, and, for the infliction of the same wounds, charge in another count, under a different section of the statute, the same elements of the offense embraced in the first, and that the wounds were inflicted with the same intent; that is to kill. In other words, if an assault is committed with a deadly weapon, and wounds inflicted which result in the disability of the party assailed, the perpetrator may be prosecuted for an assault with the intent to kill, under section 1847, and there may be included in the indictment or information other counts charging the disability of the arm or leg of the party assaulted, from the same wounds as are necessarily included in the first count, with intent, as provided in the subdivisions of section 1846, to maim or disfigure, or it may charge the felonious wounding, maiming, or disfiguring, as provided by section 1849, Rev. St. 1899; but, on the other hand, if the conviction is sought upon the same facts solely, whether for an assault with intent to kill, under section 1847, or under the subdivisions of section 1846, for disabling a limb or member of the assaulted party, with the intent to kill, then and in that case we are clearly of the opinion that the state must stand upon one section or the other. Apply this appropriate test to this case. If defendant had been charged in separate indictments—in one as charged in the first count, and in the other as contained in the second—and first tried and acquitted of the charge in the first indictment, would it be seriously contended that if called upon to answer the charge contained in the subse-

quent indictment, including the same wounds inflicted by the same weapon, and the same intent, that he could not plead in bar his acquittal upon the first indictment? We think not. There is no sound legal reason why the same principle should not be applicable where the charges are made in separate counts of the same indictment.

The jury in this case had before them, in evidence, all the facts connected with this assault; every wound; its nature and character; the results of the wounds inflicted; and they returned an affirmative verdict in which it was expressly stated that defendant was not guilty of an assault with intent to kill, and then stated, upon the second count, upon the same state of facts, that he was guilty of inflicting the injuries with intent to kill. This verdict is inconsistent and contradictory, and cannot be permitted to stand. So far as the two counts in this indictment are concerned, the essential elements of the offense are identical. The intent to kill, in each one of them, must be proven as laid, the only difference being in the one that there must be an allegation as to the result of the wounds; but at last, from the same injuries, the jury must find that they were inflicted with the intent to kill.

With all due deference to the able and well-known prosecuting officer who represented the state in the trial of this cause, and the esteemed and learned judge presiding at the trial, we have reached the conclusion that the acquittal of the defendant on the first count of the indictment operates as a bar to his conviction upon the second count. This judgment is reversed, and the defendant discharged. All concur.

PADDOCK-HAWLEY IRON CO. v. RICE et al.*

(Supreme Court of Missouri, Division No. 1.
Dec. 23, 1903.)

JOINT TORT FEASORS—CONTRIBUTION—ILLEGAL ATTACHMENTS—RATIFICATION.

1. Plaintiff brought attachment, and levied on the goods of his debtor. Various other creditors of the debtor also levied attachments the same day. The actions were all brought by the same attorney, but none of the attaching creditors knew at the time their suits were brought of the other attachments; and plaintiff's representative acted for plaintiff alone, and without consultation or concert of action with any other creditor. Judgment was rendered for interpleader in the attachment. Thereafter he sued plaintiff, and recovered a judgment for the property attached, with costs and expenses. *Held*, that there was no such concert of action between the attaching creditors as to make them joint tort feasors, so that plaintiff could recover in an action for contribution from them for money paid in satisfaction of the judgment obtained against him by the interpleader.

2. Where several creditors brought individual attachment suits against a debtor, though they all signed stipulations to be filed in each of their cases against the debtor and the inter-

*Rehearing denied February 10, 1904.

pleader in attachment, agreeing that judgment might be entered for the interpleader, this does not show a ratification by any one of the attaching creditors of the acts of the other attaching creditors, so as to render their trespass in making the attachments joint.

3. Under Rev. St. 1890, § 2870, providing that defendants in a judgment founded on an action for the redress of a private wrong shall be subject to contribution and all other consequences of such judgment in the same manner and to the same extent as defendants in a judgment founded on contract, does not authorize contribution where there was no concert of action among the tortfeasors.

Appeal from St. Louis Circuit Court; W. B. Douglas, Judge.

Action by the Paddock-Hawley Iron Company against Henry Rice and others. From a judgment for defendants, plaintiff appeals. Affirmed.

W. B. Homer, for appellant. Martin L. Clardy, Robt. A. Anthony, Walter D. Coles, Jones, Jones & Hocker, and Lyon & Swarts, for respondents.

MARSHALL, J. This is a suit in equity for contribution. In March, 1891, one E. R. Casebeer was engaged in business in Williamsville, Wayne county, Mo. The plaintiff and the defendants Rice, Stix & Co., James Beakey Stove Company, and Clark Shoe Company (which has since ceased to do business, and its former directors are sued as trustees of the company) were engaged in business in St. Louis, and the defendants M. Deguire & Co. were engaged in business in Fredericktown, Mo. Some time prior to March 17, 1891, the Peters-Miller Shoe Company began an attachment suit against Casebeer, and had it levied on his stock of goods. Thereupon, on March 17, 1891, the Clark Shoe Company, James Beakey Stove Company, Rice, Stix & Co., and the Martin Clothing Company, separately, and each for himself, and without the knowledge of the other, instituted attachment suits against Casebeer. They placed their claims in the hands of the Ladd Collection Agency, in St. Louis; and Ladd sent them to L. N. Davidson, an attorney at Poplar Bluff, and he employed S. R. Durham, an attorney at Piedmont, to help him. On March 15, 1891, a traveling representative of the plaintiff went to Williamsville, and presented a bill to Casebeer for what he owed the plaintiff. Casebeer gave him a draft for the bill, and on the next day he sold Casebeer another bill of goods. On March 18th said representative was notified that the draft had not been paid, and directed to go to Williamsville to attend to it. Upon arriving at Williamsville, said representative found the store locked up, and learned that the Peters-Miller Shoe Company had attached the goods. He made inquiries about Casebeer's affairs, and found that he had transferred all his goods and property to one Jay L. Smyth, of Iowa, to secure him what he owed him, and that Smyth was in possession when the Peters-Miller Shoe Company's attachment was served. Thereupon said representative employed John R. Raney,

an attorney at Williamsville, and on March 19th instituted an attachment suit against Casebeer. Neither the plaintiff nor its representative nor its attorney knew at that time that Rice, Stix & Co., James Beakey Stove Company, Clark Shoe Company, and the Martin Clothing Company had begun attachment suits against Casebeer two days previously. But the plaintiff's representative acted for the plaintiff alone, and without consultation or concert of action with any other creditor. Thereafter, on March 21st, a member of the firm of M. Deguire & Co. heard that Casebeer was in financial difficulty, and he went to Piedmont, and consulted John R. Raney, with the result that M. Deguire & Co. also began an attachment suit against Casebeer. But no member of that firm knew when their attachment suit was begun that the plaintiff had begun an attachment suit against Casebeer two days previously, nor that any one else had done so, except one Joe Williams, and did not even know at that time of the conveyance by Casebeer to Smyth. They also employed Mr. Raney as their attorney, but he says he did not tell Deguire & Co. that he represented the plaintiff herein, nor that they had started an attachment suit against Casebeer two days previously. The clerk issued writs of attachment in all the cases, and placed them all in the sheriff's hands at the same time, on March 23d, and the sheriff levied them on March 24th. Mr. Raney, acting for the plaintiff herein, says he directed the sheriff to levy the plaintiff's attachment first, and to levy upon property as to which the expenses would be as small as possible. None of the other creditors gave any directions whatever to the sheriff, and were not present when the levy was made. The sheriff levied all the attachments on March 24th. In his return to the plaintiff's writ, he said he levied upon "all the personal property listed in the schedule hereto attached, and which is made a part of this return," and in his returns upon all the other writs he said he levied upon "all the personal property listed and scheduled and attached to my return in the case of Paddock-Hawley Iron Co. v. E. R. Casebeer, which list is made a part of this return." On March 28, 1891, Rice, Stix & Co., Clark Shoe Company, Martin Clothing Company, and James Beakey Stove Company, each for themselves, obtained orders in their respective cases for the sale of the personal property. On May 4, 1891, the plaintiff, Paddock-Hawley Iron Company, and M. Deguire & Co., each for themselves, obtained orders in their respective cases for the sale of the personal property. Thereafter the sheriff sold the attached property for \$2,174.70. On July 16, 1891, Jay L. Smyth filed interpleas in each of the six attachment suits. The venue was changed in all the cases from Wayne county to Reynolds county. The Deguire case was tried twice. The first time it resulted in a hung jury, and the second time a verdict was returned for the defendant, but

afterwards a new trial was granted. Upon these trials, Mr. Raney, who was attorney for Deguire & Co., and also for the Paddock-Hawley Iron Company, tried the case on behalf of the defendants. He was assisted by Mr. Yancey, who was attorney for the Peters-Miller Shoe Company and for Williams & Co., and by Mr. L. F. Dinning, who was employed as special counsel in all the attachment cases. Mr. Durham was present, but only as a witness. Mr. Davidson took no part in the trial. Thereafter the case of *The Peters-Miller Shoe Company v. Casebeer* (Smyth, Interpleader) was tried in the circuit court, and resulted in favor of the plaintiff. The interpleader appealed to the St. Louis Court of Appeals, and that court reversed the judgment, but held that the evidence was insufficient to support a finding that the conveyance to Smyth was fraudulent. *Peters-Miller Shoe Co. v. Casebeer*, 53 Mo. App. 640. As the evidence adduced in that case was adjudged insufficient to support a judgment in favor of the attaching creditor, and as the evidence in all the other cases was the same, the attorneys for all the parties entered into a stipulation, to be filed in each case, agreeing that judgments might be entered in each case in favor of the interpleader, Smyth, for the \$2,939.30 in the hands of the sheriff, resulting from the sale of the attached property. Thereafter Smyth instituted suit against the Paddock-Hawley Iron Company, in Iowa, to recover the value of the goods that had been levied on under the attachment writs. The cause was removed to the United States Circuit Court for the Northern District of Iowa, and the trial resulted in a judgment for the plaintiff therein for \$4,549, principal and interest, \$1,398 attorney's fees, and \$704 costs. The court, however, required Smyth to bring suit against the sheriff of Wayne county for the recovery of the \$2,939.30 in his hands as aforesaid. This the plaintiff did, and recovered judgment against the sheriff, but as the courthouse had been burned, and the records destroyed, it was not ascertained who his bondsmen were. So no judgment was obtained against them. Nothing was realized on the judgment against the sheriff. The Paddock-Hawley Iron Company paid \$250 attorney's fees and expenses in the prosecution of this suit. Thereupon the Paddock-Hawley Iron Company paid the judgment, attorney's fees, and costs and expenses in the United States court for Iowa, amounting to \$6,651.89, and then instituted this suit in equity against the other attaching creditors, except the Martin Clothing Company, which had failed. The circuit court entered judgment for the defendants, and the plaintiff appealed.

The plaintiff's contention is that all the attaching creditors acted jointly; that, although the writs were sued out at different times, they were all levied at the same time, and that the sheriff was their common agent; that the tortious act was committed without guilty intent, but in the prosecution of what

they honestly believed to be their legal rights, and hence the right of contribution exists, or that, if there was no concert of action between the attaching creditors in the first instance, the defendants herein are liable because they ratified and affirmed the acts of their common agent, the sheriff, in levying simultaneously upon all the property, and also ratified the acts of their attorneys in making common cause in the defense of the Deguire suit, and afterwards in signing a single stipulation for judgment in the six attachment cases; and that, in addition to all this, the trespass was single, and the injured party was entitled to but one satisfaction. On the other hand, the defendants deny that the attaching creditors acted jointly, and say that each acted separately, and that none of them knew the others had instituted proceedings when they commenced their suits; deny that the sheriff was their common agent, but say he is the officer empowered by law to serve writs, and they had no power of appointment of an agent to serve their writs; deny that they gave the sheriff any directions about serving the writs, or that they knew he was going to serve the writs simultaneously, and say the plaintiff was the only one who directed the sheriff, and it directed him to serve its writ first; deny that they knew that their attorneys also represented other creditors, and say it is immaterial if they did, especially as Williamsville is a small town, and there are few attorneys there; deny that their attorneys made common cause with plaintiff's attorneys in the trial of the Deguire case, or otherwise; deny that the signing of one stipulation, to be filed in all the cases, agreeing to a judgment in favor of Smyth, constituted making a common cause; and deny that they are liable if there was no concert of action—no joint trespass—even though the trespass was single so far as the injured party was concerned.

Upon the facts disclosed by the record, there is no substantial basis for the charge that the trespass was joint, or that it was ratified afterwards. Each creditor acted for himself. None of the parties to this action knew when they sued out their writs that any of the other parties hereto had sued out writs. They all knew that the Peters-Miller Shoe Company had sued out a writ, and that it had been levied, and Deguire & Co. knew that Williams had begun suit. The defendants, except Deguire, were represented by different counsel from the plaintiff, and their suits were begun two days before the plaintiff's suit was begun, and while the plaintiff had a draft from Casebeer for what he owed them, and while they had an additional order from him for new goods, and before the draft was dishonored, or at any rate before the plaintiff's traveling representative who sued out their attachment knew that the draft was dishonored, or that Casebeer had failed. The Deguire suit was instituted by the same counsel who represented

the plaintiff, but was begun two days later than the plaintiff's suit; and the counsel says he did not tell Deguire anything about the plaintiff's suit, or that he represented them. None of the counsel representing the defendants, except Deguire, participated in the trial of the Deguire case, save Mr. Dinning, and he was special counsel in all of the cases, but it does not appear that there was any concert of action between them on employing him. All the attorneys for the attaching creditors watched the trial of the Deguire case closely, not because it would determine their cases, but because the evidence would be the same in their cases, and they could see its effect on the Deguire case, and also learn the position and authorities of the counsel for the interpleader. But there was no concert of action. There was a common sympathy, because they were pursuing a common debtor and fighting a common interpleader, but there was no unity of action or of interest. The damage to the defendant and to the interpleader was single, but it would have been the same if only one creditor had attached, and there were no concurrent, separate acts that necessarily had to combine to produce the injury. Hence the attaching creditors were not connecting links in the chain of causation. Therefore, upon the facts of this case, "the several attaching creditors were in no proper sense joint trespassers at all," as was aptly said in the similar case of *Brewster v. Gausa*, 87 Mo., loc. cit. 519.

There is also no substantial evidence that the defendants ratified or affirmed any trespass that either had committed. The attorneys of Rice, Stix & Co., Clark Shoe Company, James Beakey Stove Company, and Martin Clothing Company did not participate in—much less, make common cause in—the trial of the Deguire case. Mr. Durham, one of their attorneys, was present at the trial, but was there as a witness. Mr. Dinning was special counsel for all the attaching creditors, but there is no evidence that they made common cause in employing him, and there was no legal impediment in the way of his accepting employment from as many different clients as chose to employ him, so long as his acts in representing them were not necessarily inconsistent. Mr. Raney represented Deguire, and also the plaintiff herein; but, as there was nothing inconsistent in his representing both, so such employment did not make him their joint agent. *Frankenthal v. Lingo*, 16 Tex. Civ. App. 229, 40 S. W. 815.

The sheriff was the officer designated—except in specified cases not present here—by the law to serve writs of attachment. He was not the agent—common, joint, or special—of any of the attaching creditors. He had a legal duty to perform as to each, but he owed no common or special duty to them.

The signing of the stipulation agreeing to a judgment for the interpleader in each of

the attachment suits was in no just or proper sense an act of ratification of any previous step or act in the case that had been taken jointly or separately. The case of *Peters-Miller Shoe Company* had then been decided. That decision was a clean, unequivocal victory for the interpleader. There was nothing to be gained by further contesting these attachment suits. The attaching creditors simply surrendered. A surrender cannot be construed into a ratification of previous separate acts of the defeated parties. The paper signed by all was simply a confession of inability to further injure, delay, or fight the interpleader. It voiced no defense, no challenge, no plan of campaign, no declaration of purpose or of principle. It dealt with the then present and future, and not with the past. It did not amount to a ratification of anything.

This disposes of the first contention of the plaintiff—that the attaching creditors acted in concert. The remaining question is whether the defendants are liable even if they did not act in concert, but acted independently of each other.

The plaintiff contends that the defendants are liable upon the ground that the trespass was single, and the injured party is entitled to but one satisfaction. This contention is supported by the cases of *Vandiver v. Pollak*, 107 Ala. 547, 19 South. 180, 54 Am. St. Rep. 118; *Sparkman v. Swift*, 81 Ala. 283, 8 South. 160; *Stone v. Dickinson*, 5 Allen, 29, 81 Am. Dec. 727; and to some extent by *Ellis v. Howard*, 17 Vt. 380. But the weight of authority and the rule in this state are that, in order that there may be contribution between tort feasons, they must have acted jointly, or be concert of action. The question whether or not the injured party is entitled to only one satisfaction, or whether the trespass is single, does not determine the right to contribution. There must be actual unity of action between them to authorize contribution among them. *Jobe v. O'Brien*, 2 Humph. 34; *Navigation Co. v. Richards' Adm'r*, 57 Pa. 142, 98 Am. Dec. 209; *Rhea v. White*, 8 Head, 121; *Miller v. Highland Ditch Co.*, 87 Cal. 480, 25 Pac. 550, 22 Am. St. Rep. 254; *Frankenthal v. Lingo*, 16 Tex. Civ. App. 229, 40 S. W. 815; *Brewster v. Gausa*, 87 Mo. 518; *Leeser v. Boekhoff*, 88 Mo. App., loc. cit. 234; *Spalding v. Bank*, 78 Mo. App., loc. cit. 882; *Hardware Co. v. Grocer Co.*, 64 Mo. App., loc. cit. 681; *St. Louis v. Conn. Mut. Life Ins. Co.*, 107 Mo. 92, 17 S. W. 687, 28 Am. St. Rep. 402. In *Leeser v. Boekhoff*, 88 Mo. App., loc. cit. 234, it was said: "The evidence required to prove a joint trespass is analogous to that required to prove a conspiracy." In *Frankenthal v. Lingo*, 16 Tex. Civ. App. 229, 40 S. W. 815, it was held that where three creditors bring separate suits against the same defendant for separate debts, and sue out separate writs of attachment, which are levied at the same time, but in successive order, the

mere fact that the plaintiff creditors all had the same agent and attorney in bringing the suits and levying the writs is not sufficient to authorize contribution among them. In *Miller v. Highland Ditch Co.*, 87 Cal. 430, 25 Pac. 550, 22 Am. St. Rep. 254, it was held that "several tortfeasors, not acting in concert or by unity of design, are not liable to a joint action for damages, although the consequences of the several torts have united to produce an injury to the plaintiff." Section 2870, Rev. St. 1899, provides: "Defendants in a judgment founded on an action for the redress of a private wrong, shall be subject to contribution, and all other consequences of such judgment, in the same manner and to the same extent as defendants in a judgment in an action founded on contract." This provision has been upon the statute laws of this state ever since 1855 (Rev. St. 1855, p. 649, c. 51, § 8), but it has never been construed to warrant contribution among tortfeasors unless there was concert of action among them. It was referred to in *Brewster v. Gauss*, 37 Mo., loc. cit. 519, and was said to be "general in its nature," but was held not to apply to that case, because the attaching creditors "were in no proper sense joint trespassers." There is a well-defined difference between the liability of two or more tortfeasors to third persons, and the right of tortfeasors to contribution among themselves. As to third persons, "tortfeasors are jointly and separately liable, whether they acted in concert or independently." *Hubbard v. Railroad* (Mo. Sup.) 75 S. W. 1074; *Newcomb v. Railroad* (Mo. Sup.) 69 S. W. 355. And this is so because, where the acts of two or more persons combine to produce injury to third innocent parties, the law will not attempt to ascertain how much injury the act of each produced, and to hold each responsible only for his own wrong, but will hold all whose acts contribute in whatever degree to the injury for the whole injury, whether they acted independently or in concert. But among tortfeasors themselves the right to contribution depends upon totally different considerations. The general rule has long been that contribution is not allowed among tortfeasors. To this, exceptions have grown up, the principal of which is that when there was no guilty intent in the tortious act, and there was concert of action, contribution is allowed. A failure to differentiate between the liability of tortfeasors to third persons, and for contribution among themselves, has occasioned much of the confusion that appears in some of the adjudicated cases. The weight of authority, supported by the better reason, and the rule in this state, is that the right to contribution does not exist unless there has been concert of action between the tortfeasors.

In this suit no such condition is present, and therefore the judgment of the circuit court denying contribution is right, and its judgment is affirmed. All concur.

JONES v. HORN.

(Court of Appeals at Kansas City, Mo. Feb. 1, 1904.)

INSURANCE—FOREIGN COMPANY—WANT OF LICENSE—MISREPRESENTATION BY AGENT—PERSONAL LIABILITY—INSOLVENCY—RIGHT TO ATTACK FINDING—PRESUMPTION.

1. Insurance companies are prohibited from doing business in Missouri unless they comply with certain requirements, among which is a deposit with the insurance commissioner of a fund for the security of policy holders. When the requirements are complied with, a certificate authorizing the company to do business is issued by the commissioner, without which, under Rev. St. 1899, § 7989, no company is authorized to do business in the state. A copy of such certificate is to be held by every agent or solicitor. Section 8001 makes guilty of a misdemeanor any agent acting without first obtaining such certificate. *Held*, that the agent of a foreign company which had not been admitted to do business in the state was not personally liable for misrepresenting to an applicant that the company was so admitted, thereby inducing him to take out insurance.

2. An appellee who insists that the findings and judgment be affirmed is precluded from denying the truth of a finding.

3. No presumption of the insolvency of a foreign insurance company arises from the fact that it has not been authorized to do business in the state.

Appeal from Circuit Court, Cass County; Wm. L. Jarrott, Judge.

Action by H. E. Jones against W. A. Horn. Judgment for plaintiff, and defendant appeals. Reversed.

C. W. Sloan and C. W. Hight, for appellant. R. T. Railey and Fyke Bros., Snider & Richardson, for respondent.

BROADBUSH, J. The plaintiff in the year 1900 was engaged in the mercantile business, and owned two drug stores—one at Cleveland and the other at Kingsville, Mo.—during which time defendant was engaged as a fire insurance agent at Harrisonville, Mo. On July 16, 1900, the defendant issued and delivered to the plaintiff a policy of insurance executed by the Mercantile Insurance Company of Chicago, Ill., insuring plaintiff's stock of drugs, fixtures, etc., in his store at Kingsville. Prior to this date, however, the defendant had issued a policy of insurance on plaintiff's goods at Cleveland. At one time appellant saw plaintiff at his store in Kingsville, when it was arranged that defendant should insure his goods at that place. He placed plaintiff's insurance in a company which was not doing business in small town like Kingsville, but the company canceled the policy, whereupon defendant proffered to insure him in some good company. He then returned to his home in Harrisonville, and sent to plaintiff a blank application for insurance in said Mercantile Insurance Company, together with a printed financial statement, and also an application for insurance in the Marshall Town Mutual Insurance Company. In a letter which accompanied these applications he referred to the canceled pol-

icy, and stated that he would keep on and get plaintiff in a good company, and that both the companies to which applications were inclosed were good companies. The plaintiff signed the application to the Mercantile Insurance Company dated July 13, 1900. Upon receipt of this signed application from plaintiff, the defendant inserted in it a description of the property, which plaintiff had omitted, and also filled out and signed the blank on the back of the application designated "Agent's Survey." On the following day he wrote to agents of the insurance company at Chicago the following letter: "Gentlemen: Please find inclosed application for \$1,800 insurance on drug stock of H. E. Jones, Kingsville, Mo. Premium \$27. Please issue this policy and get it to me by return mail. The company I represent kick some on country stores, consequently if I can arrange with you I will give you a good string of business. Have you arranged with the state so that I can issue policies here, and send report of same to you? If you can do this I can give you a good volume of good business. I have a fine territory and my business will run \$3,000 per year in premiums. Think hard on this, as I can and will do you good if you will place me in position to do so. Get this policy to me and be sure to get all matters as I have them here. Your part of the cash will come promptly. Awaiting your favorable reply, I am, very truly," etc. The evidence does not show that the company made answer to the writer's inquiry whether it had arranged to do business in the state. However, the defendant received the policy issued by the company, and on the 17th day of July he mailed it to the plaintiff, with the following letter: "Mr. H. E. Jones, Kingsville, Mo.—Dear Sir: Please find enclosed insurance policy No. 11,168, Mercantile—of Chicago, Ill. This is a gilt-edge company as you will see from their statement enclosed, the only reason I did not put this in this company at first was I wanted to write the policy myself, but I have now arranged matters so it is just the same, and you have as good insurance as anybody in Kingsville. I have to pay these people spot cash so please enclose the premium, \$27, in the return envelope, and everything is O. K. If you should have a loss wire the company at their expense and write me. I will see that you have prompt service of adjuster, and that you get a fair, square settlement," etc. The plaintiff paid the premium, which defendant, after deducting his commission, forwarded to the insurance company. Subsequently plaintiff's property was destroyed by fire. The company failed to pay his loss, and he then ascertained that it was not authorized to do business in the state. Before the evidence was heard, the court was asked to make a finding of facts. Amongst other things, the finding was that defendant was acting as agent for the Mercantile Insurance Company; that the insurance was obtained upon the representa-

tions of defendant that said company was financially good and responsible; that plaintiff, at the time he received the policy, did not know that the company was not authorized to do business in the state; that defendant had such knowledge; that it was not shown that said company was insolvent at the date of the policy; and that it was not shown that it had any property in this state. The plaintiff, in his petition, relies for recovery on the ground of the representations of defendant, the inducement for his acceptance of the policy that the company was "financially good and responsible"; that at the time of the issue of said policy the insurance company was insolvent, and that it is still insolvent; that defendant knew at the time of said insolvency, of which plaintiff was ignorant; and that plaintiff did not know that said company was unauthorized to do business in this state. The finding was for plaintiff. At the beginning of the trial, defendant objected to the admission of any evidence on the ground that the petition did not state a cause of action.

The statute prohibits insurance companies from doing business in this state unless they comply with certain of its provisions, among which is one requiring them to deposit with the Insurance Commissioner a fund to be held by him as security for the benefit of policy holders. When this is done, and other requirements of the statute are complied with, the commissioner issues a certificate authorizing the company to do insurance business in this state. By section 7989, Rev. St. 1899, no insurance company is authorized to do business in the state without such certificate, a copy of which shall be held by every agent or solicitor of such company in the state. Section 8001 provides that any person who shall act as such agent or solicitor without first having obtained from the Superintendent of Insurance a certificate as required by said section 7989 shall be guilty of a misdemeanor, and on conviction shall be fined not less than \$10 nor more than \$100, or imprisoned in the county or city jail not less than 10 days nor more than 6 months, or by both such fine and imprisonment. It is contended by defendant that where a statute creates a duty, and imposes a penalty for failure to perform it, the penalty so prescribed is exclusive. In *Utley v. Hill*, 155 Mo. 232, 55 S. W. 1091, 49 L. R. A. 323, 78 Am. St. Rep. 569, the court so held. That was an action by a depositor against the directors of the bank for deceit, charging that plaintiff was induced to make such deposit by reason of false and fraudulent representations that the bank was solvent; such representations consisting of reports made to the Secretary of State as required by section 2752, Rev. St. 1889. That case and the one under consideration here are similar in principle. This is what might be called an action of deceit; the misrepresentation consisting in the fact that defend-

ant stated he would procure plaintiff insurance in a good company, whereas he procured him insurance in a company that was not authorized to do business in the state. In the Utey Case the court cited many authorities to support the holding, among which was that of *Wells v. Supervisors*, 102 U. S. 625, 26 L. Ed. 122, and quoted the following language: "When a law imposes a punishment which acts upon the offender alone, and not as a reparation to the party injured, and where it is entirely within the discretion of the lawgiver, it will not be presumed that he intended that it should extend further than is expressed." The statute regulating insurance, like that in relation to banks, imposes a penalty upon the agent for a violation of its provisions, and not as a reparation to the party injured. The plaintiff has cited decisions of the courts of other states to the effect that the representations of defendant that he would procure for him a good policy imported that it should be the policy of a company that was authorized to do business in this state, and that the Mercantile Insurance Company, not being so authorized, was, as a matter of law, insolvent. Such was the holding in *Landusky v. Beirne* (Sup.) 80 N. Y. Supp. 238. And it was further held in said case that the policy itself was invalid. The law is different in that respect in this state. Our courts hold that such policies are not invalid. See *Ins. Co. v. R. Co.*, 149 Mo. 165, 50 S. W. 281. Plaintiff also cites the case of *McCutcheon v. Rivers*, 68 Mo. 122, in which an agent had received a premium for a policy from an insurance company whose authority to do business in the state had been revoked. The court held that the party paying the premium could recover from the agent. If said case is to be considered as having any bearing here, it is certainly in conflict with the Utey Case, supra. The opinion is short—only a few lines—and no reason whatever is given for the holding. Whatever may be its effect, we are bound to follow the later case. It therefore necessarily follows from what has been said that the representation relied on, though none was in fact made, that the defendant would procure plaintiff insurance in a company doing business in the state, would not render defendant liable in this action. The burden was therefore upon the plaintiff to prove the insolvency of said company. This he claims that he did. The representation of the defendant was tantamount to saying that he would procure plaintiff a policy in a company that was solvent. The plaintiff insists that he established by evidence that said Mercantile Insurance Company was insolvent at the time the policy was issued. But the difficulty is that the court found that he failed to prove such fact. The plaintiff made no exception to such finding, and has taken no appeal therefrom. On the contrary, he is here insisting that the finding and judgment be af-

firmed. As he invokes the finding, he is precluded from denying its truth in any respect. Besides, there was evidence tending to support it. As the defendant incurred no liability other than the penalty imposed by the statute for insuring plaintiff's property in a company not authorized to do business in the state, and as there is no presumption of insolvency because said company was not so authorized to do business, and a finding against plaintiff as to such insolvency, the plaintiff was not entitled to recover on any theory of the case.

As the questions decided are conclusive of the case, we deem it unprofitable to pass upon other questions raised by the defendant.

For the reasons given, the cause is reversed. All concur.

STATE v. BEAN.

(Court of Appeals at St. Louis, Mo. Feb. 2 1904.)

ABANDONMENT OF WIFE—WIFE'S COMPETENCY AS WITNESS—INFORMATION BASED ON WIFE'S AFFIDAVIT.

1. A wife is a competent witness against her husband in a prosecution for abandonment, and hence competent to make an affidavit pursuant to Rev. St. 1899, § 2477, in support of the information.

Appeal from Circuit Court, Dent County; L. B. Woodside, Judge.

James Bean was convicted of abandonment of his wife, and he appeals. Affirmed.

J. J. Cope, for appellant. A. J. Arthur and G. W. Hodges, for the State.

BLAND, P. J. Based on the affidavit of the wife of the defendant, an information charging him with wife abandonment was filed in the circuit court, and chiefly on her testimony he was convicted. The contention of the appellant in the trial court was, and is here, that the wife is not a competent witness against her husband, and for this reason is not such a person as is authorized to make an affidavit as a basis for filing an information as provided by section 2477, Rev. St. 1899. Neither the husband nor wife are, at common law, competent witnesses for or against each other in a civil or criminal cause in which the other is a party. 1 Greenleaf, Evidence, § 334 (Lewis' Ed.); Wharton, Crim. Evid. 390. There are exceptions to this rule, allowed from necessity of the case. The principal one is that in all cases of personal injuries or violence committed by the husband or wife against each other the injured party is a competent witness against the other. 1 Greenleaf, Evidence, § 343; Wharton, Crim. Evid. § 398; *State v. Boyd*, 27 Am. Dec. 376, and extended note, where the authorities are collected; *State v. Willis*, 119 Mo. 485, 24 S. W. 1008; *Bassett v. United States*, 137 U. S. 496, 11 Sup. Ct. 165, 34 L. Ed. 762; *Cot-*

ton v. State, 62 Ala. 12; State v. Burlingame, 146 Mo. 207, 48 S. W. 72; State v. Kodat, 158 Mo. 125, 59 S. W. 73, 51 L. R. A. 509, 81 Am. St. Rep. 292. Another exception to the rule is to permit the wife to testify against the husband whenever she is the particular individual directly injured by the crime committed by her husband, and the facts are peculiarly within her knowledge, and impossible or difficult of proof by any witness other than the wife. In State v. Newberry, 43 Mo. 429, this exception to the rule was recognized, and the wife held to be a competent witness against her husband, and competent to make an affidavit to the information charging him with the offense of wife abandonment (the identical crime charged here). The exception to the rule was applied in a civil case by the Kansas City Court of Appeals in the case of Maget v. Maget, 85 Mo. App. 6.

It follows that the judgment should be affirmed, and it is so ordered.

REYBURN and GOODE, JJ., concur.

STATE ex rel. DIKE v. KINGSBURY et al.
(Court of Appeals at Kansas City, Mo. Feb. 1, 1904.)

INTOXICATING LIQUORS — DRAMSHOPS — LICENSES — APPLICATION — CONSENT OF CITIZENS — TAXPAYERS — MERCHANTS.

1. Rev. St. 1899, c. 129, requires merchants to be licensed. Section 8542 provides that merchants shall pay an ad valorem tax on goods on hand between the first Monday in March and the first Monday in June. Fayette City Ordinance, § 8, provides that such ad valorem tax shall be ascertained from sworn statements filed in the office of the clerk of the county court, and Rev. St. 1899, § 8546, requires each merchant to furnish such statements. *Held*, that merchants doing business in the city of Fayette in a block in which relator applied for a license to sell intoxicating liquors were "assessed taxpaying citizens," within section 2903, requiring that a petition for a dramshop license shall be subscribed by two-thirds of such assessed taxpaying citizens.

Mandamus by the state, on the relation of W. G. Dike, against John A. Kingsbury and others, to compel the issuance of a liquor license. Writ denied.

O. S. Barton, for plaintiff. R. M. Bagby, for defendants.

BROADDUS, J. The relator applied to the county court of Howard county during the November term, 1903, thereof, for a license to keep a dramshop in what is known as the "Opera House Block" in Fayette, a city of the fourth class. It is admitted that he is a proper person to receive a dramshop license, and that he has complied with the law, provided his petition is subscribed to by the names of two-thirds of the assessed taxpaying citizens and guardians of minors owning real estate in said block, as shown by the last previous annual assessment and vote of

the city, as required by section 2903, Rev. St. 1899, under which he made his application. The petition is signed by the names of 15 admittedly qualified signers. Seven admittedly qualified signers did not sign the petition. The defendants, composing the county court, not only counted the seven mentioned, but also counted W. A. Hancock and J. B. Campbell as qualified signers, and refused petitioner a license on the ground that he did not have the requisite two-thirds qualified signers as provided by the statute. It is agreed that, if the two persons mentioned were improperly counted, then the county court should have issued to petitioner a license; otherwise, the action of the court was proper. It is conceded that the said Hancock and Campbell own a stock of merchandise in said block, and their names appear upon the merchants' tax book of the city of Fayette, made from statements filed on the first Monday in June, 1903, for the highest amount of goods on hand between the first Monday in March and the first Monday in June, 1903, but their names do not appear in statements filed on the first Monday of June, 1902; and that the merchants' tax book of the city is made from a certified copy of the lists obtained from the county clerk after such lists had been filed with the county treasurer and passed upon by the county board of equalization. The relator contends that the said Hancock and Campbell were not assessed taxpayers. Chapter 129, Rev. St. 1899, provides that merchants shall be licensed, and prohibits them from doing business as such until they have obtained a license therefor, and in order to obtain such license they must give bond with approved security for the payment on the 1st day of November next thereafter, to the collector of the county, of all taxes which may then be due from them for the 12 months ending on the 1st day of November next, upon his license as such merchant. Section 8542 provides that merchants shall pay an ad valorem tax equal to that which is levied upon real estate on the highest amount of all goods which they may have on hand at any time between the first Monday in March and the first Monday in June in each year. The ordinances of the city have a similar provision. Section 8 thereof provides that "the ad valorem tax equal to that which is levied upon real estate on the amount of goods on which merchants shall be required to pay shall be ascertained from the sworn statements filed in the office of the clerk of the county court of Howard county." And it is made the duty of the city clerk "to procure a list of all the names of the merchants of the city from said clerk together with the amount of the stock as shown by the statements and enter the same on a merchants' tax book and extend the same upon the calculation as shown by his statement at the rate per cent. fixed by the board of aldermen on real and personal property." Section 8546 of the stat-

utes requires each merchant on the first Monday of June of each year, as stated, to furnish to the assessor of the county a statement of the highest amount of merchandise he may have had on hand at any one time between the first Monday of March and the first Monday of June next preceding, which statement the assessor is required to enter in a book kept for the purpose, and that said book shall be returned by the assessor to the county board of equalization on the first Monday in September in each year for the purpose of equalizing the valuation of merchants' statements. Section 8542 fixes the rate of taxation as equal to that which is levied upon real estate. Thus we see merchants are assessed, their assessments are equalized, and their taxes are levied. And that is not all, for, in order to do business as such merchants, they are required to give bond to pay the taxes. It is true that the method pursued in the assessment of their goods and the levying of their taxes is different from that pursued in the imposition of taxation upon other property, but the result is the same. In the present case, under an ordinance of the city, the city clerk procured from the office of the county clerk the sworn statements of merchants on file in his office entered there on a merchants' taxbook and extended the same upon a calculation as shown by his statement of the rate per cent. fixed by the board of aldermen on real and personal property. And the assessment so made was the last previous annual assessment, so it seems, that they were in any sense of the term assessed taxpayers within the meaning of section 2993, Rev. St. 1899. And the fact that merchants' license date from the 1st day of June of each year and continue for 12 months, and that the taxes are not paid until the next year, cannot affect the question of assessment. The assessments are made in September of each year, at which time the assessed become taxpayers within the meaning of the law. It seems plain that said Hancock and Campbell were assessed taxpayers at the date of petitioner's application as shown by the last previous assessment. Therefore, counting them with the seven admitted to be qualified signers, the petitioner did not have the required two-thirds qualified signers as required by the statute.

Peremptory writ denied. All concur.

MATTISON v. HOOBERRY.

(Court of Appeals at St. Louis, Mo. Feb. 2, 1904.)

FAILURE OR REFUSAL TO RETURN BORROWED WHEAT—RIGHT TO REPLEVIN FROM BORROWER'S CROP.

1. Defendant having borrowed wheat from plaintiff, and agreed to repay the same amount when he threshed, plaintiff, on defendant's failure or refusal to do so, could not replevin such amount from defendant's crop, no wheat hav-

ing been set apart for him, nor anything done showing an intention to transfer title to plaintiff to any part of the crop.

Appeal from Circuit Court, Texas County: L. B. Woodside, Judge.

Action by S. W. Mattison against Dan Hooberry. From a judgment for plaintiff, defendant appeals. Reversed, and judgment entered for defendant.

Lamar, Barton & Lamar, for appellant. Clark Dooley, for respondent.

GOODE, J. This is an action of replevin for 16 bushels of wheat. The bill of exceptions recites as follows: "Now, at this day, this cause coming on to be heard, and both parties, plaintiff and defendant, appearing and announcing ready for trial, the plaintiff, to sustain the issues on his part, introduced evidence tending to prove the following facts, to wit: That plaintiff and defendant are neighboring farmers in Texas county, Missouri; that each, in the year 1902, raised, harvested, and threshed a wheat crop on his respective farm; that plaintiff threshed his crop of wheat first; that at or about the time plaintiff threshed his wheat crop defendant borrowed sixteen bushels thereof for consumption, and actually consumed the same; that at the time of said borrowing, he agreed to pay plaintiff sixteen bushels of wheat out of his wheat crop, then grown and cut upon his farm; that a short time thereafter the defendant threshed his wheat, but failed and refused to pay plaintiff the sixteen bushels thereof so borrowed as aforesaid; that thereupon this action was brought, the writ issued and served by taking sixteen bushels from a bin of wheat on the farm of defendant, containing more than that amount, all of which said wheat in said bin was a part of the crop grown on defendant's said farm in the year 1902. At the close of the evidence the defendant requested the court to give the following instruction, to wit: 'The court instructs the jury that under the evidence they must find the issues for the defendant.' Which said instruction the court refused, to which action of the court in refusing said instruction to the jury the defendant, by its counsel, in open court objected and excepted at the time, whereupon the court, of its own motion, gave the following instruction, to wit: 'The court instructs the jury that if you believe and find from the evidence that the defendant borrowed of plaintiff sixteen bushels of wheat, and agreed to return the same out of his wheat crop then grown and cut as soon as the same was threshed, and if you further believe and find from the evidence, that when he threshed the said wheat, he did not return the same, you will find the issues for the plaintiff.' To which action of the court, in giving said instruction to the jury in favor of the plaintiff the defendant, by its counsel, in open court objected and excepted

at the time. This was the only instruction given." Replevin is a possessory remedy, and for the plaintiff to be entitled to the possession of 16 bushels of wheat which were in the defendant's possession it was necessary for the former to show some property, general or special, in the wheat. He showed nothing of the kind, but only that defendant had borrowed 16 bushels of wheat from him, and had agreed to repay him by delivering to him that many bushels of defendant's wheat when the latter threshed his crop. Obviously, there had been no wheat set apart from the defendant's crop for the plaintiff, nor anything done which showed an intention to transfer the title to any part of the crop to the plaintiff. In what way, we ask, was the ownership of the replevied wheat vested in the plaintiff? Defendant simply broke his promise to repay the plaintiff, and the latter could no more replevy unidentified wheat than he could unidentified money to reimburse himself for money he had lent. *Schnabel v. Thomas*, 98 Mo. App. 197, 71 S. W. 1076. As the defendant has filed in this court a stipulation renouncing any claim for damages for the wrongful taking of his wheat or to have it returned, the judgment will be reversed, and judgment entered here for the defendant. It is so ordered.

BLAND, P. J., and REYBURN, J., concur.

STATE v. MILLER.

(Court of Appeals at St. Louis, Mo. Feb. 2, 1904.)

INTOXICATING LIQUORS—SALE WITHOUT LICENSE—WINE GROWER—MANUFACTURE ON PREMISES.

1. Rev. St. 1899, § 3014, provides that wine may be sold in any quantity not less than ten gallons by a person holding a license, and that liquor may be sold in quantities not less than one gallon at the place where made, but not drunk on the premises. *Held*, that one who sold in quantities less than a gallon wine made on his own premises, but only in part from grapes grown by him, was subject to these provisions, and not protected as a "wine grower" by section 3015, which, in giving such a person the right to sell wine of his own production in any quantity on his own premises, means one who manufactures wine from grapes grown on his own premises.

Appeal from Criminal Court, Greene County; J. J. Glendon, Judge.

Jacob Miller was convicted of selling wine without a license, and he appeals. Affirmed.

G. D. Clark and P. T. Allen, for appellant. A. B. Lovan, for the State.

GOODE, J. The defendant was convicted of the offense of selling intoxicating liquor in less quantity than one gallon, without having a license as provided by the statutes. The case was submitted to the court on the following agreed statement of facts: "That the defendant, Jacob B. Miller, now lives at 1028 West Elm street, in the city of Springfield, Greene county, Missouri; that he has lived at this place for the past several years; that the lot on which he lives is 60 by 140 feet; that he has growing on said lot 16 grape vines; that during the past year he has manufactured 100 gallons of wine; that this wine is manufactured by the defendant at the above place, and in the manufacturing of it he used some grapes raised on the said 16 vines, and grapes bought by the defendant from other parties, who raised them in Greene county; that some of this wine has an orange flavor, made so by the defendant putting in the wine orange peelings; that some of it has a lemon flavor, and made so by putting in the wine lemon peelings; that out of this wine so manufactured by the defendant, he (the defendant), on the 26th day of November, 1901, at the county of Greene and state of Missouri, at said No. 1028 West Elm street, in the city of Springfield, it being the place where said wine was made, did sell said wine in less quantity than one gallon, to wit, one quart of wine, to one D. W. Baker. It is further admitted that the said Jacob B. Miller did not at any time have a dramshop license. It is further agreed that said wine was gauged by the United States gauger, and was found to contain 2 per cent alcohol." The point made against the conviction is that under the agreed statement of facts it appears the defendant was a wine grower; that the wine sold was of his own production, and he was privileged to sell it under section 3015 of the Revised Statutes of 1899. That statute gave the defendant the right to sell wine of his own production in any quantity on his own premises. But the agreed statement of facts tends to prove that the wine he sold was not of his own production; that is, pressed from grapes grown on his own premises. The agreed facts are that he had 16 grape vines, and manufactured 100 gallons of wine last year; that he used some grapes grown on the 16 vines, and other grapes bought from other parties in Greene county. Certainly, it is a legitimate conclusion from those facts that he was not a wine grower in the sense of the statute, if the statute means by that designation a person who manufactures wine from grapes grown on his own premises; and we think it does. That view corresponds with the definition of the word "wine grower." *Standard Dict.* p. 2068; *Century Dict.* p. 6939. Defendant's counsel argue that it is sufficient to exculpate the defendant that he manufactured the wine, whether from grapes grown by himself or by somebody

¶ 1. See *Intoxicating Liquors*, vol. 29, Cent. Dig. § 164.

else; but we think their position is untenable. Section 3014 covers that contingency by providing that wine or beer may be sold in any quantity not less than ten gallons by a person holding a wine or beer house license, and that liquor may be sold in quantities not less than one gallon at the place where made, but not drunk on the premises. The purpose of section 3015 was to create an exemption in favor of persons who raise grapes on their premises and make wine from them. *State v. Jaeger*, 63 Mo. 403.

The judgment is affirmed.

BLAND, P. J., and REYBURN, J., concur.

MORRISON MFG. CO. v. ROACH & GREEN.

(Court of Appeals at Kansas City, Mo. Feb. 1, 1904.)

PLEADING — SET-OFF AND COUNTERCLAIM — REPLICATION — STATUTES — CONSTRUCTION — NEW TRIAL — ORDER — REGULARITY — PRESUMPTION.

1. Rev. St. 1899, § 4499, provides that, whenever a set-off or counterclaim shall be filed, it shall be treated as an independent action by defendant, and the discontinuance of plaintiff's action shall not dismiss the set-off or counterclaim, but defendant may prosecute the same against plaintiff in the same manner as an original action, in which case defendant shall be subject to all the rules applicable to plaintiff. *Held*, that where defendant had pleaded a counterclaim and demanded affirmative relief, and plaintiff's amended petition was stricken on the ground that it changed the cause of action alleged in the original petition, plaintiff, after dismissing its original petition, was entitled to file a replication to defendant's answer denying defendant's counterclaim and pleading the cause of action previously alleged in its amended petition by way of counterclaim to defendant's counterclaim.

2. Where plaintiff, after dismissing its original petition, and after its amended petition had been stricken, properly alleged the cause of action pleaded in its amended petition in a replication to defendant's counterclaim, as authorized by Rev. St. 1899, § 4499, plaintiff was not barred from relief on the cause of action so alleged under the rule that there can be no recovery on a cause of action first alleged in a reply not within the general scope of the petition.

3. Where appellant did not show that an order granting a motion for a new trial was not sustained by any of the grounds alleged therefor, it would be presumed on appeal that it was justified, though the appellate court may not sustain the reason which was given by the trial court for the order.

Appeal from Circuit Court, Sullivan County; John P. Butler, Judge.

Action by the Morrison Manufacturing Company against Roach & Green. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

R. N. Johnson and W. F. Calfee, for appellant. Childers Bros., for respondents.

ELLISON, J. Plaintiff sued defendants in two counts on two promissory notes, one for \$149.30 and the other for \$587.46. Defendants had made an assignment prior to the institution of the suit, and plaintiff had presented and had both notes allowed by the assignee, thus merging them into judgments. Defendants answered plaintiff's petition, admitting the execution of the notes, but setting up the allowance and merger as in bar of an action on the notes themselves. They further answered by setting up that they had delivered certain valuable collateral to plaintiff with the notes; that enough of them had been collected to pay the notes. Defendants then pleaded a counterclaim, and demanded an affirmative judgment against plaintiff for \$149.30. Plaintiff then filed an amended petition, in which it declared on the judgments. On motion of defendants this amended petition was stricken out on the ground that it changed the cause of action in the original petition. Plaintiff thereupon dismissed its original petition and filed a replication to defendants' answer, denying defendants' counterclaim, and again set up the judgments before the assignee "by way of counterclaim to defendants' counterclaim"; in other words, plaintiff stated in this replication the cause of action on the judgments as had been alleged in its amended petition, and asked judgment for the amount of such judgments. Defendants then filed their reply or answer to plaintiff's reply. The cause was then referred to E. B. Fields, Esq., as referee. Mr. Fields in due time made his report, wherein he found for plaintiff the sum of \$385.81. Defendants filed objections to the report, in which many exceptions were taken thereto, but the trial court overruled them, and confirmed the report, and rendered judgment for the plaintiff for the amount so found. Defendants then filed their motion for new trial, setting up several grounds why it should be granted; among others, that the court "erred and improperly permitted plaintiff, after its petition and amended petition had been held bad, to file and maintain by way of replication a set-off and counterclaim, the same matter as alleged as a cause of action in its original petition." The court sustained the motion on that ground, and plaintiff appealed from that order to this court.

The action taken by the trial court on the case made as just set out involves a construction of section 4499, Rev. St. 1899, which reads as follows: "Whenever a set-off or counter-claim shall be filed in an action, as provided in this chapter, it shall be deemed in law and treated as an independent action begun by the defendant against the plaintiff, except in the cases enumerated in section 4488 of this chapter; and, the dismissal or any other discontinuance of the plaintiff's action, in which such set-off or counter-claim

shall have been filed, shall not operate to dismiss or discontinue such set-off or counterclaim, but the defendant so filing such set-off or counterclaim may, notwithstanding such discontinuance or dismissal of the plaintiff's action, prosecute the same against the plaintiff in the same manner and with the same force and effect as if he had originally begun the action on his set-off or counterclaim against the plaintiff; and, in such case, the defendant so prosecuting such set-off or counterclaim shall be subject to all the rules applicable to plaintiffs in civil actions and other procedure, and the set-off or counterclaim shall be proceeded with, in all respects, as if the action had originally been begun by the defendant against the plaintiff." In our opinion, the first view entertained by the trial court was correct, and that it erred in granting the motion for new trial on the ground that plaintiff could not set up in its replication to defendants' answer and counterclaim the same matter that was the foundation of its action as set out, whether in the original petition, which it dismissed, or in the amended petition, which was stricken out. The effect of the statute is that, where a plaintiff dismisses his action, anything on defendant's part which he has claimed in his answer, and which was proper matter of set-off or of counterclaim to plaintiff's cause of action, should be considered as though it was the basis of an action by such defendant as though he was a plaintiff against such plaintiff as though he was a defendant. When a defendant, after the petition has been dismissed by the plaintiff, shall elect to continue to prosecute his set-off or his counterclaim notwithstanding such dismissal, he takes upon himself the prosecution of an action in which he becomes to all intents and purposes a plaintiff and the plaintiff becomes a defendant. The statute aforesaid reads that such defendant shall be subject to all the rules applicable to plaintiffs in civil actions and other procedure, and that his claim shall be proceeded with in all respects as if he had originally begun the action against the plaintiff. The statute is as broad as could well be made, and we cannot see any reason why the plaintiff should not be allowed to use as set-off or counterclaim, if it be otherwise proper, the same matter upon which his petition was based in the first instance, or as amended. The opportunity to do so is given him by the defendant who elects to go on with his counterclaim or set-off. He may deprive the plaintiff of such privilege by going out of court with him.

Defendants, to sustain the reason given for granting the new trial, urge several reasons founded on the ordinary rules of pleading; among others, the rule in this state that there can be no recovery on a cause of action which first appears stated in the reply, and which are not within the general scope of the petition. *Crawford v. Spencer*, 36 Mo. App. 78; *Stepp v. Livingston*, 72 Mo. App. 175,

loc. cit. 179; *Hill v. Mining Co.*, 119 Mo., loc. cit. 30, 24 S. W. 223. By this contention it is seen that defendants regard the rights of plaintiff as they would be unaffected by the statute. But by that statute plaintiff and defendants change places, and plaintiff becomes for all practical purposes the defendant, and what counsel call the replication is really an answer. That statute was enacted to meet the special phase of such a case as it refers to; and, in so far as is necessary to effectuate its purpose in such case, it must be held to supersede the general rule governing the parties in their pleading, whether such rule be founded on the general statute or on decisions of the courts. There is a statute of the state of Iowa, certainly no broader than ours, which reads that: "In any case where a counterclaim has been filed, the defendant shall have the right of proceeding to trial thereon, although the plaintiff may have dismissed his action or failed to appear." A case arose in which the plaintiff brought his bill to enjoin the defendant from foreclosing a mortgage to secure plaintiff's notes on the ground that they had been paid, and asking that they be canceled. The defendant answered, denying the payment, and asking judgment on the notes. Plaintiff dismissed his bill, and, defendant still insisting on judgment on his notes, the plaintiff was permitted by his reply "in the nature of an answer" to defend on the same ground set up in his bill which he had dismissed. *Gardner v. Halstead*, 71 Iowa, 259, 32 N. W. 313. Defendants seek to avoid the force of that decision by suggesting that by the general statute of Iowa "any number of defenses, negative or affirmative, are pleadable to a counterclaim, and such affirmative matter of defense in the reply shall be sufficient in itself, and must intelligibly refer to the part of the answer to which it is intended to apply." But that general statute permits no more than the section of our statute which we are now construing in so far as it affects the point under consideration, for, as we have already pointed out, our statute makes a defendant with his counterclaim a plaintiff seeking to obtain judgment upon it, and it makes of the plaintiff a defendant with all the rights of any other defendant who had been sued on a demand.

But defendants urge another point, which we conclude entitles them to an affirmance of the judgment. The motion for new trial, as has been stated, included more than the one cause assigned for granting it. Among other reasons was one that "the court erred in sustaining and confirming the report of the referee." There was a bill of exceptions containing the report and the evidence had at the trial and the declarations of law. The plaintiff has not brought up the bill of exceptions, nor has it furnished us with an abstract of it. We have no means of ascertaining whether any other reason assigned in the motion for new trial was well founded.

The law is that we may examine any other ground of the motion for new trial than that assigned by the trial court in order to sustain the action of such court. *Lovell v. Davis*, 52 Mo. App. 342, 347; *Hewitt v. Steele*, 118 Mo. 463, 24 S. W. 440; *Gray v. Ry. Co.*, 54 Mo. App. 671; *Saville v. Huffstetter*, 63 Mo. App. 273. We must presume that the order granting the new trial was justified by the law, though we may not sustain the reason which was given for making it. And we have already decided that it was the duty of an appellant to show to us that the order was not sustained, not alone by the reason given, but by the law for any other reason alleged. *Ensor v. Smith*, 57 Mo. App. 584.

The plaintiff not having brought before us the entire record—having omitted that part which, defendants contend, would show the order granting the new trial was proper—we are not authorized to say that it was improper, and hence we order its affirmance. The other Judges concur.

POWELL et al. v. BROOKFIELD PRESSED BRICK & TILE MFG. CO.

(Court of Appeals at Kansas City, Mo. Feb. 1, 1904.)

NUISANCES—BRICK MANUFACTURING ESTABLISHMENT—INJURY TO CROPS—PETITION—NECESSARY ALLEGATION—DEFENSES—CORPORATIONS—REMEDY.

1. Where a motion to dismiss an action on the ground of departure is made after a motion to amend the petition is made and sustained, the filing of an answer to the amended petition, and proceeding with the trial, is a waiver of defendant's right to have the ruling on the motion to dismiss reviewed.

2. A petition in an action for damages for the maintenance of a nuisance resulting in injury to crops need not allege that the acts of which plaintiff complains were unlawfully done.

3. Where defendant maintained a brick-burning establishment about 200 feet from plaintiff's field of corn, and the smoke and gas escaping from the defendant's kilns destroyed plaintiff's crop, the defendant's establishment was a nuisance to plaintiff.

4. It is no defense to an action for damages for the maintenance of a brick manufacturing plant, constituting a nuisance to plaintiff, that the injury resulted from the reasonable use of the plant.

5. It is no defense to an action for damages for the maintenance of a brick manufacturing plant, constituting a nuisance to plaintiff, that the defendant's brickkilns were built after the most approved patterns, and that it employed skilled persons in burning the bricks.

6. Where there is nothing in the charter of an incorporated brick manufacturing company which expressly grants it the right to so operate its plant as to render it a nuisance, the mere fact of incorporation confers upon it no greater privilege or right than that of a natural person in the same situation.

7. Where a brick manufacturing plant constitutes a nuisance to an adjoining landowner, causing damage to his crops by the escaping gases from the kilns, the loss is one for which the law provides a remedy in an action for damages.

Appeal from Circuit Court, Linn County; Jno. P. Butler, Judge.

Action by A. J. Powell and another against the Brookfield Pressed Brick & Tile Manufacturing Company. From a judgment for plaintiffs, defendant appeals. **Affirmed.**

Lander & Lander, for appellant. A. A. Bailey, for respondents.

SMITH, P. J. The plaintiffs were the owners of a tract of land abutting against the right of way of the Hannibal & St. Joseph Railroad on the north, and on which there was an inclosed, cultivated field, in which plaintiffs had, planted and growing, a crop of corn. On the south side of the said railway, and opposite to the land of plaintiffs, the defendant—a manufacturing company organized under article 9, c. 12. Rev. St. 1899—owned a tract on which, at a distance 75 feet south of said railroad's right of way, it constructed and operated brickkilns for the burning of brick. The petition, *inter alia*, alleged: "Plaintiffs further say that the defendant ever since April, 1902, until the present time, has kept and maintained a large number of fires and furnaces burning in its said brickkilns and drying houses, and that said fires and furnaces have constantly and continuously, both day and night, produced, generated, and emitted large quantities of smoke, noisome and noxious vapors, and sulphurous fumes, poisonous to vegetation. And plaintiffs say that the defendant has during all said time carelessly and negligently and unlawfully permitted said smoke, vapors, and fumes to escape from its said fires and furnaces, and has carelessly, negligently, and unlawfully permitted said smoke, fumes, and vapors to escape close to the surface of the earth, and has negligently, carelessly, and unlawfully failed and refused to build chimneys or smokestacks to carry the same up into the air high enough to pass away without injuring plaintiffs' said crop, and has carelessly, negligently, and unlawfully during all of said time fed its said fires and furnaces with soft or bituminous coal as fuel, which coal was highly charged with sulphur, sulphurous compounds, and black-jack, and which coal produced and generated, when burned, smoke and vapors and fumes most poisonous and deadly to vegetation, all of which was well known to defendant, its officers, agents, and servants. And that the defendant constructed its said furnaces in and about its said brickkilns and drying houses in such a careless, reckless, and improper manner that the same did not properly consume the coal fed to them as fuel, but caused and permitted large quantities of said coal to smolder, and generate large quantities of poisonous smoke and fumes, that would not have been generated, provided said furnaces had been properly constructed, and had smokestacks connected therewith sufficiently high to cause the said furnaces to draw. And that the defendant, by and through itself, its officers, agents, and servants, during all of said time, fired, fed, and main-

tained its said fires and furnaces in such a reckless and careless manner with the coal aforesaid that the said fires and furnaces were constantly kept clogged and overcharged with the said coal, and that by reason thereof the said fires and furnaces could not and did not draw properly, which caused said fuel to smolder, and generate and emit large quantities of such smoke, vapors, and fumes, which escaped from the mouths of furnaces, and was not sufficiently heated and rarified to raise above the surface of the ground. That by reason of the premises aforesaid the said poisoned and noxious smoke and vapors and poisonous and sulphurous fumes so caused, generated, and produced by the defendant as aforesaid did from time to time, and for days at a time, during the entire growing season of vegetation of the present year, drift and pass over, and enter into and spread and diffuse themselves over and upon, into, through, and about, plaintiffs' said corn so growing as aforesaid on the said land owned and occupied by plaintiffs as aforesaid; and plaintiffs' said cornfield, and the air over, through, and about the corn growing in said field, was thereby greatly filled and impregnated with said smoke, vapors, and fumes, and the said smoke, vapors, and fumes so caused, generated, produced, and permitted to escape by the defendant as aforesaid, and so passing and drifting into and among plaintiffs' said growing crop of corn as aforesaid, did kill, injure, poison, and destroy all the corn and corn plants so growing on ten acres of the land so owned and occupied by plaintiffs as aforesaid, so that plaintiffs' said corn crop on said ten acres of land is wholly worthless." There was a trial, and at the conclusion of the evidence the defendant requested the court to tell the jury that, under the issues made by the pleading, the plaintiffs were not entitled to recover, unless it was found by the jury that the injury to the plaintiffs' growing corn was caused by the negligent manner in which defendant's brick-kilns were constructed and used; and thereupon the plaintiffs requested and the court granted them leave to amend their petition by striking therefrom, wherever they occurred, the words "carelessly and negligently." The defendant filed its motion to strike out the amendment on the ground that it constituted a departure from the original cause of action. This motion was by the court overruled. By agreement of parties, the jury was discharged, and the cause was submitted on the evidence to the court without instructions, whose finding and judgment was for plaintiffs, and defendant appealed.

Whether the amendment changed substantially the claim set forth in the original petition is a question which we need not stop to examine, for the reason that, it appears that after the motion to strike out was overruled, defendant filed an answer, and the case was tried on the issue joined. It appears from the record that the cause was

submitted to the court on the amended petition and answer. It is thus seen that there was an answer interposed to the amendment and on the issue so joined the cause was tried. This amounted to a waiver of the defendant's right to have the ruling on the motion to dismiss reviewed by us. *Scovill v. Glasner*, 79 Mo. 449; *Pickering v. Telegraph Co.*, 47 Mo. 457; *Sauter v. Leveridge*, 103 Mo., loc. cit. 621, 15 S. W. 981; *West v. McMullen*, 112 Mo. 405, 20 S. W. 628; *Holt v. Cannon*, 114 Mo., loc. cit. 519, 21 S. W. 851; *Liese v. Meyer*, 143 Mo., loc. cit. 556, 45 S. W. 232. In the original petition, both the construction of the brick manufacturing plant, and the manner in which it was operated, were characterized as negligent and careless. In the amendment this characterization was omitted, and the allegations thereof in other respects were unchanged. It was not necessary to charge that the acts of which the plaintiffs complain were unlawfully done. It was only required to allege, in substance, facts which the law would say were unlawful or wrongful. As to whether or not the acts complained of constituted a nuisance, and were therefore unlawful or wrongful, was a question of law to be determined by the court. The cause of action is the wrong that has been suffered, and the facts that show the wrong show the cause of action. They are the facts to be found, and, upon principle, they are the facts to be stated by the pleader. *Thomas v. Cannery Co.*, 68 Mo. App. 350; *Bliss on Code Plead.* § 151. The facts stated in the amendment, we think, are sufficient to meet the requirements of the rule, and, if proved, were ample to entitle the plaintiff to a recovery. An actionable nuisance is anything wrongfully done or permitted which injures another in the enjoyment of his legal rights. *Paddock v. Simes*, 102 Mo., loc. cit. 237, 14 S. W. 746, 10 L. R. A. 254; *Cooley on Torts* (2d Ed.) 670; *Railway Co. v. Carr*, 38 Ohio St. 453, 43 Am. Rep. 428. The test of nuisance is not injury and damage, simply, but injury and damage resulting from the violation of the legal right of another. There is no nuisance, however much of injury and damage may ensue; but, if a right is violated, there is an actionable nuisance, even though no actual damage results therefrom. *Wood's Law of Nuisances* (2d Ed.) 1015, and cases cited. The right of one to be secure against the undermining of his buildings by water, or the destruction of his crop, or the poisoning of the air by the stealthy attacks of an unseen element, is as complete as his right to be protected against open personal assaults, or the more demonstrative, but not more destructive, trespass of animals. *Cooley on Torts* (2d Ed.) 670.

The defendant was an incorporated manufacturing company, and was authorized by its charter (article 9, c. 12, Rev. St. 1899) to make, manufacture, and burn bricks near the corporate limits of Brookfield; and, to do this, it was necessary to erect and maintain

its several brickkilns, etc. Brickkilns have been held not to be nuisances per se. *State v. Board of Health*, 16 Mo. App., loc. cit. 12; *Kirchgraber v. Lloyd*, 59 Mo. App., loc. cit. 62. A nuisance is not the necessary result of burning bricks, and, where a nuisance is not the necessary result of the work authorized, legislative authority to create a nuisance will not be inferred from any license or authority to carry on the work; and legislative authority merely to carry on the work will not be a valid defense to a public prosecution or to a private action for a nuisance created in carrying it on. What was not contemplated in a grant is not authorized by it. Thus legislative authority to construct a canal or to dam a stream will not protect the grantee or licensee from nuisances created by the stagnancy of the water occasioned thereby. *Clark v. Mayor*, 13 Barb. 32; *People v. Gaslight Co.*, 64 Barb. 55; *Reg. v. Bradford*, 6 B. & S. 631. Even what is a nuisance per se may be carried on in a remote locality so as to be no common annoyance to the public. And, on the other hand, what is not a nuisance per se, such as a trade that has been harmlessly and beneficially carried on for years in a particular locality, may become a public nuisance, without any change in the way in which it is conducted, by reason of public streets laid out near it, or by numerous dwellings erected in its vicinity, so as to become a serious annoyance. The business of burning bricks is a lawful and necessary business, and the question as to whether it is a nuisance, or not, is to be determined largely by the surroundings of the brickkiln. It is thus seen that the authority conferred by the defendant's charter to construct and operate a brick manufacturing plant is not a valid defense to a private action like this for a nuisance created in carrying it on. The license granted to defendant to construct and operate a brick manufacturing plant did not carry with it the right to so operate it as to become a nuisance to adjacent or neighboring landed properties. In *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567, it was held that where one manufacturing brick upon his land used a process in burning by which noxious gases were generated, which were borne by the winds upon the adjacent lands of his neighbor, injuring and destroying trees and vegetation, this was a nuisance, and that the injured party might maintain an action to recover damages therefor. In the course of a very able and elaborate opinion in the case by Justice Earl it was said that "it is a general rule that every person may exercise exclusive dominion over his property, and subject it to such uses as will best subserve his private interests. Generally, no other person can say how he shall use, or what he shall do with, his property. But his general right of property has exceptions and qualifications. 'Sic utere tuo, ut alienum non lædas,' is an old maxim, which has a broad

application. It does not mean that one must never use his own so as to do any injury to his neighbor or his property. * * * But every person is bound to make a reasonable use of his property so as to occasion no unnecessary damage or annoyance to his neighbor. If he makes an unreasonable, unwarrantable, or unlawful use of it, so as to produce material annoyance, inconvenience, discomfort, or hurt to his neighbor, he will be guilty of nuisance to his neighbor. * * * As to what is a reasonable use of one's property, cannot be defined by any certain general rules, but must depend upon the circumstances of each case. A use of property in one locality and under some circumstances may be lawful and reasonable, which under other circumstances would be unlawful, unreasonable, and a nuisance. To constitute a nuisance, the use must be such as to produce a tangible and appreciable injury to neighboring property, or such as to render its enjoyment specially uncomfortable or inconvenient." In *Beadman v. Treadwell*, 31 Law Jour. (N. S.) 873, an injunction was granted restraining the burning of bricks within 650 yards of plaintiff's dwelling; the court holding that the burning of bricks within 350 yards of plaintiff's residence was a nuisance. The vice chancellor said that his mind was satisfied that there had been an actual, positive injury to plaintiff, and that the comfort and enjoyment of his mansion house were injured; that the trees planted and standing and growing for ornament had been in some cases entirely destroyed, and in many cases injured. When *Bradford v. Turnly*, 31 Law Jour. (N. S.) Q. B. 236, reached the Exchequer Chamber, it was there held that it was no answer for a nuisance creating an actual annoyance and discomfort in the enjoyment of neighboring property that the injury resulted from a reasonable use of the property, and that the act was done in a convenient place, and that the same business had been carried on in the same locality for 17 years. Many other cases of similar import might be cited. It is sufficient to say that, within the rules thus referred to, it cannot be doubted that the defendant's brick burning was a nuisance to plaintiffs. The defendant's plant was about 200 feet from the plaintiffs' field of corn. The smoke and gases escaping from the defendant's brickkilns indisputably destroyed plaintiffs' growing crop of corn. And it is no answer for the nuisance that the injury resulted from a reasonable use of the defendant's brick manufacturing plant, or that the defendant's brickkilns were built after the most approved patterns, and that it employed skilled persons in burning the bricks, for the fact remains undisputed that the smoke, gases, and vapors escaping from the defendant's brickkilns settled upon and destroyed the plaintiffs' crops, and thus greatly injured them in the enjoyment of their property.

Though the defendant was an incorporated

company—an artificial entity—we can discover nothing in its charter that conferred upon it, in respect to the operation of its plant, any greater privilege or right than that of a natural person. There is nothing there that expressly or by implication gave it the right to so operate its plant as to render it a nuisance as to plaintiffs. It is clear to us, from the evidence, that in the operation of the defendant's plant the principles of the maxim, "Sic utere," etc., already quoted, have been utterly disregarded. Nor do we think the use is *damnum absque injuria*—one where there is a loss for which the law provides no remedy.

We think the judgment ought to be affirmed, and it is accordingly so ordered. All concur.

HUNT v. ANCIENT ORDER OF PYRAMIDS.

(Court of Appeals at Kansas City, Mo. Feb. 1, 1904.)

INSURANCE—PROVISION AGAINST SUICIDE—ACCIDENTAL KILLING—EVIDENCE—APPEAL.

1. In an action on a life policy providing that the insurer should not be liable if the insured committed suicide, *held*, that there was substantial evidence that the insured's killing of himself was accidental, thus tending to support a verdict for the plaintiff.

2. An appellate court will presume that the discretion of the trial court was exercised fairly in refusing a new trial whenever there is substantial evidence, which, if believed, will support the verdict.

Appeal from Circuit Court, Vernon County.

Action by Sarah V. Hunt against the Ancient Order of Pyramids. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

S. A. Wight and C. G. Burton, for appellant. Scott & Bowker, for respondent.

ELLISON, J. The plaintiff is the widow of W. T. Hunt, deceased, who had issued to him by defendant a benefit certificate of life insurance, payable to her, for \$1,000. On Hunt's death, defendant refused payment, whereupon she brought this action, and prevailed in the trial court.

The sole ground for the appeal is the refusal of the trial court to sustain the motion for new trial, and the sole reason urged by defendant why it should have been sustained is that there was not sufficient evidence upon which to base the verdict. The certificate provided that, if Hunt committed suicide, no recovery could be had thereon. The defense was that he did commit suicide, which was denied by plaintiff, and that was the sole issue to which the evidence in the case was addressed. The theory of the defense is that the deceased was somewhat unbalanced in mind, resulting from sickness or sunstroke, or both, and that on the day of his death he was depressed because of his

wife's intention to leave home for a visit to friends and relatives in Colorado; that, being in such mental condition, he purchased a pistol at a store in the city of Nevada, where he lived, and returned home to kill himself; that members of his family, seeing he had the pistol, endeavored to get it from him, and failed; and that he then shot himself. The theory of the plaintiff is that he was not mentally wrong; that on the day in question he was in good health and usual spirits; that he bought the pistol to kill some troublesome and annoying stray cats that were prowling about the premises; that the endeavor to have him give up the pistol was not to prevent his using it on himself, but to prevent annoyance and fright to the family, and to boarders in the house, some of whom were sick; that, in slipping or stumbling, and involuntarily throwing up his arms, the pistol was accidentally discharged into his head, causing his death.

There is no doubt that the evidence given in behalf of the defendant made a strong case of suicide—so strong, indeed, that if the jury had returned a verdict for defendant no one could have called it in question. There were evidence and circumstances going to show that plaintiff, her sister, and her mother knew the moment they saw deceased with the pistol that he intended bodily harm to plaintiff or to himself, or both. It showed that plaintiff first saw the pistol while they were alone in the parlor, and that she struggled to get it from him, when it was discharged, perhaps accidentally, but the report alarmed the others; and the sister seems to have immediately thought, without being told, that he had attempted plaintiff's life. Plaintiff's mother and sister followed deceased out of the house. The mother, seeing the pistol in his hand, asked him to give it up. It was again discharged, perhaps accidentally; but great excitement existed, and the women were crying aloud, and some one called a man passing along the street to go for a policeman, which he did. One or more neighbor women came over, and all seemed to recognize that an extraordinary and terrifying condition prevailed. It was at this point that he shot himself and fell in the yard. But when the case was thus made for defendant—it may be even stronger than we have put it—the plaintiff introduced herself, mother and sister, and others. Their testimony went directly to support the theory in her behalf which we have already stated. If the jury believed these witnesses, their testimony undoubtedly supported the verdict. Plaintiff's mother testified that when she saw deceased in the yard, near the porch or platform entrance to the kitchen, she standing in the kitchen door, the pistol "went off" and he said, "Oh, I didn't go to do that." She then told him to give the pistol to her, and he turned towards her, and started to step up on the platform, as she thought, to hand it

to her; but, as he stepped up, he seemed to lose his balance. One expression of the witness was that he "stepped off backwards. He lost his balance." At any rate, he fell or stepped backwards off of the platform, and, as he did so, his hands were thrown up, and while in that falling position the discharge of the pistol occurred which sent the ball through his head; going in on the right and coming out on the left side. In addition to the affirmative testimony, there are two circumstances which the jury could well consider in behalf of plaintiff's theory. One is that, if deceased was bent on killing himself, he had an opportunity to do it before his action attracted attention, and even afterwards, while in the yard, before the fatal discharge. The other is that the physician, who was immediately called, testified that there was no burning of the hair, or powder marks on the head—nothing but the entrance of the bullet. That fact would indicate that the pistol was fired at arm's length—an unusual and uncertain way for a suicide. It ought, furthermore, to be considered that the jury could have believed deceased was mentally unsound, and that his action was as detailed by some of the testimony in defendant's behalf, and yet the fatal result have come about by accident, as described by plaintiff's mother.

When there is any substantial evidence to sustain the verdict, the appellate court will not weigh it. That is the duty of the jury and trial court. *Crossan v. Crossan*, 169 Mo. 637, 70 S. W. 136; *State v. Gleason*, 172 Mo. 259, 72 S. W. 676; *State v. Jacobs*, 152 Mo. 565, 54 S. W. 441. The law as to the duty of courts on appeal in cases involving the question of the sufficiency of evidence to sustain a verdict has been gathered and set forth by the respective counsel in their briefs. But in considering such cases it should not be forgotten that a trial court has a far wider range of discretion than has an appellate court. The former has a right to pass upon the weight of testimony, while the latter has not. And its discretion, except in cases of clear abuse, will not be supervised. And when a point is made on appeal as to the sufficiency of evidence, the appellate court always has in view the fact that the trial judge, with more power and better opportunities for correct judgment, has refused to interfere. *Reid v. Ins. Co.*, 58 Mo. 421; *Bank v. Armstrong*, 92 Mo. 265, 4 S. W. 720; *State v. Young*, 119 Mo., loc. cit. 525, 24 S. W. 1038; *Hull v. Ry. Co.*, 60 Mo. App. 593; *Reid v. Lloyd*, 61 Mo. App. 646.

The point made in argument by defendant as to the duty of the trial court to promptly grant another trial when it considers the verdict to be against the weight of the evidence, and that injustice has been done, is sustained by a large number of decisions collected by counsel. As already stated, we fully recognize that such is the duty of that court. But in this case there is substantial evidence

to support the verdict, and we have no means, therefore, of ascertaining that the trial court did not fully perform its duty. We must presume that it did until it is made clearly to appear that it did not. The rule governing appellate courts may be stated to be this: That whenever the record discloses substantial evidence, which, if believed, will support the verdict rendered, then an appellate court cannot say that the trial court had not exercised its discretion fairly and properly. The appellate court presumes that the trial court has performed its duty as the law directs. That presumption abides up to the point of a total absence of evidence of substantial character.

The judgment, with the concurrence of the other judges, is affirmed.

WEBER v. ANCIENT ORDER OF PYRAMIDS.

(Court of Appeals at Kansas City, Mo. Feb. 1. 1904.)

INSURANCE—LIFE POLICY—PROOFS OF DEATH—WAIVER—PLEADING—ANSWER—VERIFICATION—ULTRA VIRES—PAYMENT OF PREMIUMS.

1. In an action on a life policy, where the answer was not verified, the contract as alleged by the petition stood confessed.

2. The defense of ultra vires cannot avail a beneficial association in an action on a life policy, where it was not pleaded.

3. By executing a life policy, a beneficial association waived a medical examination of the insured and an application on one of its forms, required by its by-laws.

4. In an action on a life policy issued by a beneficial association, a defense that the insured did not comply with its provisions as to payments of premiums, without alleging where in there was any noncompliance with the provisions, was insufficient.

5. Proofs of death of one insured in a beneficial association were unnecessary where it denied all liability.

Appeal from Circuit Court, Jackson County; Roland Hughes, Special Judge.

Action by Charles Weber against the Ancient Order of Pyramids. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

John Sullivan, for appellant. Robinson, Bowling & McClure, for respondent.

ELLISON, J. This action is based on a benefit certificate of life insurance. The judgment in the trial court was for the plaintiff. It appears that plaintiff's deceased wife was a member of the order known as the "Knights and Ladies of the Fireside," and a benefit certificate of insurance was issued by that organization. Afterwards this was transferred to defendant, the latter issuing what is termed a "rider," whereby it contracted to and did assume the obligations and benefits of the original certificate. This rider appears to have been duly executed by defendant's officers and attached to the orig-

¶ 5. See Insurance, vol. 23, Cent. Dig. § 1965.

inal. The state of the pleadings practically settles the principal points in this case in favor of the plaintiff. The defense is based largely on the statement that defendant did not execute the rider contract; that is to say, that there was no proper proof of its execution by plaintiff. The answer was not verified by affidavit, and therefore the contract made with the defendant as charged and as filed with the petition stood confessed. *Smith v. Rembaugh*, 21 Mo. App. 390; *Thomas v. Association*, 73 Mo. App. 371. But defendant argues that, if the contract was executed by defendant as appears on its face, it is still of no force or obligation, being ultra vires the power of the corporation to receive the deceased as a transferee, or to issue the "rider" contract in the manner claimed. The defense of ultra vires is affirmative matter which should be specially pleaded. It was not so pleaded by defendant, and consequently it cannot be heard on that head. *Williams v. Verity* (Mo. App.) 73 S. W. 732. That case cites *Louisville Tobacco Co. v. Stewart* (Ky.) 70 S. W. 285. It is likewise supported by *Griese v. Association* (Sup.) 15 N. Y. Supp. 71. affirmed in 133 N. Y. 619, 30 N. E. 1146.

Defendant sets up one of its by-laws which requires, as preliminary to the issuance of a benefit certificate, that there shall be a medical examination, approved by its medical director; and that the deceased did not furnish such examination. It may be answered to this that that was an objection which should have been made by defendant before entering into the contract. By executing the contract, defendant waived the prerequisites it prescribed as necessary to induce it to become obligated. *Watts v. Association*, 111 Iowa, 90, 82 N. W. 441; *McIlwain v. Ins. Co.* (Sup.) 63 N. Y. Supp. 293.

Defendant next sets up that its by-laws require that all benefit certificates issued shall be on forms furnished by the executive council. But nevertheless it made the present contract without requiring that form, and cannot now complain. In this connection, defendant says that no certificate duly signed by the proper officers was issued to deceased. This objection is disposed of in what we said as to there being no denial of the contract under oath.

It is next set up by answer that deceased did not comply with a certain section of the by-laws as to when and how payments were to be made. The particulars of the breach of this law are not alleged, the answer merely stating that she "did not comply with the provisions of said requirements." The law referred to sets forth in detail what is to be done in certain contingencies, and when assessments are to be credited to the member, etc. The answer should have specified wherein deceased violated the law.

It lastly sets up by answer that no death proofs were made or offered. It was not necessary that proof should be made, since defendant denied in toto all liability.

After a full examination of the points made

against the judgment, we conclude they are not sufficiently well founded to authorize our interference. In our view, considering the issues as made by the pleadings, plaintiff did not need some of the evidence he offered.

Under the case made by the pleadings and proof the judgment was manifestly for the right party, and will be affirmed. All concur.

PENDLETON v. ASBURY.

(Court of Appeals at Kansas City, Mo. Feb. 1, 1904.)

CONTRACT—MONOPOLY—PUBLIC PRINTING—RIGHT OF ACTION.

1. Where two newspaper publishers, having the only plants of the kind in the county, entered into an agreement that each should bid the same rate for the county printing, the rate to be charged being the maximum allowed by law, and for an equal division of the proceeds, the contract is an unlawful one, though the county financial statement was to be published in both papers without additional charge.

2. Where two newspaper publishers, having the only plants of the kind in the county, entered into an agreement that each should bid the maximum rate for the county printing, and divide the proceeds, a refusal by one to pay over half of the proceeds of a contract for the publication of constitutional amendments gives the other no standing to enforce payment to him of his share, the claim being founded on the illegal agreement.

Appeal from Circuit Court, Dallas County; Argus Cox, Judge.

Action by E. L. Pendleton against H. H. Asbury. From a judgment for plaintiff, defendant appeals. Reversed.

J. W. Miller and John S. Haymes, for appellant. O. M. Scott, for respondent.

SMITH, P. J. This is an action on account to recover \$55.62 for publishing certain constitutional amendments in the *Buffalo Reflex*, a newspaper of which plaintiff was the proprietor. The plaintiff had judgment in the circuit court, and the defendant appealed.

The facts appearing directly or by inference from the record are that in 1900, at the county of Dallas, in this state, the plaintiff was the publisher of a newspaper called the *Reflex*, and the defendant was the publisher of that called the *Record*. These two papers were the expositors of the principles of opposing schools of political thought. They were published in a county very limited in territory, sparsely populated, and moderate in wealth. The gleanings for two newspapers in such a narrow and scant field was by no means encouraging, and just how to build up and maintain two rival newspapers in it became a problem that sorely taxed the combined genius of both plaintiff and defendant. The paramount question which was constantly arising, and, "like the ghost of Banquo, will not down," was, "What shall I do to be saved?" And while their political, financial, and perhaps social interests, under other condi-

¶ 1. See *Contracts*, vol. 11, Cent. Dig. §§ 660, 661.

tions, would have been inimical the one to the other, yet the very barrenness of the field and the helplessness of the condition in which they found themselves was a warning to them that a protracted existence would be rendered possible only by a combination of their energies. Thus it was they became, "Two souls with but a single thought, two hearts that beat as one." A "fellow feeling made them wonderous kind," and under the influence of so menacing an adversity "the lion and the lamb" were made to lie down together in apparent peace. Such environment brought them closer together. Conference and suggestion resulted. After "taking counsel of their fears," they concluded it would be "unprofessional" for either to do any public printing for less than the "legal rates." The plaintiff and defendant, having the only two newspapers in the county, entered into an agreement which provided, amongst other things, that each would bid the same rate for publishing the financial statement of the county, and which they did accordingly. The county court, seeing to what complexion it was thus reduced, proposed to plaintiff and defendant that, if they would each make the publication in his paper, it would pay the rate bid therefor, dividing such amount equally between them. By this combination competition was eliminated from the problem, and the public was forced to pay double what, but for such combination, it otherwise would have been required to pay for the publication. By the agreement to which we have already referred, the plaintiff and defendant were not to bid against each other for the county printing, nor was either to do such printing for less than a rate agreed upon, and that each should publish the constitutional amendments, and that the proceeds received for the current year for all state and county printing should be equally divided between them; or, as a witness for plaintiff testified, "they had an agreement about publishing the two accounts, and that they were to divide up on them what they got out of them—divide up the spoils, was the way I understood it." The agreement covered all the state and county printing required to be done in the county. None of the county printing was to be done for less than the maximum rate allowed by law. The Secretary of State, who, it may be inferred, belonged to the same political party as the defendant, was authorized by the statute to designate the newspaper in which the constitutional amendments were to be published in that county. The clerk of the county court, who, it may be also inferred, was of the same political party as the plaintiff, was authorized to contract for the printing of the election ballots. It was not an unreasonable expectation that the Secretary of State would designate the defendant's paper as that in which the publication of the constitutional amendments should be made; nor was it to be less reason-

ably to be expected by the plaintiff that he would be awarded by the county clerk the job of printing the election ballots, which was required to be done at the expense of the county. The plaintiff and defendant, each sharing in the common desire to realize as much as possible out of the public printing required in said county, entered into said treaty stipulations to the further effect that neither would do any county printing for less than the maximum rate allowed by statute, and that each should publish the constitutional amendments, the county financial statement, and that each should print one-half of the ballots to be ordered by the clerk, and divide equally the whole amount received; or, in other words, it was agreed that plaintiff and defendant should bid the same rate for the publication of the county statement, and when made, they would not only divide the proceeds arising from doing that printing, but also the amount received for all other printing done that year for either the state or the county. The manifest purpose of the agreement was to do away with competition for the publication of the county financial statement, and to compel the payment of a double rate therefor, which was to be divided, and to secure a division between them of the proceeds arising from the doing of all the other public printing required in the county. The scheme was one that embraced the doing of several things, but the principal thing to be accomplished by it was to compel the county to pay a rate for the publication of the county financial statement sufficiently large and remunerative to justify not only a division of it, but of the proceeds of all the other public printing required in the county. The promise of the defendant to divide the proceeds received for the publication of the constitutional amendments was a part of the combination scheme. The scheme provided by the agreement contemplated a spoliation—a raid on the county treasury. It was contra bonos mores. It must be condemned by every consideration of public policy. It cannot be upheld. *Parsons v. Randolph*, 21 Mo. App. 353; *Harrison v. McCluney*, 32 Mo. App. 481. Though the amount in controversy is insignificant, yet the principle involved is one of the greatest importance. It is true that the claim of the plaintiff is for the publication of the constitutional amendment; yet this claim is founded on the illegal agreement, is a part of it, and without which it has no foundation on which to rest. But the plaintiff contends that, as the agreement provided for the publication of the county statement in both papers, a greater publicity was given to it, and it was therefore not against public policy. The Legislature has by statute required that a publication of the county financial statement be made in "some" (one) newspaper printed in the county (section 6793, Rev. St. 1899), and has fixed the maximum rate for such publication (section 4688, *Id.*). The effect of the agreement

here was to require the county court to pay for the publication in two papers, instead of one, and to pay just double what it otherwise would have been required to pay. The combination agreement so entered into and executed was, it seems to us, but a fraudulent trick, by which the parties thereto were enabled to appropriate to their own use out of the county treasury a sum of money to which they had no lawful right. The rule has been declared to be that, when either party to the illegal contract or transaction applied to a court for aid, if the plaintiff cannot open his case without showing he has broken the law, the court will not assist him, whatever his claim in justice may be upon the defendant. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. The principle of public policy is "Ex dolo malo non oritur actio." *Hatch v. Hanson*, 46 Mo. App. 323; *Connor v. Black*, 119 Mo. 126, 24 S. W. 184. The plaintiff's cause of action was founded upon the illegal agreement to which we have referred, and cannot, therefore, be enforced. The instruction in the nature of a demurrer to the evidence should have been given.

The judgment must be reversed. All concur.

BURGE v. DUDEN

(Court of Appeals at Kansas City, Mo. Feb. 1, 1904.)

NOTES — FAILURE OF PAYEE TO SUE — EXONERATION OF SURETY — SUFFICIENCY OF ANSWER — IGNORANCE OF NAME OF PAYEE — ESTOPPEL TO PLEAD.

1. One signing a note cannot plead that he does not know the name of the payee.

2. Under Rev. St. 1899, §§ 4500-4502, providing that a surety on a note may require the payee to bring action, and that, if such requirement is not complied with, the surety will be exonerated, mere failure of the payee to sue until the principal becomes insolvent, no request therefor having been made on him, will not discharge the surety.

3. A defendant in an action on a note answered that he was a surety; that the principal was solvent for some years after the note was due; that the payee knew defendant's residence, but defendant did not know the payee's; that the principal informed defendant that the note was paid; that, if defendant had known the note was unpaid, he could have protected himself; and that, when he learned the note was unpaid, the principal had become insolvent. Held not to state a defense, so that judgment on the pleadings for plaintiff was proper.

Appeal from Circuit Court, Henry County; W. W. Graves, Judge.

Action by William O. Burge, as administrator of Oscar F. Burge, deceased, against D. S. Duden. Judgment for plaintiff, and defendant appeals. Affirmed.

Peyton A. Parks, for appellant. John Cosgrove, for respondent.

SMITH, P. J. This is an action which was brought by plaintiff against defendant on a promissory note for \$600, payable to the order of the former's intestate one year after the date thereof, to wit, December 5, 1894, at the "Banking House of Salmon & Salmon, Clinton, Mo." The note was executed by defendant and one Elges, who was not joined as a defendant. The answer of defendant Duden admitted the execution of the note sued on, and alleged (1) that defendant was merely the surety on said note, and so known to be by the payee therein, the plaintiff's intestate; (2) that Elges, at the time of the execution of said note, and for several years thereafter, was solvent; (3) that the residence of defendant was at all times well known to the payee of said note; (4) that defendant did not know at the date of said note, nor until the year 1901, the post-office address of the payee therein; (5) that in 1897 he was informed by Elges that said note had been paid; (6) that, if defendant had been advised that said note had not been paid when it became due, he could have protected himself; (7) that he did not know until 1901 that said note had not been paid, and that at about that time said Elges became insolvent; (8) that plaintiff, for these reasons, was estopped to maintain this action against him (defendant). The conclusion of the answer was that "defendant denies each other allegation contained in the petition." The trial court, on motion of the plaintiff for that purpose, gave judgment on the pleadings. The defendant appealed.

The facts pleaded by the answer manifestly constitute no defense to the plaintiff's action. The statute put it in the power of defendant to require the payee of said note to bring suit thereon, and provided that, if such requirement be not complied with, he be exonerated from liability thereon to the payee. Rev. St. 1899, §§ 4500-4502. The answer alleges that the defendant did not know the name of the payee of the note. Having presumably read it before he signed it, he could not be heard to claim ignorance of the name of the payee therein. He could no doubt have ascertained the post-office address of the payee had he inquired at the bank where the note was payable. No diligence is alleged to have been exercised by him in endeavoring to ascertain this fact. But, however all this may be, it is manifest that, to sustain such a defense—to permit a surety on a negotiable note to become exonerated from his liability thereon upon any such grounds—would be to strike down the commercial value of all bills, bonds, notes, and other securities. The statute, as we have seen, provides for the exoneration of sureties from liability on such instruments, and this is most generally the only way it can be accomplished. The passivity of the payee in the note did not have the effect to exonerate the defendant as surety. 2 Daniel on Neg. Inst. § 1339; *Russell v. Brown*, 21

¶ 2. See *Principal and Surety*, vol. 40, Cent. Dig. § 314.

Mo. App. 51. Until he received the statutory notice to sue, he could remain passive. Nothing was required of him to keep alive his security. The plaintiff's right of action in his representative capacity is not put in issue by the answer. It stands impliedly admitted. The statute expressly enjoins that we shall not reverse the judgment of any court unless we shall believe that error has been committed materially affecting the merits of the action. In view of the admissions and allegations of the answer, we cannot say that the trial court, by its judgment, has committed error materially affecting the merits of the action.

The judgment is so clearly for the right party that it must be affirmed. All concur.

HARDING et al. v. CITY OF CARTHAGE.
(Court of Appeals at Kansas City, Mo. Feb. 1, 1904.)

INJUNCTION—TIME OF TRIAL—WAIVER OF PROCESS.

1. Rev. St. 1889, § 5505, relative to injunctions, provides that, after answer is filed, motion may be made at any time in term to dissolve the injunction, and upon such motion the parties may introduce testimony, etc. Section 2013, relative to suits in general, provides that they may be instituted by filing a petition and the voluntary appearance of the adverse party, or by the filing of a petition and suing out process thereon. Section 2042, relating only to cases in which defendant has been served with process, makes actions triable at the return term. *Held*, that the court had power to order an injunction suit, in which no temporary injunction had been asked, and in which defendant voluntarily appeared at the term preceding the return term, to be tried at the term of appearance.

Appeal from Circuit Court, Jasper County; J. D. Perkins, Judge.

Suit by H. H. Harding and another against the city of Carthage. From an order of dismissal, plaintiffs appeal. Affirmed.

Howard Gray and Thomas & Hackney, for appellants. McReynolds & Halliburton and H. J. Green, City Atty., for respondent.

BROADDUS, J. This is a proceeding commenced by appellants against respondent in the Jasper county circuit court for the purpose of enjoining and restraining respondent from issuing certain bonds theretofore voted by its citizens to construct an electric light plant, and to prevent the erection of such plant. The petition was filed December 23, 1898, while the December term of court was in session. A summons issued the same day, returnable to the June term, 1899, of the said circuit court. No temporary restraining order was asked for or obtained. The summons was served December 24, 1898. On January 3, 1899, defendant entered its appearance in said cause, filed an answer, and filed a motion asking the court to set said cause down for trial during the December term of court, and duly gave appellants notice of the filing

of said answer and motion. And on January 28, 1899, the court sustained said motion, and set the case down for trial on February 6, 1899. Appellants on February 4, 1899, filed their motion to set aside said order, which motion was by the court overruled. On February 6, 1899, said cause coming on for hearing, appellants failed and refused to appear and prosecute their case, and the court dismissed the case for failure to prosecute the same. On the same day appellants filed their motion to set aside the order setting the case for trial, and to set aside the order overruling appellants' previous motion to set aside said order, and to set aside the order dismissing the case for failure to prosecute the case, which motion was by the court overruled, and appellants appealed to this court.

Appellants have printed the record substantially in full, and the only question in the case is the authority of the circuit judge to set the case down for trial at the December term of said court. The Jasper county circuit court holds four terms a year, commencing on the first Monday in March, June, September, and December, respectively. The March and September terms are held in Carthage, and the June and December terms in Joplin. Chapter 84, Rev. St. 1889, entitled "Injunctions," provides the manner of obtaining injunctions, and how they shall be heard and determined, but it only provides for their hearing in cases where a temporary injunction has been obtained. Section 5505, *Id.*, is as follows: "After the answer is filed, a motion may be made at any time in term to dissolve the injunction, and upon such motion the parties may introduce testimony to support the petition and answer, and the court shall decide the motion upon the weight of the testimony without being bound to take the answer as true." Such injunctions may be granted by the circuit court or judge in vacation, and in certain cases by the probate court or the judge thereof in vacation, or by the county court or two judges thereof. Sections 5488, 5489. But the chapter in question does not undertake to regulate the practice for hearing in cases where there has been no temporary injunction. It then necessarily follows that the hearing must be as provided by the general provisions of the Code. When a petition is filed either in term or in vacation, and no temporary injunction is asked, the clerk issues process, as in other cases, returnable to a future term, at which, if defendant is served in time, as provided by the Code, he is required to answer, and the case stands for trial. Or the defendant may waive service of process and enter his appearance, which will have the effect of giving the court jurisdiction of his person. Section 2013, Rev. St. 1889 (now section 566, Rev. St. 1899), provides how suits may be instituted, *viz.*: "By filing a petition and the voluntary appearance of the adverse party; or, by the filing of a petition and suing out process thereon." It may therefore be conceded that,

as the object of the process is for the purpose of giving the adverse party notice of the proceedings, his voluntary appearance amounts to a waiver of process, and the court's jurisdiction is as complete as if the process had been served upon him. It is agreed here that the court had jurisdiction of the subject-matter of the suit, and, as we have seen, had jurisdiction of the parties. But the contention is that the court was not authorized to hear the case at the December term, 1899, during which the suit was begun, but that the June term, to which process was returnable, was the trial term. Section 2042, Rev. St. 1889, provides when a defendant served with process shall plead to the petition, and when the case shall be triable. But this section refers solely to cases where the defendant is served with process; that is, where it has obtained jurisdiction of his person by notice. It has no reference whatever to cases where the defendant has conferred jurisdiction by his entry of appearance. The section requires service of process to be had for a certain number of days before the beginning of the term. The object of the statute is to give defendant sufficient time after notice to prepare for trial. But if he pleads to the petition he waives timely notice. And it occurs to us that the court is thereby possessed of complete jurisdiction of the case, and may or may not proceed with the trial, as the circumstances demand. We can see no good reason why a court, when the pleadings of a case are complete, should not proceed to trial, if the parties are ready. The object of the Code is to provide for the speedy administration of justice. Under such circumstances, it would be the duty of the court to set a day for trial, to enable the parties to make the necessary preparation. In this case plaintiffs were notified of the filing of defendant's answer, and of its motion to have a day fixed for trial. The plaintiffs appeared on the 28th of January, the time fixed for the hearing of the motion, which the court sustained, and set the case for trial on February 8th. When the day for trial arrived, plaintiffs did not appear, to urge any objections to a hearing, and their case was dismissed for want of prosecution. The only ground urged here against the action of the court is that the court had no authority to try the case prior to the return term of the writ. But we are of the opinion that defendant's entry of appearance by filing its answer at the December term made such term the trial term. The issues between the parties had been made on the pleadings. Under such conditions, there can be no good reason given why the court may not set a case for trial during the term, as well as at any future term. And the plaintiff need not suffer any hardship by reason of the unexpected appearance of the defendant, if sufficient time be given him to make his preparation for trial. The Code has provided for all such contingencies. See section 2123, Rev. St. 1889. The plaintiffs come into

court, in the first place, asking for a hearing, and they should not be allowed to complain of the action of defendant, who waives all preliminaries and tenders them a speedy trial. They ought at least to be as vigilant as their adversary that they have placed on the defensive.

Affirmed. All concur.

GEORGE S. HOWELL & CO. v. DICKERSON.

(Court of Appeals at Kansas City, Mo. Jan. 2, 1904.)

SALES—REFUSAL TO DELIVER—FINDING—MEASURE OF DAMAGES—ERROR IN INSTRUCTION—CURE BY REMITTITUR.

1. In an action by a purchaser of apples for failure to deliver, the evidence showed that the orchard whose yield was purchased contained from 649 to 1,500 barrels. The apples were to be barreled by the purchaser. The jury's verdict was based on the estimate that the orchard contained 649 barrels. *Held*, that an error in omitting to take account of the cost of barreling, in instructing on the measure of damages, was cured by a remittitur computed on the basis of 649 barrels in the orchard.

2. In an action by a purchaser of apples for failure to deliver, it appeared that plaintiff agreed to pack 150 barrels per day; that on the first day his employees were delayed by the seller's unreadiness; that early the next day the seller stopped picking, and ordered them away; and that during the time employed they packed about 75 barrels. *Held*, that defendant could not complain of a finding of refusal to deliver, on the ground that it was not shown that plaintiff could have packed 150 barrels, as agreed.

Appeal from Circuit Court, Polk County; Argus Cox, Judge.

Action by George S. Howell & Co. against Jerome Dickerson. Judgment for plaintiffs, and defendant appeals. Affirmed.

C. H. Skinker and G. A. Watson, for appellant. Patterson & Patterson, for respondents.

BROADDUS, J. This suit is founded upon the following contract, to wit:

"This contract made on the 16th day of September, 1901, between Geo. S. Howell & Co. and Jerome Dickerson, witnesseth: That for and in consideration of the sum of five hundred dollars paid by said Geo. S. Howell & Co. and the further considerations herein named, Jerome Dickerson has sold to the said Geo. S. Howell & Co. all apples growing in the orchard of said Dickerson, situate 8 miles north of Springfield, Mo., containing 46 acres, and bounded on the north by Lyman and on the east by Garlick, which come within the following specification: that is to say, all apples in said orchard which shall measure two and one-fourth inches in diameter and be free from rot. No apple shall be rejected on account of any blemish, wormhole or insect sting appearing on the same unless same shall also be affected with rot. The said Dickerson shall pick and deliver said apples at the City of Springfield at such place as the

said Howell & Co. shall designate within the limits of said city. Said delivery shall begin on the 1st day of October, 1901. The said Geo. S. Howell & Co. agree to pay the said Dickerson for said apples the sum of \$2 per barrel of 3 bushels each, the said apples to be received and barreled by the said Howell & Co. The said Howell & Co. agree to receive and barrel 150 barrels per day; the barrels to be furnished and paid for by said Howell & Co. The said Howell & Co. agree to pay for each 100 barrels when delivered and the said \$500 this day paid shall be considered as payment for the last hundred and fifty barrels delivered under this contract. And should the said Howell & Co. fail or refuse to carry out their part of this contract the said \$500 shall be retained by said Dickerson as liquidated damages for such failure. (Signed in duplicate Sep. 16, '01.) Jerome Dickerson. Geo. S. Howell & Co. by Geo. S. H."

The petition alleges that the plaintiffs paid the \$500 mentioned, and offered to comply with the terms of the contract, but that defendant failed to so do on his part, and that he drove plaintiffs' employes from the orchard, and failed and refused to pick and deliver the apples, and retained the \$500 paid him. There was evidence that on the last day of September the parties began picking and packing the apples, and that plaintiffs' employes were grading them down as provided in the contract, but that defendant was dissatisfied with the way in which it was done, and that defendant delayed the packing of the apples somewhat because for want of ladders for the use of his pickers; that plaintiffs packed that day and on the next until between 8 and 9 o'clock, when defendant discharged his pickers, and ordered plaintiffs' employes to leave the orchard. During the time so employed, they packed about 75 barrels. The evidence tended to show that plaintiffs were prepared to pack 150 barrels per day; that the orchard contained from 649 to 1,500 barrels of apples; that the cost of packing was about 40 cents per barrel; and that the lowest market price at Springfield, the place of delivery, was \$2.75 per barrel. Defendant's evidence tended to show that he dismissed his pickers, and required plaintiffs' employes to leave, or to comply with the contract as he understood it. He insisted that they rejected apples that should have been received under the contract. The jury, under the instructions of the court, returned a verdict for plaintiffs for \$925.50, of which \$500 was for the money paid on the contract, and the residue, \$425.50, for damages for failure of defendant to deliver the apples.

The contention of defendant is that the court erred in instructing the jury as to the measure of damages. After instructing the jury to find for plaintiff the \$500, the court instructed as follows: "And in addi-

tion, they will assess plaintiffs' damages at such sum, if any, as the weight of evidence shows was the difference per barrel between the market price October 1, 1901, and the contract price, viz., \$2 per barrel, for such number of barrels coming up to the aforesaid standard as they shall find said orchard contained, and that in no event are they to assess plaintiffs' damages at a sum exceeding the sum sued for." The objection to said instruction is that it failed to tell the jury that they must deduct from the market price the costs of barreling, as the market price at Springfield was of apples in the barrel. The error was discovered, and the plaintiffs, in order to avoid its effect, entered a remittitur of \$198.35; and the court rendered judgment for the amount of the verdict, less the sum remitted, viz., \$727.15. In order to arrive at this result, the court assumed that the apples in the orchard amounted to 649 barrels. This was the least amount, as shown by the evidence, that the orchard contained. As we read the evidence, there was more. But under the finding the defendant could not have been injured for that reason, but, rather, benefited. He is not in a condition to complain of the action of the court.

But defendant contends that there was a total failure of proof to sustain the finding. In this: that the contract provided that plaintiffs should pack 150 barrels per day, whereas the evidence does not show that, with the means at hand, they were able to do so. The trouble about this claim is that the defendant did not give plaintiffs an opportunity to determine whether they could or could not. They had been delayed some on the first day because defendant was not prepared for them, and they were required to quit early the next day. And further, if, in performing the contract, plaintiffs failed to pack the 150 barrels a day, and he was damaged thereby, he had his remedy. All he had to do was to comply, or offer to comply, on his part. But this course he did not pursue. On the contrary, he refused to deliver the apples, and ordered the plaintiffs' servants away. The jury, on proper instructions, found that he refused to deliver the apples.

The finding and judgment are for the right party, and ought not to be disturbed. Cause affirmed. All concur.

CORSON v. WALLER.

(Court of Appeals at Kansas City, Mo. Feb. 1, 1904.)

ADMINISTRATOR - ACTION - NOTICE - STATEMENT OF CLAIM - AMENDMENT - APPEAL.

1. Under Rev. St. 1899, § 188, providing that any person may exhibit his demand against a decedent's estate by serving on the administrator a notice of the amount and nature of the claim, a notice stating that the claimant will present for allowance a claim founded on two

receipts from the decedent, which are set out, is insufficient in not stating the amount and nature of the claim.

2. Under Rev. St. 1899, § 4079, providing that the statement of plaintiff's cause of action may be amended in the appellate court to supply any omission when substantial justice will be promoted thereby, but no new item shall be added, a notice to an administrator containing receipts from decedent on which a claim against his estate is based, and stating that it will be presented for allowance, as required by section 197, on which notice the claim is tried in probate court, is not a nullity, but may be amended on appeal to the circuit court by adding a statement of the "amount and nature of the claim," as required by section 188.

Appeal from Circuit Court, Cooper County; James E. Hazell, Judge.

Proceeding by James M. Corson against John A. Waller, administrator of the estate of William H. Glasgow, deceased. From a judgment dismissing the cause, plaintiff appeals. Reversed.

C. C. D. Carlos and Jno. Cosgrove, for appellant. W. M. Williams and C. D. Corum, for respondent.

SMITH, P. J. The plaintiff delivered to the defendant administrator the following notice:

"To John A. Waller, administrator of the estate of Wm. H. Glasgow, deceased: Take notice that at the next term of the probate court of Cooper county, Mo., to be held at the court house in the city of Boonville, in said county, on the second Monday of August, 1902, on the first day of said term, or as soon thereafter as I can be heard, I shall present to said court for allowance against said estate a demand founded upon the following, to wit:

"October 15, 1900.

"Received of J. M. Corson the sum of \$58.50, on the H. M. Keevil note.

"W. H. Glasgow."

"December 13, 1900.

"Received of J. M. Corson the sum of \$67.85 in full payment of the H. M. Keevil note.

W. H. Glasgow.

"June 25, 1902. J. M. Corson."

"State of Missouri, County of Cooper, ss. J. M. Corson, the above named claimant, makes oath and says, that to the best of his knowledge and belief he has given credit to the estate of William H. Glasgow, deceased, for all payments and offsets to which it is entitled and that the balance claimed is justly due.

J. M. Corson.

"Subscribed and sworn to this 30th day of June, 1902.

"C. C. D. Carlos, Notary Public."

On which notice there was indorsed in writing by the administrator the waiver "of service of any notice on me of the presentation of the above demand to the probate court," etc. On August 11, 1902, the parties appeared before the probate court, when and where there was a trial on the merits, resulting in judgment for defendant. An appeal was taken by plaintiff to the circuit

court, where plaintiff, by leave of court, filed an amended statement, which was as follows:

"Plaintiff, by leave of court first had and obtained, for his amended statement herein states that he and Wm. H. Glasgow, deceased, on the — day of —, 1898, executed and delivered their joint note to H. M. Keevil for the sum of \$117; that, in order to settle and pay off said note, he paid to Wm. H. Glasgow, deceased, on the 15th of October, 1900, the sum of \$58.50, and on the 13th of December, 1900, * * * the further sum of \$67.85, both of which sums so paid by plaintiff to said Wm. H. Glasgow, said Glasgow promised and agreed to pay and cause to be credited on the note to the said H. M. Keevil, which payments will appear by receipts dated on the dates above given, and herewith filed, and marked Exhibits A and B; that said Glasgow failed and neglected to pay said sums to said H. M. Keevil, and failed to have said sums or either of them credited on said note so held by said Keevil; that since the death of said Glasgow the said Keevil instituted a suit against John A. Waller, as administrator of the estate of said Wm. H. Glasgow, and plaintiff on said note, before J. L. Stephens, Esquire, a justice of the peace of Kelly township, Cooper county, Mo., and recovered judgment for the amount due on said note; that since then plaintiff has paid said judgment and costs, and he now asks judgment against the defendant, Waller, as administrator of said Wm. H. Glasgow, deceased, to be levied of the goods and chattels of said estate in the hands of said administrator, for said sum of \$126.35, with interest on \$58.50 from October 15, 1900, and on \$67.85 from December 13, 1900, and for costs."

To which statement was appended the affidavit required by section 195, Rev. St. 1899.

The defendant thereupon filed a motion to strike the amendment from the files for the reason that plaintiff's original statement was a nullity, and not susceptible of amendment, and which was by the court sustained. The defendant then filed a motion to dismiss the cause for the reason that plaintiff had filed in the probate court no sufficient statement of his cause of action, and for the further reason that the statement filed did not show the nature of his alleged demand, etc., which was sustained, and judgment given accordingly, and from which plaintiff appealed.

The vital question raised by the appeal is whether or not the statement of the demand exhibited to the administrator, and subsequently presented to the probate court for allowance, and by that court heard and determined, was such as was susceptible of amendment. Section 188, Rev. St. 1899, provides that any person may exhibit his demands against such estate by serving upon the executor or administrator a notice in writing stating the amount and nature of his claim, with a copy of the instrument

of writing or account upon which the claim is founded. Section 197, *Id.*, provides that any person desiring to establish a demand against any estate shall deliver to the executor or administrator a written notice containing a copy of the instrument of writing or account on which it is founded, and stating that he will present the same for allowance, etc. Under section 188, providing how a demand may be exhibited against an estate, the notice given and quoted at the outset does not meet the requirements of that section, in that it does not state "the amount and nature of the claim," though it does set forth copies of the instruments of writing upon which it (the demand) is founded. As notice of the plaintiff's desire to establish his demand, it did meet the requirements of section 197, *supra*, for it does contain "copies of the instruments of writing on which the demand was founded," etc. The notice on its face shows that its purpose was to procure the allowance against said estate of a demand founded on the instruments in writing therein copied. The plaintiff's claim or demand is founded on the receipts, but the statement of just in what way or how the same arose or the decedent's estate became liable to plaintiff thereon is not stated. The facts upon which the plaintiff claimed there was liability to him on said receipts should have been stated so as to fully advise the administrator of the nature of his claim. The notice did not advise the administrator what facts the plaintiff expected to prove in order to establish the liability of the estate to him. It is true that in probate courts formal pleadings are not required, yet common justice requires that the statement of a matter about which those in charge of the estate probably know nothing should, when presented for allowance, at least be sufficiently full and specific to apprise them of the facts involved, so that they can be prepared properly to protect the interests confided to them, and thus prevent the allowance of unjust demands from swallowing up the estate. *Watkins v. Donnelly*, 88 Mo. 322. The statement was unquestionably defective and insufficient; but, while this is so, was it unsuceptible to amendment? Was it, as defendant contends, an absolute nullity, and such as to furnish nothing to amend? A statement of a plaintiff's cause of action may be amended in the appellate court to supply any deficiency or omission therein when by such amendment substantial justice will be promoted; but no new item or cause of action not embraced or intended to be embraced in the original statement shall be added by such amendment. Section 4079, Rev. St. 1899. When a statement is so entirely barren as to state nothing at all—is a mere nullity—it is not amendable in the appellate court. *Brashears v. Strock*, 46 Mo. 221; *Lamb v. Bush*, 49 Mo. App., loc. cit. 338; *Dahlgren v. Yocum*, 44 Mo. App. 277.

While it may be that the statement here

is bad, and would not support a judgment, it cannot be said that it is entirely barren—a nullity—and therefore not amendable. It sufficiently appears therefrom that plaintiff bases his claim on the receipts. They constitute the foundation of his claim. The facts showing just how and in what way the deceased's estate is liable to plaintiff on the receipts is omitted, but it seems to us that substantial justice would be promoted by allowing him to supply by amendment the omissions. *Dahlgren v. Yocum*, 44 Mo. App. 277; *Lamb v. Bush*, 49 Mo. App., loc. cit. 338; *Brashears v. Strock*, 46 Mo. 221. If these conclusions be correct, it inevitably follows that the court erred in striking the plaintiff's amendment from the files and in dismissing the action.

The judgment will accordingly be reversed, and cause remanded to be proceeded with in accordance with the view of the law herein expressed. All concur.

WOODY v. ST. LOUIS & S. F. RY. CO.
et al.

(Court of Appeals at Kansas City, Mo. Feb. 1, 1904.)

JUDGMENT—RIGHT RESULT—IRREGULARITIES—REVERSAL—STATUTE.

1. Under Rev. St. 1899, § 865, providing that the appellate court shall not reverse a judgment unless error was committed against the appellant, materially affecting the result, a judgment will not be reversed, where the right result was reached, though the record discloses that the proceedings leading up to the judgment were in many respects irregular, and perhaps erroneous.

Appeal from Circuit Court, Polk County.

Action by Julia A. Woody and husband against the St. Louis & San Francisco Railway Company and others. From a judgment for plaintiff wife, after the husband's death, defendants appeal. Affirmed.

L. F. Parker and J. T. Woodruff, for appellants. Rechow & Pufahl, for respondent.

SMITH, P. J. This is an action which was brought in the Polk county circuit court by the plaintiffs George and Julia Ann Woody, husband and wife, against the defendants, to recover \$5,000 damages for the death of their infant son, Troy, which it was alleged in the petition was occasioned by the negligence of the agents and servants of said railway company while engaged in operating one of its trains of cars, etc. Upon the application of this defendant, the venue of the cause was removed to the circuit court of Dallas county; and upon its further application it was removed from the latter court to the circuit court of Cedar county, just after which the plaintiff George Woody died. While the cause was pending in the last-named court, some compromise settlement of the cause was entered into between the surviving plaintiff and defendants. The latter produced before the court a writing

which plaintiff had signed by making her mark, and which paper recited that, for the consideration of \$500, she released the defendants from all manner of actions whatever which she had against them, etc. Defendants further produced another paper, similarly signed, which authorized the attorneys of the defendants to dismiss the plaintiff's action at her costs. The defendants' attorneys accordingly moved the court to dismiss the action at her costs, but to this she objected on the ground that she had not executed the paper produced by defendants, authorizing such dismissal. The court refused to sustain the defendants' motion, and thereupon, by consent of parties, the venue of the cause was changed back to the circuit court of Polk county. After three changes of venue and two jury trials, without decisive results, the defendants filed an amended answer, in which, amongst other defenses, was pleaded the release heretofore referred to. The plaintiff filed a replication in which it was alleged that she made a settlement of the cause of action alleged in her petition, and by the terms of which "defendants agreed, in consideration of the release of said cause of action, to pay her \$510, and also to pay all the costs that had accrued in the action; that the defendants' agents prepared said release papers for her to sign, which, she understood, contained the agreement just stated, instead of that pleaded by the defendants in their answer, to which she never assented, made, nor entered into; that she was illiterate, could neither read nor write, and made her mark only; and that she did so with the distinct understanding that it embraced the contract as agreed upon in all the conversations and upon all the representations in relation to the matter of such settlement," etc. At this stage of the case the defendants filed a motion to set aside the order theretofore made permitting plaintiff to prosecute her suit in forma pauperis, and to require her to give bond for costs, etc. And thereupon the court made an order sustaining the said motion, with the qualification that "the only issue which the court will permit plaintiff to try without giving bond is the issue as to which party should pay the costs already accrued." No exception was taken by either party to this ruling of the court. The plaintiff then filed a motion to dismiss the action at the costs of the defendants, alleging as the ground therefor that she was illiterate, being unable to read or write, and that defendants' agents stated to her that they would pay her \$500, and all costs of suit, if she would settle her claim; that she was then in destitute circumstances, and was not represented by her attorneys; that defendants procured the services of her mother and brothers to aid them in inducing her to settle said claim, and that by reason of said undue influence she was induced to make the said pretended compromise settlement; that the written contract produced by defendants by

which she appeared to have agreed that her action be dismissed at her costs was never agreed to or signed by her; and that such agreement was not her agreement. The court thereupon required the parties to proceed to trial upon the issue raised by the motion. There was a trial to a jury, where the evidence adduced tended to prove that the defendants' claim agents came to plaintiff's house about a month after the death of her husband, and endeavored to induce her to compromise her claim for the death of her son; that they offered to pay her \$510—the \$10 to buy something "to go on"; that they prepared the paper, which she could not read, and which they pretended to read to her, and, as read to her, it provided that she was to receive \$500, and the defendants were to pay the costs of the action she had then pending against them, and, so understanding it, she signed it by making her mark. The evidence was in many respects conflicting, but that for plaintiff tended to support the allegations of her motion. At the conclusion of all the evidence, the defendants requested an instruction in the nature of a demurrer to the evidence, which was by the court refused. The court thereupon instructed the jury, in effect: (1) That the question submitted to it was, "Did the defendant, by its agent, agree, at the time the compromise was effected, to pay the costs of the action? And (2) that if it believed from the evidence that the stipulation to dismiss the suit, offered in evidence, was read over to plaintiff, and she understood its contents at the time she signed it or made her mark, then that writing became the contract between the parties, and its answer to the question herewith submitted should be, "No." If, however, it believed that the stipulations aforesaid, read to her by defendant's agent, expressed the agreement that defendant should pay the costs, and she did not know at the time of signing this stipulation what its provisions were, then she is not bound by it. The verdict of the jury was: "Did the defendant, by its agents, agree at the time the compromise was effected that the costs of the suit should be paid by defendant? Yes." Judgment was thereupon given to the effect that the costs of the suit not theretofore taxed to either party for special cause be taxed against defendants, in accordance with the verdict, and that the motion to dismiss the cause be sustained, and that execution issue for such costs. The defendants, after an unsuccessful motion to set aside the verdict and judgment, appealed.

It must be conceded that the ruling of the court on the defendants' motion to set aside the order allowing plaintiff to prosecute her action as a poor person, and to require her to give a bond with security for costs, was unusual, irregular, and perhaps outside of the established precedents, yet, as neither party interposed any objection thereto, or, if so, made such objection the basis of an

exception, but, rather, acquiesced therein, such ruling is not now before us for review. And, too, it may be conceded that it was irregular to allow the issue raised by the answer and replication as to whether or not the plaintiff had been induced to agree to and sign the compromise stipulations by misrepresentation and undue influence, or whether or not she had, as a part of such compromise, agreed that the action should be dismissed at her costs, to be raised by the motion of the plaintiff; yet, as such issue was so raised, fairly submitted, and passed upon by the jury, we do not think the result ought to be disturbed, and especially so since it is clear that the evidence introduced on the motion pro et con fully justified the verdict of the jury that it was a part of the compromise agreement that defendants should pay the costs. The facts alleged in the motion being thus indubitably established, though, perhaps, in a way somewhat irregular, the court could not ignore their existence, and in spite of them refuse to dismiss the action at the costs of defendants. The judgment dismissing the action, in view of the evidence, was therefore manifestly right; and, though the proceedings leading up to it were, perhaps, irregular and erroneous, yet we do not feel at liberty to disturb it, because we are expressly commanded by the statute not to reverse the judgment of any court unless we believe that error was committed by such court against the appellant or plaintiff in error, and materially affecting the merits. Section 865, Rev. St. 1899. It would have been far more regular, and in conformity to the practice established by our Code of Civil Procedure (section 654, Rev. St. 1899), to have sustained or overruled the defendants' motion without qualification, and to have submitted the issue along with other issues raised by the pleadings at a trial thereafter to be had. But if the issue had been regularly submitted, it is difficult to see how a different result could have been reached, and therefore we cannot see how the defendants have been prejudiced.

Many questions have been discussed in the brief of the defendants, but, in the view which we feel obliged to take of the case, it would serve no useful purpose to notice them.

Our conviction is that, though the proceeding complained of was in many respects irregular, and perhaps erroneous, yet, as a correct result was thereby reached, we feel constrained to give it our sanction, and to affirm the judgment. All concur.

QUINLAN v. KANSAS CITY.

(Court of Appeals at Kansas City, Mo. Feb. 1, 1904.)

MUNICIPAL CORPORATIONS—SIDEWALK INJURIES—FORMATION OF ICE—INSTRUCTIONS—CURE—EVIDENCE—QUESTION FOR JURY.

1. Evidence that at the place where plaintiff fell ice from two to six inches thick, rough,

and dented with abrupt edges, extending diagonally across the sidewalk for a width of about three feet, had formed from water that had flowed down from a spout on an adjacent house, raised a question for the jury as to whether the ice constituted an obstruction to the sidewalk, making it unsafe for travel, so as to impose a liability on the city for the injuries resulting therefrom.

2. In an action against a city for injuries resulting from the formation of ice on the sidewalk, an instruction authorizing recovery if plaintiff's fall was caused by rough and uneven ice, was erroneous when given without any reference as to whether such ice constituted an obstruction rendering the walk unsafe for travel.

3. In an action against a city for injuries resulting from the formation of ice on the sidewalk, an instruction allowing recovery if plaintiff's fall was caused by rough and uneven ice, without reference to whether the ice constituted an obstruction, was cured by another instruction stating that the city was not responsible merely because the ice was rough and uneven, unless its "roughness or unevenness made it an obstruction, and caused the sidewalk to be unsafe for travel."

Appeal from Circuit Court, Lafayette County; Samuel Davis, Judge.

Action by Mary Quinlan against Kansas City. From a judgment for plaintiff, defendant appeals. Affirmed.

R. J. Ingraham and J. J. Williams, for appellant. R. Latahaw and H. F. Blackwell, for respondent.

BROADBUD, J. This suit was begun in the circuit court of Jackson county, and taken by change of venue to Lafayette county, where it was tried, and appealed to this court. The plaintiff sues for damages claimed to have been sustained by reason of a fall caused by the slippery condition of defendant's sidewalk. The evidence developed that plaintiff slipped and fell on the east side of Cherry street, about 20 feet north of the corner of Thirteenth street, on January 11, 1901. Prior to the time of her fall and injury there had been a fall of snow and sleet, which the plaintiff's evidence tended to show had mostly disappeared. But this was controverted by the defendant. However, there was evidence to the effect that at the place where plaintiff slipped and fell ice had formed from water freezing that had flowed down a spout leading to the roof of an adjacent house; that it formed to the extent of from two to six inches thick, about three feet wide, beginning at the inside edge of the walk and extending diagonally across to the outside of it; and that it was rough, and dented with abrupt edges. The testimony of plaintiff and her witnesses was that while passing along she came to the place described, and when she stepped upon the ice so formed on the sidewalk her foot slipped, and she fell and was injured. It was shown that the sidewalk was in the condition stated, more or less, for 10 days previous to the accident. There was a verdict for the plaintiff, and defendant appealed.

It is one of defendant's contentions that the court should have sustained its demurrer

to the evidence, but the facts stated plainly show that it was a case for the jury. It is the law that a city is not liable for the slippery condition of its streets, caused by ice upon its sidewalks, unless it be that "the ice is so rough and uneven, or so rounded up, or at such an incline, as to make it an obstruction, and to cause it to be unsafe for travel with the exercise of ordinary care." *Reno v. St. Joseph*, 169 Mo. 642, 70 S. W. 123. It was therefore a question for the jury, under the evidence, to determine whether the sidewalk, under the condition described, constituted an obstruction such as to render it unsafe for travel. In *Reedy v. St. Louis*, 161 Mo. 523, 61 S. W. 859, 53 L. R. A. 805, it was held that: "Where the sidewalk is in fact rendered dangerous to pedestrians because of slippery ice formed from the accidental or incidental discharge of water, such not being the prevalent condition of sidewalks at the time, it is the duty of the city to cause the danger to be removed within a reasonable time after it has notice, or by the exercise of ordinary care could have discovered the dangerous condition."

Instruction No. 1 is objected to by defendant for the alleged reason that it "authorized a recovery by plaintiff without regard to whether or not the ice made an obstruction, or had any effect at all on the safety of the sidewalk. If only rough and uneven ice was a proximate cause of the fall, the jury were told that plaintiff should recover." Said instruction is as follows: "The court instructs the jury, if you find and believe from the evidence that at the time plaintiff slipped and fell the sidewalk at the point where she slipped and fell was covered with rough and uneven ice, and that said rough and uneven ice, if any, had remained upon said sidewalk at said point for a sufficiently long time prior to the time plaintiff slipped and fell for the defendant, by the exercise of ordinary care and caution, to have known of the presence of said ice, if any, and in time for defendant to have had a reasonable opportunity to have removed said ice, or to have caused the same to be removed; and if you further find and believe from the evidence that said ice, if any, was a direct and proximate cause of plaintiff's slipping and falling—then the court instructs you that defendant is not relieved of its liability, if any, to plaintiff, on account of the fact, if you find and believe from the evidence it is a fact, that said sidewalk at said time was covered with sleet, even though you further find and believe from the evidence that said sleet, if any, was also one of the direct and proximate causes of plaintiff's slipping and falling." The criticism is just. Rough and uneven ice may have existed at the point in question, but that fact did not render it unsafe, within the meaning of the law, unless it amounted to an obstruction such as to render it unsafe to pedestrians. While the plaintiff does not admit

that said instruction is faulty, she claims that, if it should be so held, the fault was cured by defendant's instruction No. 1. It must be admitted that said instruction contains many curative properties. It practically covers the whole case, being clear, concise, and comprehensive. It is as follows: "The jury are instructed that the defendant, Kansas City, is under no obligation to the traveling public who may use its sidewalks to remove from such sidewalks sleet or ice which produces a slippery condition only. Nor is it responsible for injuries sustained solely by reason of any of its sidewalks being in a slippery condition because of ice or sleet thereon. Nor is it responsible merely because the ice or sleet is rough or uneven. Unless you find from the evidence that the ice or sleet where plaintiff claims she fell was so rough or uneven that its roughness or unevenness made it an obstruction, and caused the sidewalk to be unsafe for travel, with the exercise of ordinary care, or find that it had been permitted to accumulate and remain upon the walk, until, by thawing and freezing, it became an obstruction, and thereby rendered the sidewalk unsafe for travel; and that the defendant city had knowledge of such obstruction, or by the exercise of reasonable care might have had knowledge of such obstruction, long enough before the accident to have removed the same before the accident, or by the exercise of reasonable care—then the defendant is not liable, and your verdict should be for it." In *Blackwell v. Hill*, 76 Mo. App. 46, this court held that: "An instruction for the plaintiff, which was incomplete, in that it did not leave to the jury the question whether the sidewalk was reasonably safe, is supplemented by ample instructions on this point given for the defendant, and the error is nonprejudicial." In *Squires v. Kansas City*, 75 S. W. 194, this court also held that: "Error in plaintiff's instruction that if a loose plank rendered the sidewalk 'unsafe and defective,' and plaintiff was injured thereby, to find for her, is cured by defendant's instruction that defendant would not be liable merely because there was a defect or imperfection in the sidewalk, unless it was such that on account of it the sidewalk was not reasonably safe for travel." Many other cases might be cited of a like character. It is proper, therefore, to hold under the foregoing rule that the error complained of was not prejudicial.

The plaintiff's second instruction is similarly faulty. It is substantially like her No. 1, and we do not think it was misleading in view of what has heretofore been stated.

Objections are made to other instructions of plaintiff, but we do not think they are well founded. Nor did the court commit error in rejecting those of defendant not given.

For the reasons given, the cause is affirmed. All concur.

HARRINGTON v. WABASH R. CO.

(Court of Appeals at Kansas City, Mo. Feb. 1, 1904.)

**MASTER—INJURY TO SERVANT—ASSUMED RISK
— NEGLIGENCE OF SERVANT — UNFORESEEN
CASUALTY—EVIDENCE—QUESTION FOR JURY.**

1. Evidence in an action by a servant against his master for injuries received by having his fingers crushed under a cylinder which he was assisting in moving, and which it was his duty simply to balance from the rear as two other men carried it along, examined, and held insufficient to entitle plaintiff to a submission of the case to the jury.

2. Where a servant had been for 30 years in defendant's employ, and knew the risks and hazards of the business, he will be held to have assumed them.

Appeal from Circuit Court, Jackson County; W. B. Teasdale, Judge.

Action by Pat Harrington against the Wabash Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Geo. S. Grover, Frank P. Seabee, and H. C. McDougal, for appellant. Hollis & Fidler, for respondent.

SMITH, P. J. Action to recover damages for personal injuries. The plaintiff, in his petition, amongst other things, alleged: That the defendant operated machine and car shops at Moberly, in said state, for the repair of its cars and all parts thereof, including cast-iron cylinders for placing under its cars for air or steam brakes used on its said cars in the operation of its road, said cylinders being about three to four feet long and weighing 200 pounds or more. That among said shops so maintained by defendant in the operation of its road was a paint shop, foundry, and car shop, situated about 300 feet apart. Between said shops was a pit about 70 feet wide and about 15 to 18 inches below the surface of the ground, with railroad tracks laid therein lengthwise and close to each edge of said pit. That defendant had, for the purpose of conveying castings and other articles across said pit from one shop to the other, a transfer table, which was moved up and down said pit by means of a crank, on the track laid therein, to any point where the same was needed. The top of said table was on a level with the surface of the ground on each side of said pit between the said shops, and said articles were transferred on trucks across said table, all of which could be done with reasonable safety in such manner. Plaintiff was in the employ of defendant working in its said shops as a laborer in the repair of cars and of car trucks for and in the operation of its road. That at the date aforesaid plaintiff, with two other workmen, was ordered by defendant's foreman in charge of said work and over said workmen, to carry some of the aforesaid cylinders from one of said shops to the other, across said pit and tracks laid therein, and was negligently and carelessly ordered to carry the same over on a stick, instead of using the

table provided for such purpose. That in obedience to said order of said foreman, plaintiff, with his co-laborers, attempted to carry one of said cylinders across said pit, by said co-laborers placing a stick under the cylinder, which said cylinder was of cast iron, with a very smooth surface on the outside, and of a round form. Plaintiff was holding the back end of said cylinder. The cylinder was tapering from one end to the other, the large end being in front, and plaintiff holding the rear or smaller end, endeavoring to balance said cylinder on said stick, which by great exertion and care he succeeded in doing from one edge of the pit down, into, and across said pit and tracks therein, until his said co-laborers stepped across the railroad tracks at the far edge of said pit and up out of said pit to the ground level, when, by reason of the raise caused by said co-laborers stepping up onto said ground level it became impossible for plaintiff to keep said cylinder on an exact balance on account of said abrupt step-up and said railroad tracks close to said bank and the unequal height of said co-laborers holding the front end of said cylinder on said stick, and by reason of the smoothness of said stick and cylinder it rolled, tilted, and slipped on said stick and fell back onto plaintiff, greatly injuring him.

The answer contained a general denial, to which was added the plea of contributory negligence and the assumption of the risk.

The evidence tended to show that the defendant's car repair and paint shops were about 200 feet apart, and fronted each other north and south, and that between them there was what is called a "pit," in which was operated a transfer table or portable bridge over which cars and heavy materials were transferred from one shop to the other. The pit was about 18 inches deep and 60 feet wide. On the morning that the plaintiff was hurt there were two cylinders in the car shop, which Lang, the foreman of the two shops, wanted removed to the paint shop, and he accordingly ordered Cosby and Mitchell, two of his employes, to do this. The cylinders were truncated cones, churn-shaped, and about 4 feet long and 12 inches in diameter at the larger end and 9 inches at the smaller. They weighed about 200 pounds each, and were a part of the air-brake system in use on defendant's railway trains. When Cosby and Mitchell came to remove the cylinders, the latter suggested to the foreman that they were rather heavy for two men to carry across the pit, and thereupon the foreman told them to go and get plaintiff, who was at work in the car shop. Mitchell notified plaintiff to come over and help them, which the latter accordingly did. The foreman directed them to use a stick or handspike in carrying the cylinders. A stick was procured, which was about 6 feet long and 2x2 inches, one side of which was quite smooth. The cylinder had a smooth cast-iron outer surface. The stick was put under the cylinder, Cosby

taking hold of one end and Mitchell the other. The plaintiff took hold of the rear and smaller end, so as to keep it in equilibrio on the stick while being carried. The first cylinder was removed, and when the men returned to get the other, and had placed the stick under it, the foreman directed that if—the stick—be placed a little further forward, so that more of the “heft” would be on the plaintiff in holding up the rear end. When the three men had carried it across the pit, and Cosby and Mitchell had stepped up on the level ground, the cylinder tilted up, the smaller end descending to the sill, which is in the outer edge of the pit, whereby the plaintiff’s three fingers were caught and injured. Whether this was caused by the plaintiff slipping or stumbling or by the cylinder turning or slipping on the stick so that plaintiff lost control of his end of it is not clear from the evidence. The plaintiff went down with his end, but just how it happened that he did so is somewhat conjectural. The plaintiff testified that Cosby and Mitchell were of unequal height, and that when they stepped from the bottom of the pit up on the higher ground the cylinder turned on the stick and came right down “before he knew where he was.” Cosby testified that plaintiff mostly held the cylinder in balance, and that was what it was aimed for him to do; that the hind end went down before it rolled; that after that end went down it rolled over towards Mitchell. He further testified that he could not tell whether it slipped and fell or fell suddenly; that as the cylinder fell he looked behind, and that the plaintiff was in a kind of stooping position, and had hold of his end, and jumped to let loose. The witness could not testify whether plaintiff was getting up or not, or whether he was down or not. Mitchell testified that they had stepped out of the pit before the smaller end of the cylinder fell; that when the rear end went down it rolled some towards him, but the front end held on the stick. This witness, in telling how the accident happened, said that he could not say “only that Paddy [plaintiff] slipped, or something, or stumbled on the rail, pulling the cylinder down.” He further testified that his back was to plaintiff, and that he would not say plaintiff slipped or stumbled. Whelan, a witness for plaintiff, testified that during the time he had been in the employment of the defendant he had helped carry two cylinders across the pit in pretty much the same way as the one was carried when plaintiff was hurt. Worledge, another car repairer, who was a witness for plaintiff, testified that he had helped carry two or three cylinders across the pit in about the way as that was carried by plaintiff and the two others, and that it had been the usage, during the 10 years he had worked for defendant, for one, two, and three men to carry cylinders and other articles across the pit from one shop to the other. Lang, who was the foreman of the repair shops, testified

that he had often seen three men carry cylinders and other material across the pit, and that this was one of the ways of transferring them across the pit, and that this was a safe way of carrying them over.

The question raised by the appeal is whether or not, on the evidence as we have just stated it to be, the plaintiff was entitled to a submission of the case to the jury? The common law enjoins upon the master the duty to furnish to the servant a reasonably safe place and reasonably safe machinery, tools, and appliances in which and with which to do the master’s work. *Holmes v. Brandenbaugh*, 172 Mo., loc. cit. 64, 72 S. W. 550; *Tabler v. Ry. Co.*, 93 Mo. ‘79, 5 S. W. 810; *Grattis v. Ry. Co.*, 153 Mo. 408, 55 S. W. 108, 48 L. R. A. 399, 77 Am. St. Rep. 721. This duty, however, does not make the master an insurer of the servant. *Grattis v. Ry. Co.*, supra. It is not the duty of the master to furnish any particular kind of machinery, tools, or appliances. His duty in this respect is to use ordinary care and diligence in selecting and furnishing such as are safe and suitable. No inference of negligence can arise from evidence which shows that the implement or appliance was such as is ordinarily used for like purposes by persons engaged in the same sort of business. *Bohn v. Ry. Co.*, 106 Mo. 433, 17 S. W. 580. Nor is the master required to furnish the servant the safest known appliances, tools, or machinery, nor the latest approved patterns of the same. *Holmes v. Brandenbaugh*, supra. The servant, when he enters the service of the master, assumes the risks that are usually incident to the business being conducted by the master, and his wages include compensation for injuries received from such risks. A master may conduct his business in his own way, and the servant, knowing the hazards of his employment as the business is conducted, impliedly waives the right to compensation for injuries resulting from causes incident thereto, though a different method of conducting the business would have been less dangerous. *Bradley v. Ry. Co.*, 138 Mo., loc. cit. 302, 39 S. W. 763. There was no evidence adduced which tended to prove that the plaintiff’s injury was occasioned by the negligence of the defendant either in furnishing the plaintiff a reasonably safe place or reasonably safe tools or appliances in which and with which to do the work required of him. There was no evidence showing that the number of men or the handstick furnished to carry the cylinder were insufficient or unsuitable; or, if there had been, no such negligence is alleged in the petition. The way which the defendant required the cylinders to be carried was one of the several ways or methods practiced and used by defendant in the removal of cylinders and other material from one shop to another. It is perhaps true that it would have been a safer way to carry the cylinders on the transfer

table than in the way they were carried, still, as the latter was a reasonably safe way, the defendant was not guilty of negligence for not adopting the former. *Smith v. Ry. Co.*, 69 Mo. 37, 33 Am. Rep. 494; *Muirhead v. Ry. Co.*, 19 Mo. App. 634, 644; *Conway v. Ry. Co.*, 24 Mo. App. 235; *Cothron v. Packing Co.* (Mo. App.) 73 S. W. 279; *Bradley v. Ry. Co.*, 138 Mo. 293, 39 S. W. 763; *Minnier v. Ry. Co.*, 167 Mo. 99, 66 S. W. 1072; *Holmes v. Brandenbaugh*, 172 Mo. 53, 72 S. W. 550. The plaintiff had been in the employment of the defendant for more than 30 years, and during that time he had engaged in many kinds of work for defendant. He had been section foreman, track repairer, car inspector, truck repairer, etc. He was a man of a varied and wide experience, and perfectly familiar with the defendant's manner and way of carrying on its business at its shops where he was injured. At the time of such injury he was employed as a truck repairer and to do such jobs as he was ordered by the foreman. He knew the risks and hazards that were ordinarily incident to the defendant's business as conducted by it, and no reason is seen why he should not be held to have assumed such hazards and risks, and to have impliedly waived his right to compensation for the injuries that he might receive from the same. If this rule has no application to this case, then it is difficult to conceive of one to which it does apply.

Turning again to the consideration of the evidence, it will be seen that it does not very clearly show how the injury happened. It appears that as *Cosby* and *Mitchell*, who had hold of the stick, were carefully walking along, and had stepped from the bottom of the pit to the ground above, that the hind end of the cylinder went down. The weight of the cylinder was quite equally balanced on the stick, leaving little or no weight to be carried by the plaintiff. He was only required to keep it in equilibrio. If the front end was carried to a greater elevation by the stepping of *Cosby* and *Mitchell* out of the pit upon the surface of the ground above, it would have been an easy matter for plaintiff, who was still in the pit, to have correspondingly elevated the hind end, and thus have maintained the balance; but this, it appears, he neglected to do, and the consequence was that the "heft" of the cylinder was shifted from the stick to the hind end, and this, no doubt, was the cause of that end descending to the sill and catching his fingers. It is impossible to see how the hind end of the cylinder could have gone down while in the hands of the plaintiff, as it undoubtedly did, unless the plaintiff had neglected the duty he was required to perform in respect to keeping its balance on the stick. If he had been on the alert, and had given proper attention to the work in hand, we cannot see how the hind end would have "suddenly gone down," even if the upper

face of the stick on which the cylinder was balanced was somewhat smooth. If the hind end had been depressed or elevated as the cylinder was carried along accordingly as was necessary to keep it balanced on the stick, the accident would have been averted. The cylinder could not, under such conditions, have slipped or tilted so as to throw the "heft" on the plaintiff. Such accident was caused not from the unsuitableness or unfitness of the stick for the use to which it was put, nor from that of the kind of men used in carrying the cylinder, nor from the unsafety of the way it was ordered to be carried, but rather from the negligence of the plaintiff himself. If the cause of the plaintiff's injury can—as we think is the case—be imputed to the fault of any one, it must be to that of the plaintiff himself, and for such the law gives him no redress. It may be that the plaintiff was not guilty of any negligence or carelessness in handling the cylinder, and that a misstep, slip, or stumble of the foot, or something of the kind, caused him to cast his weight on the hind end of the cylinder and in that way he was disabled from keeping it in balance on the stick, in consequence of which the fore end tilted up and the hind end down, thereby causing the injury. If the injury did not result from the fault or negligence of the plaintiff, but from an unforeseen casualty—as we think may fairly be inferred from all the evidence—the result would be the same; that is to say, there would be no liability in either case. In view of the entire evidence, we think we are justified in concluding that on either or all of the grounds stated by us the plaintiff's case must fail, and that the court erred in denying the defendant's demurrer.

Accordingly, the judgment will be reversed. All concur.

DUNLAP v. KELLY.

(Court of Appeals at Kansas City, Mo. Feb. 1, 1904.)

ACTION ON NOTE—INDORSEMENTS—ALLEGATION AND PROOF.

1. Where plaintiff in an action on a note alleges that she was the original payee thereof, but that it had been by her indorsed to a third person, and by the third person back to her, a failure to prove the allegations is fatal to recovery.

2. Where plaintiff in an action on a note alleges that she was the original payee thereof, but that it had been by her indorsed to a third person, and by the third person back to her, the indorsements themselves are insufficient to prove the allegations.

Appeal from Circuit Court, Pettis County; Geo. F. Longan, Judge.

Action by Ina M. Dunlap against Joseph H. Kelly. From a judgment for plaintiff, defendant appeals. Reversed.

W. D. Steele, for appellant. Sangree & Lamm, for respondent.

¶ 1. See Bills and Notes, vol. 7, Cent. Dig. § 1611.

ELLISON, J. Plaintiff sued defendant on a negotiable promissory note, and, on peremptory instruction from the trial court, a verdict was rendered for her. The plaintiff was the payee in the note, and the petition alleged that she transferred it in writing on the back thereof to W. O. Dunlap; that afterwards said W. O. Dunlap transferred it in writing on the back thereof to plaintiff; that she was the legal owner of the note, etc. The answer was a general denial. At the trial, plaintiff made no proof of these indorsements. Thereupon counsel for defendant made the point that plaintiff had not proven the case stated in the petition, and offered a demurrer to the evidence, which the court refused, and gave a peremptory instruction to find for plaintiff.

Generally a plaintiff should be required to prove the indorsements on the note, and should make such proof by evidence allunde the indorsements themselves. *Nat. Bank v. Pennington*, 42 Mo. App. 355; *Worrell v. Roberts*, 58 Mo. App. 197; *Mayer v. Old*, 51 Mo. App. 214; *Saville v. Huffstetter*, 63 Mo. App. 273; *Robinson v. Powers*, 63 Mo. App. 290. But, by way of exception to the rule just stated, plaintiff contends that where the plaintiff is the payee of the note, which he has parted with by indorsement, and which finally comes back to him through one or more transfers, his possession thereof raises a prima facie title, which will suffice, without proof of the indorsements out of him and back to him again, unless the defendant makes a showing that he is not the owner. In this the plaintiff is right, and doubtless such view of the law guided the trial court in its action on the instructions. The law is clearly stated by the Supreme Court of the United States as follows: " * * * If any person who indorses a bill of exchange to another, whether for value or for the purpose of collection, shall come to the possession thereof again, he shall be regarded, unless the contrary appear in evidence, as the bona fide holder and proprietor of such bill, and shall be entitled to recover, notwithstanding there may be on it one or more indorsements in full, subsequent to the one to him, without producing any receipt or indorsement back from either of such indorsees, whose names he may strike from the bill, or not, as he may think proper." *Dugan v. United States*, 3 Wheat. 172, 4 L. Ed. 362. The same ruling was made by our Supreme Court in *Glasgow v. Switzer*, 12 Mo. 395. The same statement of the law is made in 2 *Daniel on Neg. Inst.* § 1198, and in 2 *Randolph on Com'l Paper*, §§ 715, 716, 717, 719.

But the point, as made by defendant, involves plaintiff's petition, on which the sufficiency of the case made by her must be determined. As already stated, the plaintiff pleaded the indorsements and transfers of the note, and, having done so, though unnecessarily, she must prove the allegations. They cannot be rejected as surplusage, as

suggested by plaintiff. Concerning the rule which governs what may be termed immaterial allegations, and distinguishes them from mere surplusage, it is said that: "The statement of immaterial or irrelevant matter or allegations is not only censured, as creating unnecessary expense, but also frequently affords an advantage to the opposite party, either by affording him matter of objection on the ground of variance, or as rendering it incumbent on the party pleading to adduce more evidence than would otherwise have been necessary. It is therefore of the greatest importance in pleading to avoid any unnecessary statement of facts, as well as prolixity in the statement of those which may be necessary. If a party take unto himself to state in pleading a particular estate, where it was only required of him that he should show a general or even a less estate, title, or interest, the adversary may traverse the allegation, and, if it be untrue, the party will fail." 1 *Chitty on Pleading*, p. 325, § 252. In *Savage v. Smith*, 2 Bl. Rep. 1101, the action was against the sheriff. The declaration stated a judgment and execution. The latter was proven, but the former was not. It was held that, though unnecessary to aver the judgment, yet, it having been done, it should be proved. In *Bristow v. Wright*, *Douglas* (pt. 2) 665, the action was against the sheriff for taking goods without leaving a year's rent. The declaration needlessly stated the particulars of the demise, and it was held that they must be proved as stated. So, if the averment be made that a person was arrested under a writ indorsed for bail by virtue of an affidavit, the affidavit must be produced, though it was not necessary to allege it. *Webb v. Herne*, 1 Bos. & Pul. 281. Lord Kenyon stated the rule in language particularly applicable to this case. After remarking that "Good sense will reconcile all the authorities," he said that, "if the plaintiff allege anything which forms a constituent part of his title, he must set it out correctly," and prove it as alleged. *Gwinney v. Phillips*, 3 *Durnford & East*, 643; s. c. 3 *T. R. Coming* nearer to the identical question in this case, we find that in *Waynam v. Bend*, 1 *Campb.* 175, there was a note payable to A. B. or bearer. Being payable to bearer, it was not necessary to allege that A. B. indorsed it to the plaintiff; but he made the allegation, and it was held that he could not recover without proving it. That case was cited with approval in *Buddington v. Shearer*, 20 *Pick.* 477, where it was held that, under a statute making the owner or keeper of a vicious dog liable for damages done by such dog, if the petition needlessly alleged that the defendant was both owner and keeper, both must be proved. In a suit on a contract in New York, it was necessary to plead the consideration, except where the instrument acknowledged such consideration. In *Jerome v. Whitney*, 7 *Johns.* 321, the note sued on

was expressed to be for "value received," and it was therefore unnecessary to plead the particular consideration. But the pleader saw fit to allege it, and it was held that, having done so, he was bound to prove the averment. See, also, *Walrad v. Petrie*, 4 Wend. 575. Where mere foreign matter, irrelevant, not relating to the issue or issues involved, is alleged, it may be disregarded. But in actions on contracts where immaterial matter is alleged which connects with plaintiff's right to maintain the action, or his title to the subject thereof, such immaterial matter is not mere surplusage. Some confusion can be avoided by a proper understanding of what is meant by the word "immaterial." At first thought, it seems peculiar that one should be required to prove an immaterial thing. But the meaning is that the thing pleaded is unnecessary to plaintiff's action; that he could have succeeded without reference thereto, but, when he sees fit to set forth such matter, then it becomes material. It is an immaterial thing made material by the act and choice of the pleader. So, going back to the quotation from Lord Kenyon, if the matter alleged constitutes a part of the plaintiff's right or of his title, it must be proven, however unnecessary it may have been to allege it. The case at bar is as good an illustration as need be found. Plaintiff claims title to the note in suit. It being payable to her and in her possession, it was wholly immaterial that she had transferred it, and that it had subsequently been transferred to her again. She being the payee and in possession, these facts would have given her a prima facie right, which the defendant would have been compelled to meet. But at the same time the indorsements out of her and back to her were really constituent parts of her title, and she chose to set them out as the particular title by which she held the note. She must therefore prove them as stated. This rule ought not to be looked upon as technical. It is denied to be so by eminent judges. It begets brevity in pleading, by avoiding what are sometimes lengthy and confusing statements of unnecessary matter. Lord Mansfield stated in *Bristow v. Wright*, supra, that it "stood upon the best footing, for it prevents the stuffing of declarations with prolix and unnecessary matter, because of the danger of failing in the proof." And he adds that it is a rule which results in the protection of a defendant. For when such allegations are made he prepares his defense, frequently at much trouble and expense, with reference to the special matters stated as the foundation of plaintiff's right. It is highly proper that a plaintiff should be required to make good the challenge he puts forth. It is a burden which tends strongly to induce him to omit the statement of everything not necessary to his cause of action.

The judgment will be reversed, and the cause remanded. The other Judges concur.

ZOLLINGER v. DUNNAWAY et al.

(Court of Appeals at Kansas City, Mo. Feb. 1, 1904.)

HOMESTEAD—UNOCCUPIED LAND—INTENTION TO BUILD.

1. Land on which there is no house, and which was never occupied as a homestead, and which was obtained by exchange for land on which the owner had not resided for five years previous to the exchange, is not impressed with the character of a homestead from the fact that the owner intended to build a house on it and reside there when he could find himself able.

Appeal from Circuit Court, Henry County; W. W. Graves, Judge.

Action by George Zollinger against W. M. Dunnaway and others. From a judgment for defendants, plaintiff appeals. Reversed.

C. C. Dickinson, Jno. I. Hinkle, and C. D. Corum, for appellant. Campbell & Duckworth and O. L. Houts, for respondents.

ELLISON, J. Plaintiff obtained a judgment against defendant, and, in attempting to enforce satisfaction thereof, the sheriff levied an execution on 80 acres of land owned by him, which did not exceed the value of homesteads as prescribed by statute. The defendant claimed the tract as his homestead, and therefore exempt. The trial court sustained the claim, and the plaintiff duly appealed to the Supreme Court, from whence it was transferred to this court.

Accepting the testimony of the defendant in his own behalf, we feel constrained to rule that his claim is ill founded. It appears that he is the head of a family, and has been all the time during the period covered by this controversy. About seven years prior to the levy of the execution he lived on a 160-acre tract of land as a homestead. He moved from this and rented a smaller tract, though he intended to move back again when he got in better financial condition. He never returned, but, after living on the rented land for about two years, he exchanged the 160-acre tract for the 80 in controversy, on which there were no buildings, getting some money for the difference. He made this exchange, also, with a view of bettering his condition, and with the intention some time, when he could find himself financially able, of building a house on it, and residing thereon. He then gave up the rented tract, and moved with his family into the town of Windsor, about 18 miles from the land in controversy. He has lived in the town continuously since, in a rented house, being a period of about five years, and has been engaged in business in the town, and voted there at the local and general elections. He, however, says that all this time he has intended, when he could find himself able, to build a house on the 80, and reside there. What was said by Judge Marshall in *St. Louis Brewing Ass'n v. Howard*, 150 Mo. 445, 51 S. W. 1046, may

¶ 1. See *Homestead*, vol. 25, Cent. Dig. § 42.

well be repeated here: "The defendant proceeded upon the idea that he could leave the property, be absent for years, engage in business elsewhere, keep his family in other places, live in rented houses, and yet if all the time he claimed the property as a homestead, and had an intention to return to it at some future time and occupy it as such, it was still his homestead, in law, and hence exempt from sale under legal process. In this he was in error, for, whilst such animus revertendi would preserve his residence in this state, it would not preserve his right to a homestead in this property, even if, under the evidence in this case, it could fairly be said that he ever had such a homestead right, which we do not think the evidence warrants, for it is a visible occupancy of the premises as the head of a family at the time of the levy of the writ which fixes the homestead rights of the defendant." That statement of the law is supported by a number of decisions. *Barton v. Walker*, 165 Mo., loc cit. 30, 65 S. W. 293; *Finnegan v. Prindeville*, 83 Mo. 517; *Tennent v. Pruitt*, 94 Mo. 145, 7 S. W. 23. It is true that one may exchange his homestead for another, and that reasonable time will be allowed him in which to remove from one to the other. Or he may sell one homestead, with intent to invest the proceeds in another, and a reasonable time will be allowed for such purpose. *State ex rel. v. Hull* (Mo. App.) 74 S. W. 888. But the idea of occupancy can never become disassociated from the homestead. Its name implies that. The time of going from a former to a later homestead will, of course, be governed by reasonable circumstances, but the circumstances detailed by defendant do not fill that requisite. In *Goode v. Lewis*, 118 Mo. 357, 24 S. W. 61, the deeds for exchange were made, and Lewis intended to remove to his newly acquired place so soon as he recovered from sickness then upon him. He did not recover, and in two months died, without having carried out his intention. The court held such circumstances excused the delay and the failure to occupy. Considering defendant's conduct and citizenship in residing elsewhere for several years, and that the premises have no house enabling them to be occupied, and no more prospect of ever having than there has been in the past, it would be manifestly unfair to permit him to treat them as a homestead, and a bar to the rights of his creditors. *Ross v. Hellyer* (C. C.) 26 Fed. 413. The only case cited by defendant which, in its facts, lends any color to his claim, is that of *Duffey v. Willis*, 99 Mo. 132, 12 S. W. 520. There it was said that each case must rest upon its own peculiar facts, and, while the claim made was upheld there, though there was an absence of near three years from the homestead formerly occupied, yet the property had only been rented by the month, with a view of the claimant returning at any time. And before the indebtedness accrued which was

the foundation of the proceedings against the property claimed, the owner's agent had dismissed the tenant preparatory to his return. The case is as far as any has gone, and the view that the homestead had not been abandoned was not made clear without some effort. But even if considered as opposed to the view we take of this case (which we do not) we must follow the later cases we have cited.

The result is that the judgment quashing the execution is reversed. All concur.

COSGROVE v. BURTON et al.

(Court of Appeals at Kansas City, Mo. Feb. 1, 1904.)

ATTORNEY AND CLIENT—CONTRACT FOR SERVICES—COMPROMISE BY CLIENT—ACTIONS—PETITION—QUANTUM MERUIT—EXPERT TESTIMONY—INSTRUCTIONS.

1. Where a client entered into a contract with his attorney to pay him a proportion of the value of the estate involved in litigation in case of a determination in his favor, the client could not, by a compromise made over the objection of the attorney, defeat the latter's right to the contract compensation, on entry of a judgment in the client's favor.

2. A petition setting out a contract by which plaintiff was to receive a certain sum for services as attorney, and the fulfillment of its conditions, but which further states that plaintiff voluntarily reduced his fee to a certain sum, which was a reasonable compensation for his services, and which defendant agreed to pay, states a cause of action in quantum meruit.

3. It is proper to charge that the jury, in considering the testimony of experts, should take into consideration their professional standing and experience.

Appeal from Circuit Court, Howard County; Jno. A. Hockaday, Judge.

Action by John Cosgrove against Benjamin N. Burton and others. From a judgment for plaintiff, defendants appeal. Affirmed.

O. S. Barton, Wm. S. Shirk, and J. F. Rutherford, for appellants. J. W. Cosgrove and S. C. Major, for respondent.

BROADBUSH, J. Benjamin E. Nance, of Howard county, died on or about the 22d of May, 1902, leaving two children, Laura Burton and Martha E. Jordan. By his last will he left the greater part of his estate to Laura and Benjamin N. Burton; but prior to making his will he had conveyed to the said Burton 600 acres of land. After the probate of her father's will, Martha E. Jordan brought suit to set it aside, and also brought suit to annul the said deed of conveyance. The plaintiff, a counselor and attorney at law, was employed by the defendants to represent their interest in said suits. Benjamin Burton was the executor under the will of said Nance, and defendant Patrick H. Burton is the husband of said Laura. It was also a part of plaintiff's employment to recover from one Dr. R. S. Holman \$2,000, which it

¶ 1. See *Attorney and Client*, vol. 5, Cent. Dig. § 355.

was claimed he had fraudulently obtained from the said Nance in his lifetime. The petition alleges that the contract of employment between plaintiff and defendants was as follows: "Benjamin N. Burton, acting for himself and the other defendants herein, promised and agreed to pay the plaintiff for his services in and about procuring the return of said two thousand dollars from said Holman, and for his counsel and services rendered, and to be rendered, in said two above mentioned suits, the sum of five hundred dollars in the event the said Martha E. Jordan prevailed and the said Patrick H. Burton, Laura Burton and Benj. N. Burton and others were defeated therein; and in the event said suits of Martha E. Jordan against the defendants herein, and others, were decided in defendants' favor, the sum of ten per cent. of the amount and value of the estate involved in said litigation." It was shown that plaintiff acted as counselor and attorney for defendants in said matters; that his services were reasonably worth \$1,000; and that the value of the estate involved was from \$35,000 to \$40,000; and that Dr. Holman returned to the executor the said \$2,000. In the suit to set aside the will, defendants obtained a judgment establishing it; but it was proved that it was in the nature of a compromise, the consideration for which was the sum of \$5,000, paid by defendants to the said Martha E. Jordan. The suit to annul the said deed was dismissed at the cost of defendants. The jury returned a verdict for plaintiff for \$1,000.

It is the contention of defendants that, as plaintiff's cause of action was on a contract, he was not entitled to recover on quantum meruit; and that under his contract he was entitled to recover only \$500, as the defendants did not prevail in said two suits. As to the latter contention, if the contract is to receive a strict construction, plaintiff would have been entitled to recover an amount equal to 10 per cent. on the value of the property in litigation, which would amount to at least \$3,500. But defendants say that, as a matter of fact, although the judgments are formally in their favor, it was the result of compromise, for which they paid in the one case \$5,000 and in the other the costs of the suit. But defendants have left out of consideration the fact that the compromise in question was made over the objections of plaintiff. There is no doubt but what defendants had the right to do so, but it does not follow that, because they did, it would affect the contract they had with the plaintiff, and they would still be liable to him thereunder for an amount equal to 10 per cent. of the value of the property in dispute, as both the will and deed were sustained.

The petition, after setting out the contract and alleging plaintiff's compliance with its terms and defendants' success in the two suits, further states that he voluntarily reduced his fee to \$1,000, which defendants agreed to

settle, and that the sum charged is a reasonable compensation for his services. The petition admits of two constructions—the plaintiff contends that it is for quantum meruit; defendants, that it is a suit on contract. We believe the petition, fairly construed, makes the cause of action stated quantum meruit. The statement therein that he had voluntarily reduced his fee to \$1,000 for his services, their reasonable value, and that the defendants were justly indebted to him for that sum, characterizes it as such. It nowhere alleges that the amount is due upon his contract, or that the defendants have committed any breach thereof, nor has he asked to recover thereon. The most that can be said of the petition is that it is ambiguous. But it is sufficient to support a verdict. Notwithstanding defendants during the trial insisted that the action was on contract, by a number of instructions they submitted their side of the case upon plaintiff's theory that the action was one for a reasonable compensation for plaintiff's services. Perhaps they were justified in so doing, taking into consideration the dubious character of the pleading and their insistence until the last moment that the action was based upon contract.

The petition being sufficient upon which to base a verdict and judgment, renders it unnecessary to notice many of the objections made to testimony introduced by plaintiff. It is claimed that the court erred in giving the following instruction: "The court instructs the jury that they are not bound by the testimony of the expert witnesses, but in considering such testimony the professional standing and experience of such witnesses must be taken into consideration in arriving at a verdict." The objection is to that part of the instruction which tells the jury that they must take into consideration the professional standing and experience of such witness. In *Hoyberg v. Henske*, 153 Mo. 63, 55 S. W. 83, it was held that: "Jurors are in no wise bound to accept the opinions of expert witnesses, if they deem them unreasonable; and an instruction in a civil action which so states is not error." In *Cosgrove v. Leonard*, 134 Mo. 419, 33 S. W. 777, 35 S. W. 1137, the verdict was founded wholly as to the value of plaintiff's services upon the testimony of expert witnesses. The court held it was sufficient to support a verdict. In *Hull v. St. Louis*, 138 Mo. 625, 40 S. W. 89, 42 L. R. A. 753, which followed the holding of the court in *St. Louis v. Ranken*, 95 Mo. 139, 8 S. W. 249, it was held proper to instruct the jury to give to the opinions of expert witnesses the weight to which they believed they were entitled. It is the opinion of some jurists that an instruction that calls attention to this testimony of witnesses as a class ought never to be given. But, as such is now the law, and as juries may believe or disbelieve them at their own will, it certainly would be appropriate for them to take into consideration their professional standing and

experience. The trial court ought, at least in an advisory capacity, be authorized to lay down some rule for the guidance of the jury in passing upon the credibility of such witnesses. And if the opinions of such witnesses are sufficient, as held in *Cosgrove v. Leonard*, supra, to support a verdict, it was certainly not error to instruct the jury that in making up their verdict they must take into consideration their standing and experience in their profession. In fact, it is the duty of jurors in all cases not only to take into consideration the credibility of witnesses, but also every other circumstance tending to weaken or strengthen their testimony. And as the law is that the courts are authorized to instruct juries that they may disregard the evidence of expert witnesses, there can be no good reason assigned why jurors should be left without any direction whatever in weighing the force of such evidence. Other objections made to instructions are without merit.

The cause is affirmed. All concur.

DENNIS v. BAILEY.

(Court of Appeals at Kansas City, Mo. Feb. 1, 1904.)

JUSTICES OF THE PEACE—JURISDICTION— REPLEVIN—WAIVER.

1. Rev. St. 1899, § 3839, provides that every action cognizable before a justice shall be brought before some justice of the township, either, first, wherein the defendants, or one of them resides, or in any adjoining township; or, second, wherein the plaintiff resides, and the defendants, or one of them, may be found; third, if the defendant is a nonresident of the county in which the plaintiff resides, the action may be brought before some justice of any township in such county where the defendant may be found. Section 4486 provides that replevin, where the specific property is sought to be recovered, shall be brought in the county in which such property may be found, and that, where defendant is a nonresident of the county in which suit is brought, service shall be made as in attachment. Rev. St. 1879, § 3482, provides that suits by attachment against the property of a person shall be brought in the county in which such property may be found. *Held*, that a justice in a township in S. county has no jurisdiction of replevin of property in such township where both plaintiff and defendant reside in G. county.

2. The mere fact that defendant appeared to an action of replevin and proceeded to trial without objection before a justice of the peace, who had no jurisdiction of that class of actions nor of the parties, does not waive the lack of jurisdiction.

Appeal from Circuit Court, Sullivan County; J. P. Butler, Judge.

Action by John R. Dennis against C. Tom Bailey. From a judgment for defendant, plaintiff appeals. Affirmed.

Wilson & Clapp and M. Bingham, for appellant. O. G. Williams and E. R. Bane, for respondent.

SMITH, P. J. The facts agreed to in the case are as follows: That this cause originated before O. G. Allen, a justice of the

peace of Bowman township, Sullivan county, Mo., and that it is a replevin suit for 3 head of cattle and 68 bushels of black oats valued at \$99 in the affidavit. That said cattle were in said Bowman township, Sullivan county, state aforesaid, at the time of the institution of this suit, and were seized under the writ of replevin in said township by the constable thereof. That at the time of the institution of said suit both plaintiff and defendant were, and now are, residents of Grundy county, Mo. And that at the trial before the said O. G. Allen the plaintiff and defendant, both in person and by attorneys, appeared before the said Allen, and tried said cause by introducing evidence on the merits and arguing the case before the said Allen. The defendant, first having appeared for the purpose of the motion only, filed a motion before said justice to dismiss and refuse to consider the cause for the reason that, both plaintiff and defendant being non-residents of Sullivan county, Mo., and residents of Grundy county, Mo., the court therefore had no jurisdiction to hear or determine the cause. This motion the court overruled, after which the parties proceeded to trial as above set out. The judgment of the justice was for defendant, and plaintiff appealed. In the circuit court the defendant renewed his motion to dismiss, the grounds thereof being the same as those contained in that filed before the justice, that is to say, that, it being admitted of record that neither plaintiff nor defendant were residents of or lived in Sullivan county, the court, by reason thereof, was without jurisdiction to try the cause. This motion was sustained, and judgment was given accordingly for defendant, and from which the plaintiff appealed here.

The sole question thus arising is whether or not the justice had jurisdiction. The jurisdiction of the circuit court was not original, but derivative. If the justice was without jurisdiction, it (the circuit court) had none. It is well settled that justices' courts have only such jurisdiction as is expressly conferred upon them by statute. *Bank v. Doak*, 75 Mo. App. 332; *Brownfield v. Thompson*, 96 Mo. App., loc. cit. 342, 70 S. W. 378. If the justice before whom the action was brought had jurisdiction, it was conferred by section 3839, Rev. St. 1899, which provides that: "Every action recognizable before a justice of the peace shall be brought before some justice of the township, either, first, wherein the defendants, or one of them resides, or in any adjoining township; or, second, wherein the plaintiff resides, and the defendants or one of them may be found; third, if the defendant is a non-resident of the county in which the plaintiff resides, the action may be brought before some justice of any township in such county where the defendant may be found; fourth, if the defendant is a non-resident of the state, or has absconded from his usual place of

abode, the action may be brought before any justice in any county in this state where-in defendant may be found. * * * It thus plainly appears that in a case like this, where neither party is a resident of the county in which the action is brought, that the statute confers no jurisdiction on the justice. By reference to article 6, c. 43, Rev. St. 1899, it will be seen that the jurisdiction conferred by said section 3839 in no way is widened or extended by its provisions. *Smith v. Simpson*, 80 Mo. 634, was where the residence of the plaintiff was Bollinger county and that of the defendant was St. Francis county. The action was begun before a justice of the peace of Madison county. In the course of the opinion by the court it was said: "Justices of the peace, then, must get their authority from the statute. That fixes the manner and place of bringing the suit, and prescribes the territorial jurisdiction in which suits before justices may be maintained. And there is no statute that I am aware of which authorizes a plaintiff resident of one county to sue a defendant resident of a different one in a third county, where neither plaintiff nor defendant resides." *Thompson v. Bronson*, 17 Mo. App. 456, was where the action which was begun in Knox county for the recovery of the possession of property situate in that county, and both parties to the action were residents of Lewis county. It was contended that the action was properly brought in Knox county, for the reason that the property was found there. The court declined to uphold the contention; saying: "Our statute provides that suits by summons, when the defendant is a resident of the state, shall be brought either in the county within which the defendant resides or the county within which the plaintiff resides and the defendant may be found. Rev. St. 1879, § 3481. Actions for the claim and delivery of personal property are not excepted from this provision of the statute, either expressly or by implication." The next succeeding section to that just referred to—that is to say, section 3482, Rev. St. 1879—provided that "suits commenced by attachment against the property of a person shall be brought in the county in which such property may be found." In 1887 (Acts 1887, p. 229) this section was amended so as to read as follows: "Suits commenced by attachment against the property of a person, or in replevin or claim and delivery of personal property, where the specific property is sought to be recovered, shall be brought in the county in which such property may be found, and in all cases where the defendant in actions, in replevin, or claim and delivery of personal property, is a non-resident of the county in which the suit is brought, service shall be made on him as under like circumstances in suits by attachment." This section, as thus amended, was carried into the Revision of 1889 as section 2010, and made a part of article 3, c. 33, of

the Code of Civil Procedure. In the Revision of 1899 the section was not only permitted to remain a part of the Code of Civil Procedure (article 3, c. 8, Rev. St. 1899), but was also bodily incorporated in chapter 56, relating to actions of replevin in courts of record, as section 4486. It is thus seen that by the provisions of said section 4486, supra, that all actions for the claim and delivery of personal property (when it is sought to recover specific personal property) shall be brought in some court of record of the county where the property may be found, and when the defendant in such actions is a nonresident of the county in which the suit is brought service may be made on him as under like circumstances in suits by attachment, or which, in other words, is the same thing, the exclusive and original jurisdiction in actions of replevin when both parties reside in a county or counties other than that in which the property is found is made to vest in the circuit court or some other court of record of the latter county. It results that in an action of replevin, where the residence of the parties and the situs of the property is as here, that a justice has no jurisdiction.

After the adoption of said section 4486, supra, in an action of this kind, where the residence of the parties and the situs of the property is as it is here conceded to be, it was not cognizable before a justice of the peace. In such cases the jurisdiction was by that section exclusively lodged in the courts of record of the county where the property was found, without reference to the value thereof, or the amount of the damages for the injury thereto, etc. If, prior to the adoption of said section 4486, justices of the peace under any conditions had jurisdiction in an action of replevin where the residence of the parties, situs of the property, its value, etc., was as here, they were shorn of that jurisdiction by its adoption. After its adoption such actions were required to be brought in some court of record in the county where the property was to be found. Thereafter justices of the peace had no more jurisdiction in such cases than in actions against an executor or administrator, or in slander, libel, malicious prosecution, false imprisonment, ejectment, or in strictly equitable procedure. Section 4486, as already stated, is identical with section 563 of article 3, c. 8, of the Code of Civil Procedure. Section 562 of this article and chapter provides where suits in courts of record shall be brought, and said section 563 was no doubt enacted to remedy or supply the defect, imperfections, and insufficiency not only in the former, but also in section 3839 of article 2, c. 43, Rev. St. 1899, relating to jurisdiction of justices of the peace, as indicated by the adjudicated cases to which previous reference has been made. This action was accordingly brought in the wrong court—a court that was without jurisdiction of it. The lack of jurisdic-

tion was inherent. If this was so, it is plain that the mere fact that the defendant appeared to the action and proceeded to the trial on the merits could not have the effect to waive the lack of jurisdiction any more than if the action had been that of slander, ejectment, or some other of which the justice had no jurisdiction. The numerous cases relating to jurisdiction and waiver cited and relied on by the plaintiff are without application to a case of this kind where the lack of jurisdiction in the court is inherent.

Our conclusion is that the ruling and judgment of the trial court was not erroneous, and accordingly must be affirmed. All concur.

McCREADY v. STEPP.

(Court of Appeals at St. Louis, Mo. Feb. 2, 1903.)

MASTER AND SERVANT—INJURIES TO SERVANT—VICIOUS ANIMALS—KNOWLEDGE—EVIDENCE—QUESTION FOR JURY.

1. Where defendant employed plaintiff to deliver groceries with a horse and wagon, defendant was liable for injuries to plaintiff caused by the viciousness of the horse furnished for plaintiff's use in such work, of which defendant had knowledge, or by the exercise of proper care and diligence he might have known.

2. In an action for injuries to a servant by the viciousness of a horse furnished him for use by the master, evidence as to the master's knowledge of the viciousness of the horse prior to the accident held to authorize a submission of such issue to the jury.

Appeal from Circuit Court, Greene County; J. T. Neville, Judge.

Action by Harry H. M. McCready against L. F. Stepp. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Geo. Pepperdine and Hamlin & Mason, for appellant. A. H. Wear and J. T. White, for respondent.

REYBURN, J. From judgment rendered upon a majority verdict of a jury in favor of plaintiff, defendant has appealed. The petition for plaintiff's cause of action embraced averments that defendant, a retail grocer in Springfield, had in use a one-horse wagon for delivery of goods sold to his customers, and about August 13, 1902, while in defendant's employ, and about the duties of such employment, defendant wrongfully ordered plaintiff, a minor, to deliver groceries and run such wagon, having at the time hitched thereto a horse wild, vicious, dangerous, and unsafe to use for such purposes, and which wagon was therefore unsafe; that plaintiff was ordered and required by defendant to go in and run such wagon with such horse, and deliver goods; that while in performance of his duty in running and riding in such wagon for purpose of delivering goods therefrom, under the order of defendant, the horse became unmanageable and ran away, breaking plain-

tiff's leg in two places, and plaintiff had received such hurts by reason of the negligence of defendant in requiring him, a boy of 14 years, to run such wagon and deliver goods with such dangerous horse thereto attached; that the character of the horse was bad, and he was a wild and dangerous animal, liable to run away and kick, and its character was known to defendant at time he required plaintiff to go in the wagon; that plaintiff was ignorant of the character of the horse, and inexperienced, as a boy of such age usually is, in management of horses; and the injuries sustained were then detailed, and judgment for damages prayed. Defendant answered in a general denial. The facts disclosed at the trial, in effect, were that plaintiff had been in employ of defendant for several months, with duties of assisting in the grocery store and delivering goods to customers, for which defendant made use of two wagons, with two drivers, plaintiff accompanying the driver of a wagon to assist in delivering groceries; that on August 13, 1902, plaintiff was ordered to go with Beltz, who was driving one of the wagons, and, while making deliveries, the horse suddenly became unmanageable, kicked, and ran off. It appeared that one of defendant's horses commonly driven in one of the wagons had become ill, and the horse causing the mischief had been offered for sale to defendant the day preceding the accident, and had been left with him on trial. On the day after its delivery to defendant, the horse was hitched up in one of the wagons, and had been driven by Beltz for two delivery trips, and the third had started when the occurrence took place.

A general charge of error is made against the action of the trial court in giving and refusing instructions; but no specific error is assigned, and the single, comprehensive instruction given, presented and embraced the various features of the case, fairly submitted the issues to the jury, if the evidence warranted such submission, which will be later considered, and is unobjectionable. The controlling element of the case involves the proposition whether, under the evidence, the case should have been permitted to go to the jury, or whether the instruction directing a verdict for defendant should have been given, either at close of plaintiff's case, or at termination of all the evidence, at both of which stages it was requested and declined. It was the duty of Stepp, as master, to furnish for the use of his servants, while in course of his employment, appliances and instruments proper, safe, and suitable for the purposes for which they were furnished, and for the performance of the services required; and this rule extends to and embraces instruments and appliances animate as well as inanimate. *McGarry v. R. R.* (Super. Ct.) 18 N. Y. Supp. 195; *Knickerbocker, etc., Co. v. Finn*, 80 Fed. 483, 25 C. C. A. 579; *Leigh v. R. R.* (Neb.) 54 N. W. 134; *Hammond v. Johnson* (Neb.) 56 N. W. 967; *Labatt, Master & Servant*, §

¶ 1. See *Master and Servant*, vol. 24, Cent. Dig. § 245.

206. To entitle the plaintiff, however, to recovery in this case, it was incumbent on him to introduce testimony tending to prove not alone the dangerous character of the animal causing the injury, but to show, as well, that defendant knew, or by exercise of proper care and diligence might have known, of the vicious and dangerous character of the horse. Knowledge, actual or constructive, on the part of the master, is a constituent element of such negligence, essential to create any liability. Labatt, Master & Servant, c. 14, § 206. The testimony upon these branches of the case was as follows:

Jennings, who took the horse to defendant for sale, deposed as follows: "Q. When you went to Stepp's, what conversation did you and Mr. Stepp have in relation to this horse? A. Well, he was wanting to know if the mare would work, and I told him, 'Oh, yes, she would work all right anywhere he put her.' He asked me if she was gentle. I says, 'Yes; but you have to be careful with her. She hasn't been here for a year. Hadn't been worked for a good while. Been running on pasture.' He wanted to buy her, and I asked him one hundred dollars for the mare, and at last I told him he could have her for ninety-five dollars; and he says, 'I would rather take that mare and keep her a while,' and asked me if I could come back Monday, and I told him I couldn't say that. He would have to go out and see Mr. Hodgson. He was out in the wagon, and he went out and asked Mr. Hodgson if he could keep the mare and work her until Friday, when I come back, and he would probably buy her if she suited him. And I says, 'You can keep her if you will be responsible.' He says, 'I will be responsible if it is my fault;' and he says, 'Of course, if she should lie down and die, she might do the same with you;' and then Hodgson or me, and probably both, says, 'You want to be careful and not let any boy drive her, because she is peart, and has not been driven, and she won't stand a whip.' He says, 'I will have a man, and not let any boy drive her.' Q. Was anything said there by Mr. Stepp in regard to his having heard that this mare was a runaway mare? A. Well, I don't know as he did to me. If he did, I have forgotten. Q. Did you have a conversation with him at any other time in which he said he knew at the time you brought the mare there and left her he had heard she was a runaway mare? A. He told me afterwards that he had heard she had run away. He told me afterwards that she had run away. By the Court: Q. Now, let us understand—that he told you afterwards that at the time he was talking to you the first time he had heard she had run away, or told you he had heard it since that? A. I don't know as he said that. He told me afterwards that he had heard she would run away, but I don't know whether it was before he got the mare or not."

A lady customer of defendant thus testi-

fied: "Q. Now, I will ask you to state if you were in Stepp's store— You know Mr. Stepp? A. Oh, yes. Q. How long have you known him? A. I don't know. I believe, ever since he has been in the grocery business on Grant street. I don't know how many years. Perhaps ten or twelve years. Q. I will ask you to state if you were in his store on the morning of the 13th of August last? A. I think so. I didn't take any notice of the date. The morning of the occurrence of the accident I was in there. Q. Now, shortly after you left there, to fix the date certainly in your mind, you heard of the boy being hurt? A. Yes, sir; a very short time. Q. Now, I will ask you to state if you had any conversation with Mr. Stepp while you were in his store that morning in regard to a horse? A. Yes, sir. Q. Just tell the jury now what that conversation was? A. Well, I went in the store for something—I don't remember what—in the front door, and there was no one in there but Mr. Stepp, and he was very busy doing up the grocery deliveries, and Harry was carrying groceries from the counter to the side door, and I had to wait until he got through for him to wait on me; and Mr. Stepp just remarked to me, 'I have got a new horse this morning, and he is a dandy,' was his remark; and when he got through with those things, and came around to get those things, and he says, 'Wait until the boys drive around, and see it.' I am very fond of horses, and I waited a moment until Mr. Beltz and Harry came around. Mr. Stepp asked me if I didn't think he was pretty. I says, 'Yes; he is pretty in one way, but I think he is a bad-looking horse;' and they stood there a little while in front of the door, and Mr. Stepp said something about the groceries, and whether Harry was on the back of the wagon, or in the wagon, I don't remember; but Mr. Stepp says to him, 'Get up there, sonny, and you deliver the goods and you be careful, and, Mr. Beltz, you hold the lines tight.' He cautioned them, and I said to the boy, 'You mind about going behind that horse.' I didn't like the way he looked. I couldn't tell you— He didn't kick, but he was a vicious-looking animal, and shook his head and looked vicious; and, as they drove away, Mr. Stepp again said, 'Mr. Beltz, don't let go of the lines until you get back here.'"

The driver of the horse, Beltz, a witness for defendant, thus referred to the disaster and the cause: "Q. Where did you make the first stop from the time you first started? A. On Scott street, at Mr. Bloom's. Q. Now, go ahead and relate the rest of the trip? A. Then we made another stop at Mr. Davis', and we made another stop at Mr. Hedge's, and that was when the accident happened. Q. Tell about the accident? A. And just as I started up there she commenced kicking and running right from the start, and she run some distance—not far—but she kept kicking all the time. She finally kicked the

boy and hurt him. Q. What did you do? A. And as I was driving, and she broke the front rod that runs across in front to put your feet on for a brace. When she kicked and broke that, I saw I couldn't hold her any longer, and I threw myself back in the wagon so I could come up against the seat, where I would have a better brace to hold her. I seen I couldn't hold her there when she broke the rod, and I threw myself back in the seat so I could keep a better hold on her. Q. Did you hold onto the lines? A. Yes, sir. Q. How were you holding the lines? A. I was holding the lines with both hands. Q. In what position were your hands? A. Something like that (indicating). Q. Have you handled horses quite a good deal? A. Yes, sir. Q. All your life? A. Off and on."

Defendant, testifying on his own behalf, said: "Q. I will ask you the question if before the time that these men came to your place on the evening of August 12th, if you had heard anything about this horse, or knew anything about it? A. I had, but I didn't know at the time it was the same horse. But Mr. Renfro had owned the same animal down here probably a year before that, and I heard he had one to sell, and I come over to see what he had."

It was obviously not necessary that defendant should have actual, personal knowledge or proof of the vicious propensities of the horse, for the law would not afford him immunity until the horse had actually evinced to him its dangerous disposition by running away while in use by defendant; but notice of those circumstances which should have placed a reasonably prudent man upon guard, and which, upon reasonable inquiry, would have afforded information of the true character of the animal, were sufficient, and imposed the same degree of responsibility on defendant as if possessed of actual knowledge. Upon the whole case, there was sufficient testimony to submit to the jury, and the trial court was warranted in such course. The judgment, accordingly, will be affirmed.

BLAND, P. J., and GOODE, J., concur.

MARTIN v. CHOUTEAU LAND & LUMBER CO.

(Court of Appeals at St. Louis, Mo. Feb. 2, 1904.)

SALES—PAYMENT TO THIRD PARTY CLAIMING TITLE—REMEDY OF SELLER.

1. A seller cannot sue a third party, who was paid by the buyer for the property sold and delivered, on such third party's claiming title thereto, but his right of action, if any, is against the buyer, who is bound to show that the seller had no title, and that on learning such fact he bought from the true owner.

Appeal from Circuit Court, Stoddard County; Jas. L. Fort, Judge.

Action by Oscar Martin against the Chouteau Land & Lumber Company in justice

court. From a judgment for plaintiff on appeal to the circuit court, defendant appeals. Reversed.

J. R. Young, for appellant. Mozley & Wammack, for respondent.

BLAND, P. J. The suit was instituted before a justice of the peace on the following complaint filed by the plaintiff: "Oscar Martin, Plaintiff, v. Bagnell Timber Company and Chouteau Land & Lumber Co., Defendants. Before T. D. Melrose, J. P. for the Township of Duck Creek, County of Stoddard and State of Missouri. Plaintiff for his cause of action states that the Bagnell Timber Company are now, and have at all times hereinafter named been, a corporation duly organized under and by permission of the laws of the state of Missouri, and said corporation are now and was on the nineteenth day of June, 1901, engaged in the business of buying railroad ties and other railroad timbers, and that the Chouteau Land & Lumber Co. are now and was on the nineteenth day of June, 1901, a corporation organized under the laws of the state of Missouri, and engaged in the business of selling land and timber. Plaintiff further states that on or about the nineteenth day of April, 1901, he purchased of the Chouteau Land & Lumber Co. forty acres of timber for the sum of five dollars, said timber land being and lying in the county of Stoddard and known as the forty acres joining the place Gilbert Martin lives on, on the south. Plaintiff further states that he made of said timber railroad ties and delivered said ties to the Bagnell Timber Company at West Dudley, Mo., on the Iron Mountain & Southern Railroad, one hundred and thirty-six of said ties marked to Oscar Martin and sixty-two marked to Gilbert Martin for which said Bagnell Timber Company was to pay plaintiff twenty-five cents per tie; and that said Chouteau Land & Lumber Co., by its duly authorized agent, claimed said ties by right of accession, and demanded of Bagnell Timber Company the amount due on said ties, wherefore said Bagnell Timber Company paid to Chouteau the amount due on said ties, and wholly refused, neglected, and failed to pay this plaintiff for his said ties, and by reason of said refusal and neglect to pay plaintiff for his said ties the plaintiff is damaged in the sum of \$200. Wherefore plaintiff prays judgment for the sum of \$45.50 for his debt and for the sum of \$200 for his damages, making a total of \$245.50, together with all costs, and interest at the rate of six per cent. from date of filing." The cause was appealed to the circuit court, where it was dismissed as to the Bagnell Timber Company. The issues were then submitted to the court, who, after hearing the evidence, found for plaintiff, and assessed his damages at \$45.50. Timely motions for new trial and in arrest of judgment were filed, which

the court overruled, whereupon defendant appealed.

We think the motion in arrest of judgment should have been sustained. The complaint alleges that plaintiff delivered the ties to the Bagnell Timber Company; that said company agreed to pay him 25 cents per tie for the 136 ties delivered, but instead the Bagnell Timber Company paid the Chouteau Land & Lumber Company, who claimed them "by right of accession." On delivery of the ties to the Bagnell Timber Company under the contract of sale alleged in the complaint, the ties became the property of that company (if plaintiff had a title), and plaintiff's right of action to recover the contract price of the ties was against that company, and not against the Chouteau Land & Lumber Company, who set up some sort of a claim to them which the Bagnell Timber Company is alleged to have recognized. If the Bagnell Timber Company, after receiving the ties under the contract of purchase alleged in the complaint, denied the title of plaintiff to the ties, it did so at its peril, and would, in a suit by plaintiff against it for the contract price of the ties, be bound to show that plaintiff had no title, and that, after learning this fact, it bought the ties of the true owner. Plaintiff, it seems to us, has proceeded against the wrong party. His right of action, if any he has, is against the Bagnell Timber Company.

The judgment is reversed.

REYBURN and GOODE, JJ., concur.

TRIPPENSEE v. BRAUN et al.

(Court of Appeals at Kansas City, Mo. Feb. 1, 1904.)

TRIAL—INSTRUCTIONS—EVIDENCE TO SUSTAIN —APPEAL—DISMISSAL.

1. In an action by a subcontractor to enforce a mechanic's lien, in which the original contractor was made a party defendant, and claimed certain set-offs against the plaintiff for money paid on plaintiff's account, a charge that defendant was entitled to credit for the amounts claimed, if, by the usual course of dealing between plaintiff and defendant, defendant had the right to believe that he was authorized to pay the amounts claimed, and did pay the amounts for plaintiff, is erroneous, where there was no evidence as to the previous course of dealing between the parties.

2. The fact that the original abstract failed to contain the judgment and show the filing of a bill of exceptions is not cause for dismissing an appeal, where the transcript shows that there was a judgment, and the amended abstract shows that a bill of exceptions was filed.

Appeal from Circuit Court, Cole County; James E. Hazel, Judge.

Action by William Trippensee against Ernest Braun and another. From a judgment for defendants, plaintiff appeals. Reversed.

E. L. King and James H. Lay, for appellant. Pope & Belch, for respondents.

BROADDUS, J. The plaintiff's suit is to enforce a mechanic's lien. Plaintiff was a subcontractor, defendant Braun the contractor, and defendant Parker owner of the property sought to be charged with the lien. The only questions arising in the case relate to certain set-offs pleaded by the contractor, Braun. Under plaintiff's contract for work and material, he was to have \$1,080, and he claims that he did extra work which was of the value of \$33. He credits defendant Braun with cash payments amounting to \$625, and for 2,000 bricks, \$80. Defendant Braun admits that plaintiff is entitled to a credit of \$9 for extra work, and no more, and asks credit for different sums, among which are the following: \$292.95 paid to B. H. Pohl; \$125.30 overpayment made to plaintiff for work and materials on the Confederate Home at Higginsville; \$9 for work and material on the house of one G. W. Gordon; and \$20 overpaid on the house of one Schabill. The evidence tended to show that these payments were made at the instance and request of plaintiff, while the evidence of plaintiff was to the contrary.

The sole contention here is that the court committed error in the giving and refusing of certain instructions.

Instruction 4 given for defendant is as follows: "The court instructs the jury that if they believe and find from the evidence that the plaintiff owed \$292.95 for brick that was used in the construction of the Lester Parker house, and that defendant Braun paid therefor at the request of the plaintiff, or that he consented to such payment, either before or after the same was made, or that, by the usual course of dealing between the plaintiff and defendant Braun, said Braun had a right to infer and believe, and did believe, that he was authorized to pay such brick bill, and, acting in good faith under such implied authority, he paid such brick bill for plaintiff, then the jury, in making up their verdict, will allow the defendant Braun a credit for the amount paid." We have italicized that part of the instruction to which plaintiff excepts. It is settled law that "no person can make another his debtor without the consent of the party benefited. There must be a previous request, expressed or implied, or an assent or sanction given after the money is paid or the act done." Allen's Adm'r v. Richmond College, 41 Mo. 303. And it is not the duty of an original contractor to pay claims against the subcontractor until liens for such claims have been filed, and actions brought on them. Morley v. Carlson, 27 Mo. App. 5; section 4223, Rev. St. 1899. Under the law as stated, there being no evidence that the owner of the claim paid by the contractor had taken any step to enforce a lien against the building sought to be charged, the contractor, Braun, was not authorized to pay said claim unless by plaintiff's request, ex-

pressed or implied, or his assent given after payment. It is claimed that notwithstanding there was evidence that plaintiff authorized the payment before or sanctioned it after it was made, there was no evidence whatever that would justify the defendant Braun to infer that he had any such authority from the usual course of dealing between himself and plaintiff. Plaintiff's contention in that respect is well founded. The evidence related wholly to the payments in controversy, and nothing was said as to the previous course of dealing between the parties. Consequently there was nothing to base that part of defendant's instruction italicized, to the effect that the jury might infer that defendant had the authority to make the payment. The same error also occurs in instructions 5 and 9 given for respondents. And error was committed by the court in inserting in plaintiff's instructions 6 and 8 substantially the same theory.

The respondents insist that appellant's appeal should be dismissed because he has failed to comply with rule 15 of this court. The original abstract failed to contain the judgment and the filing of a bill of exceptions. But the transcript of the clerk shows that there was a judgment, and that is held to be sufficient. The bill of exceptions, which is made a part of the abstract, states that such bill was filed. But it has been repeatedly held that such a recitation is not sufficient, as a bill of exceptions cannot prove itself. There must be some order showing that it was filed. The amendment states, however, that it was duly filed. It is not necessary that a copy of the record, showing it was filed, should be in the abstract. The mere recitation of the fact is held to be sufficient. We hold that the abstract is sufficient.

For the reasons given, the cause is reversed and remanded. All concur.

STATE ex rel. BROWN v. STIFF, Mayor,
et al.

(Court of Appeals at Kansas City, Mo. Feb. 1,
1904.)

MUNICIPAL ORDINANCE—SALE OF INTOXICATING LIQUORS—RIGHT TO LICENSE—DISCRETION OF TOWN COUNCIL—CONTROL BY MANDAMUS.

1. A town ordinance authorizing the licensing of dramshop keepers, prescribing the qualifications of an applicant, and requiring him to first obtain a license from the county court, does not entitle an applicant possessing the necessary qualifications, and having obtained a license from the county court, to demand the same from the town as an absolute right; and, even if it did, it would be void, as the granting of such licenses is a matter of discretion, which must be exercised freely on each application, and cannot be surrendered in advance, or delegated to the county court.

2. Mandamus cannot be invoked to control the discretion of a town council in passing on an application for a license to sell intoxicating liquors.

Application for mandamus by the state, on the relation of James F. Brown, against C. T. Stiff, mayor of the town of Edgerton, and others. Peremptory writ denied.

J. H. Chinn, Guy B. Park, and Wilson & Wilson, for relator. Sidney Beery, E. C. Hare, and Culver, Phillip & Spencer, for respondents.

ELLISON, J. The relator is an applicant for a license to keep a dramshop in the town of Edgerton. The respondents are the mayor and alderman of that town. Relator obtained an alternative writ of mandamus, and respondents have now made return. The facts are agreed upon.

The town of Edgerton is of the fourth class, and contains less than 2,000 inhabitants. Among the ordinances of the town is the following relating to dramshop license:

"Sec. 81. Any person who shall directly or indirectly sell any intoxicating, fermented or distilled liquor in less quantity than three gallons, either in the original package or otherwise, within the corporate limits of this city, without first having obtained a license as dramshop keeper, according to the provisions of the laws of this state, and of these ordinances, shall be deemed guilty of a misdemeanor.

"Sec. 82. A dramshop license shall not be granted to any person who shall have been convicted of a violation of the ordinances of this city, relating to the sales of intoxicating liquors, nor to any drunkard; and no license shall in any case be granted to any person, who shall not have previously presented a proper petition to the county court of this county, and obtained a license from such court, to keep and maintain a dramshop in this city.

"Sec. 83. Every person who shall desire to keep a dramshop in this city, shall file an application with the board of aldermen, stating the name of the party so desiring the license and the ward and street, together with the lot and block, where such dramshop is desired, and that the applicant has obtained a proper license therefor from the county court of this county. No license for a dramshop shall be for a period of less than six months, to correspond with the date and expiration of the license obtained from the county court. The board shall in no case refund any portion of the license tax collected for such license, nor shall any such license be transferable.

"Sec. 84. Every person to whom a dramshop license may be granted by the board of aldermen, shall pay a license tax of \$300 for every period of six months, to be paid in advance before a license shall be delivered. And no such license shall authorize the keeping of more than one dramshop at the same time under such license."

The relator presented a petition to the county court of Platte county, and obtained from that court a license for six months. He

thereupon made application for a town license to the town council, composed of these respondents, which was refused. He possessed all the qualifications required by the statute and the ordinances aforesaid in order to be a dramshop keeper. He tendered the amount of the license tax and his bond. For the purposes of this case, it may be said that he possessed all the necessary qualifications for a dramshop keeper, and that he did everything which it is required shall be done as a prerequisite to obtaining a license from the town council, unless it be that he should have presented a petition to the council, for that he did not do. The theory of the relator is that, by the ordinance above quoted, when he possessed the qualifications which are therein set out, and when he had obtained a license from the county court, he had a right to demand a license from the city council. We reject that theory on the double ground that the ordinance should not be construed as he construes it, and that, if it should properly bear that construction, it would be void. The town and the county are independent entities, governed by independent bodies or tribunals, especially as to saloon licenses. No one can legally sell liquors within the limits of the town until he has a license from both town and county. The council, in recognition of this fact, ordained that it would not grant a license to any one who had not obtained a license from the county court, but it did not ordain that it would grant a license to any one who did get one from the county court. By this ordinance the town council prescribed proper and reasonable qualifications for a dramshop keeper, but it by no means said that all who had such qualifications would be granted a license. The language of the ordinance (section 83) aforesaid, that "Every person who shall desire to keep a dramshop in the city, shall file an application," etc., stating " * * * that the applicant has obtained a proper license therefor from the county court," is no more authority for the position that if one makes such application he thereby, of right, becomes entitled to the license, than is the language of the general statute (section 2997, Rev. St. 1899) that, upon the doing of certain things there required, the applicant could compel the issuance of a license. Neither the statute nor the ordinance intended to vest a right, but each merely intended to fix a qualification for those to whom a privilege could be granted. As just said, the council is powerless to enact an ordinance of the character relator says this one is. The granting a saloon license in cases like this is a matter of discretion. And the council cannot by a present ordinance grant away its future discretion. It is as powerless as is a Legislature to enact a law that at some future time it will not enact some other law. The city council, to perform its duty as contemplated by law, must exercise its discretion on each application as it is made, unbound by any notion of absolute or contractu-

al right in the applicant, and uncontrolled by any prior action of the county court. The county court is one degree farther removed from the people of a town than the council. There are other considerations to be thought of in passing upon a dramshop license than the mere statutory qualification (state or municipal) of the applicant. It may be apparent to the council that too many are engaging in the business for the well-being of the town, and it may be manifest that the place where it is sought to be located is not for the best. These and other suggestions which might be made demonstrate that the council has no right or power to surrender its discretion in advance, or to delegate its functions to the county court. The wisdom of this is illustrated in this case. For it is one of the admitted facts that the petition presented to the county court, and upon which the county license was issued, did not contain (according to the city taxbooks) the names of a majority of the taxpaying citizens of the town, as is required by section 2997 of the statute.

We have been cited to some cases from other states which would sustain relator's position, if we construed the ordinance as he does. But those cases are not at all in harmony with the policy of this state, as has been announced from as far back as 1847. *Austin v. State*, 10 Mo. 591. In that case, and many others since, it is decided that the business of selling liquor is not a right, and cannot be likened to the ordinary callings of life; that it is a mere privilege, to be granted or withheld at the exclusive discretion of the body empowered to license. *State ex rel. v. County Court*, 39 Mo. 521; *State v. Searcy*, 20 Mo. 489; *State ex rel. v. Hudson*, 78 Mo. 302; *State v. Evans*, 83 Mo. 322; *State v. Birman*, 162 Mo. 21, 22, 62 S. W. 828. As to the case from this state cited by relator (*State ex rel. v. Baker*, 32 Mo. App. 98), we need not pronounce the view there stated as sound or otherwise, for it is certain that it has no application here. There the council exercised its discretion by determining that the applicant should have the license, but at that stage refused to issue it unless he paid a tax double that required when he presented his application, and a motion made that it be granted. The court considered the case as, and likened it to, an attempt to raise the license tax on a license not yet expired, which cannot be done. *City of Hannibal v. Guyott*, 18 Mo. 515.

We have thus shown that the granting a license by a town council is discretionary. It follows that mandamus cannot be invoked to control that discretion. *State ex rel. v. Hudson*, 13 Mo. App. 61; *State ex rel. v. Higgins*, 84 Mo. App. 531; and other authorities in respondents' brief. Indeed, it is a fundamental rule of law that, whenever courts or other tribunals are in duty bound to exercise their own judgment, no superior court will attempt to exercise it for them.

The foregoing views render it unnecessary

to notice other points made by the respective counsel.

A peremptory writ is denied. The other judges concur.

CHOWNING v. PARKER et al.

(Court of Appeals at Kansas City, Mo. Jan. 19, 1904.)

SALES—ACTION FOR PRICE—EVIDENCE—AFFIDAVITS—LOSS—ARGUMENT OF ATTORNEY—MISCONDUCT—EXCUSE.

1. In an action for the balance of the price of a mining concentrating mill, evidence of the amount of lead and jack turned in from the mine operated by the plant after it had been reconstructed was admissible as tending to show the capacity of the plant after reconstruction, which defendant contended was improperly done.

2. Where, in an action for the balance due on the price of the concentrating plant, plaintiff tendered evidence of a compromise which, on objection, was refused, it was reversible error for plaintiff's attorney, in addressing the jury, to refer to such fact, and also to the fact that two former verdicts in the case had been in plaintiff's favor.

3. Where an attorney wrongfully referred in argument to excluded evidence and to the fact that two former verdicts had been in plaintiff's favor, he could not palliate such conduct on appeal by saying that it was inadvertent.

4. Where it was agreed that an affidavit as to the testimony of an absent witness might be read in order to prevent a continuance, and during the trial the affidavit became mislaid, and it afterwards transpired that it had been carried from the courtroom by an attorney who had nothing to do with the case, but defendants, after discovering the loss, made no application to supply it, but submitted their case without any effort to do so, they could not thereafter object that they were injured by its loss.

Appeal from Circuit Court, Jasper County; J. D. Perkins, Judge.

Action by James Chowning against C. A. Parker and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

J. J. Nelson, for appellants. A. M. Whitworth, for respondent.

BROADDUS, J. This suit originated in a justice's court, and was appealed to the circuit court, where it was twice tried, each of the several verdicts being for the plaintiff. As the statement on which the case was tried was lost, and has not been supplied, we can only infer from other documents and the contention of the parties the cause of action at issue. It seems that in April, 1901, plaintiff sold to defendants a mining plant—a concentrating mill; that plaintiff was to receive therefor of the defendants, when delivered, the sum of \$3,500; that said plant was already constructed, but was to be moved by plaintiff to defendants' mine, reconstructed, and put in as good condition as it was before its removal. The greater part of the purchase price had been paid, and plaintiff's claim was for \$165, which was alleged to be still due him. Defendants filed

a counterclaim, in which they admit that the original consideration for the plant was \$3,500, but allege that the consideration was subsequently reduced by the parties to \$3,415, or \$85 less; and they further allege that they were damaged in the sum of \$250 by reason of the defective reconstruction of said plant. There was evidence pro and con on the issues presented by the pleadings. Instructions were given at the instance of the parties, respectively, and some by the court on its own motion, but no complaint is made in defendants' motion for a new trial in that respect.

On the trial plaintiff offered in evidence a paper showing the amount of lead and jack turned in from the mine operated by the plant in controversy after it had been reconstructed. Defendants objected to it as irrelevant. The court admitted it as evidence on the ground that it would show the capacity of the plant. We think the court was right. It was a circumstance tending to show the capacity of the plant after its removal and reconstruction, which related to the matter in issue.

The plaintiff tendered evidence to show that defendants offered him \$85.14 as a compromise, but upon objection the tender was refused. The plaintiff's attorney, in addressing the jury, referred to that fact, and also to the fact that the two former verdicts in the case had been in favor of plaintiff. The defendants objected to the conduct of plaintiff's attorney for so doing in both instances, but his objections were overruled. The plaintiff's attorney seeks to palliate his conduct by saying that it was inadvertent. This is no excuse. If lawyers will persist in this kind of practice, which the courts have always condemned, but sometimes excused, the time has arrived when something should be done to prevent it for the future. The remedy is to set the verdict aside. The trial judges are much annoyed by the practice of attorneys indulging in such conduct in order to get an advantage of their adversary. The plea of inadvertence and want of motive ought not to be received, either as an excuse or as a palliation of the offense. After instilling the poison into the mind of a jurymen—for that is the object, as a rule—the wrong is not undone by the empty apology that the act was unintentional. Every lawyer ought to know that such conduct is wrong and unbecoming an honorable profession.

The defendants, when the trial was called, were not ready, on account of the absence of a material witness. Affidavit was made as to what his evidence would be if he was present. They went into the trial with the understanding that they could read this affidavit to the jury; but it was not to be found when the time arrived for its introduction, and the defendants concluded their side of the case without it. It is admitted that this affidavit was handed to plaintiff's attorney.

It transpired that it had been carried from the courtroom by an attorney who had nothing to do with the case. It was found in a bundle of papers secured together by a rubber band. The attorney who carried it away did not know that he had done so. It further appears that plaintiff's attorney stated that he had laid it on the judge's desk. The defendants claim that plaintiff's attorney hid it in said bunch of papers for the purpose of keeping it from being read in evidence. They insist that they were greatly injured by the wrongful conduct of said attorney in suppressing the evidence contained in said affidavit. When defendants discovered the loss of the affidavit, they should have asked the court at least for the privilege of supplying such loss, which, no doubt, the court would have permitted. C. A. Parker, one of the defendants, made the affidavit at the beginning of the trial, and was in a position to have supplied the missing one; but defendants submitted their case without making any kind of effort to supply such evidence, for which reason they have no cause for complaint.

Other immaterial points raised by defendants will not be noticed. But on account of the misconduct of plaintiff's attorney herein condemned the cause is reversed and remanded. All concur.

STRODE v. CONKEY.

(Court of Appeals at Kansas City, Mo. Feb. 1, 1904.)

MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE OF FOREMAN—FELLOW SERVANTS—VICE PRINCIPAL—EVIDENCE—DECLARATIONS—RES GESTÆ.

1. Where defendant's foreman in charge of a mine, while directing several men in loading a car, tossed a square block of wood onto the car so negligently that the block fell into the shaft, striking deceased, who was working at a pump at which he was employed, killing him, the fact that the foreman at the time was doing the work of an ordinary laborer did not relieve defendant from liability on the ground that he thereby became decedent's fellow servant.

2. At the time defendant's foreman threw a block of wood onto a car at a mine so negligently that the block fell into the shaft and struck and killed deceased, one of the men warned the foreman to look out—that he was liable to kill the man in the mine—whereupon the foreman answered, with an oath, that, "if he wanted to work there, he would have to learn to dodge." *Held*, that such statement, made while the block was in the course of its descent, was a part of the res gestæ, and admissible in an action for decedent's death.

Appeal from Circuit Court, Jasper County; J. D. Perkins, Judge.

Action by Garrard Strode, curator of the estate of Eva Bennett, a minor, against M. C. Conkey. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Percy Werner and Frank L. Forlow, for appellant. McReynolds & Halliburton, for respondent.

ELLISON, J. The plaintiff's ward is the infant daughter of R. J. Bennett, who was an employé in defendant Conkey's lead and zinc mine, and while engaged in work he was killed through the alleged negligence of defendant. Plaintiff recovered judgment in the trial court.

It appears—at least, the evidence tended to show—that one Frantz was defendant's foreman in charge, control, and direction of several men who were at work in loading a car at the surface of the mine with tools and material to be carried into the mine, among which was a square block of wood. The car, when loaded, was run down the incline by cable into the mine on a track descending at an angle of about 45 degrees. The deceased was at work down in the mine, as pumpman, at the pump, 8 or 10 feet from the bottom of the incline. The car was being loaded at the surface, when Frantz picked up the square block, and, standing off, intending to land it in the car, pitched it over the sides, and into the shaft, where it fell to the bottom, striking deceased on the head and killing him. As the block was seen not to go into the car, one of the men immediately said to Frantz, "Look out! You are liable to kill that man down there," and he answered, with an oath, that, "if he wanted to work there, he would have to learn to dodge."

It is claimed that, since the negligent act was committed by Frantz while doing the work of a laborer, he and deceased were fellow servants, and consequently defendant is not liable for the latter's negligence in throwing the block. We cannot allow the defense. We have recently considered the subject in *Donnelly v. Aida Mining Co.* (not yet officially reported) 77 S. W. 130, where the authorities will be found to the effect that, though the negligent act be that of the foreman while himself engaging in the work of those employed under his charge, yet that fact does not cause him to lose his character as vice principal. To the authorities there cited, counsel have added *Russ v. Ry. Co.*, 112 Mo. 50-53, 20 S. W. 472, 18 L. R. A. 823; *Haworth v. Ry. Co.*, 94 Mo. App. 215, 224, 68 S. W. 111.

Objection was made to the foregoing statement of Frantz when called to by one of his men as he tossed the block over the car. We think it was properly received in evidence. It was made at the very time of the act, and while the block was in course of descent. *Cunningham v. Ry. Co.*, 79 Mo. App. 327; *Stevens v. Walpole*, 76 Mo. App. 213; *Devlin v. Ry. Co.*, 87 Mo. 545; *State v. Mathews*, 98 Mo. 125, 10 S. W. 144, 11 S. W. 1135.

We conclude that defendant's objections to the instructions do not require a reversal of the cause. That made to No. 1, in view of what we have said, is not sound. The objec-

1. See *Master and Servant*, vol. 34, Cent. Dig. § 453.

tion that instruction No. 2 did not confine the jury to the necessity of arriving at a belief from the "evidence" in the cause—in other words, omitting the word "evidence"—is not substantial. Neither was the general character of the instruction objectionable as now understood by the rulings of the Supreme Court. See *Parman v. Kansas City* (not yet officially reported) 78 S. W. 1046.

After full examination of the points made against the judgment, we find nothing to justify its disturbance, and it will be affirmed. All concur.

FRAZIER v. ATCHISON, T. & S. F. R. CO.
(Court of Appeals at St. Louis, Mo. Feb. 2, 1904.)

CARRIER — CONVERSION — ACTION BY CON-SIGNEE—TITLE—MISTAKE—PLEAD-
ING—GENERAL DENIAL.

1. In an action by a consignee against a railroad company for the conversion of a car load of coal, evidence that the coal was shipped by the consignor on receiving the promise of the company's agent that it would pay for the coal, if the consignee did not do so in a reasonable time, is sufficient to support a finding that the sale was not for cash on delivery, but that the title passed to the consignee, and gave him the right to recover for its conversion, though he had not paid or tendered the purchase price.

2. In an action by a consignee for the conversion of coal by a railway company, it cannot, under a general denial, recoup the price of the coal paid by it to the consignee, or raise the question of subrogation to the rights of the consignor, or claim an allowance for freight.

3. That a railway company's act in appropriating to its own use coal belonging to a consignee was through an honest mistake, does not affect the consignee's right to redress for the conversion.

Appeal from Circuit Court, Knox County; E. R. McKee, Judge.

Action by Martin Frazier against the Atchison, Topeka & Santa Fé Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

L. F. Cottey and Gardiner Lathrop, for appellant. Geo. R. Balthrope, for respondent.

REYBURN, J. Plaintiff, a saloonkeeper at Baring, Mo., in November, 1901, through Yocum, local agent of defendant, verbally ordered a car load of coal to be shipped from Marcelline, Mo., by Lambeth & Sons. The coal was shipped at Baring, and a bill of lading issued, naming Lambeth & Sons as consignors, and plaintiff as consignee. The consignee was unknown to the shippers, and, prior to the shipment, defendant's agent agreed that defendant should become responsible to consignors for the coal, if not paid for by Frazier in a reasonable time. Upon arrival at its place of destination, the coal erroneously was placed upon the defendant's chute, unloaded with its own coal, and subsequently paid for by defendant. The bill of lading was never delivered to or in possession of plaintiff, but was in possession of

the agent of defendant, and plaintiff never paid, nor did he tender payment, for the coal, to consignors, nor to defendant, though his testimony tended to prove that he was ready and willing to make payment of its purchase price, \$2.15 per ton, on delivery or tender of the coal. He further stated in his examination in chief that the coal was worth at the time \$2.75 per ton in Baring, and which price he was offered for it. The railroad agent assured him he would order immediately another car load of coal, and plaintiff seemed to have awaited in vain for compliance with this promise to replace the car, but borrowed a ton of coal pending its arrival. This, an action by plaintiff for conversion of the car load of coal, was tried before the court, which found for the plaintiff.

It is a legal principle, generally recognized, that, when no express provision is made for time of payment, a sale of personalty is presumed by law to be a cash transaction, and the delivery of the property and the payment of the purchase price are concurrent, and the buyer is not entitled to demand or to receive delivery or possession of the goods, the subject of the contract, without proffer of the purchase price, or its actual payment. In absence of other arrangement, express or implied, concerning the time of payment of the price, and providing for future payment, or where the parties remain entirely silent respecting it, the rule is clearly established that the sale is made impliedly for cash, and title to the property sold does not pass to the vendee until payment or tender of payment has been made. The payment of the purchase price becomes a condition precedent by legal implication, and, except in event of waiver by the vendor, title does not vest in the buyer until after performance of such condition. Those principles are upheld and asserted by an unbroken line of decisions of the appellate courts of this state, as well as by the treatises of the most eminent writers upon the subject. Tiedeman, Sales, § 93; 1 Benjamin, Sales (4th Ed.) 318, 345; Southwestern, etc., Co. v. Plant, 45 Mo. 517; Southwestern, etc., Co. v. Stanard, 44 Mo. 71, 100 Am. Dec. 255; Hall et al. v. Ry., 50 Mo. App. 179; Stresovich v. Kesting, 63 Mo. App. 57. Logically it would have followed, in such event, that plaintiff, having neither the right of property in, nor the right of possession to, the coal, was precluded from maintaining trover or conversion therefor, for, unless he had the legal title or the right to the possession of the coal, at the time it was alleged to have been converted, he was not entitled to recover. Johnson, etc., Co. v. Bank, 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615; Parker v. Rodes, 79 Mo. 83; Myers v. Hale, 17 Mo. App. 204. Nor would the issuance of the bill of lading in plaintiff's name as consignee have conveyed to him conclusively title or right of possession to the coal, for a bill of lading is but prima facie evidence of

the intent of the vendor to part with his title or interest in the property for which it is issued, and extraneous evidence is admissible for the purpose of showing the true intent of the parties. *Scharff v. Meyer*, 133 Mo., loc. cit. 445, 34 S. W. 858, 54 Am. St. Rep. 672. But the testimony of Joseph Lambeth established that he relied on the promise of the agent of appellant, if the consignors did not receive payment from respondent in a reasonable time, to notify him, and he would see that they got their money. This evidence, if not decisively negating the contentions of appellant that the sale was made for cash, or that the consignors did not intend to have the coal delivered to Frazier until payment had been made, and that the bill of lading, in lieu of delivery to him, was sent to the agent of appellant in furtherance of the purpose that the coal should be withheld from Frazier until after he had made payment, at least is evidence from which it may be fairly inferred that the sale was not for cash on delivery, but to be paid for within a reasonable time thereafter, and the finding of the trial court on such issue will not be disturbed.

2. The answer was a general denial, and therefore defendant in this action was barred from recouping the price of the coal, which it seems to have paid consignors after this action was begun, and for the same reason no allowance for freight can be made; nor is any question of subrogation of defendant to rights of the consignor ensuing from such payment before us. The judgment of the court for plaintiff in the sum of \$63.25 finds abundant support in the testimony, from which it is established, beyond dispute, that defendant appropriated to its own use the car load of coal ordered by, and belonging to, plaintiff. Although this action of defendant may have occurred through an honest mistake of its agents regarding the ownership of the particular car load, yet plaintiff was none the less entitled to redress.

The judgment is for the right party, and is affirmed.

BLAND, P. J., and GOODE, J., concur.

BUREN v. ST. LOUIS TRANSIT CO.*

(Court of Appeals at St. Louis, Mo. Feb. 2, 1904.)

STREET RAILWAYS—PERSONAL INJURIES—COLLISION WITH VEHICLE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY—DRIVING ON TRACK—LIGHTS.

1. A teamster has a right to drive on a street railway track if in doing so he does not unnecessarily interfere with the operation of cars on the track.

2. It was the duty of a street railway company to have its car so lighted as to be seen a safe distance by plaintiff, who was driving on the street, on a dark night, or to sound the gong or give warning of its approach.

3. In an action against a street railway company for injuries to plaintiff, evidence that on a very dark night plaintiff was driving in the street on the left track of the street railway at a rapid speed, when he met and collided with a street car, did not show contributory negligence as a matter of law, but the question was for the jury.

Appeal from Circuit Court, St. Charles County; E. M. Hughes, Judge.

Action by August Buren against the St. Louis Transit Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Boyle, Priest & Lehman, for appellant. Daniel Dillon and T. F. McDearmon, for respondent.

BLAND, P. J. Plaintiff was engaged in the business of selling crackers, cakes, bread, etc., to groceries, saloons, etc., in the city of St. Louis, and had a regular line of customers. He owned a wagon and team, with which he made deliveries of goods to his customers. He lived in the northern part of the city on Florissant avenue, and kept his team at his home. In the afternoon of March 26, 1902, he loaded his wagon at a downtown bakery, with the intention of delivering the goods to his customers the next morning. He had with him Henry Herbert, his helper, and on his way home from the bakery picked up Louis Wagoner, who lived near him. There was a saloon on Florissant avenue, from 600 to 800 feet south of plaintiff's home. When plaintiff arrived at the saloon, Herbert, Wagoner, and himself stopped there for 15 or 20 minutes and drank one or two rounds of beer. The three then got on the seat of the wagon, plaintiff on the right, Wagoner in the middle, and Herbert on the left. Plaintiff did the driving. This was about 7:30 o'clock in the evening. It was very dark, and, some of the witnesses say, foggy and drizzling rain. The evidence is that on Florissant avenue, where plaintiff was driving, the defendant has two railway tracks. The one on the east side of the street is laid with T rails so wagons cannot drive on the track. East of this track the street was not improved, and was not used at that time by teamsters, so the only space on the street that could be used by wagons and teams was the west track of the railway and that portion of the street west of the west track which was improved. The evidence is that wagons traveling south were entitled to the right of way on that portion of the street west of the west track. There is also evidence that this part of the street was being cleaned at the time, and there were piles of mud and dirt in it. Plaintiff's evidence is that when he got on his wagon at the saloon he drove eastwardly until he came to the west railway track; that he then turned due north, to drive to his home, with the wheels on the east side of his wagon in the track and one or both of his horses between the rails; that he was driving north in a fast trot, and when he had proceeded

*Rehearing denied February 16, 1904.

¶ 1. See *Street Railroads*, vol. 44, Cent. Dig. § 212.

250 or 300 feet from the saloon his wagon was struck by something running south; he did not know what; he was thrown to the ground with such force as to render him unconscious, and was severely injured. The evidence is that the wagon and team met a south-bound car on the west track and collided with the car, in consequence of which one of the horses was killed, the wagon smashed to pieces, its contents broken up and scattered, and plaintiff thrown to the ground; that Herbert and Wagoner were thrown on the front vestibule of the car; and that the car proceeded some 50 or 60 feet after it had collided with the wagon and team. Plaintiff testified that he looked and listened for a car, but he neither saw nor heard one coming. Herbert and Wagoner testified that they were unconscious of the approach or presence of the car until it struck the team and they found themselves landed on the vestibule of the car. The three occupants of the wagon testified that there was no light in the car; that there was no headlight, and the gong or bell was not sounded, nor any warning whatever given of its approach. There was considerable downgrade to the south at the place of the collision; but H. C. Montgomery, an ex-motorman, who had had something over a month's experience as a motorman, testified that a car running at a speed of 8 miles per hour could have been stopped on that grade in from 55 to 60 feet with the brakes, and in 35 feet with the brakes and reverse. There was evidence of the value of the horse killed, the damage to the wagon, and of the extent and character of plaintiff's injury, of his loss of time, and of his earning capacity.

Defendant's motorman, Howard Johnson, testified, in substance, that the accident occurred about 300 feet south of Marcus avenue, the car going downgrade; that the night was very dark and foggy and misting rain; that there were lights in the car over the vestibule, visible to persons on the outside; that he first saw the wagon, about 30 feet in front of the car, "turn in right across in front of me, met me full in the face"; that the car and team of horses were going at about the same speed—about eight miles an hour—the horses being in a gallop; that he did everything in his power to stop the car and prevent the collision, but was unable to do so; that he rang the gong just before plaintiff turned in on the track.

James Darling, the conductor, testified, in substance, that the electric lights were lighted in the car, and there was an overhead glass transom; that there was a headlight on top, which was lighted when they left the end of the road about five minutes before the accident, and that there was an illuminated sign outside the car; that a man coming from the south could see the car 200 or 300 feet; that he did not see the accident, but from the looks of the ground supposed the car ran about 10 or 15 feet after the

collision; that after the collision the car was standing on the rails, with the trolley on. Witness supposed the car was running about 8 or 10 miles an hour.

Otto G. Kanick testified that he lived about 300 feet from where the accident happened on Florissant avenue, and saw the collision. That he was standing about 400 feet south of where it occurred on the street crossing, waiting for a car; that he was standing between the saloon and the place of the accident; that he saw these parties come out of the saloon; that they passed him, and he had to get out of their way, or they would have run over him; that they were driving fast, and the night was very wet and dark; that he was standing on the crossing, and saw the car as soon as it came to the top of Marcus avenue, about 1,000 feet away; that he saw the light of the car 1,000 feet away, and saw the headlight immediately before it struck the wagon; that there was nothing to obstruct a man's view sitting on top of a wagon; that he saw the car distinctly; that the men were driving fast, and when he saw them go on the track and the car coming he was watching for a collision, because the car was coming on the very track the wagon went up on.

At the close of plaintiff's evidence, and again at the close of all the evidence, defendant offered instructions that under the evidence plaintiff was not entitled to recover. These instructions were denied. Others were given submitting the issues to the jury, who returned a verdict for plaintiff signed by 10 of the jurors, assessing his damages at \$500. Defendant filed a motion for new trial, which was overruled by the court, and judgment entered for plaintiff on the verdict for \$500. Defendant appealed.

The only error discussed in the brief of appellant's counsel is the refusal of the court to grant the instructions offered by it at the close of all the evidence, that "under the law and the evidence plaintiff is not entitled to recover." Plaintiff offered substantial evidence tending to prove that the defendant was running its car over a traveled street on a dark night without any headlight or other light by which it could be seen, and without sounding the gong to notify persons who might be on the track, or so near thereto as to be struck by a passing car, of its approach. If these facts be true, then the defendant's motorman and conductor were guilty of gross negligence, and the only theory upon which the instructions in the nature of a demurrer to the evidence should have been given was that all the evidence shows conclusively that plaintiff was guilty of negligence which directly contributed to his injury. The plaintiff had a right to drive on the defendant's railway track, if in doing so he did not unnecessarily interfere with the operation of cars on the track. *Oates v. Railway*, 168 Mo., loc. cit. 544, 68 S. W. 906, 58 L. R. A. 447; *Degel v. St. Louis Transit*

Co. (Mo. App.) 74 S. W., loc. cit. 157; Kolb v. St. Louis Transit Co. (Mo. App.) 76 S. W. 1053. Negligence, therefore, cannot be imputed to him from the mere fact that he was driving on the track; nor do we think that a court can, as a matter of law, say that he was guilty of such negligence as to bar recovery from the fact that he drove on the track at a rapid speed, in the nighttime, when it was very dark. It was the duty of the defendant to have its cars so lighted as to be seen a safe distance by persons using the street, or to sound the gong or give some warning of its approach to enable persons to keep out of its way. Noll v. St. Louis Transit Co. (Mo. App.) 73 S. W. 907; Klockenbrink v. Railway, 172 Mo., loc. cit. 689, 72 S. W. 900; Gratiot v. Railway, 116 Mo., loc. cit. 464, 21 S. W. 1094, 18 L. R. A. 189; Dahlstrom v. Railway, 108 Mo., loc. cit. 536, 18 S. W. 919; Conrad Grocer Co. v. Railroad, 89 Mo. App., loc. cit. 397. Plaintiff had a right to rely on the performance of this duty by the railway company, and to assume that, if a car was approaching him from the north, it would have a headlight by which it could be seen, or the gong would be sounded to give warning of its approach in time to allow him to move off the track in safety. We do not hold that the evidence does not tend to show that plaintiff was guilty of negligence that directly contributed to his injury. In fact, we think the preponderance of the evidence is that way. But it is not all that way, and when there is evidence pro and con on an issue of fact on trial it is for the jury to pass upon its probative force; and when they have done so, and the trial court has approved their finding by overruling the motion of the losing party to set aside the verdict, that issue of fact is not open to review by an appellate court.

The judgment is affirmed.

REYBURN and GOODE, JJ., concur.

STATE v. BATES.

(Court of Appeals at St. Louis, Mo. Feb. 2, 1904.)

CRIMINAL LAW—APPEAL WITHOUT BILL OF EXCEPTIONS—REVIEW.

1. Where, on an appeal in a criminal case, the evidence is not preserved, and there is no bill of exceptions in the transcript, the court is confined to errors appearing on an inspection of the record proper.

Appeal from Criminal Court, Greene County; J. J. Glendon, Judge.

George W. Bates was convicted of petit larceny, and he appeals. Affirmed.

Z. Taylor, J. A. Moore, and F. M. Wolf, for appellant. A. B. Loran, for respondent.

GOODE, J. This appeal was prosecuted from the conviction of the defendant of the

crime of petit larceny. None of the evidence is preserved. In fact, on looking into the transcript we find it contains no bill of exceptions. This confines us to an inspection of the record proper for errors, in which we discover none. The information was in the usual form, and the verdict and sentence regular. The judgment is therefore affirmed.

BLAND, P. J., and REYBURN, J., concur.

MILLER v. GEO. B. PECK DRY GOODS CO.

(Court of Appeals at Kansas City, Mo. Feb. 1, 1904.)

NEGLIGENCE—STORES—DANGEROUS PREMISES—CARE REQUIRED—GUARDS—INJURIES TO CHILDREN—QUESTIONS FOR JURY.

1. Defendants maintained as a part of their department store a general reception room on the third floor, to which women accompanied by little children were invited to come. On the side of the room was a large window, hung on pivots, with sliding bolts at the top and bottom. When unbolted it would swing outward with slight pressure. Plaintiff, a child, between one and two years old, was taken to the room by her mother, where she was left with a lady friend while the mother made purchases, and while playing about the window plaintiff pressed the sash open, which caused her to fall to the pavement. Plaintiff's petition charged negligence in the maintenance of such a window without crossbars to keep children from falling out in case the window should be opened, or should be shut, but unbolted. Held, that defendant was not entitled to the direction of a verdict on the ground that the window was safe when fastened, and that up to a short time before the misfortune the window had been bolted, and thereafter had been unfastened without defendant's knowledge.

2. Whether defendant was guilty of negligence in failing to protect the window with bars was a question for the jury.

3. Where a department store maintained a reception room for female patrons who were accompanied by their children, it was bound to keep such room in such a condition as would be reasonably free from danger to such children.

Appeal from Circuit Court, Cass County; W. L. Jarrott, Judge.

Action by Bernice Miller against the George B. Peck Dry Goods Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Harkless, O'Grady & Crysler, for appellant. Wilson & Wilson and Frank P. Sebree, for respondent.

ELLISON, J. This action is for personal injury received by the plaintiff as the result of falling out of a window of defendant's building to the street 25 feet below. At time of injury plaintiff was a child between one and two years old. The judgment in the trial court was for the plaintiff.

It appears that defendant is the proprietor of a large retail business in Kansas City, known as a "department store"; that in the prosecution of such business it has and maintains a building several stories in height at the northwest corner of Eleventh and Main

streets; that on the third floor of the building, 25 feet above the sidewalk, defendant maintains a large general reception room, to which the public, including women accompanied by little children, are invited to come; that on the south side of the room is a large window, extending down to within 3 or 4 inches of the floor, the lower sash of which was between 5 and 6 feet high, and hung on pivots with sliding bolts at the top and bottom to hold it in place; that when unbolted it would, with slight pressure, swing outwardly from the bottom; that some time prior to the injury to plaintiff there were crossbars or rods fastened from the bottom of the window frame up to a height sufficient to prevent children from falling out of the window should it be open. These were maintained by the defendant in the summer months, but at the time of the accident had been removed. On November 5, 1901, plaintiff's mother took her to defendant's reception room. They were accompanied by a lady friend and two other small children, one being the friend's and the other a sister of plaintiff. The mother, desiring to do some shopping, left plaintiff and the other child in charge of the friend while she went out into the body of the store to make her purchases. While she was gone, the two older children were playing about the room near the window, the plaintiff taking part in a limited way. They were on and off of a couch near the window, and at times stood on the window sill, which, as before stated, was down nearly flush with the floor. During this play of the children plaintiff sat on the window sill, and, leaning back against the glass, pressed the sash out, which caused her to fall to the pavement below. Though the fall was 25 feet and the pavement was stone, yet plaintiff escaped death; but her injuries were such as to afford no ground of complaint at the amount of the verdict.

To hold defendant liable for the injury, the petition charges four specific acts of negligence: First, that the sash was left so that it would swing out when only slight pressure was applied, such as by a little child leaning against it; second, that, the sash being swung on pivots, defendant did not have any bars, or grating, or other fixtures in the window so as to prevent small children like plaintiff from falling out; third, that defendant failed to notify plaintiff's mother, or the lady friend left in charge of the children, of the condition of the window; fourth, that defendant kept the room for the reception of mothers and small children, well knowing that a child "could and might easily fall out of the window."

The principal point urged by defendant is that plaintiff did not make a case, and that its demurrer to the evidence ought to have been sustained. This is based on the fact that the window sash was provided with a bolt at the top and bottom, with which it was ordinarily fastened, and that when so fasten-

ed it was perfectly safe; that up to an hour and a half of the time of the misfortune to plaintiff it was known to have been bolted; that somewhere between that time and the accident some one, without the knowledge of defendant or its servants, had unfastened the bolts and opened the window, and then left it shut or swung back in place, but neglected to fasten it; that defendant could not, in reason, be expected to foresee that that would be done, and, in consequence, that a child might fall out.

Keeping in mind, in this connection, that the petition charges that it was negligence in defendant to maintain such a window at such a place, without crossbars or rods to keep children from falling out if it should be open, or should be shut but unbolted, the defendant's contention amounts to a statement that the trial court, as a matter of law, should have declared such omission was not negligence. We are of opinion that the trial court's action in refusing to sustain the demurrer was proper. In view of the fact that the room was one almost constantly occupied by women and small children, it seems to us that to maintain, 25 feet above the ground, a window which extended to the floor, with no bars across it, in the sole dependence that it would remain constantly bolted, made a state of case which should be left to the jury that they might say whether that was such an act, or series of acts, as a man of ordinary prudence and carefulness would commit. It certainly should occur to any careful man that a window hung on pivots so as to swing out from the bottom, coming to the floor of a room in the third story of a building, and not opening out onto a balcony, the room to be occupied by large numbers of women and small children, should have more safety guard than merely two bolts, which could be so easily withdrawn. The law as to the duty that a person owes to those he invites onto his premises has been so uniformly stated as that it has grown to be uncontroverted that he must keep his premises in such condition as to be reasonably free from danger, and that, if necessarily he maintains dangerous places in the prosecution of his business, he must have them guarded, or give warning of their existence. It has been discussed and stated by the Supreme Court in *O'Donnell v. Patton*, 117 Mo. 13, 22 S. W. 903; by the St. Louis Court of Appeals, through Judges Thompson and Goode, in *Welch v. McAllister*, 15 Mo. App. 492, *Sykes v. Ry. Co.*, 88 Mo. App. 193, 204, and *Kean v. Schoening*, 77 S. W. 335; and by this court, through Judge Smith, in *Hartman v. Muehlebach*, 64 Mo. App. 578. The difference between this case and ordinary cases lies in that the plaintiff, being a mere helpless infant, was not on defendant's premises for the transaction of business with defendant. But that difference in fact makes no difference in point of law; for, it being shown that defendant maintained the room as a reception or waiting room

for women patrons of the store who were accompanied by their children, the invitation which defendant gave out to the trading public must be held to include such children as plaintiff who were taken there by their parents. From this it follows that the same duty which the owner owes to his customer he likewise owes to the customer's child.

What we have said disposes of the greater part of the complaint as to defendant's refused instructions. We regard the twelfth refused instruction, as refused and as modified and given, as being far too liberal for defendant. That instruction authorized a verdict for defendant if the window was bolted an hour and a half before the accident, and some one in the room unfastened it, and defendant did not know, nor by diligence could have known, it was unfastened. It left out of consideration whether defendant should have had bars across the window. Bars or rods would have made the window safe in just the situation the instruction mentions.

We have considered the insistence of defendant that the petition does not authorize a recovery on the ground of negligence in omitting to have bars across the window. We think that it does. It is true it charges that the sash was hung on pivots so that a slight pressure at the bottom would cause it to swing outward, and that it makes no reference to the bolts with which the evidence shows it was provided, so that when fastened it could not be moved. From this, defendant infers that the pleader based the whole case on the absence of fastening for the sash, on account of which it was negligence not to have bars across the window. But we believe the petition can fairly be interpreted to charge negligence in failing to maintain the bars for a sash swung on pivots at such a place, regardless of whether there were or were not fastenings to the sash which, when properly closed, would make it secure.

After full examination of all the points made against the judgment we feel that we are not authorized to disturb it, and in consequence order its affirmance. The other Judges concur.

KALBACH v. MATHIS et al.

(Court of Appeals at St. Louis, Mo. Feb. 2, 1904.)

ALTERATION—EXPLANATORY EVIDENCE—SUFFICIENCY—EQUITY—APPEAL—WASTE—INJUNCTION.

1. In a sheriff's deed the number of the range in the first description appeared to have been erased, and the figure "7" inserted in darker ink than the balance. In the second description the range number "five," as originally written, was crossed with an ink line, and the number "seven" written above in darker ink. *Held*, that while the presumption was that the alterations were made before acknowledgment and delivery, the appearance of the deed excited suspicion, and the court properly admitted explanatory evidence.

2. Evidence examined, and *held* to sustain a finding that alterations in the description in a sheriff's deed for taxes were made by the grantee after its execution, acknowledgment, and delivery.

3. Though, on appeal in equity, the court may review the evidence, it will defer somewhat to the opinion of the trial court.

4. In a suit to enjoin cutting of timber on land claimed by plaintiff under a sale for taxes it was found that he had made material alterations in the sheriff's deed after its acknowledgment and delivery to him. *Held*, that while plaintiff may have been entitled to relief as equitable owner, notwithstanding the alterations, provided the execution, levy, and notice of sale in the tax proceedings did not misdescribe the land, the appellate court could not grant such relief in the absence of the execution in the record on appeal.

Appeal from Circuit Court, Butler County; J. L. Fort, Judge.

Action by Harrison Kalbach against Rolla Mathis and others. From a judgment for defendants, plaintiff appeals. Affirmed.

E. R. Lentz, for appellant. W. N. Barron, for respondents.

GOODE, J. The purpose of this suit is to enjoin the defendants from cutting timber on the north half of the southeast quarter of section 2, township 25, range 7 east, in Butler county. The plaintiff alleged that he was the owner of the land. His chain of title consists of a tax deed executed by the sheriff of Butler county to Aaron Mast, pursuant to a sale under a judgment for taxes against Milo P. Marble, and a subsequent warranty deed from Mast to the plaintiff. The judgment for taxes was rendered May 9, 1890, at which time Marble held the title to the land, as was admitted. The defendants asserted a right to cut and remove timber from it by virtue of a parol license from Marble. At the trial the tax deed was offered in evidence by the plaintiff, but was excluded by the court on the ground that it had been altered in a material respect by Mast, the grantee, after its execution, acknowledgment, and delivery. The result was that plaintiff's suit failed, and he appealed, assigning for error that the court wrongly excluded the deed. The deed has been submitted, with the consent of both parties, for our inspection. We find that it was executed on a blank form of the kind in common use in conveying lands sold under judgments for taxes. In the first description of the land that occurs in the deed the section, township, and range appear in figures in parallel columns. In the column for the range number the figure "7" appears, but it is apparent at a glance that there has been an erasure of some figure previously there, and "7" inserted on the abraded surface. The marks of the tool by which the erasure was made are visible, and the figure "7" appears to be in blacker ink than the rest of the deed. The second description, to wit, the granting clause, has the range written out in full, and

it was originally written as "five east." The word "five" was erased by an ink line drawn across it, and the word "seven" written above it in much blacker ink than the other portions of the deed. The clerk's entry of the acknowledgment taken in open court under date of November 15, 1890, is contained in the bill of exceptions, having been introduced by the defendants, and is as follows: "Now comes Samuel Gardner, sheriff of this county, and in open court, before the judge thereof, acknowledges the execution of a deed as such sheriff to A. Mast, for the real estate described in said deed as follows, to-wit: the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 2, Township 25, Range 5, which was sold at this term of court as the property of Milo P. Marble, Silas B. Jonas, O. P. Hedges, Frank Titus, J. A. Forbes, Charles P. Fuller and Western Mortgage & Investment Co., by virtue of a special execution issued from the office of the clerk of this court upon judgment for taxes in favor of the State of Missouri, to the use of Henry Turner, collector, etc., and against said Milo P. Marble, Silas B. Jonas, O. P. Hedges, Frank Titus, J. A. Forbes, Charles P. Fuller and Western Mortgage & Investment Co. defendants. It is ordered that the clerk of this court endorse upon said deed a certificate of said acknowledgment under his hand and official seal." That acknowledgment, it will be observed, gives the range as "five," instead of "seven," thus corresponding with the deed as it was first written. The law is that alterations in instruments of this character are presumed to have been inserted innocently, and before acknowledgment and delivery. But, if there are suspicious circumstances apparent on the face of an instrument offered in evidence, the court may let in testimony, to be weighed by the triers of the facts, as to when the alterations were made, and whether they were made by a party beneficially interested, subsequent to acknowledgment and delivery. The trial court took evidence on this question, and, we think, properly, as the appearance of the instrument excites suspicion as to the validity of the alterations, and therefore called for an explanation. *Paramore v. Lindsey*, 63 Mo. 66. Besides the entry of the acknowledgment, two witnesses were introduced, who testified as experts that the alterations were made in the handwriting of the grantee, Aaron Mast. Samuel Gardner, who executed the deed as sheriff, was put on the stand, and testified that the manuscript portions of the deed as originally written were in the handwriting of Geo. W. Register, but that the alterations were in a different handwriting, were not made by his authority as sheriff, and he believed they were made since the delivery of the deed. Mast testified that he did not make the alterations, and knew nothing about them. The purport of his testimony was that the deed was in the same condition it was when he received

it. On this evidence the court, as trier of the facts, refused to admit the deed in evidence.

This is an equity case, and we are at liberty to review the evidence; but it is customary in such instances to defer somewhat to the opinion of the trial judge, and we do not feel that the weight of the evidence is so strongly against the finding made below that we ought to reverse it. It is hard to escape the conviction that the alterations were made after the acknowledgment and delivery of the deed, in view of the evidence; especially as the entry of the acknowledgment corresponds with the deed as originally written in regard to the range number. We will accept the finding of the learned trial judge as correct.

This is not an action for damages for trespass, but is a suit to prevent waste by an injunction. A legal action for damages can be maintained only by the party in possession or by the holder of the legal title who has constructive possession. With the sheriff's deed out of the evidence, the legal title cannot be established in Kalbach, the plaintiff, and he is not in possession of the land, which is wild. He could not, therefore, maintain a legal action for trespass. But we apprehend that the equitable owner of the estate may have relief by injunction against waste. *Webb v. Boyle*, 68 N. C. 273. If all the proceedings leading up to this sale were regular, plaintiff would be entitled to a corrected deed, we think. *Ozark Land & Lumber Co. v. Franks*, 156 Mo. 673, 57 S. W. 540; *Dollarhide v. Parks*, 92 Mo. 178, 5 S. W. 3. He may be the equitable owner of the land, and only lack the legal title because of a mistake in the description in the tax deed. This is suggested by the judgment for taxes rendered in the suit against Marble. That judgment was copied into the bill of exceptions, and is against the tract of land in controversy, which is described as in range 7. It is manifest, therefore, that Marble's land was in range 7, and that the tax proceedings were against the land by its correct description; the error in describing it having occurred subsequent to the judgment. On this account we were inclined to favor the plaintiff's suit; but on reflection have concluded we may not do so, because, perchance, there may have been a mistake in the description in the execution levy and notice of sale. If the execution misdescribes the lands, plaintiff would, of course, not be entitled to a corrected deed, for the execution must follow the judgment, and, if it fails to do so, no title passes by the sale. The execution is not in the record, and, as the presumption is in favor of the correctness of the decision below, in the absence of an affirmative showing of error we cannot grant the plaintiff relief.

The judgment is affirmed.

BLAND, P. J., and REYBURN, J., concur.

**FIRST NAT. BANK OF LEAVENWORTH,
KAN., v. WRIGHT.**

(Court of Appeals at St. Louis, Mo. Feb. 2, 1904.)

CHattel Mortgage—Private Sale by Mortgagee—Agency—Evidence—Lost Letters—Testimony of Wife.

1. That a wife wrote letters for her husband, at his dictation, relating to the settlement of his note and mortgage on cattle, and kept his accounts, and did his writing generally, does not constitute her his agent so as to make her competent, under Rev. St. 1899, § 4650, cl. 3, providing that a wife may testify as to any transaction conducted by her as his agent, to testify as to the transaction between him and an agent of the mortgagor as to settlement of the debt.

2. Where a mortgagor testified that he had received letters from the mortgagee, a bank, as to the authority of its agent, and that he had lost them, and had no copies, and the bank had no copies, and denied they were written, his testimony as to their contents was admissible.

3. That a letter from a bank was handed to mortgagor by its authorized agent is prima facie evidence of its execution by the bank.

4. Evidence held insufficient to sustain a finding that a bank's agent, sent to get mortgaged goods from the mortgagor, was authorized to make any settlement or compromise of the debt.

5. A chattel mortgagee, whose agent sells the mortgaged goods at private sale under a power in the mortgage, is the mortgagor's trustee, and as such must stand the loss if they are sold for less than the best price obtainable.

Appeal from Circuit Court, Ralls County; David H. Eby, Judge.

Action by the First National Bank of Leavenworth, Kan., against D. W. Wright. From a judgment for defendant, plaintiff appeals. Reversed.

Warner, Dean, McLeod & Holden and David Wallace, for appellant. Allison & Allison and E. L. Alford, for respondent.

BLAND, P. J. In June, 1899, defendant purchased of W. B. McAllister & Co., at Kansas City, Kan., 54 head of cattle for \$2,268. For the purchase price defendant gave his promissory note secured by a mortgage on the cattle. He moved the cattle to his farm in Ralls county, Mo. At the maturity of the note a new one was given for the principal and accumulated interest on the original note, aggregating \$2,378.45. The renewal note matured in six months from date, and bore interest at 9 per cent. per annum from maturity. Before maturity, the note, with the mortgage on the cattle, was, for value, transferred by McAllister & Co. to the plaintiff bank. On November 7, 1900, the bank indorsed on the note a credit of \$1,635.11. The suit is to recover the balance of the note. The answer, omitting caption, is as follows: "Now comes the defendant, and for answer to plaintiff's amended petition herein admits the execution of the note sued on as alleged in the plaintiff's said petition, and denies each and every allegation in said plaintiff's petition and not

herein expressly admitted. For other and further answer to plaintiff's said petition defendant states that on the 15th day of September, 1900, he paid the plaintiff the amount of said note in full and that said payment was then and there accepted and received by the plaintiff in full satisfaction and payment of said note. Defendant further states that on the 15th day of September, 1900, and before the commencement of this action, he, the said defendant, delivered to the plaintiff fifty-two cattle of great value, to wit, the value of ——— dollars, in full satisfaction and settlement and discharge of the note herein sued on and of the cause of action in plaintiff's said petition mentioned, and which said fifty-two cattle the plaintiff then and there accepted and received of and from the defendant in full satisfaction, settlement and discharge of said note sued on herein and of said cause of action in plaintiff's petition mentioned. And that at the time said cattle were so received by plaintiff, and at all times down to and including the 7th day of November, 1900, they were well worth the full amount of the principal and interest of said note. Defendant, having fully answered, asks to be discharged, and for costs and for general relief." The reply was a general denial of the new matter set up in the answer. The verdict and judgment were for the defendant. Plaintiff appealed.

About September 12, 1900, the plaintiff bank sent W. H. Davis to the farm of the defendant in Ralls county to see about the mortgaged cattle. After arriving there, he took possession of the cattle for the bank, secured pasturage for them for six or eight weeks, and then shipped them to Kansas City, and sold them there on November 7th, under the mortgage, at private sale. The net sum realized on the sale was \$1,635.11, which was credited on the note by the bank. The principal controversy in the case centers on an alleged agreement or compromise testified to by defendant and denied by plaintiff's evidence, that Davis took the cattle in full payment and satisfaction of the note, and on the authority or want of authority of Davis as the agent of the plaintiff to make the alleged agreement or compromise, if it was made. The note fell due June 26, 1900, when plaintiff wrote defendant, making inquiry about the mortgaged cattle and their condition. This letter the defendant answered as follows:

"Vandalia, Mo., July 2, 1900.

"Dear Sirs: Yours rec'd. There are 53 head of cattle on good blue grass. They will average now, I think, close to 1,100 lbs. They have not been weighed for some time. The cattle will remain on farm until sold. There is \$65 more against these cattle beside the note you hold, for feed bill last winter. Cattle are worth the money and doing well.
Yours truly, D. W. Wright."

No further correspondence was had between the parties until September 7, 1900,

when the defendant wrote plaintiff as follows:

"Dear Sir: The cattle are doing no good, shrinking every day. I am out of water in the pasture and can't do justice by them. I am not able to rent other pasture. I am ready to turn them over to you; you to pay a note of \$65 against them for feed bill. I have put in two summer's grass and winter's feed and that is all I can lose on them.

"Yours truly, D. W. Wright."

Plaintiff answered the above letter as follows:

"September 8, 1900.

"We are in receipt of your favor of the seventh inst. We were in hopes the cattle were getting better every day. If they are doing no good, something must be done at once. Please write me by return mail and say what, in your opinion, they will average in weight and quality, and if you would recommend shipping now."

On the following day defendant wrote the president of the bank as follows:

"A. Caldwell—Dear Sir: Yours just rec'd. In regard to the cattle the quality is good but they have shrunk until I hardly think they will average over 1,000 pounds. They did fine until my grass dried up and water gave out. I have no grass where the water is and they have got to breaking in the corn fields and they act so I have to keep them in lot and feed them green corn. I think you could get a pasture for them about eight to ten miles from here where there has been rain. The cattle are not ready for market. I will just have to give them up as I am not able to hold them. The cattle have nice big frames on them but no flesh. If the season had been as usual for grass and water they would have easily weighed 1,200 lbs. this fall. They should be put on good grass as soon as possible.

"Yours truly, D. W. Wright."

Defendant testified that in answer to this letter he received a letter from the president of the bank, which he had lost, and was unable to produce, and of which he had no copy. He was thereupon permitted to testify to its contents, which he gave as follows: "Well, answer to the letter to them, they just replied, 'Contents noted,' and the man that acted for them as their agent to look after those matters for them was out, and would be in a few days, and as soon as he returned they would send him down, and any transaction that I and him might make would be perfectly satisfactory to them." Defendant also testified that Davis brought with him a letter of introduction from the bank at the time he took possession of the cattle, and that this letter had also been lost or destroyed, and he had no copy of it. Thereupon he was permitted to testify from his memory of its contents, which he gave as follows: "Well, as I stated, 'This is to introduce to you our man Davis, who will represent us in this cattle business, and anything he should do or

you and him should do in the transaction that would transpire between you two would be satisfactory to us'—satisfactory to the bank. That was about the substance of it." It is in evidence by both parties that Davis had the note and mortgage, and also defendant's letter of September 7, 1900, in his possession when he took possession of the cattle. Defendant's evidence is that when Davis came to his place he had the cattle in a dry lot, and was feeding them on green corn, and after much dickering, and the making of several propositions by him to Davis, and after Davis had repeatedly examined the cattle, he (Davis) finally agreed to take the cattle in full payment of the note, and to pay a feed bill of \$65, which defendant owed for hay he had purchased and fed to the cattle the previous winter; that, after making this agreement, Davis took possession of the cattle, hired pasture for them, paid the feed bill of \$65, and subsequently hired pasture of him (defendant), and put the cattle on it, and kept them there until he shipped them to Kansas City. Over the objections of the plaintiff, he further testified that at the time Davis took possession of the cattle there were 52 head (two of the original 54 having died), and that they would have averaged 1,000 pounds in weight, and were worth from $4\frac{1}{2}$ to $4\frac{3}{4}$ cents per pound; and when the cattle were sold by Davis they were worth more on the market than was due on the note. Over the objection of plaintiff, defendant's wife testified (by deposition), corroborating all of the material part of the evidence of the defendant. The evidence on the part of the plaintiff is that A. Caldwell was the president of the plaintiff bank, and the principal officer in its management; that all the correspondence of plaintiff in respect to the note and cattle was conducted by him, and letterpress copies of all letters written by him to defendant were kept; that he wrote neither of the letters claimed to have been received by defendant and lost, and that the letterpress books of the bank (produced at the trial) contained no copy of either of the alleged letters; that Davis was a farmer and a cattle dealer living near Lawrence, Kan.; that he never was at any time a general agent of the bank, but was employed occasionally to look after cattle for the bank upon which it had or was considering loans, but had never been employed or authorized by the bank to deal with any question of indebtedness on cattle, and that he had no such authority to deal with defendant; that he was authorized to look after the cattle and had nothing to do with defendant's indebtedness to the bank; that all questions of indebtedness to it had been uniformly passed on by the bank itself. Davis testified that he had no letter of introduction from the bank to defendant that he remembered of; that defendant told him he had written the bank that he wanted to turn the cattle over to it, and that he thought they would turn his paper back to him; that he

told defendant he had nothing whatever to do with that, and said to defendant, "We will have to get some pasture for these cattle; something will have to be done to save the bank and to save you." Defendant said, if he turned over the cattle he ought to have his paper; and that he (Davis) told him he had no authority to give him the mortgage or papers, and, if he would not deliver the cattle on agreeable terms, he would have to replevy them; that defendant then said he did not want to have any trouble, that he was willing to give the cattle up, that he had no water or feed to take care of them; and he (Davis) then said, "I will get a rig, and go and hunt pasture for the cattle" and defendant volunteered to go with him, and they went and hunted pasture for the cattle. He further testified that the cattle brought \$3.60 per hundred on the Kansas City market, and sold for their full market value, and that no better offer had been made to him for the cattle by any one at any time after he took possession of them.

1. The evidence of defendant's wife was admitted on the theory that she was his agent. The only evidence, if evidence at all, of agency, is that she wrote her husband's letters for him as dictated by him, and kept his accounts, and did his writing generally. At common law a married woman is disqualified to testify for her husband in a civil suit brought by or against him, but under clause 3, § 4656, Rev. St. 1899, she is not disqualified to testify for him in respect to "any matter of business transactions, where the transaction was had or conducted by such married woman as the agent of her husband." The transactions (if they may be called transactions) testified to as having been conducted by the wife for her husband as his agent were writing his letters at his dictation and keeping his books of account. The transactions about which she may testify, under the statute, are transactions had with some person other than her husband, and not transactions had by the husband himself with some other person. There is not a word of evidence that any agreement in respect to the cattle or the debt was made by and between Davis and Mrs. Wright as the agent of her husband; on the contrary, defendant testified that the transaction was conducted by himself with Davis, and all his wife had to do with it was to write out the receipt for the cattle as dictated by Davis. She was not defendant's agent in this transaction. The transaction was not conducted by her, and she was an incompetent witness, and her deposition should have been excluded.

2. We do not think the court erred in admitting defendant's evidence of the contents of the letters he testified he had received from the bank and had lost. The evidence tends to show that the bank had no copy of these letters, if they had ever been written, and it denied that they had been written. In this state of the evidence the memory of de-

fendant of the contents of these lost instruments was the best and only means of reproducing their contents. It is contended that there was no proof of the execution of the alleged lost letter of introduction. The letter was not received in due course of mail, but, if received at all, it was handed to defendant by Davis, who was sent to him by plaintiff as its authorized agent. We think this was prima facie evidence, at least, of its execution.

3. If there is substantial evidence tending to show that Davis was authorized to settle or compromise the debt with defendant, it must be found in the letters of defendant or in those written by the bank to defendant, as both Davis and Caldwell, president of the bank, denied that any such authority was given. These letters must be construed with reference to the specific object had in mind when written. Meachem on Agency, § 306. The subject under consideration both by defendant and the plaintiff, and to which their letters specifically referred, was the present condition and the future care of the cattle. The defendant was without water or feed for them, and voluntarily called the attention of plaintiff to this fact by his letter of September 7th. The cattle had to be cared for. Defendant was in a position that he could not care for them. It was to the interest of both parties that they should not be allowed to perish, nor so shrink in flesh as to become of little or no value. The bank and the defendant had this condition in mind during the period of their correspondence, as is shown by the letters read in evidence. Nowhere is the debt itself mentioned in this correspondence, and the letters furnish no evidence whatever tending to prove that Davis was authorized to settle or compromise the debt. The alleged lost letters, the contents of which were testified to by defendant, do not mention the debt. The matters to which these letters refer were matters mentioned by defendant in his letters to plaintiff, to wit, the cattle and their condition, and "the transactions" to be made by the man to be sent by the bank cannot be construed to mean any transactions other than the possession and the care and disposition to be made of the cattle; hence these lost letters furnish no evidence that Davis was authorized to settle or compromise the debt itself. The circumstance that Davis paid the feed bill, and had the note and mortgage in his possession, we think would (if there was other evidence tending to prove his authority to settle the debt) corroborate such evidence, but, standing alone, is of itself insufficient to prove such authority. Opposed to the evidence of defendant that Davis did take the cattle in settlement and payment of the note, and that he had authority to do so, stands out prominently the fact that, notwithstanding the debt, according to defendant's contention, was paid and settled, and that he knew Davis had in his

possession the note and mortgage, yet he got neither of them, nor did he demand them of Davis. Instead he was contented to take from Davis the following receipt for the cattle:

"September 15, 1900.

"Received this day of D. W. Wright 52 head of cattle, the same being all now alive of the 54 head bought of J. B. McAllister Live Stock Commission Co. on June 21, 1899.

W. H. Davis."

This conduct on the part of defendant is wholly inconsistent with defendant's contention, and not in accord with the usual course of business.

We think the evidence was wholly insufficient to submit to the jury the question of Davis' authority to settle the debt. The mortgage provided that on default of payment of the note the cattle might be sold at Kansas City at private sale by the holder of the note. They were so sold by Davis as the agent of the bank. In these circumstances, the bank was the trustee of the defendant, and was bound to sell at the best obtainable price in the Kansas City market on the date when sold. If they were sacrificed, the bank should stand the loss.

For the errors herein noted, the judgment is reversed, and the cause remanded.

REYBURN and GOODE, JJ., concur; the latter in paragraphs 1 and 2.

STRICKLAND v. STATE.

(Court of Criminal Appeals of Texas. Feb. 17, 1904.)

BURGLARY—EVIDENCE—SUFFICIENCY.

1. The mere possession of recently stolen property, without evidence of a breaking, is insufficient to show a burglary.

Appeal from District Court, Erath County; W. J. Oxford, Judge.

Joe Strickland was convicted of burglary, and appeals. Reversed.

J. T. Daniel, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of burglary. The main question in the case is the sufficiency of the evidence. The state relies for a conviction upon the fact that appellant is shown to have traded a watch some time subsequent to the alleged burglary. On December 15th, Mrs. Starr, wife of the alleged owner of the house, put a watch in the top of her trunk in a glass case. Defendant was at the house at the time this was done. She immediately went about preparing supper. Just where appellant was at the time is not shown, but Mrs. Starr testifies she noticed him about the house after she began her evening work and the preparation of supper. She had previously

placed the watch in the trunk. This is the only time that appellant is shown to have been on the place from that day subsequently. On Thursday, the 19th, she and her husband went from the house at 8 or 9 o'clock in the morning, to a neighbor's, to pick cotton, returning about 4 o'clock in the evening, and for the first time she noticed that the watch was gone. Mrs. Starr closed the house, bolted or fastened the doors. On their return the house was in the same condition as when they left. There was no evidence of any disturbance about the premises in any way indicating that any one had been there. So we have a case established for the state of appellant's possession of said watch some time after the disappearance, with no testimony at all as to a breaking or entry of the house; and no evidence showing him about the premises, except on Sunday evening, when Mrs. Starr placed the watch in the trunk. It has been held that possession of recently stolen property taken from the burglarized house is a sufficient predicate to justify a conviction for burglary, but in all those cases, so far as we are aware, an entrance to the house by somebody was a necessary condition as a predicate for the burglary conviction. The mere possession of recently stolen property, without evidence of a breaking, is not sufficient to show a burglary. If the breaking is proved, and the party is recently thereafter found in possession of the property taken from the house, it would perhaps be sufficient to justify the conviction for the burglary; but the facts in this case do not so show. We have the fact that appellant was in the house on Sunday evening after the watch was placed in the trunk; that for the first time on Thursday following it was missed, with no evidence that the house was broken, or that defendant was in the house, or near the house, after said Sunday evening. We do not believe this evidence is sufficient to justify the conclusion that the watch was taken out by means of a burglarious entry. Because the evidence is not sufficient to justify the conviction, the judgment is reversed, and the cause remanded.

POSEY v. STATE.

(Court of Criminal Appeals of Texas. Feb. 10, 1904.)

HOMICIDE—INTENT IN USE OF WEAPON—STATE—INSTRUCTIONS—ERROR.

1. In a prosecution for homicide, where the defense is based on Pen. Code 1895, art. 717, providing that the instrument or means by which a homicide is committed are to be taken into consideration in judging the intent of the party offending, and that if the instrument be one not likely to produce death it is not to be presumed that death was designed, unless from the manner in which it was used such intention evidently appears, the defendant is entitled to a charge that if the jury find the instrument used in the homicide was one not likely to produce death, in that event, before they find defendant guilty of any grade of felonious homicide, they

¶ 1. See Burglary, vol. 8, Cent. Dig. § 104.
78 S.W.—44

are required to find that from the manner of the use of the instrument it was the evident intention of defendant to take the life of deceased.

2. Error in charging the jury, in a prosecution for homicide, that if they believed defendant voluntarily and unlawfully engaged in the combat with deceased, without any intention of killing or inflicting serious bodily injury on deceased, defendant would not be guilty of any higher grade of offense than manslaughter, is not cured by a subsequent charge that if the instrument used was not a deadly weapon, and defendant did not intend to kill deceased, but committed an unlawful assault on him, defendant would be guilty of an aggravated assault.

Appeal from District Court, Hunt County; H. C. Connor, Judge.

Bill Posey was convicted of manslaughter, and appeals. Reversed.

Bennett & Jones, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of manslaughter, and his punishment assessed at confinement in the penitentiary for a term of two years; hence this appeal.

It is not necessary to discuss any question in this case except that which relates to the charge of the court and the special requested charges which were refused. It appears that the homicide occurred in a sudden quarrel between appellant and deceased. Both of the parties were railroad men. Deceased, Murray, was the conductor of a freight train, and had just brought his train into the station. Appellant, who was sitting in the room in the station, asked deceased when he came in what engineer pulled him, and he replied "that damn crazy Bob Posey." Appellant told him he ought not to talk that way about Bob Posey, that he was his brother. Deceased told him he would talk that way about him. Appellant replied if he did he would have him to whip. Deceased told him if he would come outside he would do it, and walked out of the room. According to some of the witnesses, as he went out he inquired for a knife, in order to borrow it. Appellant followed him out, and just as he went out to where deceased was in the dark he grabbed what the witnesses term a sealing weight, or piece of iron, shown by the testimony to weigh from three to six pounds, and immediately after going out where deceased was struck him one blow, which fractured his skull, and which in about a week caused his death. Appellant contends that the weapon used was not a deadly weapon, and that appellant's defense was mainly based on article 717, Pen. Code 1895, and that the court failed to give an adequate charge where a homicide occurs and the weapon used is not of a deadly character. In the charge of the court on murder in the first and second degrees and manslaughter, all of which were given by the court, the same are submitted to the jury on the idea that a sealing iron was a deadly weapon; that is, the jury were instructed, if

they believed defendant struck deceased with a piece of sealing iron, and that the same was a deadly weapon, to find him guilty, etc. Subsequently, however, the court did copy article 717 in the charge, and then instructed the jury if appellant, under the influence of sudden passion, struck Murray on the head with a piece of sealing iron, which caused his death, and they believed said sealing iron was not in its nature calculated to produce death, and that the defendant did not intend to kill Murray, then to find him guilty of an aggravated assault and battery. In our opinion, the jury should have been distinctly instructed that if they believed the instrument used in the homicide was one not likely to produce death, in that event, before they could find appellant guilty of any grade of felonious homicide, they were required to find that from the manner of the use of said sealing iron it was the evident intention of appellant to take the life of deceased. Instead of this in the charge on manslaughter the court told the jury, if they believed defendant voluntarily and unlawfully engaged in a combat with A. B. Murray, without any intention of killing or inflicting serious bodily injury upon A. B. Murray, he would not be guilty of any higher grade of offense than manslaughter, which was tantamount to telling them that under such circumstances he would be guilty of manslaughter, whereas the fact is, if appellant had no intention of killing or inflicting serious bodily injury upon Murray, he could not be convicted of manslaughter. He must have such intention, and if the weapon is not of itself a deadly one the jury must gather such intention of killing from the manner in which the weapon was used, and it must evidently appear to them from such use of the weapon or instrument the intention to kill evidently appeared. The charge given, as quoted above, announcing an erroneous principle, was not cured by the court subsequently instructing the jury that if the sealing iron was not a deadly weapon, and that defendant did not intend to kill Murray, but made an unlawful assault on him, he would be guilty of an aggravated assault. It has been held that, where a homicide is committed with a weapon not necessarily of a deadly character, it is incumbent on the court to instruct the jury on this issue; and of course in such case, when an instruction is required, it should be a proper instruction, and not contradictory in terms. See *Shaw v. State*, 34 Tex. Cr. R. 435, 31 S. W. 361; *Griffin v. State*, 40 Tex. Cr. R. 312, 50 S. W. 366, 78 Am. St. Rep. 718; *Honeywell v. State*, 40 Tex. Cr. R. 199, 49 S. W. 586; *Fitch v. State* (Tex. Cr. App.) 36 S. W. 584. The court also gave an instruction on negligent homicide. We find nothing in the case authorizing an instruction on this subject.

For the errors discussed the judgment is reversed, and the cause remanded.

LOVE v. STATE.

(Court of Criminal Appeals of Texas. Jan. 27, 1904.)

CRIMINAL LAW—TRIAL—PROSECUTING ATTORNEY—ARGUMENTS—APPEAL—BILLS OF EXCEPTIONS—EVIDENCE—REVIEW.

1. Where, in a prosecution of a negress for theft from the person, she confessed to being a prostitute, argument on behalf of the county attorney, "that she was by her own confession a low-down, black whore, and a common prostitute, unworthy of belief," was legitimate.

2. Where the bill of exceptions does not show the ground of an objection to evidence, the ruling thereon cannot be reviewed.

3. Where a bill of exceptions to the exclusion of evidence does not show what the answer of the witness would have been, or in what way the testimony expected would have been pertinent to the issue on trial, the ruling cannot be reviewed.

4. Where a bill of exceptions to the allowance of a question, over objection that it was not pertinent, did not show what the answer of the witness was, or how or in what manner defendant was prejudiced thereby, the ruling was not reviewable.

Appeal from District Court, Ellis County; J. E. Dillard, Judge.

Mag Love was convicted of theft from the person, and she appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of theft from the person, and her punishment assessed at confinement in the penitentiary for a term of three years.

By bill appellant complains of the following language used by the assistant county attorney in his argument before the jury: "She was by her own confession a low-down, black whore, and a common prostitute, unworthy of belief." The bill does not show to whom this referred. However, were we permitted to indulge inferences to assist a bill of exceptions, it would be that it referred to defendant. The record shows that defendant did confess to being a prostitute; and it also shows that she is a negress. No special charge was asked by appellant that the court instruct the jury to disregard this language. Furthermore, in our opinion it was legitimate argument.

The second bill complains that the county attorney asked defendant if she was not a common prostitute. Appellant's counsel objected, but the bill does not show the ground of objection. In this there was no error.

While prosecuting witness, J. H. Kemble, was on the stand, he was asked by appellant's counsel, "If, when he was drunk on times different from the time under review, he had not on such occasions charged persons who were with him with stealing his money on such occasions, when such charges were false." State's Attorney objected, because the answer would be immaterial. The bill does not show what the answer of the witness would have been, or how or in what

way the testimony would have been pertinent to the issue on trial.

Bill No. 4 shows that the county attorney asked prosecutor Kemble as to George Mason giving him a drink and driving him around, and charging him \$7 for carriage fare. The objection was it was not pertinent to any count in the indictment against defendant, and was only calculated to prejudice the jury. This bill is defective in that it does not show what the answer of the prosecutor was, or how or in what way she was prejudiced by said answer.

Appellant made a motion to quash the indictment. The indictment is in good form, and the court properly overruled the motion.

The evidence supports the verdict of the jury. The judgment is affirmed.

THOMPSON v. STATE.

(Court of Criminal Appeals of Texas. Feb. 10, 1904.)

CRIMINAL LAW—CONTINUANCE—EVIDENCE—MATERIALITY—WEIGHT—COMPETENCY—ACCOMPLICES—INSTRUCTIONS.

1. On a prosecution for theft of a red heifer a continuance was sought because of the absence of a witness who would testify that he knew the red heifer of prosecutor, claimed to have been lost, and that owned by defendant; that he was at defendant's house just after he killed the heifer in question, and recognized the hide as that of defendant's heifer; and that just after the killing of the heifer he saw prosecutor's heifer with his cattle. *Held*, that the evidence was material.

2. Though, on a motion for a continuance because of the absence of a witness, the diligence shown was not entirely sufficient, the motion should have been granted, the evidence being material, and the witness a respectable white person, and it appearing that most of the witnesses were negroes; and that the state's case depended on the testimony of an accomplice, a small girl, who had fled from defendant's house and threatened to send him to the penitentiary.

3. In a prosecution for theft of a heifer a witness testified that while defendant was under arrest witness, without warning him, asked defendant to show the hides he had, and that the defendant showed some hides, and, as witness started to look under a bed, defendant said the hide was under it. *Held*, that the evidence should have been excluded, since the statements and acts, either or both, of a party while under arrest for crime cannot be used against him unless he has been properly warned.

4. Statements of an accomplice, made out of court, could not corroborate her statements in court.

Appeal from District Court, Caldwell County; L. W. Moore, Judge.

Arthur Thompson was convicted of theft, and he appeals. Reversed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was charged with and convicted of theft of "one yearling." His first application for continuance was overruled. This was sought for the absence of a witness named Patton, who was fa-

¶ 4. See Criminal Law, vol. 14, Cent. Dig. § 1135.

millar with the cattle of appellant and the alleged owner, Carter, and knew well the red heifer Carter claims to have lost, and also the red heifer owned by appellant; that he will testify, when appellant killed the red heifer he was at appellant's house just afterwards, and saw the hide, and recognized it as coming off the red heifer owned by appellant. He will further testify that he was at appellant's house just after the animal was killed, looking after some cattle on which witness' father had a claim, and that he then saw the red heifer owned by Carter with Carter's cattle, and that it was alive after appellant had killed the red heifer claimed to have been stolen. And the witness will further testify that he was present when appellant cut the hide so as to fit on his (appellant's) bed. This testimony was of a most material character, and the application was evidently refused upon the theory that the diligence was not sufficient. Carter and appellant each had a red heifer about the same age, and very much alike in description. Appellant killed a red heifer, and the state's case is based upon the theory that it was Carter's heifer, and not appellant's. Without going into the question of diligence, we take it that it was sufficient under the circumstances, and, if it was not entirely sufficient, the materiality and bearing of this testimony upon the case was of a most cogent character, coming from a respectable white witness, and might have been of very great importance to appellant. It seems that most of the witnesses were negroes, and the state's case depended almost entirely upon the testimony of an accomplice, a small girl, who had fled from appellant's house, and had threatened to send him to the penitentiary.

The witness Holmes was permitted to testify that on the night of and while appellant was under arrest he asked appellant to show him the hides he had on the place. He was not warned nor advised that any statement he might make could be used against him. The witness stated that he asked appellant to show him all the hides he had on the place, and that appellant first showed him some pieces of a black hide; that he asked him if he had any more hides, and defendant showed him some hides in the bottoms of some chairs; that witness then looked under one bed and found no hide, and started to another bed, when defendant told him that the hide was under that bed. We believe this testimony should have been rejected. This was used as a criminating circumstance, and was evidently introduced for the purpose of showing that appellant had secreted the hide, and was falling or refusing to tell the officers as to the whereabouts of the hide. The statements and acts, either or both, of a party while under arrest for crime, cannot be used against him unless he has been properly warned.

Upon another trial a charge on accom-

plis's testimony should be more fully given. The witness Lela Moore was unquestionably an accomplice if the animal in question was the property of the alleged owner. Under the facts the jury should be charged not only with reference to the fact that she was an accomplice, and that she must not only be corroborated as required by the statute, but that her statements made out of court could not corroborate her statements in court, so as to have a tendency to connect defendant with the crime. In other words, an accomplice cannot corroborate herself by making statements. It must be by testimony independent of her statements.

The judgment is reversed, and the cause remanded.

GILFORD v. STATE.

(Court of Criminal Appeals of Texas. Dec. 16, 1903.)

CRIMINAL LAW—EVIDENCE—STATEMENTS IN ACCUSED'S PRESENCE—SEARCH—CONDUCT OF ACCUSED—CONTINUANCE—FIRST APPLICATION.

1. On a trial for the theft of bacon, it having been shown that the bacon was found in a crib on the premises of the accused's father, evidence of the father's statement, in the presence of the accused and of those searching the premises, that all the meat on the place was in the smokehouse, was admissible.

2. Where it was shown in evidence, on a trial for the theft of bacon, that the accused was seen with a sack at the smokehouse of the owner of the bacon on the night it was taken, evidence of an officer that on the following morning, under a search warrant, he searched the premises of the accused's father, found the meat freshly covered with fodder, and then arrested the accused, was admissible.

3. Evidence, on a trial for the theft of bacon, that when a search warrant was read to the accused's father, accused appeared excited, and trembled, and that in the search he led the way till they approached the corner, where the meat was found, when he fell behind, was admissible.

On Rehearing.

4. On a prosecution, a first application for continuance for absent witnesses, whose testimony would have strengthened accused's case materially, should be granted, though such evidence would be only cumulative.

Appeal from Walker County Court; Jno. C. Williams, Judge.

Morgan Gilford was convicted of the theft of bacon, and appeals. Reversed.

McKinney & Hill, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of the theft of bacon, and his punishment assessed at a fine of \$25, and 20 days' confinement in the county jail.

The alleged owner testified that about 1 o'clock at night his dogs aroused him from slumber, and, going out towards the smokehouse, he found appellant about three feet from the door, with a sack upon his back; that there were two or three parties off near

by. Under the circumstances he was afraid to arrest defendant, and returned to the house for his gun, and when he returned the parties were gone. The next morning he obtained a search warrant to search the premises of Arch Gilford, father of appellant, and a warrant for the arrest of appellant. He, with the officer Traylor and another party, went to the residence of appellant's father, where appellant resided, and looked about the smokehouse and henhouse for the stolen meat. Appellant was in the front, pushing open the doors, etc. Failing to find the meat at any of these places, they immediately started toward the crib, and, when they did, appellant fell behind. Upon examining the loft of the crib, a sack containing five sides of bacon was found, which the alleged owner identified as his, giving various reasons why he identified it. En route from the smokehouse of the alleged owner along the trail or pathway or road that led to appellant's residence, strings similar to those used by the alleged owner in hanging his meat were found scattered. These were gathered, and presented in evidence to the jury on the trial. Two theories were presented by appellant: First, an alibi, which is testified to by several of his family—his father, brothers, and a friend, by the name of Harris, spending the night. It was shown by all these witnesses that appellant slept in a room of the house, going to bed about 11 o'clock; that he was a very sound sleeper; it was difficult to wake him; and that he did not leave the house during the remainder of the night. One of his brothers also testified that this was his meat, or meat that he had obtained from his father for the purpose of paying for two poland-china pigs he had bought from a neighbor; that it was taken out of the smokehouse of his father, and put on a bench in the yard during the day; that his mother had locked the smokehouse after getting out the meat, and had gone to town, taking the keys with her; that after dinner (it being a prohibition election day) he decided to go to the polls and vote in the little town near by; so he took the meat, which he said was in the sack, and placed it in the loft of the crib and covered it with fodder, and it was found in this condition the following morning by the alleged owner and officers. He assigns, as a reason for putting it in the loft and covering it with fodder, that the party with whom he had traded for the pigs had failed to come for the meat, as he had promised, and, as he desired to go to vote, he concluded to put it in the loft of the crib and cover it with fodder to keep the cats from getting it. This is practically the case.

Application for continuance for some absent witnesses to corroborate the alibi was refused. We are of opinion that the court was correct in refusing it. The facts show not only that the evidence was not probably true, but entirely improbable, for the

alleged owner not only identifies defendant within three feet of the burglarized smokehouse, with two or three parties standing near by, but he and the officers tracked three parties from the scene of the burglary and theft to the residence of the father of appellant, where appellant and some of his brothers lived, and found the meat hid as described. The alleged owner identified the meat, and gave in detail the reasons why he knew it was his meat. The father of appellant, in the presence of appellant, stated there was no meat on the place, except that in the smokehouse, and that he had no other meat.

The alleged owner, Buckna, was permitted to testify that on the morning after he missed the meat he went to Capt. Fisher's, got a search warrant, and with Traylor, sheriff, and Nixon, went to Arch Gilford's house and searched for the meat, and found the five sides of bacon in the crib at Arch Gilford's; they searched his premises and could find no other meat, except some in the smokehouse. Arch Gilford said, in the defendant's presence, that this meat in the smokehouse was all the meat he had on the place. Appellant objected to this testimony because it was not shown that the defendant put the meat in the crib or that he was in any way concerned with putting it there, that it was not in his possession, and that no statement made by Arch Gilford could bind defendant. We are of opinion this testimony was properly admitted. The statements introduced were made in the presence and hearing of appellant, who was not under arrest. This testimony was clearly admissible. The fact that appellant did not then have it in immediate possession would make no difference.

The officer Traylor testified that Capt. Fisher, the justice of the peace, gave him the search warrant to search Arch Gilford's house for meat claimed to have been stolen from Frank Buckna; that he took John Nixon and Buckna with him; that he went to Arch Gilford's house and searched the smokehouse, some outhouses, and then searched the loft over the crib, and there found a sack of meat; and he thereupon arrested defendant. This was objected to because there was no evidence showing defendant was in possession of the meat, or that he put it in the crib, or that he either had possession exclusive or otherwise of the houses and premises; and because, it showed the premises were under the control of defendant's father. These grounds of objection are questions of fact, and are not verified by the bill as being facts. But concede the premises belonged to the father of appellant, and that appellant was not seen in possession of the crib or the meat at his father's, still it would be admissible. The evidence shows that he was seen at the smokehouse of Buckna the night before with the sack; that the meat was taken out of the house; that he and the parties who were seen near by went direct-

ly from the owner's smokehouse to Arch Gilford's place, and the meat found, freshly covered with fodder. Appellant lived at his father's, and was a boy between 18 and 19 years of age, and that was his home. These facts were clearly admissible.

The witness Nixon was permitted to testify that he went with the officer and the owner of the stolen meat to the premises searched, and, when Traylor read the search warrant to the father of appellant, that appellant appeared to be very much excited, and trembled; that they went to the out-houses, first searching the smokehouse, and then the fowlhouse, and then the cornerrib. In the cornerrib this witness found a sack of bacon under the fodder; the meat was covered up with the fodder; there were three or four bundles of fodder over it. "When we went to search the fowlhouse, the defendant went ahead of us, and threw open the door, and told us to search. He led the way to all the houses until we went to search the crib, and then he fell behind." To this testimony defendant objected, and asked the court to rule it out, and instruct the jury not to consider it. No further objection was urged. It was clearly admissible.

The other bills of exceptions, as we understand the record, have no merit in them, and are not discussed. The alleged newly discovered testimony presented in the motion for new trial, we think, is without merit. The facts, if true, were all known to defendant before the trial, or could have been easily ascertained. Much of it was touched on during the trial by the witnesses. As we understand the record, the judgment should be affirmed, and it is so ordered.

On Rehearing.

(Feb. 17, 1904.)

Just before adjourning at Tyler, the judgment herein was affirmed. Motion for rehearing was filed, and the case brought here for disposition on the motion. Appellant urges these grounds of the motion: First, the overruling of his application for continuance; second, the error in holding there was no merit in motion for new trial. The main ground urged in this connection was the failure of the court in the former opinion to hold that the newly discovered evidence was material. It is contended that in the original opinion the court misconceived the evidence upon one point, in this: that the opinion states the alleged owner, and the officers, Traylor and Nixon, tracked three parties from the scene of the burglary and theft to the residence of appellant's father, where appellant resided, and there found the meat said to have been taken from the alleged burglarized house. Upon a more critical examination of the testimony, we find this criticism of the opinion is correct. We find that the original owner, Buckna, only testified in regard to the tracks; that he then secured a

search warrant, and the services of the two officers, and went to the residence of appellant's father. This may have grown out of the fact that, immediately after the alleged owner had followed the tracks, he testified to securing the officers; and the writer understood, before rendering the former opinion, that it was after he secured the services of the officers that the following of the tracks occurred. But a more careful examination of the evidence shows this incorrect, and it leaves the only witness who followed the tracks the alleged owner, Buckna. After having read again more carefully the application for continuance, in connection with the testimony, we believe the absent testimony may have a material bearing upon the case; and, it being the first application, the rule with reference to cumulative testimony does not apply. The absent witnesses would have strengthened appellant's alibi, because one of these absent witnesses was expected to testify that he slept that night with defendant in the same bed at appellant's father's house, about three miles distant from the scene of the alleged burglary. Some of the absent witnesses would have also strengthened another phase of the case relied upon by appellant, to wit, that the meat found by the officers, and identified by the alleged owner, belonged to his brother, and was gotten by the brother from his father or mother, or both, for the purpose of paying for a couple of poland-china pigs that had been bought by this brother, and appellant was in no way connected with the meat. If these facts were true, of course they were material. Viewing the record on motion for rehearing, we have concluded, under all the circumstances, to grant the rehearing, and give appellant the opportunity of having the absent witnesses before the jury.

The motion for rehearing is granted, the judgment is reversed, and the cause remanded.

SMITH v. STATE.

(Court of Criminal Appeals of Texas. Jan. 27, 1904.)

HOMICIDE — EVIDENCE — MANSLAUGHTER — INSTRUCTIONS — MALICE — APPEAL — OBJECTIONS NOT MADE AT TRIAL—REVIEW.

1. Where there were only 1,000 negro voters in a county, out of a total of 9,000, and not more than 3 or 4 of such negroes were qualified to sit on a grand jury, and the jury commissioners testified that they did not discriminate against negroes in selecting the grand jurors, and did not take into consideration whether the jurors were negroes or white men, an indictment found against a negro by a grand jury consisting of white men was not invalid on the ground of discrimination, though there was evidence that but 2 negroes had served on the grand jury for a number of years.

2. An instruction in a prosecution for murder that the next lower grade of culpable homicide after murder in the first degree was murder in the second degree; that malice was also a necessary ingredient of such offense, but that the distinguishing feature, so far as the element of

malice was concerned, was that, in murder in the first degree, malice must be proved to the satisfaction of the jury, beyond a reasonable doubt, as an existing fact, while, in murder in the second degree, malice might be implied from the fact of an unlawful killing—was not erroneous, the court having properly defined both express and implied malice.

3. In a prosecution for homicide, an instruction that, if the jury have a reasonable doubt of defendant's guilt of murder in the first degree, they should acquit him of that offense, and proceed to inquire as to his guilt of murder in the second degree, was not objectionable as precluding the jury from acquitting on finding accused not guilty of murder in the first degree.

4. Defendant was cruel to his wife, and quarreled with and mistreated her. On the night of the homicide he went to her room, and, after some words had passed, she was heard to state to defendant, "If you are going to kill me, why, shoot me," and immediately he fired three shots, killing her instantly. He had previously threatened to take her life, and she had been in her room but a few minutes before the tragedy, after which he went to a saloon, told of the occurrence, and was arrested. *Held*, that such facts did not present the issue of manslaughter.

On Rehearing.

5. Where a clause of the court's charge was not excepted to at the trial, or objected to on motion for a new trial, a criticism thereof cannot be reviewed on appeal.

Appeal from District Court, Ellis County; J. E. Dillard, Judge.

Brozler Smith was convicted of murder, and he appeals. Affirmed.

Tom Whipple, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of murder, and his punishment assessed at death.

Motion was made to quash the indictment because of discrimination against the negro race, he being a negro. While the evidence shows there had been but 2 negroes summoned or served upon the jury for a number of years, yet the testimony does not show discrimination against that race. The facts show that there were perhaps 1,000 negro voters in Ellis county, and about 8,000 white voters in the county. Yet these witnesses further testify that they knew practically no negroes who were qualified to sit on the grand jury, none of them placing the number larger than 3 or 4. The commissioners testify they did not discriminate in selecting grand jurors—in fact, did not take into consideration whether jurors were negroes or white men. We do not believe there was any error in the refusal of the court to quash the indictment. *Hubbard v. State*, 67 S. W. 413; *Parker v. State*, 65 S. W. 1066; *Martin v. State*, 72 S. W. 386.

This excerpt of the charge is criticised: "That, in murder in the first degree, malice must be shown by the evidence to have existed, to the satisfaction of the jury, beyond a reasonable doubt, while, in murder in the second degree, malice would be implied from the fact of an unlawful killing." The whole paragraph, taken together, is as follows:

"The next lower grade of culpable homicide than murder in the first degree is murder of the second degree. Malice is also a necessary ingredient of the offense of murder in the second degree. The distinguishing feature, however, so far as the element of malice is concerned, is that, in murder in the first degree, malice must be proved to the satisfaction of the jury, beyond a reasonable doubt, as an existing fact, while, in murder in the second degree, malice will be implied from the fact of an unlawful killing." Then follows the definition of "implied malice," which is correct; the court having previously defined "malice" in its general sense, as well as "express malice." We do not believe there is any error, and the criticism is hypercritical. The charge, taken together with the definitions of "malice," and the two degrees of murder, and the necessary existence of malice in the two degrees, is clearly and fully defined by the court.

This excerpt of the charge is also criticised: "If the jury have a reasonable doubt of defendant being guilty of murder in the first degree, they should acquit him of that offense, and next proceed to inquire whether he is guilty of murder in the second degree." This is criticised because it precludes the idea of an acquittal, and requires the jury to consider as to the lower grade, although they may have believed defendant not guilty of any offense. This charge is not subject to this criticism. It simply informed them, if they believed him not guilty of murder in the first degree, they then may inquire whether he is guilty of murder in the second degree. This does not assume any fact against defendant, nor does it so inform the jury. After submitting murder in the second degree, they are informed, if they do not believe beyond a reasonable doubt that he is guilty of murder in the second degree, they should acquit him.

It is contended further that the law of manslaughter should have been given in charge to the jury. There is no evidence in the record in the remotest degree suggesting this issue. The evidence shows that appellant had been harsh and cruel to his wife, and quarreled with her and mistreated her. On the night of the homicide he went to her room, about 11 o'clock, and some words passed between them, as heard by witnesses near by, but these are not stated, except that deceased said, "If you are going to kill me, why, shoot me;" and he immediately fired three shots into her body, killing her instantly. He had threatened to take her life. She had been in her room but a few moments when the tragedy occurred, and her prostrate body was found in a partially undressed condition, preparatory to her retirement for the night. He went to town, and in a saloon told of the tragedy, and was arrested. We believe the evidence was sufficient to justify the verdict of the jury.

The judgment is affirmed.

On Rehearing.

(Feb. 17, 1904.)

At a former day of the term the judgment was affirmed. Appellant criticises the court on motion for rehearing because we did not pass upon this excerpt from the charge: "Or do the facts and circumstances in the case show such a general disregard of human life as necessarily includes the formed design against the life of the person slain." There was no exception taken to this clause of the charge, either during the trial, or on motion for new trial; and, under the unbroken line of decisions since *Johnson v. State*, 42 Tex. Cr. R. 87, 58 S. W. 60, 51 L. R. A. 272. The question cannot be reviewed on appeal. No criticism of the charge will be entertained in this court unless the point was made, either during the trial or on motion for new trial, in the trial court. This excerpt mentioned by counsel in motion for rehearing was not criticised in any manner in the trial court, and was presented for the first time in his brief on appeal. This is a sufficient answer to this ground of the motion for rehearing.

It is contended we were in error holding the evidence sufficient to justify the conviction of murder in the first degree. We have carefully reviewed the evidence, and are thoroughly satisfied it is sufficient. The court, in the original opinion, uses this expression: "On the night of the homicide he [meaning defendant] went to her room [meaning his wife's room] about 11 o'clock, and some words passed between them as heard by witnesses near by, but these are not stated," etc. The criticism is that the evidence does not state that appellant went to his wife's room about 11 o'clock. The evidence does not expressly so state. This was a conclusion of the court from the testimony of the witnesses. The facts show that, on the night of the homicide, deceased, with some friends, went to the theater, and passed near defendant en route. His wife informed him as to her destination, and he said, "All right." Later on, defendant was seen in the opera house by some of the witnesses. When he left the opera house, is not shown. Nor is it shown at what time he reached the opera house. Nor is it shown at what time he reached the house occupied by his wife. Nor is it definitely shown that he did or did not reside with his wife at the time. The witness Kemble says that about September, 1902, "I had to reprimand defendant for mistreating deceased—for running her out into the street and stamping her. I ordered him to stay away from my premises. I saw him there no more for some time. Later I would see him back there, but heard no more violence. Sarah [deceased] was always kind and considerate to him, and seemed to try to please him. He was cross and harsh to her, and seldom gave her a kind word." It is an inference, rather, from the facts, that he

passed in and out of the servant's house at Kemble's where she was working, and he may or may not have resided there with her; but we take it that it makes no difference, and the criticism practically has no merit in it. It is certain, if the witnesses tell the truth, that he and his wife were attending the opera house that night. It is certain that deceased reached her little cabin about 11 o'clock, or a little later. It is not certain from the facts at what time defendant reached the cabin. He may have preceded her, or he may have gotten there about the same time, or he may have gone into the cabin after she did. But we do not see what important bearing this could have upon the case, and how the fact that he may or may not have reached the cabin exactly at 11 o'clock, or thereabouts, would have any effect in granting a rehearing. It is certain that he was there, and it is certain that he killed his wife; and whether he preceded her a short time, or whether he got there at 11 o'clock, we take it, is immaterial.

The motion for rehearing is overruled.

MARONEY v. STATE.

(Court of Criminal Appeals of Texas. June 24, 1903.)

PERJURY—TESTIMONY IN ACTION—MATERIALITY—INDICTMENT—ALLEGATIONS—CIRCUMSTANTIAL EVIDENCE—COURTS.

1. Where a statute created a judicial district, giving it a number, and provided that it should consist of certain counties which had formerly been part of another judicial district, and provided that the judge of the old district should be the judge of the new, his title was not affected, and he was the lawful judge of such district.

2. Perjury may be shown by circumstantial evidence.

On Rehearing.

3. On a prosecution for perjury the materiality of the false testimony must be averred in the indictment, though it may be done in general terms.

4. On a prosecution for perjury the materiality of the issue on which the testimony was given may be shown by introducing all or so much of the pleadings in the action as shows the materiality, together with such facts proved, as would tend to show the testimony on a material issue.

5. After a loss insured in a fire policy assigned the policy to defendant, who assigned it to one who sued on it, and on the trial defendant falsely testified that the insured at the time of the assignment was indebted to him. On a prosecution against defendant for perjury the indictment alleged that the testimony was on a material issue, inasmuch as the transfer was for the purpose of defrauding the creditors of insured. *Held*, that the testimony was not material, there being no evidence that insured owed any debts.

6. The testimony was not material because of a clause in the policy to the effect that any fraud or false swearing concerning the insurance should render the policy void, since such provision had relation only to the insurer.

7. The testimony was not material as tending to mislead the insurer as to the ownership,

¶ 3. See Perjury, vol. 39, Cent. Dig. §§ 82, 83.

in the absence of any showing of any creditors of the insured.

8. Under the allegations of an indictment for perjury that the evidence was material as showing that an assignment of the policy to defendant was to defraud creditors it was not permissible for the state to show the materiality of the testimony, on the theory that it would tend to show that the insured burned his house.

9. Where an indictment for perjury charges in general terms that the testimony was on a material issue in an action it is for the court to determine from the record in testimony the materiality of the issue.

10. Insured in a fire policy assigned it after a loss to defendant, who assigned it to another, who sued on it, and on the trial defendant testified that at the time of the assignment insured was indebted to him. *Held*, that on a prosecution for perjury based on such testimony, where the indictment alleged in general terms that the testimony was material the testimony could not be regarded as material on the ground that it tended to show that insured burned the building, there being no evidence that insured owed any debts.

Brooks, J., dissenting.

Appeal from District Court, Comanche County; N. R. Lindsey, Judge.

J. T. Maroney was convicted of perjury, and he appeals. Affirmed.

Joiner & McMillan, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of perjury, and his punishment assessed at confinement in the penitentiary for a term of two years.

Appellant insists that the judge who tried this case had no legal authority to do so. The bill shows the following facts: "That N. R. Lindsey was duly elected judge of the Forty-Second Judicial District of Texas, which district at the time of his said election and up to the time of the creation of the Fifty-Second Judicial District was composed of the counties of Comanche, Eastland, Shackelford, Jones, Callahan, Stephens, and Taylor; and that was the district of which N. R. Lindsey was elected district judge. Thereafter the Twenty-Eighth Legislature, at its regular session, created an additional judicial district in the state of Texas, to wit, the Fifty-Second Judicial District, composed of the counties of Coryell, Hamilton, and Comanche. That no district judge has been elected by the people of these counties in said district, and no election has been held therefor, and no appointment has been made by the Governor of the state; the said N. R. Lindsey, the present judge, acting alone by reason of the fact that said Legislature enacted that he should continue and be the judge of the Fifty-Second Judicial District of Texas. Said judge has not taken the oath of office since his appointment as judge of the Fifty-Second Judicial District." We do not understand the Legislature to have attempted anything except to change the district for which the said N. R. Lindsey was elected. Nor did they attempt to appoint said Lindsey judge. The mere fact that they changed the district and changed the name or the number

of the district would not in any sense affect his title to the office or his duties as district judge. We understand the law and Constitution of this state to authorize the Legislature to change the district, as was done in this case. Without going into a further discussion of the matter, we hold that the Honorable N. R. Lindsey was judge of the district court that tried this case.

Appellant complains of the introduction of certain evidence on the trial, and his objections are embodied in several bills of exceptions. But under the qualification of the court appended to each bill we hold there was no error in the ruling of the court.

The only remaining question is as to the sufficiency of the evidence. Appellant insists that in a case of perjury he cannot be convicted upon circumstantial evidence. To this we cannot agree. Since the decision in *Maines v. State*, 26 Tex. App. 14, 9 S. W. 51, this court has held that a conviction could be had upon circumstantial evidence in this character of prosecution. See, also, *Anderson v. State*, 24 Tex. App. 705, 7 S. W. 40; *Beach v. State*, 32 Tex. Cr. R. 240, 22 S. W. 976; *Plummer v. State*, 35 Tex. Cr. R. 202, 33 S. W. 228; *Rogers v. State*, 35 Tex. Cr. R. 221, 32 S. W. 1044. The indictment is sufficient. The evidence amply warrants the verdict of the jury.

The judgment is affirmed.

Opinion on Rehearing.

(Feb. 17, 1904.)

HENDERSON, J. This case was affirmed at the last Austin term, and now comes before us on motion for rehearing. Appellant strenuously insists that this case should be reversed because the issue on which perjury was predicated was not shown to be material. He alleges that we failed to pass on this issue in the original opinion, though it was raised, and he now invokes the decision of this court upon that question. It appears from the allegations in the indictment that the alleged perjury was committed by appellant in the trial of a suit in the district court of Comanche county, in which Casey-Swasey Company was plaintiff against the Manchester Fire Insurance Company, the same being brought on an insurance policy for \$1,000, issued by said insurance company to one West on a certain stock of goods, furniture, and fixtures, and by West transferred to appellant, J. T. Maroney, and by him transferred to Casey-Swasey Company. It is further alleged that on the trial of the case, appellant, J. T. Maroney, testified as a witness that the transfer of said policy from West to him was made for a valuable consideration; that said West owed him a bona fide debt of principal and interest amounting to \$1,000. We do not state the allegations in the indictment accurately, but this was the effect thereof. It was averred that this testimony was upon a material issue in the trial of said case, inasmuch as the transfer

from West to Maroney was without consideration, and was made for the purpose of hindering, delaying, or defrauding the creditors of said West. It may be conceded that the allegations in the indictment showing the materiality of the issue upon which the allegation of perjury is based are sufficient; but this materiality must be responded to by the evidence—that is, the evidence adduced on the trial must show the materiality of the alleged false testimony to some issue in the case. We have carefully examined the record on this point. The pleadings—that is, the answer of defendant—state in general terms that West was indebted in large amounts to divers parties, and was not indebted to Maroney, but transferred the policy of insurance to said Maroney in order to defraud his creditors, etc., when in truth and in fact the said West owed the said Maroney nothing whatever for borrowed money; and that the effect of the transfer would be to mislead and deceive appellant as to the real beneficial owner of the proceeds of said policy, and would cause, and might probably cause, embarrassment and difficulty to defendant as to the proper party to make settlement with, and might embarrass defendant in litigation with reference to who was in fact and in law the beneficial owner of the proceeds of said policy. It is further shown in said pleading that the fire that caused the destruction of the insured property was originated and caused by the consent and knowledge and procurement of the said insured, etc. Portions of the policy were also introduced. We copy one of the clauses, as follows: "This entire policy shall be void if the insured has concealed or misrepresented in writing or otherwise any material fact or circumstance concerning this insurance or the subject-matter thereof, or if the interests of the insured in the property be not correctly stated herein, and in any case of fraud or false swearing by the insured touching any matter relating to this insurance or the subject-matter thereof, whether the same be before or after a loss." Portions of the supplemental petition of the plaintiff were also introduced. The first count was a general demurrer to defendant's answer, the second count a general denial, and the third count a plea that defendant had waived all rights as pleaded by defendant as warranties and set out, etc. The judgment in that case showed that defendant recovered—that is, he defeated plaintiff in the suit—which presumably was on the ground that West had fraudulently caused the fire. We would observe in this connection that no creditor of West is named in the proceedings, nor was there any intervention by any creditor whatever; nor is it disclosed or suggested in the record that defendant Manchester Fire Insurance Company in said civil suit would not have had the same defense, as far as it was concerned, against the suit of any transferee or holder of said policy, which it would have had

against the insured, West. The facts further fail to disclose, so far as we are able to discover, any debts at the time of the transfer by West to Maroney due by the said West to other parties. It may be conceded that the testimony abundantly shows that appellant, Maroney, swore falsely as to the payment by him to West of a valuable consideration for the transfer to him of said policy by West, but under all the authorities, as we understand them, the materiality of the false testimony must be averred in the indictment. This may be done in general terms; but its materiality must be proved by the evidence in the perjury trial. White's Ann. Pen. Code. §§ 328, 329. This may be done by introducing all the pleadings, or so much thereof as sufficiently shows the materiality of the issue joined, or enough of the pleadings, together with the facts proved on the former trial, as would tend to show that the alleged false testimony was upon a material issue in the trial. Bishop's Cr. Proc. vol. 2, § 935. This was not done. So far as we are advised, it was absolutely immaterial in said civil suit between Casey-Swasey Company and the Manchester Fire Insurance Company whether the transfer of said policy was made with or without consideration as between West and Maroney, or as between Maroney and the plaintiff in that suit, the Casey-Swasey Company.

We note in this connection that the state relies on Insurance Co. v. Willis & E., 70 Tex. 12, 6 S. W. 825, 8 Am. St. Rep. 506. It does not occur to us that that case is in point. That was a contest between Willis & Bro., who garnished the insurance company for a debt due them by the original insurer, Scott; but it seems that by the consent of the insurance company, before any loss by fire, Scott had transferred the policy to Hargrave, who became ostensibly the owner of the insured property. In that case there was no question as to the fraudulency of the transfer of both the property and policy from Scott to Hargrave; that it was done to defeat the creditors of Scott; and both parties were instrumental in practicing a fraud upon the insurance company. It was held that this fraud practiced on the company vitiated the policy, and the garnishing creditors, Willis & Bro., could not recover. In this case there was no proof that West owed any debts, or that the transfer by him was with the intent to defeat any creditors. Nor, in our opinion, does that clause in the policy, "in case of any fraud or false swearing concerning this insurance or the subject-matter thereof, whether the same be before or after the loss," affect the question. This has relation to the insured, West. Nor would it affect him even as to the policy upon an immaterial matter. Phoenix Ins. Co. v. Sherman (Tex. Civ. App.) 43 S. W. 930; Marion v. Ins. Co., 35 Mo. 148; Titus v. Ins. Co., 31 N. Y. 419; Sullivan v. Hartford Ins. Co., 89 Tex. 665, 36 S. W. 73.

Nor, in our opinion, does the record show that the testimony was in any wise material as tending to mislead or deceive the insurance company as to the real beneficial ownership of said policy. In the absence of any showing of creditors of West, it is difficult to see how any complication could arise as to the ownership of said policy, or the beneficial interests therein, that would constitute a material issue. However, it appears since the submission of the case the prosecution has shifted its ground, and now contends that the alleged false testimony was material, because it would tend to show that West, the original insured party, burned his house, and so defeat a recovery on the policy. If this be conceded as true, then, under a general allegation of materiality under the indictment and sufficient evidence adduced to show materiality, the position assumed would be correct. But, as we understand the indictment it is not predicated upon a general assignment that the testimony was material, but the indictment proceeds to allege how said testimony was and became material. It is alleged to have been a material issue in the case whether or not the transfer of said policy from West to Maroney was made upon a valuable consideration; and it was averred that it was not upon a valuable consideration, but was made with intent to hinder, delay, and defraud the creditors of said West; it being further averred in that connection that the said Maroney swore that the transfer was made by West to him for a valuable consideration due from West to him, to wit, certain borrowed money, amounting, principal and interest, to \$1,000. So that, the state, having charged how said false testimony was material to the issue, will be held to prove the allegations as laid in the indictment.

We would furthermore observe that, if the indictment had set out the alleged false testimony, and then charged in general terms that it became and was upon a material issue in the case, then the evidence should show the materiality of said false testimony to some issue in the case; for, unless it be shown that the matter testified about could in some way affect the result of the suit, it could not be considered material. *Misener v. State*, 34 Tex. Cr. R. 588, 31 S. W. 858. That is, the question of materiality is for the court. But the record should contain enough of the testimony in order that the court might determine its materiality to some issue, and direct the jury accordingly. *McAvoy v. State*, 39 Tex. Cr. R. 684, 47 S. W. 1000. We have examined the record in order to ascertain how the alleged false testimony would have aided the jury in said civil suit in determining whether or not West burned his house, which was insured. If West did not owe anything at the time of the fire—and the record does not disclose that he did, unless he owed Maroney—it does not occur to us in what way the transfer

of his insurance policy, subsequent to the fire, to Maroney, with or without consideration, would tend to show that he set fire to and burned his house. The record, so far as we are able to discover, as stated above, does not aid us in solving this matter; and it falls far short of being sufficient to have authorized the judge in his charge to the jury to have informed them that the alleged false testimony was material upon the issue of whether West burned his house in order to procure the insurance. We hold that the record before us fails to show that the alleged false testimony was upon any material issue in the case.

The motion for rehearing is granted, and the judgment is reversed, and the cause remanded.

BROOKS, J. (dissenting). I do not agree with the opinion of the majority granting the motion for rehearing and remanding this case, and will state my views. Appellant insists that the question at issue in the civil suit in which the alleged perjury is charged to have been committed was the bona fides of the transfer of the policy sued on from Z. P. West to appellant. The transfer was made after the loss had occurred, and appellant's contention is that under these facts it is immaterial whether the transfer of the policy was bona fide and for a valuable consideration, or was without consideration, and made with intent to defraud the creditors of Z. P. West. In other words, that the perjury is based upon an issue that was immaterial in the trial of the civil suit, and therefore, cannot be legally a basis for perjury. It appears that in the district court of Comanche county, in a certain civil suit then on trial, styled "Casey-Swasey Co., a Corporation, Plaintiff, vs. Manchester Fire Insurance Company, a Corporation, Duly Incorporated in England, and Doing Business by Permit in the State of Texas, Defendant," and after the issues were all made the jury was sworn, etc., and in the course of the trial it then and there became a material issue whether Z. P. West transferred, assigned, and delivered to J. T. Maroney the policy of insurance on which said then pending suit of Casey-Swasey Company v. said Manchester Fire Insurance Company was brought and predicated. The indictment, in substance, alleges that J. T. Maroney testified that he had loaned Z. P. West \$1,000, and that West transferred the policy, after the burning, to said Maroney to pay said amount. Subsequently Maroney transferred said policy to plaintiff in the civil suit, to wit, Casey-Swasey Company; that the statement by Maroney that he loaned said money was false; and that the transfer to said Maroney by West was for the purpose and intent on the part of both to hinder, delay, and defraud the creditors of the said Z. P. West. Upon the trial, among other defenses set up by defendant insurance company, was this: The policy

contract sued on, among other things, provides by warranty clause therein as follows: "This insurance policy shall be void if insured has concealed or misrepresented in writing or otherwise any material fact or circumstance concerning this insurance or the subject thereof, or in case of any fraud or false swearing concerning this insurance or the subject-matter thereof, whether the same be before or after a loss." Under the clause of defendant's answer just referred to, it certainly became a material inquiry as to whether Maroney had a bona fide transfer of said policy from West. If he did not, then West had no right to transfer said policy, and, West having no right to do so, Maroney would have no right to transfer it to the plaintiff. Goodson's testimony shows that the insolvency of West was thoroughly established.

Appellant refers us to various authorities holding that, in order to void this clause of an insurance policy, the evidence must show that the swearing was willfully done. These authorities, I take it, are correct, and in no way assist appellant's contention now urged, since the allegation in the indictment is that appellant willfully swore to said facts, and the proof clearly established the fact that he did willfully swear to said facts, and said facts were and are material inquiry in said civil suit.

In *Insurance Co. v. Willis*, 70 Tex. 12, 6 S. W. 825, 8 Am. St. Rep. 566, the following were the facts: Scott obtained a policy of insurance on a house in Lampasas for one year from Hargrave, the local agent of the insurance company; and shortly thereafter Scott, with the consent of the company, transferred said policy to Hargrave, he having a short time before purchased the property insured from Scott, and received a general warranty deed to the same. These transfers were made without consideration, and with intent on the part of both Scott and Hargrave to defraud the creditors of Scott. But this intent was not known to the insurance company until after the destruction of the building by fire on August 14, 1884. On July 13, 1884, Hargrave made a general assignment of all his property, including that insured, to Henry Exall, for the benefit of Hargrave's creditors. The insurance company in no way consented to this assignment. Willis & Bro., who were creditors of Scott, brought suit against him, and caused an attachment to be levied on the property insured, claiming that the transfer to Hargrave was fraudulent and void, and garnished the insurance company. Notice of the fire was given and proof of the loss made by said Scott in proper form. He then claimed that the transfer of the property to Hargrave was intended as a mortgage; and the insurance company, through its general agent, denied all liability to Scott, and afterwards, in answer to the garnishment, denied under oath that it was indebted or in any way liable to

Scott on the policy of insurance, which answer was controverted by Willis & Bro. by written affidavit. Under this state of facts the court say: "Was appellant liable on its policy to the creditors of Scott? The company was induced to give its consent to the transfer of the policy upon the false representation that Hargrave had become the owner of the property insured, while the proof showed that the understanding was that the transfer from Scott to Hargrave should be a mere cover to enable Scott to effect a favorable compromise with his creditors, he being at the time largely indebted; and, no consideration having passed, the transfer was fraudulent and void as to his creditors. In the policy it was provided 'that all fraud or attempted fraud by false swearing or otherwise shall be a complete bar to any recovery from loss under it.' The company doubtless understood, and it was without doubt intended by Scott and Hargrave that it should understand, there had been a complete and valid transfer of the property as to all persons; but, it being invalid as to the creditors of Scott, created such a state of confusion and doubt as to the ownership of the property as rendered it hazardous to pay the loss to any one. This was to the disadvantage and detriment of the company, and calculated to provoke litigation, and, being induced by false representations, was a fraud upon it, which it had provided against in its policy." It was held in that decision that Willis & Bro. could not recover by sheer force of the fraud perpetrated by Scott and Hargrave. The clause that the insurance company defended on in the civil suit, out of which this perjury grew, stated that any fraud or false swearing, either before or after the loss, would vitiate the policy. So it will be seen that the clause relied upon to vitiate the policy now under consideration is much broader in its scope and terms than the clause of the policy relied upon in *Insurance Company v. Willis & Bro.* Certainly it was a material inquiry in said civil suit, and hence was a legal and proper basis for the indictment for perjury, as held in the original opinion.

In my opinion, the motion for rehearing should be overruled.

WESTERN UNION TELEGRAPH CO. v. NEWNUM.*

(Court of Civil Appeals of Texas. Jan. 23, 1904.)

TELEGRAPHS—MESSAGES—DELAY—ISSUES—SUBMISSION—EVIDENCE.

1. Where, in an action against a telegraph company for delay in delivering a message announcing the serious illness of plaintiff's mother, the evidence was insufficient to warrant a finding that, if the telegram had been delivered earlier, plaintiff would have undertaken to have made a trip to his mother's bedside, more than

*Rehearing denied February 12, 1904.

80 miles distant, on horseback, or, if he did, that he could have reached there before his mother's death, or that he could have arrived before his mother's death on the next day, it was error to submit to the jury as an issue in the case the diligence of defendant in delivering the telegram to plaintiff in time for him to have reached his mother before her death.

Appeal from District Court, Grayson County; Rice Maxey, Judge.

Action by A. M. Newnum against the Western Union Telegraph Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Geo. H. Fearons and Wilkins, Vinson & Moore, for appellant. Hardy & Franklin and Randell & Wood, for appellee.

RAINEY, C. J. Appellee sued appellant for damages for the alleged negligent failure to transmit and deliver to him a telegram informing him of the serious illness of his mother, which negligence prevented him from being present at her death and burial. Defendant answered by general denial, and pleaded contributory negligence. Judgment was rendered in plaintiff's favor, and defendant appeals.

The court, by its charge, submitted as an issue the question as to the diligence of defendant in delivering the telegram to plaintiff in time for him to have reached his mother before her death. This action of the court is complained of; the contention being that said issue should not have been submitted, for the reason that the undisputed evidence shows that plaintiff could not have reached his mother before her death if said message had been delivered within a reasonable time after reaching its destination. The message was filed in the Paris, Tex., office about 3 o'clock p. m. February 18th, according to the testimony of the sender. It was filed about 3:40 p. m. according to the testimony of the operator who received it for transmission. The destination of the message was Madill, Ind. T., and was received there at 4:30 p. m. the same day. Plaintiff alleged in his original petition that, had the message been delivered at any time before 9 p. m. that day, he would have started on his way to see his mother by the train which left Madill at 47 minutes past 10 o'clock p. m. The only train through Madill in the afternoon, of which plaintiff could have availed himself, had the message been delivered promptly, left at 9:40 p. m., and, going on that, he would have arrived at Paris at 8:30 the next morning. Plaintiff testified that, "if the telegram had been delivered to me in the afternoon of the 18th, I believe I could have reached my mother by half past four or five o'clock on the morning of the 19th. I could have gone through the country on horseback. Paris was about in the neighborhood of 80 or 85 miles through the country from Madill." On cross-examination he testified: "Q. You say if you had gotten that message in the evening—say at 4 o'clock in the evening—

of the 18th, that you would have gone across the country? A. I don't know as I would, but if I thought I could make time by that * * * Q. Would you have gone? A. I would have tried some way to go. If I had gotten the message at 4 o'clock in the afternoon on the 18th of February, I could have left Madill on the night train, and arrived at Paris at 8:30 the next morning. That was the only way I could have gotten there by rail. I think I could go across the country on horseback, about 85 miles, and gotten there by half past four the next morning. That would have been 12½ hours. If I had had no other chance, I would have tried to go that way. I knew the chance. I would have tried it. I got the message between 12 and 1 o'clock on the 19th of February, and I waited until 9:40 that night before I started to go to my mother." Plaintiff's mother died at Paris about 5 o'clock a. m. February 19th, the day after the message was delivered to the appellant.

This state of facts did not raise the issue, and the court erred in submitting it to the jury. From it no legitimate deduction can be drawn that plaintiff would have undertaken the trip on horseback, or, if undertaken, it is not at all probable that he would have reached Paris by 5 o'clock next morning. That he would have undertaken it, under the circumstances, is contrary to human experience; and, if any inference can be drawn from his testimony that he would have done so, it is dissipated by the fact that he did not do so the next day, when he received the message, but, instead, waited nine hours for the train before starting. The delivery of the message having been delayed, it seems, presents a more urgent reason why he would have undertaken the trip on horseback the second day than on the first, if it had been feasible and seriously contemplated by him.

The judgment is reversed, and the cause remanded.

FOSTER v. ROSEBERRY.*

(Court of Civil Appeals of Texas. Jan. 22, 1904.)

LANDLORD AND TENANT—DISPOSSESSION—INJUNCTION—RESTITUTION—DAMAGES—PETITION—SUFFICIENCY.

1. A petition alleged that plaintiff rented certain land from defendant for a year from June 21, 1902, together with the farm implements, etc., thereon; that he immediately took possession, began the cultivation of the farm, and continued in possession of the same until December, 1902, when defendant entered and took forcible possession of a portion of the premises, together with the personal property, and by force and threats of violence withholds the use and enjoyment thereof from plaintiff, and, though plaintiff is still in possession of the dwelling house, defendant will not permit him to cultivate and gather crops maturing on the land; and that, as defendant was insolvent, and not responsible for damages for the injury done, plaintiff had no adequate remedy at law. *Held*,

*Rehearing denied.

that such allegations were sufficient to entitle plaintiff to an injunction and the restitution of the property, and to damages for defendant's alleged wrongful acts.

Appeal from District Court, Nueces County; Stanley Welch, Judge.

Action by L. S. Roseberry against C. J. Foster. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. C. Scott, R. R. Savage, and Delmas Givens, for appellant.

PLEASANTS, J. Appellee brought this suit to recover from appellant the possession of certain real and personal property described in his petition, and for an injunction requiring appellant to restore to him the possession of said property, and to refrain from further interfering with his possession of same. The petition alleges, in substance, that plaintiff on the 21st day of June, 1902, rented from defendant, for a term of one year from that date, a farm belonging to defendant, and situated in Nueces county, together with the farming implements, stock, and poultry belonging to and being upon said farm at the time said rent contract was executed; that he immediately took possession of said premises and property, and began the cultivation of said farm under the terms of his contract of rental, and continued in the possession of said entire premises and property until the 10th day of December, 1902, on which date the defendant entered upon a portion of said premises, and forcibly took possession of the same, together with the personal property above mentioned, and, by force and threats of personal violence, withholds from plaintiff the use and enjoyment of same. It is alleged that plaintiff is still in possession of the dwelling house upon said premises, but that defendant will not permit him to cultivate and gather the crop growing and maturing upon said land, nor allow him the use of the personal property to which he is entitled under his contract. It is further alleged that defendant is insolvent, and could not respond in damages for the injury done and threatened plaintiff, and that plaintiff has no adequate remedy at law. This petition was filed on January 16, 1903, and, in addition to the prayer for injunction and the restitution of the property, it sought to recover of the defendant the damages which had been caused plaintiff by the alleged wrongful act of defendant in taking possession of plaintiff's crop, and preventing him from gathering same, and depriving him of the use of the personal property above described. If there are any sufficient allegations as to the amount of damages claimed, it is only as regards the damages sustained prior to the filing of the petition, and the amount so claimed is less than \$200. There is no allegation as to the amount of the damages which plaintiff will suffer by being deprived of the possession of the property for the remainder of the term of the lease accru-

ing after the filing of the petition. A temporary injunction was granted as prayed for, and the defendant, in obedience to said injunction, on January 19, 1903, surrendered to plaintiff the possession of the premises and property. Upon the trial the defendant answered by general and special exceptions and general denial, and special plea denying that the contract under which plaintiff claimed the right to the possession of the property was a contract for the lease or rent of the premises, but that it was one of hire, and that plaintiff was placed in the possession of the premises and property as the hired man of defendant, and, having refused to comply with his contract of hire, and perform the services thereby required of him, defendant had the right to eject him from the premises and withhold from him the possession of the property. He further pleaded in reconvention for damages for the loss of the crops which he would have grown upon the premises during the spring of 1903, had he not been deprived of the possession of said premises by the act of plaintiff in wrongfully procuring the issuance of the temporary injunction requiring him to restore to plaintiff the possession of said premises. The cause was tried in the court below by a jury, and resulted in a verdict and judgment in favor of plaintiff for the possession of said premises and property during the term of said lease, and restraining defendant from interfering with his possession during the continuance of said term. Neither party recovered anything upon his claim for damages.

We deem it unnecessary to consider categorically the numerous assignments of error presented in appellant's brief. It is sufficient to say that, in our opinion, the allegations of the petition were sufficient to entitle plaintiff to the relief prayed for, and the district court had jurisdiction of cause of action alleged. The jury, under proper instructions, and upon sufficient evidence, determined the fact issues involved in favor of the plaintiff. No reversible error is shown to have been committed in the trial.

We are of opinion that the judgment of the court below should be affirmed, and it is so ordered. Affirmed.

BEAKLEY v. RAINIER et al.*

(Court of Civil Appeals of Texas. Dec. 9, 1903.)

FACTORS—ACTION AGAINST PRINCIPAL—MONEY ADVANCED FOR GOODS—MEASURE OF RECOVERY—REFUSAL TO RECEIVE GOODS PURCHASED—LIEN FOR DAMAGES—DECLARATIONS OF PRINCIPAL—CONTRACT WITH THIRD PERSON—ADMISSIBILITY.

1. Factors purchased for their principals a large quantity of goods at different times from different persons, and at different prices. They sued their principal for money advanced to purchase a particular car load. Held that, in the absence of evidence identifying the car load.

*Rehearing denied February 17, 1904.

judgment for more than the average rate per pound paid for all the goods was erroneous.

2. Factors have no lien on goods in their hands purchased for their principal, for damages arising from his refusal to receive other goods purchased by them, which on such refusal their own vendor had retained and resold, leaving a claim for damages against them.

3. In an action by factors against their principal, in which they claimed to have been authorized to purchase goods without restriction as to the price to be paid, evidence of the principal's declarations that he had made such a contract with a third person is inadmissible.

Appeal from District Court, Llano County; Clarence Martin, Judge.

Action by S. D. Rainier and another against H. N. Beakley. Judgment for plaintiffs, and defendant appeals. Reversed.

J. C. Randolph, for appellant. Chas. L. Lauderdale, for appellees.

KEY, J. This is a suit by S. D. Rainier and D. S. Munroe, composing the firm of S. D. Rainier, against H. N. Beakley. The plaintiffs sued and obtained judgment for \$2,334.93, with interest thereon from November 10, 1902, at the rate of 6 per cent. per annum, as money advanced to pay for a car load of pecans for the defendant; \$379.16, with 6 per cent. interest thereon from November 10, 1902, as commissions owing by the defendant to the plaintiffs; and \$148.33, with interest thereon from November 10, 1902, at the rate of 6 per cent. per annum, as damages for refusal to accept a car load of pecans which the plaintiffs had contracted to purchase from Hoffman & Co. The defendant has appealed, and presents the case in this court on an elaborate brief, which contains more than 40 assignments of error. While some of the questions on which we decide against appellant are quite interesting, yet the volume of business before this court, and the number of questions presented, preclude a detailed consideration of any other than those which furnish the reasons for reversing the case; and these are as follows:

1. The plaintiffs' suit is based upon an alleged contract with the defendant by which they were to purchase pecans for him, and they sought to recover the purchase money paid by them for 31,759 pounds of pecans, as well as the other two items heretofore referred to. The undisputed testimony shows that they purchased under their contract 121,759 pounds of pecans at different times from different parties, and at different prices. Some of the pecans were purchased at a much less rate per pound than the plaintiffs recovered for the 31,759 pounds involved in this suit; and therefore, in order to warrant the judgment recovered, it was necessary to identify the 31,759 pounds, and show that they cost the amount alleged in the plaintiffs' petition, and in both these respects they failed in their proof. The voluminous statement of facts has been carefully examined, and we are unable to find testimony

which sufficiently identifies the 31,759 pounds of pecans still held by the plaintiffs for the defendant, as having been purchased from particular persons, and at such figures as would bring the total cost up to the amount sued for and recovered. As the testimony stands in the record, the plaintiffs were not entitled to recover for the pecans in question more than the average rate per pound paid for the 121,759 pounds; but, as the judgment awards them a sum considerably in excess of the amount so ascertained, we sustain the eleventh assignment of error, and reverse the judgment.

2. The twenty-sixth assignment of error is also sustained. The \$148.33 which the plaintiffs recovered as damages on account of the defendant's failure to receive the Hoffman car of pecans rests upon these facts: The plaintiffs, without disclosing the fact that they were acting for the defendant, contracted with Hoffman & Co. for a car of pecans. The defendant refused to accept the pecans, and the plaintiffs failed to take them from Hoffman & Co. Thereupon Hoffman & Co. disposed of the pecans at the market price, and sustained a loss of \$148.33, for which they claim the plaintiffs are liable to them. The plaintiffs being liable to Hoffman & Co. for the loss referred to, if the defendant wrongfully refused to receive the pecans he should be required to make good the loss thereon for which the plaintiffs are liable, but the plaintiffs have no lien upon the pecans involved in this suit to secure that claim against the defendant. As we understand the law, a factor's lien does not extend beyond the amount owing him by his principal for commissions or funds advanced by the factor, and the item now under consideration does not come in either class.

3. We also sustain the thirty-ninth assignment of error, which complains of the action of the trial court in permitting plaintiffs' witness J. A. Weeks to testify as to statements made by the defendant concerning a contract made by the defendant with one M. D. Chastain, a merchant in Ballinger, to buy pecans for the defendant. The substance of the testimony objected to was that the defendant told the witness that he had employed Mr. Chastain to buy pecans for him, without any limit as to prices, and that, as a result of so doing, he lost about \$1,500. In the case at bar the plaintiffs testified that the defendant made a similar contract with them, and especially that he placed no restriction upon them as to prices to be paid for pecans. The defendant's testimony was sharply in conflict with that given by the plaintiffs, and the evidence objected to must have been admitted upon the theory that it tended to corroborate the plaintiffs as to their version of the contract sued on in this case. We do not think it was admissible for that or any other purpose. Persons capable of contracting have the right to make such contracts as they see proper, and the fact that

a defendant has made a particular contract with a third person does not tend to show that he has made a similar contract with the plaintiff.

The other assignments are overruled.

For the reasons stated, the judgment is reversed, and the cause remanded. Reversed and remanded.

INTERNATIONAL & G. N. R. CO. v. WIEGRITTE.

(Court of Civil Appeals of Texas. Feb. 3, 1904.)

RAILROAD DAMAGES—DEPRECIATION IN VALUE OF FARM—EVIDENCE—VERDICT.

1. Where in an action to recover \$200 damages to a farm by reason of its depreciation owing to a railroad company depriving the owner of the right to cultivate land on the railroad right of way, the witnesses, in estimating the damages, included elements which the court in its charge excluded from the consideration of the jury, and no witness testified that the depreciation amounted to \$200, a verdict for the full sum was not sustained by the evidence.

Appeal from Hays County Court; Ed. R. Kone, Judge.

Action by Augusta Wiegriffe, executrix, against the International & Great Northern Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Will. G. Barber, for appellant. O. T. Brown, for appellee.

FISHER, C. J. We overrule all of the appellant's assignments of errors, except the eleventh. The plaintiff sued to recover the full sum of \$200 damages to her farm by reason of the depreciation in its value owing to the acts of the railway company in depriving her of the right to cultivate a strip of land on the railway right of way. The verdict of the jury and the judgment of the court were in favor of appellee for the full sum sued for.

All of the witnesses in their testimony, in estimating the total damages sustained by appellee, include certain items and elements which the court in its charge to the jury excluded from their consideration. The witnesses in effect testified that these matters which were excluded by the charge of the court entered into and formed the basis for the total amount of the damages sustained by the plaintiff, which each of the witnesses placed at \$200. It is apparent, from the evidence on the subject of the amount of damages sustained, that the jury, in finding the verdict, must have considered those elements which were excluded by the court in its charge to the jury. All these witnesses, in testifying upon this subject, say that these items which were excluded were considered by them in forming a basis or estimate of the amount of damages sustained, and, as we construe the evidence, there is no witness who testifies that the depreciation in the val-

ue of the premises to the extent of \$200 was occasioned by reason of the fact that the appellee was deprived of the right and privilege to cultivate the strip of land in question.

Judgment reversed, and cause remanded.

CITY OF MARLIN v. GREEN.

(Court of Civil Appeals of Texas. Feb. 3, 1904.)

TAXATION—LIABILITY OF HOMESTEAD—WRIT OF POSSESSION—TIME OF ISSUANCE.

1. Under the Constitution, a tax lien exists on a homestead for the taxes thereon, with interest, and the costs of assessment and collection, including costs of suit; but not for the penalty provided by the act of 1897 (Laws 1897, p. 132, c. 102), nor for the interest, costs, and penalty due on taxes on other property.

2. In a proceeding to foreclose a tax lien, plaintiff is entitled to a writ of possession whenever the property is sold under order of the court, with the privilege reserved to the owner to redeem within two years; and a judgment withholding such writ for two years is erroneous.

Appeal from District Court, Falls County; Sam R. Scott, Judge.

Action by the city of Marlin against Andrew Green. From a judgment awarding insufficient relief, plaintiff appeals. Reversed.

J. W. Spivey, for appellant.

FISHER, C. J. This is an action by appellant against Green for the poll and ad valorem taxes alleged to be due appellant for the years 1892 to 1899, inclusive, and 1901, and interest on the taxes for each year from the date of maturity, with the 10 per cent penalty provided by law for the taxes due for the years 1897, 1898, 1899, and 1901, and to foreclose lien on a lot in the city of Marlin for the taxes due thereon for each of the years above mentioned, and also to foreclose the lien upon the lot for the amount of interest and 10 per cent. penalty, the lot in question being the homestead of appellee. The city recovered judgment against the appellee for the amount of taxes due, and costs, but was denied a foreclosure of lien on the property in question for any of the costs, interest, and statutory penalty, and the judgment provided that the writ of possession should not issue for the term of two years.

There is no dispute as to the facts—they are all one way—and reference is made to the record, which contains the agreement stating the facts upon which this case is submitted in this court. Appellant's assignments of errors are as follows: "(1) The court erred in rendering judgment denying plaintiff a lien upon the lot in controversy for the fees or costs of officers prescribed by the act of 1897 (Laws 1897, p. 132, c. 102). (2) The court erred in rendering judgment denying plaintiff a lien upon the lot in controversy for the general court costs incurred in the prosecution of plaintiff's suit to collect its debt. (3) The court erred in rendering judg-

ment denying plaintiff a lien upon the land in controversy for the 10 per cent. penalty, prescribed by the delinquent tax act of 1897, upon each year's tax assessed against the land in controversy for the years 1897, 1898, 1899, and 1901. (4) The court erred in rendering judgment denying plaintiff a lien upon the land in controversy for legal interest upon each land-tax item sued for the several years, 1897, 1898, 1899, and 1901. (5) The court erred in rendering judgment against plaintiff upon its demand for interest at the legal rate upon the taxes due, and sued for, for the years 1892 to 1896, inclusive. (6) The court erred in ordering and adjudging that writ of possession should not issue herein until the expiration of two years from date of sale under order of sale, and in ordering and adjudging that the purchaser under order of sale should not have right to possession of the land so bought until the expiration of said two years."

Plaintiff's assignments of errors, except the fifth and sixth, complain of the refusal of the trial court to foreclose the lien on the lot in controversy for the items stated in each of the assignments. The lot in controversy is the homestead of appellee, and only liable under the Constitution for the taxes, costs, and interest assessed against it, and it cannot be made liable for the taxes, costs, interest, or penalty that may be due by appellee on other property owned by him. But we are of the opinion that the language of the Constitution, making the homestead liable for taxes due upon it, includes interest, which is an incident of the tax debt, and that it is also liable for the costs and expenses incurred in assessing and collecting the taxes due upon such homestead, and the cost of suit, if any, that might be incurred in foreclosing a tax lien upon such property; but it could not be charged with the costs and expenses of assessing and collecting taxes due upon other property, or for costs incurred in obtaining judgment for such other taxes. Nor is it liable for the interest due upon other taxes, nor for the penalty prescribed by the act of 1897, either for the taxes due upon such property, or for any other taxes due upon property by the appellee.

The principle decided in *San Antonio v. Berry*, 92 Tex. 319, 48 S. W. 496, and *Bean v. City of Brownwood* (Tex. Civ. App.) 43 S. W. 1036, in effect recognizes the liability of the homestead for the costs incurred in collecting the taxes due upon it, and for the interest due upon such sum. In keeping with the above views, we are of the opinion that the court erred in not foreclosing the lien upon the property in question for the taxes due upon that property, as well as the costs incurred in an effort to collect same and foreclose the lien in this case, and for the costs permitted and authorized by law in assessing the property, etc., and for the interest due for the years 1897, 1898, 1899, and 1901. But we are of the opinion that there was no er-

ror in the court's declining to render judgment for the interest for the years 1892 to 1896, inclusive. There was no error in refusing to foreclose the lien for the 10 per cent. penalty prescribed by the act of 1897.

We are also of the opinion that the sixth assignment of error is well taken. The plaintiff was entitled to its writ of possession whenever the property should be sold under the order of court; however, with the privilege of the owner to redeem within the two years allowed by law. *San Antonio v. Berry* (Tex. Sup.) 48 S. W. 499; *Guerguin v. San Antonio* (Tex. Civ. App.) 50 S. W. 140.

Judgment is reversed, with instructions to trial court to render in accordance with this opinion. Reversed, with instructions.

HARRIS v. SCRIVENER.*

(Court of Civil Appeals of Texas. Dec. 9, 1903.)

LIFE INSURANCE—CHANGE OF BENEFICIARY—BILLS AND NOTES—ACTIONS—ATTORNEY'S FEES.

1. Refusal by an insurance company to change the beneficiary in the manner provided in a policy of life insurance under which the risk had attached was not, in the absence of fraud, a defense to an action on a note given for the premium.

2. Where a note bound the maker to pay attorney's fees if it was not paid at maturity and suit was brought thereon, a petition alleging that the note was not paid at maturity, and asking judgment for attorney's fees, warranted such judgment, without alleging that suit was brought thereon.

Appeal from District Court, Travis County; R. L. Penn, Judge.

Action by Charles P. Scrivener against Sidon Harris. From a judgment for plaintiff, defendant appeals. Affirmed.

Sidon Harris, for appellant. Wilbur P. Allen, for appellee.

STREETMAN, J. Appellee recovered of appellant upon a promissory note. The second assignment of error complains of the action of the court in sustaining an exception to appellant's answer. The answer alleged, in substance, that the note was executed for the first premium upon a policy insuring appellant's life in favor of his wife; that the policy contained a provision and condition that appellant might change the beneficiary therein in a certain manner therein provided; that this was a vital condition and provision of the policy, and that, but for said provision, appellant would not have executed the note; that the policy became effective May 1, 1902, and that his said wife died May 26, 1902, and thereafter, before the maturity of the note sued upon, appellant requested the insurance company, in the manner prescribed in the policy, to change the beneficiary therein; and that said company failed and refused to make such change, whereupon he notified said company

*Rehearing denied February 17, 1904.

that he repudiated said transaction, and demanded his said note.

We are of opinion that there was no error in sustaining the exception. Appellant has cited no authority which sustains his contention. On the other hand, the rule is well established that, in the absence of fraud, where the risk has once attached under a policy, a recovery of premiums paid cannot be had because of a breach of some provision of the policy. The remedy would seem to be an action for specific performance of the contract. *May on Ins.* §§ 567-569; *Ins. Co. v. Houser*, 111 Ind. 266, 12 N. E. 479; *Standley v. Ins. Co.*, 95 Ind. 254. In this case the risk attached, and the loss was carried for a certain period of time, before any demand was made for a change of beneficiary. The premium represented by the note was therefore partly earned, and in such case the amount of the premium is held not to be apportionable. *Fulton v. Ins. Co.*, 7 Ohio, 5, pt. 2; *Ins. Co. v. Clapp*, 11 Pick. (Mass.) 56.

The third assignment complains of the judgment for attorney's fees, because it is claimed that the petition did not allege the facts which would make said attorney's fees payable. The note provided that, "If the note be not paid at maturity, and if suit be brought thereon, we agree to pay an attorney's fee of ten per cent.," etc. The petition alleged that the note was not paid at maturity, and prayed for judgment for attorney's fees. It was unnecessary to allege that suit had been brought. The court was necessarily aware of that fact.

No other assignments are presented, and, there being no error, the judgment is affirmed. **Affirmed.**

PIERSON v. MCCLINTOCK.

(Court of Civil Appeals of Texas. Jan. 25, 1904.)

DEEDS — CONSTRUCTION — RECORDS — NOTICE — SUBSEQUENT PURCHASER — LIMITATIONS.

1. Where certain conveyances through which defendant claimed title to a tract of land described the same as "the unsold portion" of a certain tract, and the deeds attempted to specify the part sold, but by mistake omitted a 25-acre tract conveyed to plaintiff by a deed which was not recorded, defendant was not charged with notice of the conveyance of such 25-acre tract by the reference to the "unsold portion" in the previous deeds.

2. Where defendant entered into possession of land under a deed purporting to convey a portion of the tract previously sold by defendant's grantor to plaintiff under a deed which was not recorded, and defendant and his grantors fenced and tilled the land, used the same for pasturage, etc., and paid taxes thereon, for more than 10 years, defendant acquired title by limitation.

Error from District Court, Harris County; Wm. H. Wilson, Judge.

Action by H. W. Pierson against John McClintock. From a judgment in favor of defendant, plaintiff brings error. **Affirmed.**

O. L. Bradley, for plaintiff in error. Lock McDaniel, for defendant in error.

GILL, J. On November 1, 1901, plaintiff in error, H. W. Pierson, brought this suit to recover of defendant in error, John McClintock, 25 acres of land, a part of the Jacob Thomas survey in Harris county, Tex. The form of the action was trespass to try title. The defendant answered not guilty, pleaded limitation of five and ten years, and, asserting title in himself, prayed for affirmative relief. A trial before the court without a jury resulted in judgment for defendant.

The following facts are disclosed by the record: In 1884 Pierson bought of C. S. Benedict and wife 25 acres of land out of the northeast corner of a tract of 165⁸/₁₀ acres, part of the J. Thomas quarter-league survey, and which the Benedicts had bought from W. G. Halsey. The 25 acres thus sold to Pierson was deeded to him by the Benedicts, and was described by metes and bounds. This deed was never placed of record and is lost. On November 4, 1893, the Benedicts executed another deed to Pierson in lieu of the lost one, and therein recited the former conveyance, and fully described the land as it is described in plaintiff's petition. This deed was recorded November 11, 1893. When the 25-acre tract was purchased, it was included within the fence which inclosed the entire Benedict tract at that time, and Pierson did not take possession of his purchase or make any change in the fencing. Pierson never took actual possession. On March 27, 1890, Benedict and wife sold and conveyed to A. C. Herndon and Edward Newbouer the land described in the deed as follows: "All that certain tract or parcel of land lying and being situated in Harris county, Texas, out of the Jacob Thomas ¹/₄ league survey containing 155 acres, being the unsold portion of the land sold us by W. G. Halsey by deeds dated December 20, 1882, and November 21, 1888, and recorded in Book 26 B, p. 187, and Book — which deeds are made a part hereof, conveying to us 165⁸/₁₀ acres, of which we have sold to Levi Brown two acres, which two acres have been reconveyed to us. Armstrong 4 acres. Ross 2 acres. Finch 3 acres and Gebhart 6 acres, leaving a balance unsold of one hundred and fifty-five acres, which unsold balance is herein conveyed." This deed was filed for record March 27, 1890. The purchase price of \$3,100 was paid by Herndon and Newbouer without notice of the Pierson deed or any claim by him to any part of the land. Before the purchase they had the tract surveyed, and a map of their purchase made. This map was adduced in evidence; showed the small sales mentioned in the deed to them, and that their purchase included the 25 acres in controversy. At the date of the purchase the land was all fenced, except that a small part on the west was not in-

cluded and the fences were not accurately on the lines. The fences were also out of repair. Herndon and Newbouer immediately took possession, had the fences changed so as to rest on the true lines as indicated by the survey, and extended it on the west so as to include the land which the fence had not theretofore inclosed. They put down an artesian well and made two ponds near the center of the tract. Tobe Collins, who owned an adjoining tract, was placed in charge, and given the use of it in consideration of his repairing the fences and maintaining them and looking after the property. He at once took possession, repaired the fences, pastured cattle on the land, cut hay, and maintained the fences and this possession until 1894, when a German was placed in possession as a renter. The latter planted a crop of rice in the northeast corner, which included the land in controversy. From the entry of the German until the McClintock purchase the land has been occupied by tenants of Herndon. On April 12, 1898, Herndon bought Newbouer's interest by the following descriptions: "70¼ acres of land being an undivided ½ interest in 140½ acres out of the Jacob Thomas ¼ league, located about 5 miles S. E. of Houston, said 70¼ acres being an undivided half interest out of 155 acres sold to A. C. Herndon and Edward Newbouer March 27, 1890, by C. S. Benedict and wife less 14½ acres sold by Herndon and Newbouer to G. C. Street." By virtue of an execution issued on a judgment against A. C. Herndon and John G. Brown, the sheriff of Harris county levied on and sold to the defendant, John McClintock, the land described as follows in the deed executed by the sheriff on the 5th day of May, 1901: "All the right, title and interest which the said A. O. Herndon or the said John G. Brown, or either of them, had on the 2nd day of April, 1901, or at any time afterwards in and to the following lands, out of the Jacob Thomas ¼ league survey near Harrisburg in Harris County more particularly described by metes and bounds as follows: Beg. at the N. cor. of the Wannecke 42 acre tract where the same corners on the right of way of the G. H. & S. A. R. R. Thence N. 59½ deg. E. 3236 ft. to N. W. Cor. of a tract of land out of the same survey owned by T. J. Collins. Thence South 2 ¼ deg. West 1809 feet for corner. Thence West 1015 feet for corner. Thence S. 2¼ deg. West. 1074 feet for corner. Thence N. 70½ deg. West 302 feet. Thence N. 55½ deg. West along the N. E. line of the Wannecke tract 700 feet. Thence N. 47 deg. West along the N. E. line of the Wannecke tract 1048 feet to the place of beginning containing 78²²/₁₀₀ acres more or less, the same being the unsold balance of 155 acres of land sold and conveyed by Benedict and wife to A. O. Herndon and Edward Newbouer by deed dated March 27, 1890, and recorded in Vol. 148 of Harris county deed

records on page 498." This description included the land in controversy. The vendees in the various deeds in defendant's chain of title were purchasers for value in good faith without notice of the unrecorded deed of the plaintiff.

Plaintiff in error contends that the judgment should be reversed for the following reasons: (1) Because none of the descriptions in the deeds in defendant's chain of title from the Benedicts, the common source, down to himself, contain descriptions which include plaintiff's land, the use of the expression "unsold portion" excluding the conveyance of that part. (2) Limitation of five years was not shown because of insufficient description in the respect mentioned, and because the character of adverse possession shown was insufficient to support the plea. (3) Because the ten-year plea was not sustained by the possession shown by the proof.

An inspection of the descriptions which we have taken the pains to set out makes it plain that the first reason is untenable. In the deed from the Benedicts to Herndon and Newbouer the portions claimed to have been sold are distinctly designated. The acreage in the original Benedict purchase is named, and the named sales deducted leave practically the acreage undertaken to be conveyed. Newbouer's conveyance to Herndon of an undivided interest is equally specific, and the sheriff's deed to McClintock includes the 25 acres in controversy within its metes and bounds. None of these instruments come within the cases cited by plaintiff, to the effect that a deed conveying an unsold portion conveys no more, and that a purchaser thereunder cannot hold against a prior purchaser, though the deed be unrecorded.

The description being sufficient, and payment of taxes being shown under duly recorded deeds, both the five and ten-year bar of limitation are established if possession is sufficient. And we are convinced the facts stated satisfy the requirements of the law as to adverse possession. There was immediate entry upon enclosed lands—the digging of wells, making of ponds, cutting of hay, pasturage by tenants with assertion of right to the entire enclosure, maintenance of the fences, and payment of taxes for more than ten years, and actual cultivation of plaintiff's land as early as 1895. These facts clearly distinguish this case from such cases as *Fuentes v. McDonald*, 85 Tex. 185, 20 S. W. 43, cited by plaintiff. In that case there was no enclosure, and the adverse acts of possession consisted in pasturing sheep and goats in charge of shepherds. The live stock of others also grazed thereon. In Texas unenclosed lands are treated as commons, and in no case has such possession been deemed sufficient to uphold the bar of limitation.

We are of opinion the facts show defendant to be a holder under an innocent purchase for value without notice of plaintiff's

claim, and that for that reason the judgment should be affirmed. If we are in error in this, the judgment should nevertheless be affirmed on the issue of limitation.

Plaintiff in error contends the deeds in defendant's chain of title were adduced by plaintiff solely to show common source, and that, as defendant did not offer them at all, they cannot avail him for any purpose. Plaintiff is mistaken as to the state of the record. It is distinctly stated that the papers were also offered by defendant.

Affirmed.

MISSOURI, K. & T. RY. CO. OF TEXAS v. HAMMER.*

(Court of Civil Appeals of Texas. Jan. 23, 1904.)

RAILROADS—PERSONS ON TRACK—CHILDREN—INJURIES—CARE REQUIRED—LOOKOUT—ACTIONS—INSTRUCTIONS—HARMLESS ERROR.

1. In an action for injuries to a minor child while trespassing on a railroad track, an instruction requiring the railroad's employees to use ordinary care to discover infants who may be on or near the track in front of the train, by keeping a reasonable lookout for that purpose, was proper.

2. Where, in an action for injuries to a child, while trespassing on a railroad track, the railroad company could not have exercised ordinary care to discover the child on the track except by keeping a lookout, it was not error for the court to charge that the railroad's failure to keep such lookout was negligence per se.

3. Where, in an action for injuries to a child while trespassing on a railroad track, the court had charged that the railroad was bound to exercise ordinary care to discover children on the track, a further instruction that the degree of care would vary as the known probabilities of danger varied along different portions of the road was not objectionable on the ground that the degree of care required in a given case did not vary, though the amount of diligence or vigilance might vary with the varying probabilities of danger.

4. Where a railroad company was bound to keep a proper lookout for children on the track, and one of the grounds of negligence alleged in an action for injuries to a child of tender years was the company's failure to perform such duty, a requested instruction excluding the issue of the company's negligence in failing to keep a proper lookout, and confining the jury's consideration to the issue of discovered peril, was properly refused.

5. Where, in an action for injuries to a child on a railroad track, the court charged that if the operatives of the train, after discovering plaintiff on or near the track, could have stopped the train, by ordinary care, before reaching plaintiff, and they failed to exercise such care, and were thereby guilty of negligence, which was the proximate cause of plaintiff's injury, plaintiff was entitled to recover, the jury could not have been misled by an abstract instruction that it was the duty of the railway company's servants when they had discovered an infant of tender years on or near the track in front of its train, immediately thereafter to resort to all the means at their command to stop the train before reaching such infant.

6. Where an infant who was injured on a railway track was of such tender years that the operatives of a train were not entitled to presume that she would leave the track before the train reached her, such operatives were bound,

as soon as they discovered such infant, to stop the train before reaching her, if it could be done by the exercise of the highest degree of care.

On Rehearing.

7. Where, in an action for injuries to a child on a railroad track, the engineer testified that while on the road he had seen children playing on the right of way, and that plaintiff's brothers and sisters had a toy railroad track, built of wood, on the right of way and played there sometimes, and, though he did not know he had ever seen them on the track, he had seen them on the right of way, and on cross-examination stated that he had seen children playing along the track on the previous trip, and that he knew that the house of plaintiff's father was near where the injury occurred, and also the position of the crossing, and had seen children playing there, such evidence justified a finding that he had seen children playing on the right of way "near the crossing."

Appeal from District Court, Ellis County; J. B. Dillard, Judge.

Action by J. A. Hammer, as next friend, etc., against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

T. S. Miller and G. C. Groce, for appellant. Finley & Knight and Love, Gammon & Wimbish, for appellee.

RAINEY, C. J. J. A. Hammer brought this suit as next friend for the use and benefit of his child, Mary Hammer, against appellant, to recover damages on account of personal injuries inflicted upon her through the negligence of appellant's servants. The company answered by general denial. A trial resulted in favor of plaintiff.

The evidence shows that plaintiff, with his family, lives on his farm, situated upon the line of appellant's railway; the residence being 75 or 100 yards from the track, and the yard extending to the right of way, and within 60 feet of the track. The right of way was inclosed by a wire fence; the first wire being about 6 inches from the ground, the next being 10 or 12 inches, and so on. Opposite the house there was a private crossing, and a path leading from the yard gate to said crossing. Along the right of way, it was grown up in weeds, thistles, etc. Between the rails south there was a smooth path or walkway. At this point the track runs north and south, and is practically straight and level, without obstruction to view for a considerable distance both ways. On May 31, 1900, J. A. Hammer and wife went to a neighboring town, Waxahachie; leaving at home their seven children, ranging in ages from 17 years down to about 20 months. The youngest, Mary, being left in charge of her older sister and brothers, strayed upon the track to a point 75 or 100 yards south of the crossing, where she was struck and injured by an engine pulling freight cars, which was being operated by appellant's servants. Prior to this the engineer had seen the children playing on the right of way near the crossing, and saw that they had a little

*1. See Railroads, vol. 41, Cent. Dig. § 1822.

*Writ of error denied by Supreme Court.

play railroad constructed there. There is no positive evidence as to how long the child had been upon the track when struck, nor where she first went upon it; but it is sufficient to warrant the conclusion that, if the operatives had used ordinary care in keeping a lookout, the child could have been seen by them in time to have prevented the injury. The evidence is also sufficient to warrant the amount of damages assessed by the verdict.

On the issue as to the duty imposed upon railroads, the court charged the jury as follows: "It is the duty of the agents, servants, and employees of a railroad company engaged in running and operating its trains to use ordinary care to discover infants of tender years who may be on or near the track in front of the train, by keeping a reasonable lookout for that purpose; the degree of such care being such as a person of ordinary prudence would commonly exercise under like circumstances, and varying as the known probabilities of danger may vary along different portions of the road on which said train is being run." It is urged that this charge is erroneous, in that an affirmative duty of keeping a lookout was placed upon appellant, to prevent injuring the child; the contention being that, the child being a trespasser, no duty arose in relation to it unless its danger was known or should have been anticipated. The doctrine that a railroad owes no duty to one wrongfully on its track, except to refrain from wanton injury to him, has been expressly repudiated by the Supreme Court of this state—not only so, but it has held that it is the duty of carriers to keep a lookout for any one who may be on the track. *Ry. v. Sympkins*, 54 Tex. 516, 38 Am. Rep. 632; *Ry. v. Hewitt*, 67 Tex. 479, 3 S. W. 705, 60 Am. Rep. 32; *Ry. v. Watkins*, 88 Tex. 20, 29 S. W. 232. In the *Watkins* Case, cited, the court uses this language: "The true rule is that it is the duty of the servants of the railway company operating its trains to use reasonable care and caution to discover persons on its track, and a failure to use such care and caution is negligence on the part of such company, for which it is liable in damages for an injury resulting from such negligence, unless such liability is defeated by the contributory negligence of the person injured or of the person seeking to recover for such injury, and the circumstances under which the party went upon the track are merely evidence upon the issue of contributory negligence. If such circumstances show that the party injured was a wrongdoer or trespasser at the time of the injury, the issue of contributory negligence is, as a general rule, established as a matter of law, but not so in all cases." But it is contended that this language was used in a case where the facts show that the accident happened at a point where the presence of a person should have been anticipated, and that it should only apply to such a state of facts. We think, however, that in its use the able judge intended

it to have a general application to the operation of trains. The proposition was there made that, as the injured party was a trespasser or a mere licensee, the railroad owed her no duty to keep a lookout to discover her, or give her any notice of the approach of the engine. In discussing this proposition, the court quoted from the *Sympkins* and *Hewitt* Cases, *supra*, to the effect that a lookout must be kept, then announced the rule above stated, and then added: "It results from the above that it was the duty of the railroad to use ordinary or reasonable care to discover and warn defendant in error, whether she be considered a trespasser or a mere licensee, and a failure to use such care was negligence," etc. This, to our mind, shows that the court had in mind the distinction as to the duty owing a trespasser, and one not such, and indicates that the measure of duty is ordinary care to discover a person on the track. That the railroad company must use ordinary care to prevent injury to any infant of tender years on the track, we think, is well settled. We can conceive no way that a discovery could be made, except by keeping a lookout.

It is also urged that neither the common law nor statute imposes such a duty, and, in the absence of such requirement, it was error to so charge, but it was a question for the jury. Unless an act is *per se* negligence, it is error for the court to so charge, but it should submit it to the jury to determine. In another paragraph of the charge, the court, in applying the law to the facts, left it to the jury whether the employees used ordinary care to discover the infant on the track "by keeping a lookout." There was no other way to use ordinary care in this instance, and the law being, as held by the foregoing decisions, that it was the duty to keep a lookout, the failure to do so was negligence *per se*, and it was not error for the court to so instruct the jury.

It is further urged that the court erred in stating that the "degree of care" would "vary as the known probabilities of danger may vary along different portions of the road," etc.; the contention being that the "degree of care" due in a given case does not vary, though the amount of diligence or vigilance might vary with varying probabilities of danger. We see no error in the charge in this respect. It does not convey the idea that the care to be used is other than ordinary care, and the only reasonable construction of which it is susceptible is that the amount or quantum of diligence varies under different conditions. It is a little difficult for the ordinary mind to distinguish the difference, if any, between the expressions "degree of care" and "amount of diligence," when used in this connection. While this part of the charge might have been omitted, we are unable to see that it was in the least calculated to injure appellant. Aside from this, the charge has been approved in *Ry. Co. v. Phil-*

lips (Tex. Civ. App.) 37 S. W. 621, and Ry. Co. v. Harvin (Tex. Civ. App.) 54 S. W. 629, and writs of error denied in both cases.

The appellant complains of the action of the court in refusing to give the following requested charge, viz.: "Defendant requests the court to instruct the jury that if the evidence shows that Mary Hammer went upon its track at a time and place when and where its employes in charge of its train, in the exercise of that degree of care usually and ordinarily exercised in the operation of railway trains by persons of ordinary care, prudence, and caution, had no reason to anticipate her presence on the track, and if, after discovery of the presence of the said Mary Hammer on or dangerously near its track, the employes of defendant in charge of its train promptly made use of the appliances at hand to stop said train, and used all efforts in their power so to do before said Mary Hammer was struck, then the law is for the defendant, and you will so find." If, as contended by appellant, no duty of lookout along its track was imposed upon the railroad company, except at crossings, or where its track was commonly used by pedestrians, then this instruction should have been given; but, as heretofore stated, this court does not concur in appellant's contention. The requested charge excludes from the consideration of the jury the issue of negligence as to the keeping of a proper lookout, and confines, in effect, the jury's consideration to the issue of discovered peril; and on the issue of discovered peril the court's charge is substantially as one requested. The plaintiff, among other grounds of negligence, alleged the failure to keep a proper lookout, and the court only submitted that ground, and that of discovered peril. If the duty to keep a lookout to discover the infant devolved upon the railway company, then the question of anticipated danger, as applied to crossings and places along the track that pedestrians commonly use, had no application. It is insisted that a lookout is not enjoined, except at such places, and numerous cases are cited that discuss the amount of care to be used where injury is inflicted at such places by the operatives of trains; but in none of them, as we understand it, is the doctrine that a duty to keep a lookout to discover persons along other portions of the track excluded. Whenever the courts of this state have been called upon to pass upon the question, where the question of contributory negligence was eliminated, they have uniformly held that the railway company was liable if the operators of the train failed to use ordinary care to discover the party on the track, though it was at a place where one would not ordinarily be expected. Ry. v. Sympkins, 54 Tex. 615, 38 Am. Rep. 632; Ry. v. O'Donnell, 58 Tex. 42; Ry. v. Vaugh (Tex. Civ. App.) 23 S. W. 745.

Another error assigned is that the court did

not correctly charge the law on discovered peril. The charge is as follows: "It is the duty of the agents, servants, and employes of a railway company, when they discover an infant of tender years upon or near its track, in front of its train, immediately thereafter to resort to all the means at their command to stop the engine and train before it reaches such infant." While this charge is not strictly correct, in view of the evidence, and that portion of the court's charge where the law was applied to the facts, no injury could have resulted therefrom. The court, in the charge above quoted, was stating the law abstractly, but, when applying it to the facts, charged that "if the jury should believe from the evidence before them that the agents, servants, or employes of defendant in charge of its said train, after they discovered that plaintiff was on or near its track, if they did, could have stopped said engine and train, by the exercise of ordinary care and effort, by the use of the means at their command, before it reached plaintiff, and they failed to exercise ordinary care and effort to stop said engine and train before it reached plaintiff, by the use of the means at their command, and that they were thereby guilty of negligence, as the same has been heretofore defined in these instructions, and that such negligence was the direct or proximate cause of plaintiff's injury, if she was injured, then the jury should find for plaintiff," etc. The charge on this issue, when taken in its entirety, could not have been misleading. The court tells the jury that, before plaintiff can recover, they must believe that, after the infant was discovered, the operatives could have, by the exercise of ordinary care, by the use of the means at their hands, stopped the train before reaching her. The plaintiff being of such tender years, no presumption could arise that she would leave the track before the train would reach her, as in a case of one of more mature years. So the duty devolved upon the operatives, as soon as discovered, to stop the train before reaching her, if it could have been done by the exercise of the highest degree of care; that is, the operatives should have used every reasonable means at hand to avert striking her. Ry. Co. v. Matula, 79 Tex. 583, 15 S. W. 573; Ry. Co. v. Wallace (Tex. Civ. App.) 53 S. W. 77; Ry. Co. v. Bowen, 95 Tex. 363, 67 S. W. 408.

We are of the opinion that there is no reversible error in the record, and the judgment is affirmed.

On Rehearing.

(Feb. 13, 1904.)

The appellant, on motion for rehearing, complains of our finding in reference to the engineer, prior to the accident, having seen children playing on the right of way, "near the crossing," and that they had a little play railroad constructed there. The complaint is

that the evidence does not show that it was near the crossing. The only testimony on this point is that of the locomotive engineer who was operating the engine at that time. While he did not use the expression "near the crossing," his testimony, to be exact, was: "During the time he had been on the road, he had seen children playing on the right of way. They had a railroad track on the side, built of wood, and played there sometimes. Didn't know that he had ever seen them on the track, but had seen them on the right of way." On cross-examination he stated: "He might have seen children playing along the track on the trip before. He knew that Hammer's house was there, and also the crossing, and that he had seen children playing there." This evidence is given to show the basis of our conclusion, and which, we think, supports it.

The motion for rehearing is overruled.

SORRELLS v. GOLDBERG et al.*

(Court of Civil Appeals of Texas. Jan. 16, 1904.)

PAROL LEASE—PART PERFORMANCE—STATUTE OF FRAUDS—ISSUE OF FACT—EVIDENCE—DIRECTING VERDICT.

1. Though, under Sayles' Ann. Civ. St. 1897, art. 2543, subds. 4, 5, a parol lease of real estate for a longer term than one year is not enforceable, the taking possession of premises and paying rent under a parol lease for a longer term than one year is such performance as will take the lease out of the statute, making it enforceable according to its terms.

2. Where there was evidence that a parol lease of premises was made for a longer term than one year, and that the tenant took and held possession of the premises and paid rent thereunder, thereby making the parol lease enforceable, and also evidence that the tenant was merely holding over under a monthly rental, an issue of fact was raised, and a direction of a verdict was error.

Appeal from Hill County Court; L. C. Hill, Judge.

Action by C. J. Sorrells against Sam Goldberg and others. From a judgment for defendants, plaintiff appeals. Reversed.

Spell & Phillips, for appellant. A. P. McKinnon and Clark & Bolinger, for appellees.

BOOKHOUT, J. On August 24, 1901, appellant, by appropriate proceedings, sued out in justice court of Precinct No. 1, Hill county, Tex., where the rented premises in question were situated, a distress warrant, returnable to the county court of Hill county, Tex., running against appellees, alleging in his affidavit that on June 10, 1901, he had rented to appellee Sam Goldberg the premises in question by a verbal contract for a term beginning June 10, 1901, and expiring August 31, 1902, by the terms of which said appellee agreed to pay as rent for the premises the sum of \$50 per month, in advance,

from the beginning of the term to September 1, 1901, and from September 1, 1901, to August 31, 1902, the sum of \$60 per month in advance upon the 1st day of each month; that the contract under the laws of this state was inoperative for a longer period than one year from the date of the commencement of the said term, but was valid and subsisting and enforceable for such period, that is to say, from June 10, 1901, to June 10, 1902; that said appellee was justly indebted to appellant in the sum of \$560, which was not yet due, but would mature in the sum of \$60 per month, commencing on September 1, 1901, and upon the 1st day of each month for eight consecutive months thereafter, and \$20, being the rent from June 1, 1902, to June 10, 1902, being due June 1, 1902, in accordance with the terms of the contract, the rent due to September 1, 1901, having been paid; that said appellee was about to remove from the premises, which were situated in said precinct aforesaid, and was about to remove his property therefrom, which property was in the possession of the co-appellee, S. Feinberg. Under the distress warrant certain property was seized, which was duly replevied by appellees. On September 25, 1901, appellant filed his amended petition, alleging his cause of action as theretofore, and praying judgment upon the replevy bond, alleging his landlord's lien upon the property seized under the writ and covered by the replevy bond. To this appellees filed their original answer, presenting: (1) General demurrer. (2) General denial. (3) That at the time the alleged contract was made appellee Goldberg was in possession of the premises, and that the contract was inoperative under the statute of frauds, because not to be performed within one year; that on August 25, 1901, appellee Feinberg purchased the goods in question, upon which the levy was made, at that time situated in said building; that at that time Goldberg owed the rent for July and August, 1901, which he paid, and delivered the keys of the building to the agent of appellant, J. J. Yerby, who had since retained them; and wherefore appellant was estopped to claim the enforcement of the contract. They denied the creation of the contract asserted by appellant, and contended that the rental of the premises by Goldberg was by the month, and that at the time of the removal of the goods all the rents had been paid; that Goldberg had expressly refused to make such a contract as alleged by appellant when requested to do so by appellant's said agent. In replication to such answer, on February 7, 1903, appellant filed his supplemental petition, pleading: (1) General demurrer. (2) General denial. (3) That, if the contract in question was within the statute of frauds, under and by virtue of it said Goldberg had entered into the possession of the premises, and had continued therein until the time by appellant alleged in his petition, and had

*Rehearing denied February 12, 1904.

¶ 1. See *Frauds, Statute of*, vol. 23, Cent. Dig. § 304.

paid the rent therefor to September 1, 1901; that appellant had put him in possession of the premises under said contract, and was willing that he should continue to occupy same under the contract, and the building had at all times during the term been subject to his occupancy according to the term of the contract, and if Goldberg had failed to occupy same it was due to his own fault, and his abandonment of the premises was voluntary; that, if the contract was within the statute of frauds, it was taken out of the statute by reason of such facts, and it became a contract for the tenancy of said premises for the term of one year from the commencement of the said term, and enforceable as such; that, if the rent for the entire term of the contract was collectible, appellant elected to waive and abandon his right to that portion maturing after June 10, 1902, and sued only for the balance of the rent due under the contract for the one year beginning June 10, 1901, and ending June 10, 1902. Trial before a jury was had on February 7, 1903, and at the conclusion of the testimony the court, at the request of appellees, peremptorily directed a finding for appellees. Plaintiff appealed.

By the terms of the statute of frauds a parol contract for the lease of real estate for a longer time than one year is not enforceable. Sayles' Ann. Civ. St. 1897, art. 2543, subds. 4, 5. It is contended that the effect of a parol lease for a longer period than one year is to create an estate for the statutory period for which a parol lease is good. And where such contract is made between parties, and possession of the premises had and rent paid thereunder, the contract is enforceable to the extent of one year from the commencement of the term. This contention is supported by the holdings in some jurisdictions; but the decisions seem to be based upon statutes of those states giving to such parol lease the force and effect of estates at will. Washburn on Real Property, § 823; Taylor on Landlord & Tenant, § 28. We have no such statute in this state. So long as the contract remains executory, it is not enforceable. But, if there has been a substantial part performance of the contract, the rule is different. Where, by virtue of a parol lease for a period longer than one year, the landlord places the tenant in possession of the premises, and receives from him one or more installments of rent in accordance with the terms of the lease, this constitutes such part performance as will take the contract out of the statute of frauds, and the same may be enforced in accordance with its terms. Randall v. Thompson Bros., 1 White & W. Civ. Cas. Ct. App. § 1101; Anderson v. Anderson (Tex. Civ. App.) 36 S. W. 817; Earle of Aylesford Case, 2 Str. 783; Grant v. Ramsey, 7 Ohio St. 158; Jones v. Peterman, 3 Serg. & R. 543, 8 Am. Dec. 672. Our statute places contracts for the sale of real estate or the lease thereof for a longer

term than one year upon the same footing. It is uniformly held that parol contracts for the sale of land, if the purchase money has been paid and the vendee has taken possession and made valuable improvements with the knowledge of the vendor, are taken out of the statute. The question whether part performance of a parol lease of real estate for a longer term than one year would take the contract out of the statute of frauds was not passed upon in Bateman v. Maddox, 86 Tex. 546, 26 S. W. 51. It is expressly so stated by Judge Brown at the conclusion of his opinion in that case. 86 Tex. 555, 26 S. W. 54.

The plaintiff introduced evidence which would have justified the jury in finding that the parol lease set out in the petition was made, and that Goldberg took and held possession of the premises and paid rent thereunder. It was shown that prior to June 10, 1901, Goldberg had been renting the building by the month, paying a monthly rental of \$50. There was testimony from which the jury could have found that no parol lease was in fact made, and that the possession of Goldberg after June 10, 1901, was a holding over under such monthly renting. This raised an issue of fact between the parties whether the parol lease was made, and whether the possession and payment of rent was by virtue of the terms thereof or under the former monthly holding. These issues should have been passed upon by the jury.

It follows that in instructing a verdict for defendant there was error, which requires that the judgment of the trial court should be reversed, and the cause remanded

HOUSTON & T. O. R. CO. v. TURNER.

(Court of Civil Appeals of Texas. Jan. 30, 1904.)

MASTER AND SERVANT—RAILROADS—INJURIES TO SERVANT—TRIAL—EVIDENCE—REBUTTAL—INSTRUCTIONS—REFUSAL—REQUESTS TO CHARGE—EXAMINATION—DAMAGES.

1. Where defendant handed requests to charge to the court, and after they had been refused the judge asked plaintiff's attorney if he desired to read the same, which was objected to by defendant, who withdrew the requests from plaintiff's attorney and handed them to the judge, who returned them to the clerk with instructions to file them, on their being filed they became court papers subject to plaintiff's inspection.

2. Where plaintiff made no request to be permitted to examine defendant's requests to charge after they had been refused and filed by the court, he could not contend on appeal that such requests should be considered as abandoned by reason of defendant's refusal to permit plaintiff to read them before they had been filed.

3. Where, in an action for injuries to a servant of a railroad company by being struck by a car on a switch track, one of the acts of negligence alleged was the violation of a municipal ordinance restricting the speed of cars to six miles an hour, and evidence was introduced on such question, defendant was entitled to have such issue submitted to the jury by a proper charge.

4. Where, in an action for injuries to a servant, the court failed to charge on an issue as to defendant's alleged violation of a speed ordinance, a requested instruction that, if the movement of the cars was at a speed not greater than that allowed by the ordinance, plaintiff could not recover on the alleged ground of negligence that the speed of the cars was unlawful, was sufficient to call the court's attention to such issue.

5. In an action for the alleged wrongful death of plaintiff's husband, an instruction that the measure of damages would be the pecuniary compensation for plaintiff's loss of her husband, which would be such an amount of money, estimated as received at the present time, as plaintiff would reasonably and probably have received from his earnings and accumulations had he not been killed, was erroneous as assuming that compensation for the pecuniary injury must necessarily consist of a sum of money equal to the amount plaintiff might probably have received from her husband's earnings and accumulations had he not been killed.

6. In an action for the death of a servant, an instruction that if he was guilty of contributory negligence plaintiff could not recover, though such negligence was not the proximate cause of his injury, was properly refused.

7. Where, in an action for the death of plaintiff's husband by being struck by a car on a railroad switch track, witnesses testified for defendant that just before he died deceased stated how he got hurt, and that defendant was not to blame, but that he was killed by his own fault, plaintiff was entitled to introduce evidence in rebuttal that deceased did not make such statement, but, on the contrary, stated that he had a "foul deal" and was not to blame.

Appeal from District Court, Ellis County; J. E. Dillard, Judge.

Action by Mollie Turner against the Houston & Texas Central Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Baker, Botts, Baker & Lovett and Frost & Neblett, for appellant. Templeton & Harding and Lancaster & Beall, for appellee.

TALBOT, J. William Turner was struck and killed by the cars of the Houston & Texas Central Railroad Company on November 20, 1901. He was a section foreman of appellant, and in charge of a gang of men at work in its switchyard in the city of Waxahachie. There were three parallel tracks in the yard a short distance apart, running east and west. The north track was known as the passing track, the middle as the main track, and the south track as the elevator track. The sectionmen under the control of the deceased, William Turner, were engaged at the time of the accident in putting in what is called a "cut-off track," between the main track and the passing track, on the north side of the main track. The yard crew were engaged in switching and transferring cars from one track to another. While this switching of cars was being done, the deceased, Turner, went upon the elevator track, some 20 or 30 feet from where his men were at work, at or near the east end of a flat car which was standing on that

track. While in this position the switch crew "shoved" or "kicked" back from the west onto the elevator track some box cars, which, by the impetus given them by the engine, rolled back eastward, struck the flat car, causing it to move suddenly forward against Turner, knocking him down and running over him, inflicting injuries upon him from the effects of which he died in a few hours. He left, surviving him, Mollie Turner, his wife, who brought this suit to recover damages alleged to have been sustained by her on account of her husband's death. The defendant answered by general demurrer and general denial; pleaded contributory negligence, and assumption of risk on the part of the deceased. There was a trial by jury, and a verdict and judgment in favor of appellee for the sum of \$10,000.

Appellee objects to the consideration by this court of appellant's assignments of error 13 to 25, inclusive, which relate to and are based upon special charges requested by appellant and refused by the court. The contention is that such special charges were withdrawn and abandoned by appellant in the court below. It appears from the record that, on the evening preceding the morning that the court's charge to the jury was read, at the request of appellant's attorney the trial judge handed said charge to said attorney for inspection. That said attorney read same, and presented to the judge a number of special charges prepared by him, and requested that said special charges be given in charge to the jury, in addition to the court's main charge. The judge, after an examination of said charges, marked each of them "Refused," and, before reading his main charge to the jury, asked one of appellee's attorneys if he desired to read or see said special charges, to which he replied in the affirmative. The judge then remarked that the special charges were in his private office, and the attorney for appellee got them, and, in the presence of the court and counsel for appellant, was in the act of reading them. Whereupon counsel for appellant objected to attorney for appellee reading said charges, and took them from him, stating that they were his property and not court papers, and that he would file them when it suited him. Attorney for appellant then handed said charges to the judge presiding, who in turn handed them to the clerk, with instructions to file them. Counsel for appellee protested against this action, and claimed the right and privilege to examine said special charges, and stated that after an examination of the same they would probably agree to the giving of them in charge to the jury; and, not being allowed to read said charges, excepted to the proceedings on the ground that if said charges were requested to be given by the court, then they were court papers, and, if they were not court papers, then such special charges could not be considered as having been requested. The judge then read his

* 6. See Master and Servant, vol. 34, Cent. Dig. § 735.

main charge to the jury, and they retired. About the time the court concluded reading his charge to the jury the clerk finished filing the special charges, and the attorney for appellant took them from the clerk and kept them during the deliberation of the jury, and did not again ask that they be given in charge to the jury. When these special charges were delivered to the judge it became his duty to give such of them as in his judgment contained correct propositions of law applicable to the facts of the case, not covered by the main charge, and to refuse such as did not embody such propositions. Whether given or refused, the duty devolved upon the judge to indorse his action thereon, and to direct the clerk of the court to mark them "Filed" and place them among the papers of the case. When so delivered to the judge and by him ordered filed, they became court papers, and as such a part of the record in the cause as other papers filed therein. They were then subject to the control of the court, and could not be withdrawn without the consent of the parties and permission of the court. A very cogent reason may be found for the rule in the fact that, whenever the trial judge has been misled and induced to give an erroneous instruction to the jury by reason of a special charge requested to the same effect, the appellate courts have treated such error as having been invited, and have uniformly held that the party responsible therefor would not be heard to complain. Furthermore, we are of the opinion that the practice of submitting special charges asked to opposing counsel, in order that the trial judge may have the benefit of their respective views to assist him in a correct presentation of the law to the jury upon every issue in the case, is to be commended. The object and purpose of securing a fair trial free from errors should be kept steadily in view by the court and counsel engaged in the trial of any cause, and the most effective methods for the accomplishment of that end should be pursued. In the case at bar the bill of exception shows that appellee's counsel claimed the right to examine the special charges asked, and that counsel for appellant insisted that they were not court papers, and that appellee's counsel could not see nor read them until after they were filed by the clerk. It does not appear that after the court directed the clerk to file the charges, and appellant's counsel had withdrawn them from the custody of the clerk, any request was made of appellant's counsel for them, or of the court to require counsel for appellant to deliver said charges to appellee's attorneys for examination as court papers. If, after such filing, request had been made for said charges and refused, and the court been requested to require the delivery of them, the presumption will be indulged that the court, in a proper exercise of its authority, would have complied with such request. And in view of the

absence of such request, and the failure to call into requisition the aid of the court, we do not feel authorized to hold as a matter of law that said special charges had been abandoned, and refuse to consider them.

It is insisted, under appellant's first assignment of error, that the issue of assumed risk on the part of deceased, William Turner, was raised by the evidence, and that the court erred in failing to submit that issue to the jury. In view of the earnestness with which the proposition has been urged, we have very carefully considered the contention, but with the conclusion reached that it should not be sustained. It is sufficient to say that, after a careful review of the evidence contained in the record, we are of the opinion that the real issue involved is one of contributory negligence on the part of deceased, and that the court correctly declined to submit the question of assumed risk.

Appellant complains of the action of the court in refusing to give in charge to the jury its special charge No. 8, which reads as follows: "You are instructed that if from the evidence you find that the movements of the cars in making the switch of the cars was at a speed of not more than five or six miles an hour, then no recovery can be had by plaintiff on the alleged ground of negligence that the speed of the movement of the cars was unlawful." One of the specific acts of negligence alleged in plaintiff's petition was in effect that, in violation of a municipal ordinance of the city of Waxahachie, the cars which were being switched and which caused William Turner's death were moving at a rate of speed in excess of six miles per hour. Evidence was introduced upon this question, but the court did not charge upon the issue raised. It is conceded by counsel for appellee in their brief that the evidence not only raised the issue of negligence in running the cars at a greater rate of speed than six miles an hour, but contends that the same was amply sufficient to have authorized a finding in favor of appellee upon that issue. In view of these allegations, and the evident prominence given the issue in the progress of the trial, it is believed the appellant was entitled to a proper charge upon that phase of the case. If the special charge requested was not strictly correct, standing alone, because of the allegations and probable issue that appellant's employes were guilty of negligence in permitting said cars to run down said track at a high rate of speed, though less than six miles an hour, yet it was sufficient to call the court's attention to the omission in the main charge, and suggest the giving of a suitable instruction thereon, at the same time carefully guarding other issues in the case.

Upon the measure of damages, the court charged the jury as follows: "You are further instructed that, if you find for the plaintiff under the foregoing instructions, the measure of damages would be pecuniary com-

compensation for the loss of her husband; that is, such amount of money, estimated as received at the present time, as she might reasonably and probably have received from his earnings and accumulations had he not been killed." This charge is assigned as error, and the assignment must be sustained. It is peculiarly worded, of doubtful construction, and, under the most favorable consideration, does not conform to the rule announced by our Supreme Court. In the case of *Railway Co. v. Morrison*, 93 Tex. 529, 56 S. W. 745, it is said: The "charge given required the jury only to find the amount of the pecuniary aid which the plaintiffs would have received from their son if he had not been killed, and assumed that such amount was fixed by law as the measure of damages. This took from the jury the right to consider the question whether or not a less sum paid now would compensate the plaintiffs for their loss of the aid which their son would have rendered, as he would probably have rendered it, during the whole of their lives. * * * Whether or not a less sum than that to which the son's whole contributions would have amounted would compensate plaintiffs for the loss of such contributions, as he would have made them, was a question which should not have been taken from the jury by a charge which assumed that the compensation must necessarily consist of a sum equal in amount to that of such contributions." In the more recent case of *Merchants' & Planters' Oil Co. v. Burns*, 7 Tex. Ct. Rep. 565, 74 S. W. 758, the substance of a special charge asked and refused was as follows: "She can only recover such sum as would represent the present worth of the probable amount which Burns would have contributed to her support had he lived." This charge was held to be erroneous, and in discussing it Judge Brown remarks: "The effect of this charge would be to prescribe a mathematical rule by which to ascertain what a given sum would be worth at the time of the trial. While the jury may not arbitrarily assess such sum as to them may seem proportionate to the injury without reference to the facts and circumstances of the case, yet the law does confide to them considerable discretion, and the court should not undertake to lay down a fixed rule by which they must be governed in ascertaining that sum which, now paid, would be compensation for the pecuniary injury sustained. * * * The trial court should inform the jury that the effect of the law is to give compensation for the pecuniary loss, but the jury must be permitted to decide, under all the circumstances of each case, whether a sum less than the aggregate amount which the deceased would probably have contributed to the injured party, if he had lived, would compensate for the pecuniary injury sustained." See, also, *San Antonio Traction Co. v. White*, 94 Tex. 468, 61 S. W. 706; *Ry. Co. v. Worthy*, 87 Tex. 459, 29 S. W. 376. Giving the charge under consideration in the

present case the most favorable construction of which its language is susceptible, for the purpose of upholding it, still, when tested by the rule announced in the cases mentioned, it is clearly incorrect, and requires a reversal of the case. It unquestionably assumes that compensation for the pecuniary injury sustained by appellee in the loss of her husband must necessarily consist of a sum of money equal to such an amount as she might probably have received from his earnings and accumulations from time to time throughout his life, had he not been killed, and deprived them of the right to consider whether or not a less sum paid now would have compensated her for the loss sustained.

The basis of appellant's eighteenth assignment of error is the refusal of the court to give in charge to the jury the following special instruction: "You are instructed that if William Turner voluntarily went behind the flat car on the elevator track, and that such position taken by him was by him known to be one of probable danger, and that such act on his part was an act which an ordinarily prudent person, having regard for his own protection and personal safety, would not have done, and that he thereby contributed to his own injury, then, though you may believe the defendant's employes were guilty of negligence in making the switch, or in the movement of the cars, the plaintiff should not recover, though the negligence of William Turner was not the proximate cause of his injury." This charge is erroneous in that the jury were told, in effect, that, if they found the facts to exist as therein stated, the same constituted negligence on the part of the deceased, Turner, and precluded a recovery by appellee, although such negligence was not the proximate cause of his injury. If the deceased, Turner, was guilty of negligence in the respect mentioned in said charge, and such negligence was the proximate cause of his injury, then appellee was not entitled to recover. It was not enough to defeat appellee's recovery, by reason of this issue, that the jury believed that deceased was guilty of negligence, but they must also have believed that such negligence contributed proximately to his injury and death. Had the special charge been in conformity with the views of the law here expressed, it should have been given. The plea of contributory negligence was a vital issue in the case, and was presented in a very general way, only, in the main charge. We are of the opinion that the appellant is entitled upon another trial, if the evidence is the same as now before us, to have the facts upon which it relies to establish such defense grouped in a proper charge, and the issue thus submitted to the jury. *G. O. & S. F. Ry. Co. v. Mangham*, 95 Tex. 413, 67 S. W. 765.

We believe there was no error in admitting the evidence complained of in appellant's twenty-sixth and twenty-seventh assignments of error. Witnesses introduced by appellant

had related their version of a conversation had with the deceased just before he died. They had testified, at the instance of appellant, in substance, that the deceased stated in this conversation particularly how he got hurt, and said the company was not to blame, and that he was killed by his own fault. This statement attributed to deceased was denied by appellee, and in rebuttal she placed witnesses on the stand who testified that they were present and heard the same conversation related by witnesses for appellant; that deceased did not state what appellant's witnesses say he did, but, on the contrary, that he stated that he had had a "foul deal" and was "not" to blame. This testimony was not offered by appellee as a part of the *res gestæ*, but in rebuttal of the testimony which had been given by appellant's witnesses, and was, we think, clearly admissible under the circumstances shown by the record.

We deem it unnecessary to discuss other assignments. The judgment of the court below is reversed, and the cause remanded.

VIRGINIA FIRE & MARINE INS. CO. v. CUMMINGS.

(Court of Civil Appeals of Texas. Jan. 14, 1904.)

INSURANCE — IRON-SAFE CLAUSE — SUBSTANTIAL COMPLIANCE — AGENTS' KNOWLEDGE — INTEREST OF ASSURED — MISSTATEMENT — ESTOPPEL.

1. Where insured had taken an inventory in 1901 and 1902, during the continuance of a policy, and the 1901 inventory, and invoices of purchases made between January 1, 1902, and the date of the fire, had been journalized, so that from the books and papers preserved a substantially complete record of the business transacted, including all sales, purchases, and shipments, was shown, and the amount and character of the inventory of January, 1901, could be and was determined with reasonable accuracy, the iron-safe clause of the policy was substantially complied with, though the 1901 inventory, and invoices between January 1, 1902, and the fire, were left out of the safe and burned.

On Rehearing.

2. Where S., who had previously insured plaintiff's stock, on being unable to reinsure the stock in any company which he represented, applied to other insurance agents for such insurance, who had authority to fill out, countersign, and issue policies for defendant already in their possession, and such agents, at the request of S., issued the policy sued on to plaintiff, and divided the commission with S., the latter was the agent of defendant in the issuance of the policy, and his knowledge of any fact that would estop the defendant from setting up a defense thereto was binding on defendant.

3. Evidence reviewed, and held insufficient to show that an insurance agent, in issuing a policy to plaintiff, had knowledge at that time that the property insured belonged to a firm of which plaintiff was a member, and not to plaintiff, to whom the policy was issued, so as to estop the insurer from enforcing a provision requiring plaintiff to state his interest in the policy, if other than sole and unconditional ownership.

Error from District Court, Harris County; W. P. Hamblen, Judge.

Action by O. S. Cummings against the Virginia Fire & Marine Insurance Company. From a judgment in favor of plaintiff, defendant brings error. Reversed.

Alexander & Thompson, for plaintiff in error. H. Grass and Bryan, Tod & McRae, for defendant in error.

GARRETT, C. J. This action was brought by O. S. Cummings, as assignee, against the Virginia Fire & Marine Insurance Company, to recover on a policy of fire insurance issued to J. R. Kimmins for \$1,000 on a stock of hardware, and \$600 on a building situated in the town of Alvin, in Brazoria county.

The petition alleged that at the time the policy was issued the property belonged to the Kimmins Hardware Company, a firm composed of J. R. Kimmins and W. R. Kimmins; that the defendant knew the true ownership, and when it issued the policy intended to insure the property of the Kimmins Hardware Company, although the policy was issued in the name of J. R. Kimmins. It was also alleged that an adjuster of the defendant had investigated the loss and expressed himself satisfied, and had offered 50 per cent of the face of the policy in settlement thereof, which the plaintiff had refused, demanding payment of the full amount.

Among the defenses pleaded were stipulations of the policy to furnish proofs of loss, the "iron-safe clause," and a provision that the policy should be void if the assured were not the sole and unconditional owner of the property. It was averred that J. R. Kimmins, to whom the policy was issued, was not the sole and unconditional owner of the property insured; that he owned only a half interest therein, the other half being owned by W. R. Kimmins. It was also averred that the assured had failed to take the inventories and keep the books of account, and to preserve them, as required by the iron-safe clause. There was a jury trial, which resulted in a verdict and judgment in favor of the plaintiff for the full amount of the policy.

The policy sued on was as described in the petition. Among other things, it provided for notice and proofs of loss if fire should occur, and that no sum should be due and payable, or any suit maintained thereon, until such stipulation had been complied with. It further provided: "The following covenant and warranty is hereby made a part of this policy: (1) The assured will take a complete itemized inventory of stock on hand at least once in each calendar year, and unless such inventory has been taken within twelve calendar months prior to the date of this policy, one shall be taken in detail within thirty days of issuance of this policy, or this policy shall be null and void from such date. (2) The assured will keep a set of books, which shall clearly and plainly present a complete record of business transacted, in-

cluding all purchases, sales and shipments, both for cash and credit, from date of inventory, as provided for in first section of this clause, and also from date of last preceding inventory, if such has been taken, and during the continuance of this policy. (3) The assured will keep such books and inventory, and also the last preceding inventory, if such has been taken, securely locked in a fire proof safe at night, and at all times when the building mentioned in this policy is not actually open for business, or failing in this, the assured will keep such books and inventories in some place not exposed to a fire which would destroy the aforesaid building, and unless such books and inventories are produced and delivered to this company for examination, this policy shall be null and void; and no suit or action shall be maintained hereon; it is further agreed that the receipt of such books and inventories and the examination of the same shall not be an admission of any liability under the policy, nor a waiver of any defense to the same." It is further provided that, if the assured named in the policy were not the sole and unconditional owner of the property offered for insurance, the policy shall be void. It further provided: "This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements or conditions as may be endorsed hereon or added hereto; and no officer, agent or other representative of this company, shall have power to waive any provision or condition of this policy (except such as by the terms of this policy may be the subject of agreement endorsed hereon or added hereto, and as to such provisions and conditions, no officer, agent or representative shall have such power or be deemed to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed unless so written." The policy was dated September 5, 1901, signed by the president and secretary, and provided that it should not be valid until countersigned by the duly authorized agents of the company at Houston, Tex., and it was countersigned by Spears & Kattman, as such agents at Houston, Tex.

The stock of hardware and the building insured belonged, at the time the policy was issued and when it was terminated by fire, to the Kimmins Hardware Company, a partnership composed of J. R. Kimmins and W. R. Kimmins, doing business at Alvin, in Brazoria county. It was burned on August 6, 1902. The value of the property destroyed was sufficient to support the amount of the judgment under the provisions with respect to liability only for three-fourths of loss, and for proportionate amount thereof in case of concurrent insurance. About 10 days after the fire H. C. Robinson, as adjuster for the defendant, went to Alvin and examined into

the loss. The assured produced such books and papers as he had. Inventories had been taken in January, 1901, and in January, 1902. The 1901 inventory, and invoices of purchases made between January 1, 1902, and the date of the fire, were left out of the safe and burned in the fire, but the invoices had been journalized. From the books and papers preserved a substantially complete record of the business transacted, including all purchases, sales, and shipments, both for cash and credit, was shown, and the amount and character of the inventory of January, 1901, could be and was determined with reasonable accuracy. See companion case, *Continental Ins. Co. v. Cummings*, 78 S. W. 378, 8 Tex. Ct. Rep. 881. The iron-safe clause was substantially complied with, and further proofs of loss were waived by the acts of the adjuster of the defendant. The policy was transferred by J. R. and W. R. Kimmins to O. S. Cummings, the plaintiff, on August 9, 1902.

Upon the question of estoppel by notice to the defendant of the true ownership of the property, the evidence showed that one Stevens was a local insurance agent at Alvin, but did not represent the defendant. He had written insurance for J. R. Kimmins on the property described in the policy in another company which was about to expire, and, being unable to renew the insurance in any of the companies represented by him, he applied to Spears & Kattman, insurance agents at Houston, to write the renewal of the policy. Spears & Kattman were agents of the defendant, and had blank policies, signed by its president and secretary, ready for filling out and issuance, and countersigned and issued the policy sued on as requested by Stevens, and divided commissions with him. It was sent to Stevens for delivery to the assured. The policy previously written by Stevens had been written in the name of J. R. Kimmins by the express direction of J. R. Kimmins, and the policy sued on was issued on Stevens' request for a renewal of insurance. Stevens had no authority from the defendant to represent it, and was not in possession of any of its stationery or blanks. He applied to Spears & Kattman for the insurance, in accordance with a custom of insurance agents, when one is not able to place a risk in a company represented by him, to apply to another, who writes the insurance and divides the commissions. Stevens knew of the firm name "Kimmins Hardware Company," and was of the impression that others besides J. R. Kimmins were interested in the business, but he did not know that W. R. Kimmins or any one actually owned any part of it. Spears & Kattman were local agents at Houston for the defendant, acting under a written power of attorney from it, and had in their possession its blank policies, which they filled out, countersigned, and issued. They had never previously written any insurance for J. R. Kimmins. The policy

was written in the name of J. R. Kimmins as sole owner of the property, just as Stevens directed that it should be written. At the time it was written Spears & Kattman knew that there was a firm Kimmins Hardware Company, but did not know who composed the firm, whether J. R. Kimmins alone, or he and others. At no time prior to the fire did they have such knowledge. There had been no dealings between Stevens and Spears & Kattman for a year or more prior to 1901, and there was no understanding between them with regard to the matter. It was not shown that they had ever written a policy for the defendant through or on the solicitation of Stevens.

As has been already stated, we are of the opinion that the iron-safe clause was shown to have been substantially complied with, and that further proofs of loss than such as were exhibited by the assured to the defendant's adjuster, Robinson, were waived. But there was a breach of the condition of the policy as to the sole and unconditional ownership of the insured property. Such ownership was stated in the policy to be in J. R. Kimmins, while it is an uncontroverted fact that the property insured belonged to J. R. Kimmins and W. R. Kimmins, partners composing the firm of Kimmins Hardware Company. It was contended, however, at the trial below, and is urged here as a reason why the judgment should be affirmed, that the defendant was estopped to set up the breach of the condition by knowledge on the part of its agent or agents of the true ownership of the property when the policy was issued and before its destruction by fire. The evidence utterly fails to support any such theory of the case. On the contrary, the undisputed evidence shows that Spears & Kattman did not know who composed the firm of Kimmins Hardware Company, and had no reason to suppose that the ownership of the property was otherwise than as stated in the policy. While we hardly think there was evidence sufficient to sustain a finding affecting Stevens with notice of the true ownership, it is unnecessary to determine that question, for it is very clear that Stevens was not the agent of the defendant. *Ins. Co. v. Blum*, 76 Tex. 653, 18 S. W. 572. It is not necessary to notice the assignments of error in detail. Because the undisputed evidence shows that J. R. Kimmins was not the sole owner of the property insured, and there are no facts to show that the defendant was estopped to assert a breach of the policy in that respect, the judgment of the court below will be reversed, and judgment will be here rendered in favor of the defendant.

Reversed and rendered.

On Motion for Rehearing.

(Feb. 18, 1904.)

Upon consideration of the plaintiff's motion for a rehearing, we have come to the conclu-

sion that the case of *Insurance Co. v. Blum*, which we cited as authority for holding that Stevens was not the agent of the defendant in the issuance of the policy sued on, may be distinguished from this case. The facts of this case show that Stevens was engaged in business as an insurance agent at Alvin, but did not represent the defendant. Companies represented by him had been carrying insurance for J. R. Kimmins upon the stock of hardware and building described in the policy sued on, and when the prior insurance was about to run out, having no company represented by him that could take the risk, because their limit of insurance in the block in which the property was situated had been reached, Stevens, as was customary among insurance agents, applied to Spears & Kattman, the agents of defendant at Houston, for insurance, to the amount of the policy, of the property as the property of J. R. Kimmins. Spears & Kattman having authority to fill out, countersign, and issue policies for the defendant already in their possession, signed by its president and secretary, prepared the policy in question, countersigned it, and forwarded it to Stevens for delivery to J. R. Kimmins, and collection of the premium, and, according to the custom, divided commissions with him. Kimmins' insurance was renewed by Stevens without further application, but in accordance with the custom of insurance agents to renew policies for their customers. J. R. Kimmins received the policy and paid the premium. In the case of *Insurance Company v. Blum, Bridges*, who did business as an insurance agent at Navasota, solicited insurance from Glenn & Son, merchants at Buffalo. They had three policies on their stock, and were not ready then to take further insurance. Some time afterwards, however, Glenn & Son wrote to him requesting insurance for \$1,000, but designated no company. At that time Bridges represented no company with which he could place the risk, and applied to Lofland & Menard, insurance agents at Galveston, for the insurance. They wrote and sent a policy for the desired amount in the East Texas Fire Insurance Company. There was a proviso in the policy allowing concurrent insurance, but requiring consent thereto when taken. Glenn & Son subsequently took out further insurance to the limit. They testified that Bridges had told them, when they wished to take out additional insurance, to do so and notify him by letter, which they did. The company had previously notified Bridges that it had canceled the policy. On the night the letter of Glenn & Son reached Bridges notifying him of the additional insurance the loss occurred, without other notice either of the cancellation or of the additional insurance. The question arose as to whose agent Bridges was, as bearing upon the notice of cancellation of the policy and consent for additional insurance. It was held that he was the agent of the company only for the purpose of receiving and remitting the premium, and that he was

the agent of Glenn & Son for the purpose of procuring the policy, and that with its procurement his agency ceased. The effect of notice to Bridges, at the time of the delivery of the policy, of any fact that might have estopped the company if Bridges had been its agent, was not considered, and although the Supreme Court, in disposing of the question, treated Bridges as an insurance broker only, yet, in view of principle and authority for holding him as the agent of the company for the issuance of the policy, and charging the company with notice of such facts as would affect its issuance of which he might have knowledge, we do not think the decision in *Insurance Company v. Blum* should be extended so as to relieve the company from the effects of such notice. An examination of the following authorities will show the distinction between an insurance broker and an insurance agent who procures insurance from a company that he does not represent; they give cogent reasons for enforcing the principle of agency and consequent notice upon an insurance company that intrusts the ascertainment and determination of facts to support the issuance of its policy to a person who does not represent it under a general appointment: 1 *May on Insurance* (1900) § 124A; *May v. Assur. Co.* (C. C.) 27 Fed. 280; *Ins. Co. v. Trust Co.*, 111 Fed. 697, 49 C. C. A. 555. The case last cited contains a number of citations to which reference is made. Since we conclude that Stevens was the agent of the defendant in the issuance of the policy, his knowledge of any fact that would estop the company to set up a defense thereto, if known to the company, would affect the company with such knowledge and estop it from setting up the defense. If, then, at the time of the issuance of the policy, Stevens knew that J. R. Kimmins was not the sole and unconditional owner of the insured property, the defendant would be estopped from setting up that defense in avoidance thereof.

This conclusion brings us to the question of the sufficiency of the evidence to support a verdict that Stevens knew that J. R. Kimmins was not the sole and unconditional owner of the insured property, or, rather, whether there was enough evidence to require the issue to be submitted to the jury. If not, the judgment heretofore rendered by this court should remain as it is, except as hereinafter indicated. J. R. Kimmins testified that two or three years before the issuance of the policy sued on, in conversation with Stevens about the property, he told Stevens that others owned an interest in it. He was not only indefinite and uncertain about what he told Stevens, but what he told him did not tend to prove any fact to show knowledge of the condition of the title at the time of the issuance of the policy. All that Stevens testified to concerning his knowledge of the ownership of the property was merely gossip and speculation about who had money in the business. There is no scrap of testimony in the evidence tend-

ing to show that at the time Stevens procured and delivered the policy to Kimmins he knew that J. R. Kimmins was not the sole owner of the property. The defendant, however, should be required to return to the plaintiff the sum of \$94 premium paid for the insurance, and our judgment heretofore rendered will be reformed in that respect. On all other points the motion for a rehearing is overruled.

Overruled.

ELLIS v. RIDDICK.*

(Court of Civil Appeals of Texas. Jan. 18, 1904.)

SALES — CONTRACT — CONSTRUCTION — EXPRESS AND IMPLIED WARRANTY — BREACH — REMEDY.

1. Plaintiff agreed to sell the entire crop of cane to be grown by him on his plantation for four years, and to cultivate all cane in a good manner, and to deliver it cleaned for the mill; "said cane to be sound, ripe and merchantable." Defendant obligated himself to receive all the cane raised on the plantation during said term. No opportunity was had for inspection before it was received at the mill. *Held*, that there was an express warranty, and plaintiff was not entitled to recover the stipulated price for all cane if such cane was not sound and merchantable.

2. The purchaser of cane, who agreed to furnish cars, etc., to aid in the delivery, was not entitled to an instruction that, as the contract contained an express warranty, he was not liable for the contract price for cane not sound and merchantable, though it was received by him, where it did not refer to a contention that the damaged condition of cane was occasioned by his failure to comply with the contract.

3. Where a contract for the sale of cane contained an implied warranty, and there was no opportunity afforded for inspection before it was received at the purchaser's mill, he was not bound to seek a rescission on delivery of inferior quality, but might keep the property and seek redress for breach of contract.

Appeal from District Court, Travis County; R. L. Penn, Judge.

Action by C. W. Riddick against Amanda M. Ellis. Judgment for plaintiff, and defendant appeals. Reversed.

C. W. Riddick brought this action against Amanda M. Ellis, as executrix of the estate of L. A. Ellis, deceased, seeking to recover for alleged breaches of a written contract; and from a verdict and judgment in favor of the plaintiff, the defendant has appealed.

The contract referred to reads as follows:

"State of Texas, County of Fort Bend. Know all men by these presents that we, C. W. Riddick, party of the first part, and C. G. Ellis, agent of the estate of L. A. Ellis, deceased, party of the second part, witnesseth:

"(1) The party of the first part is now the owner of what is known as the Klondyke Plantation in Fort Bend County, Texas, and has in cultivation thereon sugar cane. That

*Rehearing denied February 17, 1904.

† See *Sales*, vol. 43, Cent. Dig. §§ 1153, 1237.

the party of the first part intends to cultivate 300 acres or more of said Klondyke Plantation in sugar cane during the year 1900, and is to cultivate as much as 300 acres of said land in sugar cane during the term of four years beginning with the first day of January, 1900, and ending with the last day of December, 1904, and he has this day sold to the party of the second part the entire crop of cane to be grown by him on said Klondyke Plantation for and during the period of four years, beginning, as aforesaid, on the first day of January, 1900, and ending with the last day of December, 1904.

"And the party of the second part is to pay to the party of the first part, for said cane delivered at his (party of the second part's) mill in Fort Bend County, Texas, at the rate of eighty cents per ton for every cent that sugar known and classed as prime yellow clarified is worth in the market of New Orleans on the date of the delivery of said cane and at the rate for each fraction of a cent said class of sugar is worth. That is (to illustrate) if the said class of sugar in the market of New Orleans is worth on the date of the delivery of any of said cane four and one-half cents per pound, then the party of the first part shall receive for his cane, so delivered, the sum of three and $\frac{99}{100}$ (\$3.00) dollars per ton.

"And the party of the first part is to cultivate all cane in a good manner, and to cut, haul, and deliver, cleaned as customary for cane to be cleaned for the mill, said cane to be sound, ripe and merchantable for the price above mentioned, to the party of the second part at his mill. The party of the second part is to unload the tram cars at his own expense at the mill. And the said party of the first part also agrees to pay a certain indebtedness in sugar cane at the price above mentioned to the party of the second part. The said indebtedness referred to is an indebtedness heretofore due by the estate of Dr. Dillard and S. J. Winston of Fort Bend County, Texas, to the party of the second part, amounting to the sum of two thousand nine hundred and seventy (\$2,970) dollars. Said indebtedness is, however, to be paid in two equal installments, with interest at the rate of eight per cent. per annum. First installment is to be taken out of the crop of cane for the year 1900, and the second installment is to be taken out of the crop for 1901. And the said amounts representing said debts here referred to, are evidenced by two notes executed by the party of the first part, of even date herewith, to the party of the second part. And the party of the second part shall receive as payment for said indebtedness sugar cane at the rate above mentioned and under the terms of this contract. And the party of the first part is also to deliver said cane to the party of the second part in a seasonable time for manufacturing it into sugar each fall, amount to be delivered by the par-

ty of the first part to the sugar mill of the party of the second part each day to be hereafter mutually agreed upon, said agreement to be governed by the estimated quantity of cane the party of the first part shall have to deliver.

"(2) The party of the second part hereby obligates and binds himself to receive from the party of the first part all of the cane raised by him on the said 300 acres or more, of land cultivated on the Klondyke place in Fort Bend County, Texas, for and during the period of four years from and after the first day of January, 1900, and agrees to receive said cane at his sugar mill in Fort Bend County, Texas, and agrees to pay the party of the first part therefor 80 cents per ton for every cent and every fraction of a cent in the same proportion that sugar of the class known as prime yellow clarified is worth in the markets of New Orleans on the date of each delivery of such cane, and agrees to pay for said cane at the end of each week for the deliveries made during that week.

"And the party of the second part also obligates and binds himself to put down a tramroad leading to the sugar mill of L. A. Ellis into the land to be cultivated by the party of the first part in cane, and agrees to extend said tramroad to the center of the land so cultivated in cane by the party of the first part; the party of the first part agrees to furnish to the party of the second part the right of way through any and all lands which will be necessary to pass through after leaving the land of the party of the second part to reach the land of the party of the first part, free of all cost or charge to the party of the second part; said right of way to be a direct line as near as practicable, and he also agrees to maintain said tramroad in good repair and also to furnish the party of the first part the necessary tram cars upon which the cane raised by the party of the first part can be loaded for delivery to the party of the second part at his mill. And the party of the second part also further agrees to keep said tramroad open and free of obstruction at all times during the harvesting season to enable the party of the first part to deliver said cane to the party of the second part without hindrance or interference.

"And the party of the second part shall maintain and keep in repair the tram cars furnished and to be furnished to the party of the first part for the delivery of said crop of cane, and agrees to have the cars unloaded at his own expense at the mill when so delivered, and in the quantity as delivered by the party of the first part.

"It is understood and agreed that in case of a destruction of the sugarhouse from fire or tornado or any action of the elements over which the party of the second part has no control, the party of the first part agrees to release the party of the second part from the requirements of this contract, until such

a time that the party of the second part may rebuild the sugarhouse, and again be ready for operation, and it is also agreed that in case of a breakage of machinery, that the party of the second part has the right and privilege to stop the party of the first part from delivering cane, until the necessary repairs can be made to again put the factory in operation. It is also agreed that the party of the first part can deliver his cane to the mill any day while the party of the second part is saving his own crop.

"And the party of the second part also agrees to receive in payment for the two notes executed by the party of the first part of even date herewith, cane at the price above mentioned, in payment of said notes. And if the party of the second part shall fail or refuse to comply with his part of this contract he shall not require the party of the first part to pay said notes in money.

"This contract shall be in force for and during a period of four years, and is executed in duplicate, each copy of which shall be considered an original.

"In testimony whereof, we have this day signed and sealed the same on this the first day of November, A. D., 1899. [Signed] C. W. Riddick. C. G. Ellis, Agt. for Estate of L. A. Ellis."

The plaintiff alleged in his petition that, in pursuance of said contract, he planted and raised a crop of cane on the farm referred to during the year 1901, and that, as authorized by the contract, he and the defendant entered into a supplemental agreement, by the terms of which the defendant agreed to furnish him during the harvesting season 60 tram cars, with which to deliver his crop of cane to the defendant; and he alleges a breach by the defendant of the agreement referred to, and damage resulting to him therefrom. He also sought to, and did, recover the contract price for some cane delivered to the defendant which had not been paid for. Some other claims are asserted against the defendant, which it is unnecessary to particularize. The plaintiff alleged in his petition that all the cane delivered by him to the defendant was of the class and quality mentioned in the contract. The defendant, in addition to her general denial, averred that the plaintiff obligated himself to deliver sound, ripe, and merchantable cane, and that, of the amount delivered, 329 tons were spoilt and entirely worthless, and 932 tons were not sound, ripe, or merchantable, but were soured, spoilt, and damaged, and worth only about one-half of what it would have been if in accordance with the contract. There was testimony tending to sustain the latter plea. The trial court held, and so instructed the jury, that, as the uncontroverted testimony showed that all the cane received and used by the defendant was received after full opportunity to inspect it, she was bound to pay for it according to the price stipulated

in the written contract, unless there was a subsequent verbal agreement, as asserted by the defendant, modifying the written contract, as to the price to be paid for damaged cane. Counsel for the defendant requested an instruction predicated upon the theory that the contract contained an express warranty by the plaintiff that the cane was to be sound, ripe, and merchantable, and that, if any of it was not such, then, although the defendant may have received the same without objection, the plaintiff would be entitled to recover therefor only the reasonable market value of such cane at the time and place of delivery.

Hogg, Robertson & Hogg, for appellant. Hutcheson, Campbell & Hutcheson and West & Cochran, for appellee.

KEY, J. (after stating the facts). Appellant's brief presents a number of questions for decision, none of which will be discussed in this opinion, except the one predicated upon the action of the court in giving the one and refusing the other instruction, as above stated. It is sufficient to say that the other questions have been duly considered, and it is not believed that they point out reversible error.

Perhaps no subject in the entire domain of the law has produced more contrariety of opinion than has the subject of warranty in sales of personal property. Not only have the courts differed in deciding cases, but courts and authors have often failed to discriminate between warranties and deceit, or fraudulent representations. As an illustration, it is often said, in considering the subject of express warranty, that it is not necessary that the seller should have intended, by the language used, to warrant the thing sold, and that, in order to create a warranty, the purchaser must be influenced by the statement alleged to constitute the warranty. Both of these propositions are correct, as applied to a question of fraud, based upon a statement made by the seller, but neither is correct in determining whether or not the statement constitutes an express warranty. Such a warranty is entirely a matter of contract, and the contract which creates it must, like all other contracts, embody the mutual intentions of the parties. Nor is it necessary that the buyer must have been deceived, before he can recover for the breach of an express warranty. *Shordan v. Kyler*, 87 Ind. 38; *Harrington v. Smith*, 138 Mass. 92; *Smith v. Hale*, 158 Mass. 182, 83 N. E. 493, 35 Am. St. Rep. 485.

It seems now to be a well-settled principle that, where there is an express warranty of quality, the purchaser, though having opportunity of inspection, and being aware of the defect in quality, may receive the property, and recover damages for breach of the warranty, or, if sued for the purchase money of the property, may offset such damages against the contract price. *Barnum Iron &*

Wire Works v. Seley, 77 S. W. 827, 8 Tex. Ct. Rep. 716; *Parks v. O'Connor*, 70 Tex. 389, 8 S. W. 104; 2 *Mechem on Sales*, § 1895. The author cited says: "The express warranty therefore stands upon different ground, in reference to acceptance, from that occupied, according to many authorities, by the implied warranty or condition; and it is well settled, where an express warranty accompanied the contract, that while, by accepting the goods, the buyer may lose his right to subsequently reject them, he does not thereby necessarily lose his right to rely upon the warranty. The express warranty survives acceptance, and, by the great weight of authority, gives the buyer a remedy, notwithstanding the defects were visible or open to discovery at the time they were received. The buyer may reject them, but he is not compelled to do so. He may retain them and rely upon the warranty." Although the contrary was once held, it appears now to be firmly established that an express warranty may exist in connection with an executory contract. 2 *Mechem on Sales*, § 1894; *Day v. Pool*, 52 N. Y. 416, 11 Am. Rep. 719; *Brigg v. Hilton*, 99 N. Y. 517, 3 N. E. 51, 52 Am. Rep. 63; *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 23 N. E. 372, 16 Am. St. Rep. 753; *Polhemus v. Helman*, 45 Cal. 573.

Counsel for appellant contends that the language of the contract, "said cane to be sound, ripe and merchantable," imports an express warranty by appellee. On the other hand, it is contended, and we presume the trial court held, that the language referred to was not intended as a warranty. "A warranty is an express or implied agreement, collateral, but annexed to the agreement to transfer the title, by which the seller undertakes to vouch for the title, quality, or condition of the thing sold." 2 *Mechem on Sales*, § 1222. And the authorities agree that it is not necessary that the word "warranty" be used to create an express warranty. A warranty is to be distinguished from mere representation or expression of opinion, and in many cases it may be difficult to determine whether or not the language in question should be held to constitute a warranty, or merely an expression of opinion. But such difficulty is not encountered in cases like the one at bar. The language that we are now dealing with was not a mere verbal statement made by the seller while the parties were negotiating, and concerning the quality of something then in existence. It was incorporated into a written contract of sale, and it referred to something that had no existence at that time. When parties are negotiating concerning the sale of property then in existence, words of commendation by the seller may properly be held as merely expressions of opinion; but, when a written contract is made for the sale of an article not yet in existence, and it is stipulated that it shall be of a particular quality, it would be unreasonable to hold that such stipulation

was intended merely as expressing the seller's opinion as to what would be the quality of the article when it was manufactured or produced. Such a stipulation signifies a promise on the part of the seller that the article shall be of the quality named. In some cases it is said that such language is descriptive of the thing sold, and not a warranty; but in the case at bar the first section of the contract describes the property sold as "the entire crop of cane to be grown by him on said Klondyke Plantation for and during the period of four years, beginning, as aforesaid, on the first day of January, 1900, and ending with the last day of December, 1904." Then, after fixing the price to be paid for the cane, it reads: "And the party of the first part is to cultivate all cane in a good manner, and to cut, haul, and deliver, cleaned as customary for cane to be cleaned for the mill, said cane to be sound, ripe and merchantable, for the price above mentioned, to the party of the second part at his mill." If nothing more had been said in the contract, it would seem that the language "said cane to be sound, ripe and merchantable," was not intended as limiting the amount of cane sold, because it was not inserted as a proviso in the preceding paragraph, which declared that the entire crop of cane to be grown on the Klondyke Plantation during the period of four years was thereby sold. In other words, the language referring to the quality of the cane does not appear to have been used in the sense of qualifying and limiting the amount of cane contracted to be sold, but, rather, as an assurance that the entire crop should possess the qualities named. But furthermore, in the second section of the contract, and following after the language referred to, is this express stipulation: "The party of the second part hereby obligates and binds himself to receive from the party of the first part all of the cane raised by him on the said 300 acres or more of land cultivated on the Klondyke place in Fort Bend County, Texas, for and during the period of four years from and after the first day of January, 1900." Now, it would seem that if the language of the contract which refers to the quality of the cane was used only in a descriptive sense, and as limiting the amount sold, the purchaser would not thereafter, and in a subsequent section of the contract, have expressly and specifically obligated himself to receive from the seller all the cane produced on the farm referred to. It is also to be noted that, at the time the contract was made, the subject-matter of the sale was not in existence, and the contract required Mrs. Ellis to furnish part of the consideration, or perform part of the obligation of the contract, before she would have an opportunity to inspect the cane. It required her to build a tramroad from her farm to and upon that of the plaintiff, and furnish him with cars with which to haul his cane to the mill. Moreover, the contract in-

dicates on its face that it was intended by the parties that there should be delivery of the cane before the defendant would have opportunity to inspect and ascertain its quality. It required her to furnish the plaintiff with the necessary number of cars to harvest his cane, and required the plaintiff to load the cane on the cars, and deliver them to the defendant at her mill, and required her to unload the cars.

In the absence of an express or implied agreement as to what shall constitute delivery, the general rule is that, as between the parties themselves, the property is delivered whenever, at the time and place which the law fixes, or the parties have agreed upon, the seller has done everything which is necessary to be done in order to put the property completely and unconditionally at the disposal of the buyer. 2 *Mechem on Sales*, § 1186. In this case, according to the obvious meaning of the contract, when the plaintiff loaded the cane on the cars, and carried the cars to the defendant's mill, delivery was complete, because, when that was done, the plaintiff had done everything which the contract required him to do to place the property at the absolute disposal of the defendant. Such being the case, and there being nothing on the face of the contract, nor disclosed by the testimony, indicating that the defendant would have opportunity to examine the cane before it reached the mill, we hold that she was not required or expected to make such examination before the property was delivered.

In view of these considerations, we feel constrained to hold that the language of the contract which refers to the quality of the property was used for the purpose of expressing an agreement collateral to the contract of sale, by which agreement the seller undertook to vouch for the quality and condition of the thing sold. And if we are correct in that conclusion, then the language referred to constitutes an express warranty, and the trial court erred in construing it otherwise, and in charging the jury that the plaintiff was entitled to recover the price stipulated in the written contract for all the cane received and used by the defendant.

The special instruction requested by the defendant on the subject of warranty was not correct, because it overlooked and eliminated the theory asserted by the plaintiff, to the effect that the damaged condition of the cane was occasioned by the failure of the defendant to comply with the contract.

Counsel for appellee rely upon *Parks v. O'Connor*, 70 Tex. 377, 8 S. W. 104, and some other cases which have followed that decision. As reported, the entire contract in that case is not set out, and we do not know whether or not that case is entirely analogous to the case under consideration. In fact, that case is somewhat confusing, because, while it is stated in the opinion that

the stipulation in the contract, "good merchantable cattle," does not imply a warranty, the opinion concludes with the declaration that the court erred "in giving and refusing instructions, as appellants complain in the assignments under consideration"; and one of the assignments under consideration, as shown in the opinion, complained of the trial court in not charging, as requested by the defendant, that the words "good, merchantable yearlings" constituted a special warranty. Furthermore, that case, if construed correctly by counsel for appellee, seems to be in conflict with *Blythe v. Speake*, 23 Tex. 429, and the decided weight of authority in other jurisdictions. The following cases tend to support the conclusion reached by us in this case: *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 23 N. E. 372, 16 Am. St. Rep. 753; *Latham v. Shipley*, 86 Iowa, 543, 53 N. W. 342; *Callanan v. Brown*, 31 Iowa, 333; *Powell v. Chittick*, 89 Iowa, 513, 56 N. W. 652; *Reed v. Hastings*, 61 Ill. 268; *Shordan v. Kyler*, 87 Ind. 38; *Warren v. Coal Co.*, 83 Pa. 437; *Holloway v. Jacoby*, 120 Pa. 583, 15 Atl. 487, 6 Am. St. Rep. 737; *Groetzinger v. Kann*, 165 Pa. 578, 30 Atl. 1043, 44 Am. St. Rep. 676; *Polhemus v. Helman*, 45 Cal. 578; *McLennan v. Ohmen*, 75 Cal. 559, 17 Pac. 687; *Lewis v. Rountree*, 78 N. C. 323; *Love v. Miller*, 104 N. C. 582, 10 S. E. 685; *Osgood v. Lewis* (Md.) 18 Am. Dec. 317; *Jack & Towne v. R. Co.*, 53 Iowa, 399, 5 N. W. 537; *Barnes v. Burns*, 81 Wis. 232, 51 N. W. 419; *Drew v. Edmunds*, 60 Vt. 401, 15 Atl. 100, 6 Am. St. Rep. 122; *Burr v. Redhead & Co.*, 52 Neb. 617, 72 N. W. 1058; *Erskine v. Swanson*, 45 Neb. 767, 64 N. W. 216; *Reese v. Bates*, 94 Va. 321, 26 S. E. 865; *Money v. Fisher*, 92 Hun, 347, 36 N. Y. Supp. 862.

But if we are wrong in holding that the contract contains an express warranty of the quality of the property, we still think the court's charge was erroneous for the reason that the testimony does not show that the defendant had opportunity to examine the cane before she received it. As already shown, delivery was complete when the plaintiff loaded the cane on the cars and carried them to the defendant's mill, and the testimony does not indicate that the defendant had any opportunity of examination until that was done. It does show that she had such opportunity, and exercised it, before she used the cane, but not before she received it. This being the case, if she discovered that the property was not of the quality stipulated in the contract, she was not required to demand a rescission, but could keep the property, and, as she has done, seek redress for breach of the contract, which contains at least an implied warranty of quality.

For the error pointed out, the judgment is reversed and the cause remanded. Reversed and remanded.

**JACKSON v. MISSOURI, K. & T. RY. CO.
OF TEXAS.***

(Court of Civil Appeals of Texas. Jan. 30, 1904.)

**RAILROADS—CAUSES OF ACTION—JOINDER—
INJURY TO GRASS LAND FROM FIRE—MEAS-
URE OF RECOVERY—INSTRUCTIONS.**

1. An action against a railroad for damages for injury to property by constructing its roadbed across a branch from a spring on plaintiff's land, causing the water from the branch to overflow the spring and fill it with sediment and dirt, so as to entirely stop the flow thereof, was properly joined with an action for damages to plaintiff's grass land from fire originating from sparks from defendant's engine, which spread from defendant's right of way to plaintiff's grass, adjoining the right of way, destroying the grass roots, turf, and grass sod.

2. In an action against a railroad for damages to plaintiff's grass land from fire originating from sparks from defendant's engine, which spread from defendant's right of way to plaintiff's grass, adjoining the right of way, destroying the grass roots, turf, and grass sod, the measure of damage is the difference in the market value of the land before and after the burning.

3. A special instruction, in an action against a railroad for damages to plaintiff's grass land from fire originating from sparks from defendant's engine, which spread from defendant's right of way to plaintiff's grass, adjoining the right of way, destroying the grass roots, turf, and grass sod, given by the court in answer to a question propounded by the jury as to what the court meant in its charge by the word "originate," which told the jury that it was meant by the use of the word that the fire must have originated in the grass or combustible matter on defendant's right of way, and must have been originated therein by sparks from defendant's engine, is not objectionable as imposing on plaintiff the duty of proving by more than a preponderance of evidence that the fire originated in combustible matter on the railroad right of way from sparks emitted from its engine, and which fire communicated to plaintiff's land.

Appeal from District Court, Dallas County; Richard Morgan, Judge.

Action by T. J. Jackson against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for less than claimed, plaintiff appeals. Reversed in part.

Taylor & Coombs, for appellant. Thomas & Rhea, for appellee.

BOOKHOUT, J. The first assignment of error complains of the action of the trial court in sustaining the exception of defendant that there was a misjoinder of causes of action. The petition alleged, in substance, that the plaintiff owned about 560 acres of land in Dallas county, upon which there was a spring, and from which a spring branch extended; that the defendant railroad company constructed its roadbed over and across said tract of land, and over and across said spring branch, and a short distance from his spring, and failed to construct and maintain sufficient culverts to permit the flow of water accumulating in said branch, and thereby

and on account of said embankment and insufficient culverts the flow of water was impeded and caused to back up and overflow said spring, and fill the same with sediment and dirt, so as to entirely stop the flow of said spring. It was alleged that the spring was of great value in furnishing water for the supply of his stock, which it had always done until the construction of said road and embankment, and by the construction thereof he alleged he had been damaged \$500. The petition further charged that on the 8th day of August, 1899, the 2d day of October, 1899, and on the 4th day of March, 1901, and on the — day of July, 1901, the defendant railroad company, in operating its trains over its road through appellant's land, negligently permitted sparks to escape from its engine, and thereby set fire to combustible matter on the right of way, which spread to and burned appellant's grass upon his grass lands adjoining the right of way, and that the grass roots, turf, and grass sod upon said lands were burned and destroyed, and the said lands so burned over were thereby rendered useless to plaintiff for a period of four years, to his great damage. To these allegations the defendant interposed a special demurrer of misjoinder of causes of action. The exception was sustained, and the plaintiff was required to elect which cause of action he would proceed to trial upon. To this ruling he excepted, and elected to try his action for damages to his land for burning his grass, and destroying his grass roots, sod, and turf on said land.

We are of the opinion that the trial court erred in holding there was a misjoinder of causes of action. It was said by Judge Wheeler, speaking for the court in *Carter v. Wallace*, 2 Tex. 209, that "at common law the joinder of actions often depends on the form and not the right of action. Thus, trespass cannot be joined with trover, not because the rights asserted in these actions are inconsistent, but because, as it is said, the joinder depends on the form of action, and the judgments are different, that in trespass being in strictness quod capiat, and that in trover quod sit in misericordia (1 Term, 277; *Cooper v. Bissell*, 16 Johns. 146), and the objection could be taken advantage of by writ of error. Here no such distinctions exist, and no reason is perceived why distinct injuries, occasioned by a trespass upon lands, and a tortious conversion of personal property, may not be joined in the same action, since the forms of action of the common law are not recognized in our courts, but every right of action may be asserted upon its own particular facts and circumstances, without regard to form. All our actions are in the strictest sense, though not in a technical sense, special actions on the case, being what the actions framed under the statute of Westminster II have been described—actions 'whereby the suitor has ready relief, according to the exigency of his busi-

*Rehearing denied February 13, 1904.

¶ 2. See *Damages*, vol. 15, Cent. Dig. § 251; *Railroads*, vol. 41, Cent. Dig. § 1737.

ness, and adapted to the specialty, reason, and equity of his very case.' 3 Com. 51. It may be truly said here, with a slight variation of the language of Lord Hardwicke, 1 East, 226, that wherever the common or our statute law recognizes or creates a legal right for a violation of that right the injured party may bring a special action on his own case, by a petition framed according to the peculiar circumstances of his own particular grievance. In our petition the technical distinctions and artificial boundaries of the common-law actions constitute no element and have no place, but its only requisites are that it shall disclose a right, an injury, and a remedy—the facts which constitute the plaintiff's right, the injury committed by the defendants, and a specification of the relief sought. It is subjected to no such test as, does it pursue the form of trespass or trover or any one of the common-law actions? but the inquiry is, does it disclose any valid, subsisting cause of action?"

In the case of *Railway Co. v. Stewart*, 1 White & W. Civ. Cas. Ct. App. § 1246, it was held that a petition setting up four distinct causes of action, viz.: (1) The conversion of cotton; (2) overcharge of freight on cotton; (3) damage done to buggies in transporting same; and (4) discrimination in freight on 150 bales of cotton—was not subject to the exception of misjoinder of causes of action. To the same effect is *Railway Co. v. Donaldson*, 2 Willson, Civ. Cas. Ct. App. § 238. While the question as to what causes of action may be joined is discussed in many of our decisions, as stated by Judge Towne in his valuable work on Pleading, "there is no course of adjudication in which the courts have more persistently adhered to the policy of refusing to announce or hold to rule than this." Towne's Tex. Pl. p. 158.

Our statute recognizes no distinction in forms of pleading, and great latitude is allowed in the joinder of actions, when such joinder does not tend to manifest confusion. Our decisions seem to be uniform in condemning a multiplicity of suits and an accumulation of costs.

We think it clear that there was no such inconsistency between the causes of action set out in the petition as made the same subject to the exception of misjoinder. As bearing upon this discussion, see *Pitts v. Ennis*, 1 Tex. 604; *Walcott v. Hendrick*, 6 Tex. 415; *Chevallier v. Rusk*, Dall. Dig. 613; *Ry. Co. v. Graves*, 50 Tex. 202; *Dobbin v. Bryan*, 5 Tex. 283.

It is contended that the trial court erred in sustaining the exception of defendant to testimony offered by plaintiff to prove the value of the use of the land for the purposes he used the same. Plaintiff offered testimony that the value of the use of the land was \$4 per acre per annum, and it would require about five years for the grass roots, turf, and sod to grow back. The objection to this testimony was that the measure of damage

could not be thus proved. The true measure of damage for the burning of the grass, roots, turf, and sod was the difference in the market value of the land before and after the burning. There was no error in sustaining the objection to the testimony.

It is insisted that the court erred in sustaining appellee's motion to strike out the testimony of appellant tending to show the value of the land to him. Appellant testified "that he knew the market value of the lands from which the grass, grass roots, sod, and turf were burned at the respective times that same was burned, and that its value immediately before the burning of same was \$40 per acre; that in his opinion the market value of the said lands for the purposes for which witness kept and used same was diminished about one-half; and upon cross-examination witness testified that his land was not for sale, and that on account of said lands being surrounded by his other lands, and the shapes in which same were burned, that he did not know what it would have sold for immediately after the fire; that thereupon the defendant, by its counsel, moved the court to withdraw from the consideration of the jury all of the said testimony of the plaintiff as above set out, which motion the court sustained." The court approved the bill of exception, with the following explanation: "The court refused to permit plaintiff to testify as to what was the diminution in the value of the land to plaintiff for pasturage purposes, stating to counsel for plaintiff that the rule, as the court understood it, as to the measure of damages, was as to any damage to crops or personal property—the market value of the property injured or destroyed; and, as to any damage to the land, the difference between the market value of the land immediately before and immediately after the injury complained of, and that plaintiff might introduce any evidence he had along these lines, but that he could not testify as to what he considered the decreased value of the land to him for pasturage purposes only. With this explanation or qualification, this bill is signed and made part of the record." In view of the explanation, we are of the opinion that there was no error in striking out the testimony as to the diminished value of the land. The court expressly stated that plaintiff could introduce evidence to show the value of the land before and after the burning.

The court did not err in the special instruction given in answer to the question propounded by the jury, said instruction reading: "Gentlemen of the Jury: Through your foreman you have propounded to me in writing the following question: 'In your charge what do you mean by the word "originate"? Do you mean that the fire originated in the grass or combustible matter, or do you mean that the fire originated in defendant's engine?' In response to your said question, I reply that I mean that the fire must have

originated in the grass or combustible matter on defendant's right of way, and must have been originated therein by sparks from defendant's engine." This charge did not impose upon plaintiff the duty of proving by more than a preponderance of evidence that the fire originated in combustible matter on the railroad right of way from sparks emitted from its engine, and which fire communicated to plaintiff's land.

The judgment of the court in favor of appellee on the cause of action arising from the alleged burning of appellant's grass, grass roots, turf, and sod is affirmed; the judgment holding there was a misjoinder of causes of action is reversed; and the cause is remanded for trial on the cause of action arising from injuries to appellant's spring.

Affirmed in part and reversed and remanded in part.

TIBOLDI v. PALMS et al.*

(Court of Civil Appeals of Texas. Jan. 22, 1904.)

ADMINISTRATORS — APPOINTMENT — NOTICE — FAILURE TO PUBLISH — CLAIMS — FILING — REAL ESTATE — HOMESTEAD — AWARD TO CHILDREN — LIENS — VACATION.

1. Where, after the death of the grantor in a deed of trust, the county court, in administration proceedings, set apart the land described therein to defendants, who were the grantor's minor children, as their homestead, and the holder of the debt secured did not file his claim therefor as a claim against the estate, and did not appear in any manner in the administration proceedings, he could not thereafter enforce his lien against the land.

2. The fact that an administrator did not publish notice of his appointment did not affect the conclusiveness of an order of the county court setting apart property covered by a trust deed to the children of decedent as their homestead, since all parties interested in the estate were required to take notice of the administration proceedings regularly begun, and the administrator's failure only rendered him liable for any damages occasioned a creditor thereby, as provided by Rev. St. 1899, art. 2067.

Appeal from District Court, Galveston County; Robt. G. Street, Judge.

Action by Peter Tiboldi against Robert E. Palms and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Wm. T. Austin, for appellant. Wm. B. Lockhart, for appellees.

PLEASANTS, J. On April 13, 1891, Louisa M. Palms and her husband, Ange Palms, being indebted to Charles A. Brown in the sum of \$1,000, executed and delivered to him their promissory note for said sum, payable one year after date, with interest at the rate of 8 per cent. per annum from date, and, for the purpose of securing said note, on the same day, executed a deed of trust whereby they conveyed to A. B. Buetell lot No. 2 in block No. 672 in the city of Galveston. This

trust deed authorized the trustee, in event default was made in the payment of said note, to sell the property therein described, at public sale, before the door of the courthouse of the county of Galveston, if requested so to do by the holder of said note, and apply the proceeds thereof to the satisfaction of said indebtedness. At the time this deed of trust was executed, the property thereby conveyed was not the homestead of said Louisa M. and Ange Palms. The note was not paid at maturity, but was extended by agreement of the parties from time to time. Ange Palms died in January, 1895, leaving a will, which was duly probated, whereby he devised all of his property to his wife, Louisa, and appointed her sole and independent executrix of said will. Thereafter, on January 26, 1896, the said Louisa, having previously qualified as such executrix, entered into a written agreement with the then holder of said note, whereby, in consideration of the extension of the time of payment of the note, she acknowledged the existence of said debt and lien, and promised to pay the same on April 13, 1899. Louisa M. Palms died intestate in December, 1897, and in March, 1898, B. R. A. Scott was appointed administrator of her estate by the county court of Galveston county, and qualified as such administrator on April 24, 1898. At the next term of the court after the inventory of the estate had been filed, the property described in the deed of trust, which at the date of the death of Louisa M. Palms was occupied by her as a homestead, was, upon the application of the administrator, set apart to the minor children of said Louisa M. Palms—the appellees herein—as their homestead. The property, if ever occupied by appellees as a homestead after the death of their mother, has long since been abandoned as such. The appellant, prior to the death of Louisa M. Palms, for a valuable consideration, and in due course of trade, became the owner and holder of the indebtedness evidenced by the note and the renewal thereof executed by said Louisa M. Palms. The administration of the estate of Louisa M. Palms in said court continued until the 28th day of January, 1900, on which date the final account of the administrator was approved and the administration closed. Appellant did not present his claim to the administrator, and made no effort to collect same through said administration. He did not know of the death of Louisa M. Palms, nor of the pendency of said administration, until after same was closed, and no notice of his appointment was published by the administrator as required by the statute. After the close of said administration, the indebtedness evidenced by said note being long past due and unpaid, the trustee named in said deed of trust, at appellant's request, sold the property therein described. This sale was made in accordance with the terms of the trust deed, and appellant became the purchaser of the property.

*Rehearing denied, and writ of error denied by Supreme Court.

The foregoing statement contains, in substance, the facts set out in appellant's petition as constituting his cause of action. The prayer of the petition is for a recovery of the property, or, in the alternative, for the establishment of the debt, and a foreclosure of the lien given by the trust deed.

The court below sustained a general demurrer to this petition, and, appellant declining to amend, his suit was dismissed. Counsel for appellant earnestly contends that the judgment of the court below should be reversed because it appears from the petition that, at the time of the sale of the property under the power conferred by the trust deed, the indebtedness for the security of which said deed of trust was executed was valid and subsisting, and the administration upon the estate of Louisa M. Palms had been closed, and therefore the power of the trustee, which was only suspended after the death of Louisa M. Palms, revived, and the sale under said trust deed was effective to pass the title to said property.

It is conceded by appellant's counsel that it is the settled rule of decision in this state that a sale made by a trustee after the death of the maker of the trust deed, and pending an administration upon his estate, or, if no administration has been had, within four years after the death of the maker, is void. This has been settled law since the case of *Robertson v. Paul*, 16 Tex. 472, and the rule there announced has been followed by numerous decisions of our Supreme Court. In the case of *Rogers v. Watson*, 81 Tex. 400, 17 S. W. 29, it was held that where there had been no administration upon the estate of the maker of the deed of trust, and the time within which said administration might have been taken out had expired, the power of the trustee, which had been in abeyance during the four years next succeeding the death of the maker, became again effective, and a sale made by him under said power passed the title to the property sold. We do not think that the rule announced in *Rogers v. Watson*, *supra*, should be extended so as to cover cases in which there has been an administration upon the estate of the maker of the trust deed. The question has been directly decided adversely to appellant's contention by the Court of Civil Appeals for the Third District in the case of *Markham v. Wortham*, 67 S. W. 341. It may be, as insisted by counsel, that the judgment of affirmance in that case can be sustained upon other grounds than the one stated in the opinion, and therefore the refusal of a writ of error by the Supreme Court cannot be regarded as an approval by that court of the rule announced in the opinion of the Court of Civil Appeals; but we are not disposed to question the soundness of that opinion, and feel constrained to follow it, there being no decision of the Supreme Court to the contrary.

The jurisdiction of the county court over estates of deceased persons, when it has once

attached to a particular estate, becomes exclusive, and the orders and judgments of that court disposing of the property of the estate are final and conclusive, as between the heirs and creditors of said estate, unless appealed from or set aside by a direct proceeding instituted at the proper time.

The object of the statute in requiring all creditors of an estate to present their claims against the estate, and have same adjudicated in the court in which the administration of the estate is pending, is to enable that court to adjust and fix the rights of all the creditors, as well between themselves and the heirs as between each other. It would be impossible to accomplish this result if a creditor who had failed to present his claim in the administration of the estate was permitted after the close of said administration to establish and foreclose liens upon property of the estate which had been disposed of by order of the court in the administration.

Appellant admits that his right to foreclose his lien upon this property would have been lost, had the property been sold by the orders of the court during the administration, but insists that the order of the court setting aside the property as a homestead for the minor children of the deceased did not and should not in any way affect his lien thereon. It is true that, had he sought to enforce his lien in the county court while said administration was pending, and the entire estate was in the hands of that court, the order setting aside the property as a homestead would have been of no effect, and said property would have been subjected to his lien. Had he asserted his claim in the administration, the minor children might have had other property of the estate set aside to them as a homestead, or in lieu thereof. It seems to us that after the administration of the estate has been closed, the property all disposed of, and the jurisdiction of the county court over the estate exhausted, and its power to protect appellees in their homestead rights lost, it would be manifestly unjust to permit appellant to deprive appellees of the homestead which was set apart to them by a court of competent jurisdiction by an order valid upon its face, and not obtained by fraud, and which would not have been made but for the failure of appellant to inform the court, in the manner prescribed by the statute, of the existence of the lien claimed by him. We think both law and equity require that appellant be held to have lost his lien by his failure to assert his claim at the proper time. The alleged failure of the administrator to publish the notice of his appointment as required by the statute in no way affects the conclusiveness of the orders of the county court made in the administration of the estate. All parties interested in the estate were required to take notice of the pendency of the administration, which had been regularly begun; and the only effect of the failure of the administrator to publish the

notice of his appointment would be to render him liable for any damage thereby occasioned a creditor, and could not defeat the jurisdiction of the court, or render invalid any orders regularly made in the administration of the estate. Article 2067, Rev. St. 1895; *McGowen v. Zimpleman*, 53 Tex. 483; *Hirshfeld v. Brown* (Tex. Civ. App.) 80 S. W. 963.

We are of opinion that the judgment of the court below should be affirmed, and it is so ordered. Affirmed.

WEISMAN et al. v. THOMSON.*

(Court of Civil Appeals of Texas. Dec. 23, 1903.)

TRESPASS TO TRY TITLE—DEFENSES—LIMITATIONS—ADVERSE POSSESSION—STATUTE.

1. Where an action of trespass to try title was prosecuted and judgment rendered in favor of plaintiff, from which an appeal was taken by defendants, but never perfected, the fact that defendants continued in possession of the land does not affect the conclusiveness of the judgment as far as title to the date of its rendition is concerned.

2. In an action of trespass to try title, in which the defense of adverse possession for 10 years is pleaded, proof that prior to the expiration of the 10 years defendant acknowledged the superior title of another, and held no longer in his own right, but as tenant of the holder of the superior title, defeats the claim of defendant.

3. Where one person is in possession of land, claiming title to it by adverse possession, but holding under a recorded deed made to an entirely different person, though for the benefit of the person in possession, neither of such persons can compute the time of such adverse possession as part of the five years required by Rev. St. 1895, art. 3342, providing that every suit to be instituted to recover real estate as against any person having peaceable and adverse possession thereof cultivating, using, or enjoying the same, and paying taxes thereon, if any, and claiming under a deed or deeds duly registered, shall be instituted within five years.

Appeal from District Court, Tom Green County; J. W. Timmins, Judge.

Action by Lena Weisman and others against J. T. Thomson. From a judgment for defendant, plaintiffs appeal. Reversed.

Hill & Lee, for appellants. Jos. Spence, Jr., and J. T. Thomson, for appellee.

STREETMAN, J. Appellants brought this action in the form of trespass to try title to recover a section of land in Irion county, and from a judgment in favor of the defendant, J. T. Thomson, they prosecute this appeal.

As evidence of title, the plaintiffs introduced conveyances and an agreement showing a chain of title from the state to Abraham Young. Exceptions were reserved to the admission of some of these conveyances, and to a certificate of the land commissioner, introduced to aid the description in one of them, and these objections are presented by appellee in cross-assignments. In the view that

we take of the case it is unnecessary to pass upon these cross-assignments, and, there being no controversy as to the contents of the instruments, it is not necessary to describe them in our findings of fact.

The conveyance by which Abraham Young acquired his title was dated November 5, 1873. On April 10, 1888, the heirs of said Abraham Young brought suit against Joseph Spence and J. T. Thomson in the district court of Tom Green county to recover the land in controversy, and, after answer pleading not guilty, on November 23, 1888, obtained judgment in said cause for said land against said defendants. The defendants gave notice of appeal and filed a cost bond, but the appeal was never prosecuted. It was abandoned, and no writ of error was sued out. No writ of possession or other process was issued under this judgment, and the defendants continued in possession of the land. Said court adjourned for the term November 29, 1888. The plaintiffs in this suit are in part the same persons who were plaintiffs in the above suit, and the other plaintiffs herein derive their title by devise and inheritance from the plaintiffs in that suit. The defendant in this suit is the same J. T. Thomson who was defendant in that suit, and now claims under a conveyance from said Joseph Spence, who was the other defendant in that suit. We are unable to see why the judgment in favor of the plaintiffs in that suit would not be conclusive in this case, as far as the title to that date is concerned. We therefore conclude that the plaintiffs were entitled to recover, unless the defendant, Thomson, could show a superior title acquired subsequent to the date of that judgment. No effort was made to show such title, except by limitation, and it therefore becomes necessary to inquire whether the judgment in this case in favor of the defendant, Thomson, can be sustained upon his pleas of limitation.

The defendant pleaded the five and ten years' statutes of limitation. In support of these pleas he introduced the following conveyances: (1) Quitclaim deed from Jas. E. Brown, by his attorney in fact, Jas. E. Brown, Jr., dated June 30, 1885, to Joseph Spence, Jr., and J. T. Thomson, composing the firm of Spence & Thomson. This deed described the land in controversy, and was duly recorded July 15, 1885, in the proper county. (2) Quitclaim deed from Chas. F. Potter to George B. Jackson, dated October 20, 1894, describing the land, and duly recorded in the proper county February 9, 1895. (3) Special warranty deed from George B. Jackson to J. T. Williams, dated October 29, 1897, describing the land, and duly recorded in the proper county November 1, 1897. (4) Deed from J. F. Williams to the defendant, J. T. Thomson, dated February 20, 1900, describing the land, and duly recorded in the proper county February 23, 1900. Payment of taxes upon the land in suit was shown by defendant and

*Rehearing denied February 17, 1904.

those under whom he claims, as follows: For 1895, taxes paid by J. T. Thomson for G. B. Jackson on January 22, 1896; for 1896, taxes paid by Geo. B. Jackson on December 9, 1896; for 1897, taxes paid by Geo. B. Jackson on December 21, 1897; for 1898, taxes paid by J. F. Williams January 3, 1899; for 1899, taxes paid by J. T. Thomson for J. F. Williams on January 17, 1900; for 1900, taxes paid by J. T. Thomson December 17, 1900; for 1901, taxes paid by J. T. Thomson December 30, 1901.

The defendant, J. T. Thomson, testified as follows: "I have known the location of section 11, S. P. R. R. Co., in Irion county, and have known the location of the land since 1844 or 1885. It was inclosed by Spence and Thomson in 1885, with 11 other sections. It was used from that time by Spence and Thomson and their tenants. There were no roads through the pasture, and since I bought out Spence I have had possession of the pasture. The possession of the pasture by Spence and Thomson was continuous from 1885 down to the time Spence sold to me in 1897, and I have had possession of the pasture ever since, and am now in possession of it. After the date of the judgment in case No. 448—Fannie Dopplemayer et al. vs. Jos. Spence, Jr., and J. T. Thomson—rendered in November, 1888, we continued in possession, and no writ of possession was ever issued or served by the plaintiffs in that judgment, and no demand of any kind has ever been made, nor has the possession ever been questioned or disputed. When Geo. B. Jackson bought the land from Potter, I took possession of it for him, and paid taxes on it under contract with Jackson. I leased the section from Jackson, and handled the land as his agent. I also rented the same section from J. F. Williams after he bought from Jackson. During the time I had said section No. 11 from Jackson and Williams, I leased it to Tol Rutledge and others. Sterrett & Co. had the pasture leased from 1892 to 1895; then Moore had it leased from 1895 to June, 1897. G. C. Davis and W. L. Davis had the pasture leased from June 1, 1897, to 1899, and Tol Rutledge has had the pasture leased since October 1, 1899. Spence and Thomson paid taxes on this land from the date of their deed from Brown till the judgment rendered against them in 1888. Then they did not pay taxes for several years, but resumed payment of taxes under the Jackson title, and paid them till I bought out Spence's interest in the pasture, and since that time I have paid them every year to the present time, when due. Since the sale of west half of the pasture to Davis, there has been a fence on the north and west of this section, and prior to that sale, a fence across the north end since 1885."

Cross-examined: "The pasture was fenced by Spence and myself about June, 1885. No house was built on this section of land, and no part of it has ever been put in cultiva-

tion, or used for any other purpose besides grazing. Prior to 1891 this section No. 11 was inclosed in a 12-section pasture containing about 8,000 acres. In 1891 we sold the west half of the pasture to G. C. Davis, and a cross-fence was built between what we sold him and what was left. In 1897 we leased five sections in this pasture to G. C. Davis. This lease was made in April or May, to begin in June of that year. * Davis was to pay us \$256 per annum lease on the five sections so rented to him. I was not claiming said section No. 11 in 1897. Davis was to pay the taxes upon said section No. 11 for the use of it during the two years of his lease. Said section No. 11 was worth as much rent at that time as any one of the other sections, and I cannot say why we did not lease said section No. 11 for the same rental that we got for the other sections. Section No. 11 was not included in the lease with the other five sections. I let Davis have it for the taxes for benefit of our bargain. I don't know who rendered this section for taxes in 1888. Chas. F. Potter wrote to Spence and me in 1894 about selling us this section. This was after he had moved from here to Colorado. I did not recognize Potter's title. I did not know that Potter had bought a tax title to this section. I don't know whether Jackson consulted me about buying this section of land from Potter. He may have done so. Soon after Jackson bought it from Potter, I took possession of the land under Jackson's title, and recognized his title. We were to pay the taxes for Jackson for the use of the land. We built the pasture fence first about June 1, 1885. Neither Spence nor myself ever lived on the land. I think there was a house in the pasture, but I don't know who occupied it in 1886, and don't know who occupied the pasture in 1887 or 1888. I think Sterrett had the pasture in 1889. I was not on the lands but four or five times prior to the last three or four years. The fence between the Davis pasture, after we sold him the west half of the pasture, may have been down a part of the time while we had the east half rented to him. I negotiated the sale of this section when Jackson sold to Williams. Williams bought the land for my benefit. Williams never paid anything for the land. It was bought for me, and when Williams made me the deed introduced in evidence to the land I never paid him anything for it. Williams was a friend of mine, and took the deed from Jackson for my benefit. I did not take a deed from Jackson, because I thought it best for it to be in Williams' name. I wanted to acquire the land, and thought it best, in order to get it by limitation, that the deed be made to Williams instead of myself. The deed from Potter to Jackson and the deed from Jackson to Williams, was prepared by either Spence or myself, and I prepared the deed from Williams to me. I did not pay Williams the \$320 recited as a consideration in the deed from him

to me, for when the land was bought from Jackson it was bought by Williams for me. I don't think Jackson was paid anything at the time he conveyed the land to Williams. I asked Williams to buy the land. I never had any correspondence with the Young heirs. I wrote to their agent, Mr. C. M. Raguet, at Marshall, Texas, some time in 1901, about it, in answer to a letter he wrote me to know what claim I had to the land. This was a short time before this suit was filed. Ed. McDonald, county clerk of Irion county, wrote me that Mr. C. M. Raguet, as agent for the Young heirs, was paying the taxes on the lands. I don't remember when that was, but it was after the inquiry made by Mr. Raguet. The fence between Davis and our pasture was never removed after being built in 1891. The second year of their lease they had a gap or two in the fence that they said they made to let the cattle go to water. These gaps were made without our knowledge or consent, and as soon as discovered we had them put up, as our lease to Davis required him to keep the fences in as good condition as they were delivered to them. My object in paying the taxes was to acquire title to the land. I have tried, ever since we first fenced, to get title to this land; and we thought when we got the Brown title it was the best, and I still think that at that time it was. The reason that there are other lands in the same tax receipt is that the others belonged to me, and I paid on them all at once and on the same rendition. I rendered them all in my own name after I bought of Williams."

Redirect: "Smith had the pasture from 1889 to 1893, Sterrett & Co. from 1893 to June 1, 1895, W. P. Moore from June 1, 1895, to 1897, Davis from June 1, 1897, to August, 1899, and Rutledge from October 1, 1899. When Davis leased the pasture he also leased section 11 by the year, and agreed to pay taxes for the use of it; but they did not pay them, and when I found out that they had failed to do so I paid them myself. I never knew that they had paid for either year until G. C. Davis' deposition was taken in this case, and never saw or knew of this tax receipt before."

Recross-examined: "I don't know who paid the taxes for the years from 1888 to 1895. I don't know date when Ed. McDonald wrote me that Mr. Raguet was paying taxes on the land for the Young heirs. Don't remember rendering the land for taxes for Jackson for the year Jackson bought, but paid them for that year, and rendered and paid for him afterwards till he sold to Williams."

Defendant also introduced certain lease contracts, as follows:

(1) A lease contract executed by Joseph Spence, Jr., and J. T. Thomson, acting for themselves and as agents to W. P. Moore, leasing certain other sections of land, and also the section in suit, dated June 1, 1895. The section in controversy is described in

this lease as follows: "Also section No. 11 in said block for 640 acres, owned by George B. Jackson, for whom said Spence and Thomson act as agents in leasing said section No. 11."

(2) The following: "In consideration of the agreement on the part of G. C. Davis and W. L. Davis to pay the state and county taxes that shall be assessed for the years 1897 and 1898 on section No. 11 in Blk. 10, S. P. R. R. Co. surveys in Irion County, Texas, I, J. T. Thomson, agent for G. B. Jackson have leased said section of land to said G. C. & W. L. Davis for the term of two years, from and after the first day of June next ensuing. Said lessees hereby agree to hold possession of said section from June 1st, 1897 to May 1st, 1899, as tenants of said G. B. Jackson, and to pay said taxes for use of the same for said term. This 9th day of February, 1898. J. T. Thomson, Agent."

(3) The following: "Know all men by these presents that I, J. F. Williams, of the state and county aforesaid, in consideration of one dollar and other good and valuable considerations, among other things the listing of the property hereinafter described and payment by the lessee of all taxes that have been or at any time during the term of this lease be assessed against the said property, have leased and rented, and do hereby lease, rent and let to J. T. Thomson of Tom Green County, Texas, for five years (subject to sale) beginning October 29th, 1897 and ending October 28th, 1902, same to be used for grazing purposes only and lease to be paid annually, and if the same is not paid annually the lessor may avoid this lease by giving 30 days notice to lessee. And lessee agrees to hold possession for lessor and to abide by the terms of this lease, and to surrender quiet and peaceable possession thereof at the expiration of this lease. It is expressly agreed and understood that lessee shall have the right to sublease the property hereby leased, the same being survey No. 11, in Block 10, in the name of the Southern Pacific Railway Company, containing 640 acres and situated in Irion County, Texas. Witness my hand this October 29th, 1897. J. F. Williams."

The first question that arises under the facts stated is whether the plea of the 10-years statute was sustained. The judgment above referred to having been rendered November 23, 1888, and this suit instituted August 22, 1901, we must seek for evidence between those dates to sustain this defense. and we must find the 10-years continuous possession either by the same parties or by parties claiming in privity with each other. The evidence shows that the possession continued immediately after said judgment by Spence and Thomson, and was presumably under the deed obtained by them from J. E. Brown June 30, 1885. Appellants insist that the effect of said judgment would be to render their possession subject to appellants' title, unless they notified appellants of their

adverse claim. We are not inclined to agree with this view, but it is not essential to the decision of the case. Treating their possession, however, as adverse from the date of that judgment, it had continued less than 10 years when the deed was executed October 20, 1894, by Potter to Jackson. No privity is shown between the title conveyed by Potter to Jackson and that under which Thomson and Spence had been previously holding. But immediately after Potter executed this conveyance to Jackson, Thomson unequivocally admits Jackson's ownership, and acknowledges that his possession is under Jackson. He and Spence, as above shown, executed leases, in which Jackson is stated to be the owner of the land. Thomson himself testifies: "When Geo. B. Jackson bought the land from Potter I took possession of it for him, and paid taxes on it under contract with Jackson. I leased the section from Jackson, and handled the land as his agent." He further testifies: "Soon after Jackson bought it from Potter, I took possession of the land under Jackson's title, and recognized his title." In the case of *Robinson v. Bazoon*, 79 Tex. 524, 15 S. W. 585, Judge Gaines says: "Adverse possession, to be available under the statute, must be continuously hostile, and under the same claim of right. The possession must continue in the defendant himself for the full period, or in himself and others with whom he can assert some privity, and through whom he claims." When the defendant in this case abandoned his own claim, under which he had been holding, and acknowledged the superiority of Jackson's title, and held no longer in his own right, but as Jackson's tenant, the continuous possession necessary under the statute was broken, and neither before nor after that date was there sufficient lapse of time to complete the period of limitation.

Counsel for appellee insist that the opinion in the case cited is not in harmony with the cases of *Craig v. Cartwright*, 65 Tex. 417, *Converse v. Ringer* (Tex. Civ. App.) 24 S. W. 707, and the cases there cited. There is nothing, however, in these cases which militates against the doctrine announced in *Robinson v. Bazoon*, above cited. In each of the cases relied on by appellee there was continuous possession, either by one person or by different persons claiming in privity with each other. In this case, however, when the deed was made to Jackson, and appellee attorned to him, appellee's possession ceased, and a possession by Jackson began, which had no connection with the previous possession of appellee. It makes no difference that appellee, some years later, acquired Jackson's title. This could not serve to unite these periods of possession held by different persons under different claims. The case stands precisely as if Jackson, having acquired his deed from Potter, had actually ejected appellee from the prem-

ises, and held possession for a period in person. In that case Jackson could certainly not have availed himself of the previous possession of Thomson, nor could Thomson have done so by afterwards purchasing Jackson's title and re-entering under that claim. We therefore conclude that the evidence failed to sustain the plea of 10-years' limitation, and we next inquire whether 5 years' limitation was shown.

No payment of taxes was proved until 1895, for which year payment was made by appellee for Geo. B. Jackson. We must therefore look to the time subsequent to this date for proof of limitation under this statute, and, recurring to the deeds offered by defendant, we find that deeds were registered in regular order from Jackson down to appellants covering a period of more than five years, and that payment of taxes was made for that period. It is insisted that proof of rendition for taxes was necessary, but it is unnecessary to pass upon that question. When we come to the fact of possession, however, we are confronted with a question of some difficulty. Jackson's deed from Potter was registered February 9, 1895. The evidence already referred to shows that appellee, Thomson, recognized Jackson's title, and held possession for him. This continued until October 29, 1897, when Jackson executed a deed to Williams, which was recorded November 1, 1897. With reference to this transaction, as we have already seen, appellee, Thomson, testified, in substance, that Williams in fact had no interest, and claimed none, in the land under this conveyance; that he (Thomson) furnished the money, and that Williams bought the land for his benefit, and because he thought in that manner he could better perfect his title by limitation. Possession was held in this manner by Thomson, under this deed to Williams, from November, 1897, to February 20, 1900, when Williams conveyed to Thomson. The time during which appellee, Thomson, thus held under the deed to Williams is necessary to complete the period of five years.

The question is therefore presented, where one person is in possession of land claiming title to it, but holding under a recorded deed made to an entirely different person, although for the benefit of the person in possession, can either of such persons compute the time of such possession as part of the five years required by the statute? The statute itself provides: "Every suit to be instituted to recover real estate, as against any person having peaceable and adverse possession thereof, cultivating, using or enjoying the same and paying taxes thereon, if any, and claiming under a deed or deeds duly registered, shall be instituted within five years," etc. Rev. St. 1895, art. 3342. The reasons which led to the enactment of this statute have been frequently discussed by our Supreme Court, as well as the purpose of its several provisions. Discussing article 2392 of Hartley's

Digest, which contained substantially the same provisions, Judge Roberts says: "To acquire a right to land under this section, the party must show a deed duly registered, and possession under his deed for five years, and such possession must, during that time, be attended with the usual incidents of full ownership; that is, the advantage of cultivation, use or enjoyment, and the burden of paying the taxes, if any be due. It rests on the idea that he who can show that he has thus notoriously claimed and used and borne the burthens of property as his own is most likely to be its true owner, although he may not be able to exhibit a regular chain of title from and under the government, and shall be taken to be the true owner. This is giving very great force to the presumptions arising from the usual incidents of ownership, and can only be accounted for reasonably on the supposition that great importance and weight was attached to the concurrence of so many of the incidents of ownership as are specified in this section, to wit, a deed, registration of deed, possession of land, cultivation, use or enjoyment, payment of taxes; and these all continued in connection during the full period of five years." *Mitchell v. Burdett*, 22 Tex. 633. But can it be said that there is a concurrence of those incidents in this case, where the deed and its registration is in the name of one person, while the possession, use, and claim of ownership is in another? Again, it is said by Judge Gould in *Flanagan v. Boggess*, 46 Tex. 335, that "the object of the statute in making registry of the deed necessary to enable the possessor to avail himself of the five-years limitation is to give notice to the owner that the defendant in possession is claiming under the deed." This language is quoted from the opinion of Judge Wheeler in *Kilpatrick v. Sisneros*, 23 Tex. 137, in which the defendants were claiming under deeds which did not correctly describe the lands. There it is said: "If the owner, seeing the defendant in possession of the land, had consulted the record, he would not have been apprised thereby that the defendant was claiming under these deeds." If the purpose of requiring the deed to be registered is to give notice that the person in possession is claiming under such deed, clearly the facts of this case did not meet the requirements of the statute. Had the owner gone to the land, he would have found Thomson in possession. Had he asked him how he claimed, if he had answered as he testified in this case, he must have said that he claimed the land in his own right as the owner. Had the owner then gone to the record, he would have found no deed to Thomson, but only to Williams. This record would have afforded no notice whatever that Thomson was claiming under this deed. We therefore conclude that during the period mentioned the requirements of the statute did not concur either in Thomson or Williams, and that, therefore,

the evidence failed to establish the defense under the five-years statute of limitations.

These conclusions render it necessary that the judgment in favor of appellee be reversed, and that judgment be here rendered for appellants for the land sued for and all costs of suit, which will accordingly be done. Reversed and rendered.

METHODIST EPISCOPAL CHURCH SOUTH et al. v. CLIFTON et al.*

(Court of Civil Appeals of Texas. Jan. 27, 1904.)

VOLUNTARY ASSOCIATIONS—ACTION AGAINST —LIABILITY—EQUITABLE RELIEF.

1. A voluntary association cannot be subjected to an ordinary judgment for debt.

2. Where plaintiffs, acting as trustees of a college, had, for the use of a voluntary religious association, and under authority of the association, expended their moneys in erecting a new building for the college, and subsequently the building erected was sold, and it appeared that the association held no property as a general fund, and that all the property controlled by it or held for its use was charged with particular charitable uses distinct from the college in question, there was no property which could in equity be subjected to plaintiffs' claim for the moneys they had expended.

Appeal from District Court, McLennan County; Sam R. Scott, Judge.

Action by W. R. Clifton and others against the Methodist Episcopal Church South and others. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

Boynton & Boynton, for appellants. Clark & Bolinger and Geo. W. Barcus, for appellees.

STREETMAN, J. W. R. Clifton, D. R. Gurley, Mrs. S. A. Bell, as independent executrix of the estate of J. D. Bell, deceased, Eugene Williams, and Bart Moore brought this suit against the Methodist Episcopal Church South, a voluntary association, whose membership is too numerous to be herein sued; Granbury College, a voluntary association, of which John Hanley, John D. Baker, and D. L. Nutt are trustees, its members and trustees being too numerous to be herein sued; Clarendon College, Weatherford College, Polytechnic College, and Southwestern University, duly incorporated corporations; and M. S. Hotchkiss, J. R. Nelson, B. R. Bolton, W. D. Jackson, and T. P. Sparks, as members of said church.

Plaintiffs alleged that certain individuals named in the petition were members and local agents representing said corporations and associations in various counties named, and were representative members of said church and said Granbury College, as voluntary associations, and hold title to the property therein described as members and trustees of said voluntary associations.

Plaintiffs alleged that in November, 1888,

*Rehearing denied February 17, 1904.

said church, acting by Northwest Texas Conference, composed of the persons named in the petition and others, duly authorized by said church, appointed plaintiffs trustees of the Waco Female College, and authorized plaintiffs, with others, as general agents of defendants, to build a new college building in or near Waco, Tex., for the Waco Female College. That by virtue of said authority, plaintiffs undertook the work of erecting said building, and in conducting the same (being authorized so to do by said church and its codefendants), on or about April 1, 1899, contracted indebtedness aggregating \$17,500; this indebtedness being represented by promissory notes signed by plaintiffs, payable to various banks and persons, and bearing interest at 10 per cent. per annum. That the money, labor, and materials received for said notes were devoted to the erection of the new college building. That said building was accepted by said defendants as the property of said church, and said defendants, with full knowledge of all the facts, including said indebtedness, ratified and confirmed all the acts of the plaintiffs in the erection of said new building and the contracting of said indebtedness. That, in all matter relating to said debt, plaintiffs were sureties and defendants were principals. That said indebtedness was from time to time extended by giving renewal notes, remaining the debt of defendants, until about January 1, 1900, at and before which time judgments were obtained on notes given therefor by the plaintiffs, and said creditors now look alone to plaintiffs. That thereby said church and its codefendants, as members of the church and holding its assets, became bound to pay plaintiffs \$17,500, with 10 per cent. per annum interest from April 1, 1899, that being the amount so assumed and paid by plaintiffs to said creditors.

Plaintiffs further allege that said church and its codefendants for more than 15 years have been engaged in religious and educational work, accumulating money and property for such purposes, and said corporations and associations have acquired the following real estate: (Then follows a description of certain lots and tracts in McLennan county, and the campus properties of the various educational institutions made defendants.) Said real estate is alleged to be of the reasonable market value of \$200,000.

Plaintiffs further alleged that all of said property has been acquired for the use and benefit of said church, and is held by the codefendants of said church solely for its use and benefit, the equitable and beneficial title being vested in said church as a voluntary association. That said total property of said church aggregates more than \$1,000,000, and that plaintiffs have from time to time made donations to said church of money, time, and labor, and in said new college enterprise, as agents of said church by appointment of Northwest Texas Conference, secured a cam-

pus and building of the reasonable value of \$105,000, charged with a debt of \$30,000, in addition to the debt herein sued upon, and said defendants failed and refused to assist in discharging same, and allowed said property to be lost to said church under execution sale, and without fault upon the part of plaintiffs. That said church holds no property in its own name, and all the property of the church is held by corporations or boards of trustees for its use. That, for a valuable consideration, all members of said church have agreed that all obligations contracted by its agents in good faith for its use and benefit shall be discharged by the church, and thereby all the property of said church is charged with an equitable lien for the payment of the debt sued on, and that there is no adequate remedy at law.

Plaintiffs pray for judgment against said church, and said corporations, associations, and individuals as members of said church, and that said judgment be charged as a lien on said described real estate, and for foreclosure and order of sale and execution against the church, to be levied on any property held for its use and benefit, or owned by said church, and for general and special relief.

The petition of appellees might be construed as an effort to obtain a simple judgment against the Methodist Episcopal Church South, and the judgment rendered, in some respects, can hardly be distinguished from an ordinary judgment at law for debt; but appellees in their brief state that they sued in equity to charge upon the property of appellant the indebtedness incurred by them as agents of the church in its educational extension work. The answer of appellant was, in our opinion, sufficient to raise the questions discussed in this opinion.

Special issues were submitted to the jury, and upon their answers thereto a judgment was rendered. After setting out the special issues and the answers of the jury, the judgment recites that it appears that W. R. Clifton, Bart Moore, D. R. Gurley, J. D. Bell, and Eugene Williams were, previous to 1890, appointed by the Methodist Episcopal Church South its agents, with power and authority to erect a new building for one of its educational institutions, then known as the Waco Female College, and that, in performing the work of erecting such building, said agents borrowed and advanced during said year the sum of \$17,300, and continuously since have paid or been held personally responsible for interest thereon, aggregating the further sum of \$20,489.72; that, after borrowing the amount, the same was expended in erecting and completing said building; that in 1892 said church, through the Northwest Texas Conference, was notified that said agents had created an indebtedness, of which the amount so borrowed and expended by said agents was a part, and, after such notice, ratified the acts of said agents in creating

said indebtedness, and claimed said building to be the property of said church, and thereby became responsible to plaintiffs for said amount and interest; and it being expressly adjudicated, as against all parties to the suit, that said church is a voluntary association, and that a sufficient number of its members have been made parties and have answered for its protection, and that the titles to the properties described herein in the plaintiffs' petition are held in trust by the respective trustees, in whom said titles are vested, for the use and benefit of said church, and that said church owns the equitable titles thereto, and said titles and said properties are subject to execution for the payment of said indebtedness, said properties being described as follows: (Then follows a particular description of two parcels of land in Waco, Tex., one of which the judgment says is the "New Austin Street Methodist Church property," and the other "the church and parsonage, being the 5th Street Methodist Church property.")

Then the judgment continues as follows: "And it further appearing to the court that the plaintiffs are entitled to their debt and interest, as damages, aggregating thirty-seven thousand seven hundred and eighty-nine and $\frac{12}{100}$ (\$37,789.72) dollars, together with issuance of execution therefor, to be levied upon the property of said church within the jurisdiction of the N. W. Texas Conference of said church, excepting therefrom the following described property, to wit: [Here follows description of real estate belonging to Granbury, Weatherford, Polytechnic, and Clarendon Colleges and Southwestern University.] Now, therefore, it is ordered, adjudged, and decreed by the court that the plaintiffs, W. R. Clifton, Bart Moore, D. R. Gurley, Eugene Williams, Mrs. S. A. Bell, legal representative of the estate of J. D. Bell, deceased, do have and recover of and from the Methodist Episcopal Church South, the Board of Trustees of Waco Female College, a duly incorporated corporation, and of J. R. Nelson, R. O. Rounsavall, L. B. Black, Sam P. Wright, W. D. Jackson, H. A. Borland, G. W. Wyatt, John Hanley, John D. Baker, D. L. Nutt, M. S. Hotchkiss, B. R. Bolton, W. D. Jackson, T. P. Sparks, J. D. Stocking, C. A. Burton, T. J. Nolan, I. W. Stephens, R. W. Kindel, W. H. Edleman, R. C. Armstrong, J. B. Baker, George Mulkay, Joseph S. Key, J. W. Hodges, J. W. Snyder, as being constituent members in law of said voluntary association, Methodist Episcopal Church South (but not against them as individuals), the sum of thirty-seven thousand seven hundred and eighty-nine and $\frac{12}{100}$ (\$37,789.72) dollars, together with interest thereon at the rate of six per cent, per annum from this date until paid, for which let execution issue, to be levied only upon any property of the said Methodist Episcopal Church South within the jurisdiction of the Northwest Texas Conference, and excepting

therefrom the tracts of land hereinbefore excepted."

The Methodist Episcopal Church South has appealed, and in its brief presents a number of assignments, contending, among other things, that the indebtedness of plaintiffs was incurred without its authority and in violation of its instructions, denying that the Northwest Texas Conference ratified the transactions by which the indebtedness was incurred, or that it had authority to do so. Two questions, however, are presented which control the disposition of the case, and render unnecessary a consideration of other assignments: (1) Whether the appellant was such person in law as could be subjected to an ordinary judgment for debt; and, (2) if not, did appellees show themselves entitled in equity to subject any property of appellant to any character of trust or lien for their benefit? As we have stated above, it is not clear whether appellees insist that they were entitled to a judgment for debt against appellant, or only to relief in equity by the enforcement of an equitable lien, but the judgment rendered seems to proceed upon both theories, first establishing a lien upon certain property, and then awarding judgment as for an ordinary debt, with execution accordingly. It is therefore necessary to decide both questions.

The petition simply alleges that appellant is a voluntary association, and a number of persons are made defendants, not as individuals, but as constituent members of said association, upon the theory that the entire membership is too numerous to be made parties. It is not sought to be held as a partnership, nor a corporation, and no personal liability is claimed against its members. It is well established that such an association cannot be sued, and a personal judgment rendered against it. As said by Chief Justice Garrett, in *Burton v. Grand Rapids School Furniture Company* (Tex. Civ. App.) 31 S. W. 91: "There was an evident attempt to sue the church as an organization, which, as it was an unincorporated association, could not be done (citing *Tunstall v. Wormley*, 54 Tex. 476; *Devoss v. Gray*, 22 Ohio St. 168; *Wilkins v. Wardens*, etc., 52 Ga. 352; *Ash v. Guile*, 97 Pa. 498 [39 Am. Rep. 518]). An unincorporated association is no person, and has not the power to sue or be sued. When such an association has been organized and is conducted for profit, it will be treated as a partnership, and its members will be held liable as partners. But in the case of religious and eleemosynary associations, the members and managing committees who incur the liability, assent to it, or subsequently ratify it, become personally liable." The authorities cited, as well as many others which we have examined, fully justify the conclusions above quoted. *Bates on Partnership*, § 75; *McCabe v. Goodfellow* (N. Y.) 30 N. E. 728, 17 L. R. A. 204; *Reding v. Anderson* (Iowa) 34 N. W. 300; *Clark v.*

O'Rourke et al. (Mich.) 69 N. W. 147, 66 Am. St. Rep. 389; In re St. James Club, 2 De Gex, M. & G. 388. We conclude that no judgment could be properly rendered against the Methodist Episcopal Church, as such, unless for the purpose of enforcing some equitable right which plaintiffs had against some property held by that association.

Many authorities are cited by appellees involving actions against unincorporated associations and their members, and to which we have given careful examination and consideration. They will be found to fall clearly within one of three classes: (1) Cases in which the association has been found to be a joint-stock association, and in which it or its members have been held liable on the theory of partnership. Of this class are Gorman et al. v. Russell et al., 14 Cal. 581; Industrial Lumber Co. v. Texas Pine Land Association (Tex. Civ. App.) 72 S. W. 875. (2) Cases in which individual members have been held liable, either in person, or on the principle of agency for debts incurred by them for the benefit of such associations. Such are Ridgely v. Dodson, 8 Watts & S. (Pa.) 118; Downing v. Mann, 8 E. D. Smith (N. Y.) 36. (3) Cases in which the plaintiffs have shown themselves entitled in equity to subject the general property, or some particular property of such association, to their claims, by virtue of an equitable lien or some species of trust. Of this character are the following: Society of Shakers v. Watson, 68 Fed. 730, 15 C. C. A. 632; Smith v. Swormstedt, 16 How. (U. S.) 302, 14 L. Ed. 942; Van Houten v. Pine, 36 N. J. Eq. 133. In this case it is not claimed that there was a partnership. There are express findings by the jury that neither of the corporations or individuals sued as defendants personally authorized or took any part in the creation of the debt sued upon. Clearly, therefore, this case is not of the first or second class above described. It remains to be determined whether it is a case of the third class enumerated. The case of Van Houten v. Pine, 36 N. J. Eq. 133, was a suit against Pine as president, and Ingalls as secretary, and "twelve hundred other copartners, as the Masonic Mutual Life Insurance Company." The company was alleged to be a voluntary, friendly life insurance society, in which the members, according to the agreements contained in the constitution and by-laws, contributed by regular assessments to create the funds of the society, upon the mutual agreement and understanding that at their death a certain sum of money should be paid to their designated relatives. Van Houten was a member of this society, and upon his death his widow filed a bill in equity to compel the payment of the policy, to which a demurrer was filed for want of parties and want of equity in the bill. In disposing of the latter ground of demurrer, the court says: "The Masonic Mutual Life Insurance Company is not a corporation; it is a voluntary, friendly

life insurance society. Equity takes cognizance of the affairs of such associations, and grants relief by treating them as partnerships, or by looking into the scheme and compelling conformity to it, or reforming it and enforcing it, or, if the plan is deemed impracticable, decreeing a dissolution and distributing the funds; and, speaking generally, it redresses, as far as it can, the grievances of the members of these societies who complain to it of injustice affecting their pecuniary interests therein. In the case in hand (though it is not stated in the bill to be so) the company, as appears by the copy of by-laws put in on their part on the argument, has a very large accumulated surplus fund, amounting to over \$20,000. Apart from that admission, and looking at the statements of the bill alone, it does not appear that the company has not a fund out of which the complainant may be paid. It is therefore unnecessary now to consider whether the court would, if there were no other means, order payment through an assessment on the members. It is enough to say that it is not an absolute, certain, and clear proposition that the bill would be dismissed for want of merits on the hearing." The effect of this decision is that, where such a voluntary association has a fund created for the purpose of paying certain death claims, the persons entitled thereto may sue a sufficient number of the members of such association, and compel their claims to be paid out of such fund.

The case of Smith et al. v. Swormstedt et al., above cited, grew out of division of 1844 of the Methodist Episcopal Church North and South. It appeared that the Methodist Book Concern, a corporation under the laws of Ohio, was, prior to said division, operated for the purpose, among others, of providing a charitable fund, known as the "Book Concern," for the support of the traveling and worn-out preachers of said church. The bill was filed by the complainants for themselves, and in behalf of the traveling and worn-out preachers in connection with the society of the Methodist Episcopal Church South in the United States, to recover a share of that fund. The court, after holding that the separation was not an act of secession by the Southern Church, but a voluntary division of the society, simply decides that the complainants, having shown themselves to be the beneficiaries for whom said fund was created, and not having forfeited their rights, were entitled in equity to have a division of said fund, and to have their share set apart to them.

The basis of the suit in Society of Shakers et al. v. Watson et al., 68 Fed. 730, 15 C. C. A. 632, was a promissory note, but in that case it was shown that the debt represented by the note was incurred by the regularly appointed trustees of the society, and that the money borrowed went to increase the funds of the society, and that the persons

who furnished the money in this manner were entitled to an equitable lien upon the property thus increased.

The foregoing cases are cited and relied upon by appellees. Many others of similar import might be added, but the principle involved is the same. In every instance the complainants show themselves entitled to charge some property belonging to the association generally, or to some particular fund, either as beneficiaries or as holders of an equitable lien.

In this case, the pleadings and evidence show that the particular property belonging to the Waco Female College has been sold, and there is no effort to fix a lien upon that property. Other property is pointed out in the petition, which is sought to be subjected to a lien, as was done in the cases cited. With reference to this and all other property held for the use of appellant, the jury made the following special findings: "(22) Does the defendant Methodist Episcopal Church South accumulate property or hold any property for general purposes? Ans. They do not. (23) Is the property used by the various branches or institutions of the Methodist Episcopal Church South denomination contributed by voluntary donations for a definite, specific purpose? Ans. It was. (24) Have Clarendon College, Granbury College, Polytechnic College, Weatherford College, and Southwestern University, or any two of them, any joint, common, financial interest, or has any one of said schools any control over the finances of any other school? Ans. No. (25) Did any of the schools mentioned in the preceding question have any connection with the creation of the debts sued upon, or any interest in the matters for which said money was expended? Ans. No. (26) Does the Northwest Texas Conference or the Methodist Episcopal Church South own any property, and, if so, what property, and for what purpose or purposes is the same held? Ans. They own church and school property: purpose, for school and churches. (27) How has the property held by local Methodist Church associations been accumulated—by voluntary donations or otherwise? Ans. Voluntary and solicited. (28) If the property last mentioned has been accumulated by voluntary donations, were said donations solicited and made for the use of the particular school or local church using the same, or were such donations made for general purposes? Ans. For specific purposes." Upon these findings, the property of the other defendant colleges was excepted from the operation of the judgment, but the judgment virtually authorizes execution against the Austin Street Church property and the Fifth Street Church property in the city of Waco. In our opinion, the verdict of the jury makes it clear that the church now holds no property directly connected with the enterprise for which the indebtedness of appellees was incurred; that it holds no property, as a gen-

eral fund of the association, which might be charged in equity with this debt; but that all of the property controlled by it, or held for its use, is charged with particular charitable uses, separate and distinct from the Waco Female College, and which cannot be lawfully diverted from the purposes for which it was donated. Perry on Trusts, §§ 733, 734, and cases cited; 24 Am. & Eng. Ency. Law (2d Ed.) p. 352.

These conclusions compel us to answer in the negative both of the questions propounded in the beginning. Appellant was not such a person as could be sued at law, and appellees not only failed to point out any property subject in equity to their claim, but, on the contrary, the evidence and the verdict conclusively shows that no such property exists. Appellees insist that the judgment should not be, for this reason, set aside, because appellant might in the future acquire property subject to their demand. It is not clear to us how this could be possible, but, if it were, the contention could only be sustained on the theory that the appellees were entitled to an ordinary judgment for their debt, with award of execution; but this we have decided they cannot obtain. We therefore conclude that neither at law nor in equity were appellees entitled to recover, and the judgment in their favor will therefore be reversed, and judgment rendered in favor of appellant.

Reversed and rendered.

HOUSTON & T. C. R. CO. et al. v. DE BERRY et al.*

(Court of Civil Appeals of Texas. Jan. 6, 1904.)

PUBLIC LANDS — CERTIFICATES — SURVEYS — TRESPASS TO TRY TITLE — EVIDENCE — MATERIALITY — JUDGMENTS — COLLATERAL ATTACK — SECONDARY PROOF — SUFFICIENCY OF PREDICATE.

1. The district surveyor of one county was not authorized to make the surveys in another county, where that county at that time was attached to a different land district than that to which the surveyor belonged.

2. Under Pasch. Dig. art. 4573, which was in force in 1846, and which, while it required certificates to be filed with the entry of application in the office of the county or district surveyor, also provided that the act should not be so construed as to prevent holders of certificates of scrip from having the same surveyed without entry, a survey made in 1846 under a bounty certificate was valid, although such certificate was not actually filed in the office of the surveyor.

3. Evidence that the original of a judgment and papers in the cause in which it was rendered had been destroyed by fire, together with proof by the plaintiff in the cause and his attorney that a paper offered was, with some unimportant exceptions, a true copy of the decree rendered and entered in the cause, was a sufficient predicate for the introduction of the copy.

4. The fact that a judgment in a suit under Pasch. Dig. art. 5460, providing for actions against unknown heirs, and the publication of citation against them, did not show on its face that proper affidavit was made, authorizing publication by citation, nor that it was a proceed-

*Rehearing denied February 17, 1904, and writ of error denied by Supreme Court.

ing in the district court of any county, nor in what paper, if any, publication was made, nor that land certificates were in the possession of a party to the suit, nor that an attorney was appointed to represent the unknown heirs, was not sufficient to affect the judgment in a collateral proceeding.

5. Where a certificate was issued to the heirs of a person shown by it to be dead, a judgment against the heirs of such dead person, and in favor of one claiming the land adversely to such heirs, shows a complete title to the certificate in the person in whose favor the judgment is rendered and his successors.

6. Assignments presenting two questions—the admissibility of testimony for the purpose of proof and for the purpose of contradiction—are not in such form as to require consideration on appeal.

7. In trespass to try title, where plaintiffs claim under a judgment against unknown heirs, to whom a certificate was granted, evidence that some person claiming to be an heir, within the description of the certificate, had filed a power of attorney in the General Land Office shortly prior to the date when the above judgment was rendered was immaterial, as it could not affect the validity of the judgment, or have any bearing on the title of the persons claiming thereunder.

Appeal from District Court, Travis County; George Calhoun, Judge.

Action by A. A. De Berry and others against the Houston & Texas Central Railroad Company and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Cobbs & Hildebrand, for appellants. West & Cochran and E. Cartledge, for appellees.

STREETMAN, J. Appellees brought this suit in the form of trespass to try title against the Houston & Texas Central Railroad Company, Chas. Dillingham, and F. P. Olcott, to recover a tract of 1,920 acres of land, known as the "John M. Seaton Survey," now in Ford county, but formerly situated in Hardeman county, Tex. The case was tried on change of venue to the district court of Travis county, Tex., and appellees obtained judgment for the land sued for, from which said defendants have prosecuted this appeal.

The appellees derive their title through the heirs of John M. Seaton, and claim under a location and survey made under bounty certificate No. 8, issued to the heirs of John M. Seaton April 30, 1846. Appellants claim by virtue of a patent based upon a location and survey of two land certificates issued by the state to the Houston & Texas Central Railroad Company. The contention of appellees, which was sustained by the trial court, is that the survey under which appellants claim was invalid because not made by the proper officer. The facts with reference to said survey and the location of the certificates of appellants, and also that under which appellees claim, were agreed upon in the trial court, and we do not deem it necessary to set out said facts in full in this opinion. The surveys under which appellants claim were made September 25, 1872, by J. H. Denken, deputy surveyor of Jack land district, whose field notes were approved by

E. Boone, district surveyor of said district. The survey under which appellees claim was made by virtue of a duplicate certificate issued in lieu of the bounty warrant certificate No. 3, above mentioned, by W. A. Benson, district surveyor of Jack land district, by W. S. Mabry, his duly appointed special deputy, on November 14, 1874.

Appellants' first and second assignments of error complain of the holding of the trial court to the effect that the location of appellants' certificates, as above stated, was invalid, because of the want of authority in the officer who made said surveys. Appellants have presented under these assignments a lengthy and able argument in support of their contention, but we do not discover in the record any facts which distinguish this case from those in which the validity of surveys made by these officers have been heretofore passed upon by our courts. The following cases have directly or indirectly disposed of all the contentions made by appellants, and we do not believe that it would serve any good purpose to discuss these questions further at this time: *Cox v. Railway Co.*, 68 Tex. 226, 4 S. W. 455; *Olcott v. Smith* (Tex. Civ. App.) 70 S. W. 343; *H. & T. C. Ry. Co. v. Carter* (Tex. Civ. App.) 24 S. W. 1104; *Marsalis v. Creager* (Tex. Civ. App.) 21 S. W. 547; *Kimmarle v. H. & T. C. Ry. Co.*, 76 Tex. 686, 12 S. W. 698; *Blum v. H. & T. C. Ry. Co.* (Tex. Civ. App.) 31 S. W. 528; *H. & T. C. Ry. Co. v. Bowie's Heirs* (Tex. Civ. App.) 21 S. W. 305; *Duran v. H. & T. C. Ry. Co.*, 86 Tex. 291, 24 S. W. 258. The effect of the foregoing decisions is that the district surveyor of Jack county was not authorized to make the surveys in Hardeman county, under which appellants claim, in 1872, because said county was at that time attached to the Montague land district.

The third and fourth assignments of error attack the validity of appellees' location on the ground that the certificate under which said locations were made was never filed with the district surveyor of the Jack land district, and that no entry was made of said certificate. This does not seem to have been a positive requirement of the statute at the time these locations were made. Articles 3894, 3895, and 3896 of the Revised Statutes of 1879 contain a positive provision requiring the certificate to be filed, together with the entry or application, in the office of the county or district surveyor, and further provide as follows: "Hereafter no survey shall be made until after entry or application, as provided in the preceding article." Article 4573, however, of *Paschal's Digest*, which was the law in force at the time appellees' locations were made, while it contained substantially the same requirements as the articles above cited, concluded as follows: "Provided that nothing in this act shall be so construed as to prevent holders of certificates or scrip from having the same surveyed without en-

try, but such survey shall not have a preference, or give any right over a location or entry of the same land previously made in the proper office." The difference in these provisions, in our opinion, justified the lower court in holding that the surveys made under the Seaton certificate were valid, notwithstanding the fact that said certificate was not actually filed in the office of the surveyor.

Substantially the same question is presented under the fifth and sixth assignments of error.

In appellants' seventh and eighth assignments of error it is contended that the location of appellees' certificate was invalid, because at said time the counties of Wise, Montague, Jack, and Young had not had their county lines or boundaries legally surveyed and established, and because said counties had not complied with the law in force prior to said date, in getting copies of field notes of prior surveys and maps, as required by the act of March 20, 1848, and the act of January 26, 1858. The contentions of appellants under these assignments are virtually disposed of in the case of *Pardee v. Adamson* (Tex. Civ. App.) 48 S. W. 44, in a case involving the validity of locations in the San Saba land district, under an act substantially the same as that creating Jack county land district, under which appellees' locations were made. *Gammel's Laws*, vol. 8, pp. 163, 182. Appellees derive their title to the John M. Seaton certificate through a judgment rendered in the district court of Houston county, Tex., November 27, 1872, in the suit of J. C. Wooters, administrator of Samuel J. W. Long, deceased, against the unknown heirs of Jas. Seaton, deceased, in which said administrator recovered judgment against the unknown heirs of John M. Seaton and James Seaton for several land certificates and tracts of land, including among the rest the duplicate bounty warrant, No. 29-186, issued 6th of October, 1870, in lieu of the original bounty certificate issued by Adj. Gen. W. G. Cook on the 30th of April, 1846, for 1,920 acres, to said John M. Seaton. It was agreed that appellees were the heirs of said Samuel J. W. Long. Said judgment is as follows:

"J. C. Wooters, Administrator of Samuel J. W. Long, Deceased, v. The Unknown Heirs of James Seaton, Deceased. November Term, A. D. 1872, Twenty-Seventh Day. This cause coming on to be heard, and the defendants appearing not, there was a judgment by default, and a writ of inquiry rewarded, and thereupon a jury of good and lawful men were impaneled and sworn to try said cause, and thereupon the plaintiff proved the following facts: By the affidavit of the printer and the sheriff's return, that notice had been published in the East Texas Herald for eight successive weeks previous to the last term of the court, and that the service had been perfected in accordance

with law. Plaintiffs showed by the deposition of Cyrus H. Randolph, of the county of Brazos, that S. J. W. Long, plaintiff's intestate, placed in the hands of himself and A. J. Corley certain title papers for land formerly the property of John M. Seaton; also certain certificates for land purporting to be the headright and bounty land certificate of John M. Seaton. The number of acres was not remembered. Had seen the papers, but could not describe them minutely. Understood that said papers had been sent to James Webb, attorney at law, of Austin or Corpus Christi. Could not state whether the papers were lost or not. Had not seen them since they were sent to Webb, and, after the lapse of twenty years, could not describe the papers better than had been done. Witness remembered that Seaton was one of the parties, and that the transfers from him for the land and certificates in question were properly authenticated. Does not know the heirs of Seaton, or whether or not Seaton is dead. This is, in substance, the testimony of said Randolph, whose depositions are on file in this cause. It was shown by the plaintiff that he was and is the administrator de bonis non of Samuel J. W. Long, deceased. Never knew James Seaton nor John M. Seaton. Did not know whether dead or living. Know nothing of the transaction, except from hearsay, and had been made to believe and did believe that the land and certificates were the property of the estate of Long, deceased. Had inquired about the transfers, and had made search for same among the papers of the estate, but had been unable to find them. The land and certificates are the same as described in the petition, and the same as he has always understood the property of his intestate's estate. Wm. Cundiff stated that the transfers to Long to the certificates described in the petition were sent to Judge Webb; that the certificates had been placed in his hands for location, and that he had located part, and had obtained patents on the same; the patents are the same shown to the court and in evidence, and the certificates are the same as mentioned in the petition; that the same were duly transferred to said Long, and were now the property of his said estate, except his locative interest in same, which by the contract was to be one-half the land, after his paying expenses of location; that he had made diligent search for the transfers; that he had been unable to find same; that Judge Webb is dead, and that witness had gotten a person to search for the transfers among the papers of the estate of said Webb, but had been unable to find and get possession of said transfers from Seaton to Long; that John M. Seaton and James Seaton are dead. Does not know anything of the heirs or their residences.

"After the introduction of the evidence, which was in substance as above stated, and the charge of the court and argument of counsel, the jury retired to consider of their

verdict, and returned into open court the following verdict, to wit: 'We, the jury, find for the plaintiff.' Whereupon it is ordered, adjudged, and decreed by the court that the plaintiff, James O. Wooters, administrator de bonis non of the estate of Samuel J. W. Long, deceased, do have and recover of the defendants, the unknown heirs of James Seaton, deceased, and John M. Seaton, the land and certificates mentioned and set out in plaintiff's petition, to wit: One hundred acres of land situated in the county of Houston and state of Texas, situated on the waters of Pine Island Bayou, and granted by patents to the heirs of John M. Seaton, of bounty warrant No. 2, issued to John M. Seaton by the Adjutant General on the 30th day of April, 1846, for 640 acres of land, said patent being issued on the 3rd day of December, A. D. 1862, by F. R. Lubbock, governor, and to which said patent reference is here made for better description; also five hundred and forty acres granted by patent to the heirs of said John M. Seaton on the 3d day of December, 1862, by said Lubbock, governor, etc.; the same being situated in the county of Hardin and state of Texas, on the waters of Pine Island Bayou; the same being granted by virtue of balance of said donation warrant issued as aforesaid to the said John M. Seaton, and to which patents reference is here made for better description. Also one land certificate headright of said John M. Seaton, and issued to him for one-third of a league of land, or 1,466 acres of land; the same being first-class duplicate No. 29-787, issued on the 6th day of October, A. D. 1870; the original being No. 13, and issued July 4, 1850. Also duplicate bounty warrant No. 29-186, issued 6th of October, A. D. 1870, original issued by Adjutant General W. G. Cook on the 30th of April, 1846, being No. 3, for nineteen hundred and twenty (1,920) acres of land, and issued to the said John M. Seaton—and that all the right, title, and interest which the said James Seaton and the said John M. Seaton ever had in and to said lands and land certificates be, and the same is hereby, divested out of them and the said heirs of the said James Seaton and the said John M. Seaton, and the same is hereby vested in the said James C. Wooters, administrator of the estate of Samuel J. W. Long, deceased, for the purpose of administration, and the legal heirs of the said Long, deceased, in fee simple, forever; and it is further ordered that the plaintiff pay the costs of this suit, which is to be paid in due course of administration."

This judgment, as it appears in the record, is accompanied by a certificate of the district clerk of Houston county, Tex., dated 24th day of February, 1873, that the same is a true copy of the decree rendered in said cause; and this is followed by a certificate of the Commissioner of the General Land Office, dated March 10, 1891, that the foregoing judgment and certificate is a true copy of the

original on file in his office at that date. As a predicate for the introduction of this copy of the judgment, appellees proved that the original of the judgment and the papers in said cause had been destroyed by fire, and proved by the plaintiff in said cause, J. C. Wooters, and by W. A. Stewart, the attorney who represented the plaintiff in said cause, that the above was, with some unimportant exceptions, a true copy of the decree rendered and entered by said district court in said cause.

Appellants' assignments of error from the eleventh to the twenty-fifth, inclusive, are directed against the admissibility in evidence of this judgment; and, without setting out said assignments in detail, we deem it sufficient to say that, in our opinion, the predicate laid for the introduction of said copy by the parol testimony of Wooters and Stewart was sufficient to authorize its introduction. It is insisted that the judgment is not against the unknown heirs of John M. Seaton, but a careful reading of the judgment does not sustain this contention.

It is also insisted that the judgment does not show upon its face that proper affidavit was made, authorizing publication by citation; that no attorney was appointed to represent said unknown heirs; that it does not show upon its face that it was a proceeding in the district court of any county; that it does not show upon its face in what paper, if any, publication was made, and that it does not show that said land certificates were in the possession of any person a party to said suit; and that it appears that the court was without jurisdiction to hear and determine said cause. Some of these objections are not sustained by the record. For instance, the parol evidence showed that there was an attorney appointed to represent said unknown heirs, who did represent them in the trial of said cause; but none of the objections urged against the judgment are, in our opinion, sufficient to affect it in a collateral proceeding. The district court which rendered the judgment was a court of general jurisdiction in cases of this character, and the proceeding against unknown heirs after citation by publication was authorized by the statute then in force. Pasch. Dig. art. 5460; *Byrnes v. Sampson* (Tex. Sup.) 11 S. W. 1073. And if any of the contentions urged against the judgment are meritorious, they are such as could have been available only in a direct proceeding to set aside the judgment, or upon appeal or writ of error.

In the twenty-third and twenty-fourth assignments of error it is insisted that said judgment is insufficient to sustain the title of appellees to the John M. Seaton certificate, for the reason that it is not proof of the facts therein recited as to the death of John M. Seaton, and it is not shown that the parties thereto were the sole heirs of John M. Seaton. As we have already stated, a careful reading of the judgment shows that it

was in fact rendered against the unknown heirs of John M. Seaton, as well as James Seaton. The certificate under which appellees' location was made appears not to have been issued to John M. Seaton, but to his heirs; and it shows upon its face that John M. Seaton himself was killed on March 27, 1836, in the massacre of Col. Fannin's command. The title to the certificate, therefore, being by its terms vested in the heirs of said John M. Seaton, and this judgment being against the heirs of said John M. Seaton, and in favor of Wooters as administrator, we are unable to see that anything is lacking to complete the title of appellees to said certificate.

Appellants' twenty-sixth and twenty-seventh assignments of errors are as follows:

"(26) The court erred in not permitting the defendants to offer in evidence a certified copy of the field notes of 284 acres of land made by virtue of John M. Seaton certificate, by virtue of certificate No. 3, for 1,920 acres of land in Coryell county, for the purpose of showing that said certificate had been located in another county than Houston county, and as contradictory of the statement in said judgment of J. C. Wooters, etc., v. The Unknown Heirs of James Seaton, Deceased, contained.

"(27) The court erred in not permitting the defendants to introduce in evidence a certified copy of the field notes of 406 acres of land made by virtue of John M. Seaton, in Coryell county, by virtue of certificate No. 3, for 1,920 acres of land, for the purpose of showing that the certificate had been located in another county than Houston county, and as contradictory of the statement in said judgment of J. C. Wooters, etc., v. The Unknown Heirs of James Seaton, Deceased, contained."

These assignments are attempted to be submitted as propositions, and no other propositions are submitted under them. It will be observed that each of these assignments presents two questions: First, the admissibility of the testimony offered for the purpose of showing a previous location of the John M. Seaton certificate; and, second, for the purpose of contradicting the statement in the judgment above set out. The assignments, being in this condition, are not in form to require our consideration. *Cammack v. Rogers*, 74 S. W. 945, 6 Tex. Ct. Rep. 594; s. c. 73 S. W. 795, 7 Tex. Ct. Rep. 211.

The twenty-eighth assignment of error is as follows: "The court erred in not permitting appellants to introduce in evidence the certificate of facts made by the Acting Commissioner of the General Land Office in respect to the certificate original bounty warrant No. 3, issued by Wm. G. Cook, adjutant general, to the heirs of John M. Seaton, and the location and disposition of said certificate, the same having been located in other counties than that in which the land involved herein is situated; it appearing from said

certificate that there was filed with the claim on the 1st of September, 1872, a power of attorney executed by B. M. Seaton, claiming to be the heir of John M. Seaton, to Hilliard J. Jones, dated the 27th day of May, 1872, and acknowledged before Z. E. Coombes, deputy clerk of the district court of Dallas county, the same day, authorizing him, the said Jones, to represent his interests in all things, lands, and moneys pertaining to the estate of John M. Seaton, and his rights thereto as heir." This assignment is attempted to be submitted as a proposition. It can hardly be considered as such, but, even if entitled to be considered, we are unable to see how the testimony offered could have any legitimate bearing upon the case. It would simply have shown that some person claiming to be an heir of John M. Seaton had filed a power of attorney in the General Land Office shortly prior to the date when the judgment was rendered in favor of Wooters, administrator, against the unknown heirs of John M. Seaton. We are unable to see how this could have affected the validity of that judgment, or have had any material bearing upon the title of appellees.

No error being shown, the judgment of the district court is affirmed. Affirmed.

GALVESTON, H. & S. A. RY. CO. v. BUTCHEK.*

(Court of Civil Appeals of Texas. Jan. 6, 1904.)

INJURY TO RAILROAD EMPLOYEES—CONTRIBUTORY NEGLIGENCE—FELLOW SERVANTS—EVIDENCE—SUFFICIENCY—DAMAGES—ASSIGNMENT OF ERROR—QUESTION FOR JURY.

1. Inconsistencies between the testimony of a witness and that which he gave in a former trial are matters exclusively for the jury.

2. Evidence, in an action by an employe to recover for injuries sustained by falling into a pit under the tracks in a railroad machine shop, held sufficient to show that a board furnished by defendant to serve as a bridge across such pit was over the "dugout" at the time in question.

3. The fact that a helper in a railroad machine shop was familiar with rules which required him to inspect appliances and premises to avoid danger therefrom did not make his failure to see that a board used as a bridge across a pit therein, into which he fell, was of proper length or properly in position, contributory negligence as a matter of law.

4. In an action for injuries sustained by falling into a pit under the tracks in a railroad machine shop as a result of the failure to furnish a board of sufficient length for bridging the pit, it appeared that plaintiff had only worked in the shop three weeks. Other employes carried the planks to the pits, and he had never done so, nor put one on. There was always one there when he crossed, and he always crossed wherever the board was, and never saw one elsewhere. He did not know how long they were, and never knew one to fall. When he approached the board it was perfectly level between the rails, and he could not see how much lap it had before stepping on it. It had very little, however, and was liable to work off. The light was deficient. Held not to show that he assumed the risk as a matter of law.

*Writ of error denied by Supreme Court.

5. In an action for injuries to an employé in a railroad machine shop, plaintiff testified that he was a machinist's helper. The only other helpers were two colored men, with whom he never worked. There were about 15 men on stationary engines, about 15 machinists, and about 45 men altogether. His duties were to clean engines and help the machinists, and he was controlled by everybody in the shop excepting the colored helpers. *Held* sufficient to show that he was not a fellow servant with the other employés.

6. An assignment of error alleging inconsistency between the main charge and a special charge will not be considered where there is no proposition therein or elsewhere presented under the same.

7. In an action for injury to an employé who was ruptured by a fall, the fact that he was physically susceptible thereto is no avail to defendant as to the amount of damages.

8. In an action for an injury to an employé who was ruptured by a fall, it appeared that he was 32 years of age, and that the injury was permanent, and, besides this, his labor capacity was affected from one-half to three-fourths, and his injury either caused him inconvenience and suffering, or was liable to at any time. There was also testimony that a man in his condition was in constant danger, and in daily and hourly dread. He was earning at the time \$1.40 a day. *Held*, that a verdict for \$5,000 was not excessive.

Appeal from District Court, Bexar County; J. L. Camp, Judge.

Action by Charles Butchek against the Galveston, Harrisburg & San Antonio Railway Company for personal injuries. From a judgment for plaintiff for \$5,000, defendant appeals. Affirmed.

For former opinion, see 66 S. W. 335.

Newton & Ward and Baker, Botts, Baker & Lovett, for appellant. R. B. Minor, Perry J. Lewis, and H. C. Carter, for appellee.

JAMES, C. J. Plaintiff alleged that he was employed by defendant (the appellant) in its machine shop as a general helper. That in said shop were three pits or trenches situated under railway tracks, about the width of the distance between the rails, and, to enable employés to cross said pits, defendant provided and had in use boards known as "pit boards," about 12 inches wide and 2 inches thick, resting at either end upon the wooden stringers supporting the rails, and also upon the flanges of said rails. That at the portions of said pits known as "dugouts," where the wooden stringers were cut away and substituted by iron stringers or support rails known as "guard rails," said pit boards rested at either end upon the balls of the guard rails, the pit boards being designed to be of sufficient length, and to be held in place and prevented from slipping from their supports at either end, by fitting against the ball of the main rail, the purpose of the same being for defendant's employés to cross the pits in passing from one part of the shop to another in the course of their work, and were removable from one place to another. That on July 16, 1900, in the course of his

work, while carrying a heavy jackscrew, about 100 pounds in weight, across one of the pits over a dugout, and over a pit board placed there for that purpose and resting at either end upon the ball of the guard rails, plaintiff was caused to fall into the dugout by the board slipping and falling from the ball of the guard rail, and thereby received his injuries. The negligence alleged was that one of the pit boards provided by defendant was too short to span the space and rest sufficiently over the balls of the guard rails to be securely held in such position and kept from the main rails, whereby, on account of longitudinal and lateral play, a slight movement of the board would move its end off its support. That this rendered the pit board insecure and dangerous when in use as a bridge, and rendered the shop not a reasonably safe place for the performance of plaintiff's work, which condition was known to defendant, or in the exercise of reasonable care by defendant would have been known to it. Besides a general denial, defendant pleaded that, if the pit board was of insufficient length, it had been placed there by plaintiff's fellow servants; that by defendant's rules plaintiff was required to inspect appliances before using them, and if the board, or the boards furnished for use, was of insufficient length and insecurely placed, plaintiff could have discovered it by the use of reasonable care; also in terms assumed risk and contributory negligence.

Conclusions of Fact

We conclude, in view of the verdict, that plaintiff's injuries were occasioned by the negligence of the defendant by failing in its duty to plaintiff to furnish a pit board of sufficient length to make it secure against either end slipping and falling down from the guard rail while in use as intended. We also conclude that plaintiff was not guilty of contributory negligence, and the facts concerning this board and the danger therein were not so known or obvious to plaintiff as to make the risk an assumed one. Also that the verdict is not excessive in amount.

The first and second assignments assert that there was no testimony which showed that the board in question was over the dugout, but that the undisputed evidence showed it was not over the dugout. The importance of the matter alleged in these assignments seems to lie in the fact that the danger involved in the negligence alleged in the petition, by reason of the shortness or the improper placing of the board, would not have existed if it was anywhere else than over the dugout portion of the trench. It appears that the case had been tried once before, and there were apparently contradictions between plaintiff's testimony on the former trial and that on this trial as to where the board was—whether over the dugout or not. Inconsistencies on the subject between his testimony on the two trials, and inconsis-

¶7. See Damages, vol. 15, Cent. Dig. § 42.

encies, if any, in the testimony he gave at the latter trial, if any, were matters which addressed themselves to the jury. It is sufficient for us to inquire as to whether or not there was testimony that went to prove that the board was over the dugout. In plaintiff's testimony, as collected and presented in appellant's brief, there is evidence, if accepted by the jury, which shows that the board was over the dugout at or about the junction of the dugout and another portion of the pit. He is quoted as stating that "the pit board I tried to walk across was resting on iron." This could not have been if at any other portion of the pit than over the dugout, because at the other places it would have rested upon wooden stringers. Again, after pointing out on a photograph a certain place as the place where the board was, which was inconsistent with the above, he undertook to correct himself, and located the board at the junction above mentioned. This he maintained, though exhibiting some degree of uncertainty about it. He stated that, when he went to go upon the board, there were wooden stringers to his right, but he did not observe and did not know what was to the left; and he also stated that there was no wooden stringer there; that he now recollected there was not any there; and that he was sure of it. There was other testimony tending to confirm this: First. He stated that the board was lying between the main rails, and was about half an inch below the tops of these rails. This could only have been where the guard rail was, that is, over the dugout, because if the board lay upon the wooden stringers, where there was no guard rail, it would have been at least two inches below the main rail. Second. He stated that when he fell he got up about the middle of the dugout, about two feet from the board, and the dugout was shown to be about seven feet in length. Third. The board, it appears, did not drop into the pit, and plaintiff explained that the cause of his fall was that the end of the board opposite him slipped and fell down. As that end must have been caught in the fall—for it did not go into the pit—it would appear that this must have happened where the flange of the guard rail was, because, if the end had slipped and gone down anywhere else, the board must necessarily have gone into the pit. The flange was about four inches below the top of the ball of the guard rail, and this shifting of the board suddenly, considering the weight upon the board, was calculated to cause plaintiff to lose his balance and fall. The tendency of this end of the plank to slip from the ball of the guard rail and drop down on the flange, if the end toward plaintiff was close to the ball of the main rail opposite, was testified to by defendant's witness Welmer; and he testified also that, if the end of the board slipped and fell and was caught, it must have occurred over the dugout. In addition to this, plaintiff might be excused in the eyes of the jury

from not knowing the minute details of his surroundings, or from not accurately observing or relating the precise situation in reference to the position of the board. The fall, if it occurred as he relates, was sudden and unexpected; and he testified that he had made no measurements in the shop where he was hurt, because he was refused permission to go there to do so. The assignments are overruled.

The third assignment asserts that the undisputed evidence shows that it was plaintiff's duty to see that the pit board was properly placed and safe for him to cross over on, and that in failing to see that it was properly placed he was guilty of contributory negligence. The fourth is that the verdict was without evidence to support it, in that the pit boards were safe and of sufficient length if properly used, and that the accident was due to his want of care in properly adjusting it, and in failing to see that it was so adjusted that he could safely use it. The fifth charges, in addition to what is contained in the fourth, that the undisputed evidence shows his want of care, and also shows that he assumed the risk in using it in the manner he did. The eighth alleges that the undisputed evidence shows that if the board was too short it was a matter that was obvious and patent, as well as the danger accompanying its use, and he therefore assumed the risk.

Plaintiff's duty to inspect the board, and its placing, is based upon instructions or rules contained in time cards given to employes, which were signed and turned in every night. They instructed the employe to be very careful and to make a test of all implements and everything used before using same, and also contained this injunction: "Examine carefully scaffolding, tackle, and all other appliances before trusting them." Plaintiff was familiar with these rules. The duty of inspection of appliances, etc., for the safety of the servant using them, is not transferable, and cannot ordinarily be shifted from the master to the servant. Plaintiff was not engaged to inspect appellant's appliances and premises. He was employed as a general helper about the shop. While so occupied, the law imposed upon defendant the duty of ordinary care in seeing that the appliances, passageways, and places used by him were safe, as a part of the relation existing between them. This duty defendant could not rid itself of by a general rule or command that the servant himself should perform it. *Bookrum v. Ry.* (Tex. Civ. App.) 57 S. W. 919. Plaintiff's failure to see that the board was of proper length or properly in position was not contributory negligence as a matter of law by reason of said rules.

The only issue as to defendant's negligence submitted was in respect to the board being too short for the safety of employes having occasion to use it. It appears that, if the board had been adjusted so that its ends

extended an equal distance over the balls of the guard rails, it would probably not have slipped as this one did. So that its being placed, or its having come to be conditioned as it was in the course of its use, so as to have but little lap over the rail on the side opposite plaintiff as he walked upon it, doubtless had something to do with its falling at that end. Nevertheless the original negligence, if any, in furnishing a board so short as to admit of that result in its use, would be a proximate cause of the accident, and render defendant liable, unless by negligence of plaintiff in some form, or by the rule of assumed risk, he is debarred from recovering.

As to assumed risk: Plaintiff had only worked in the shop three weeks. He testified that the machinists carry the planks to the pits and move them around, and that he had never moved one of them himself, nor put one of them across a pit; that there was always one there when he crossed a pit, and he always crossed wherever the board was. He never had to put one across a pit, and never saw one of them except across a pit. That he did not know how long they were. He had never known one to fall. That, when he approached the board for the purpose of carrying the jackscrews over, it was lying perfectly level between the main rails; that he could not see how much lap it had over the opposite rail; that the thickness of the board (about two inches) prevented him from perceiving the lap it had there; and that the upper surface of the board was only about half an inch below the top of the main rails; therefore the difficulty in the way of his detecting at a glance, or at all before going upon the board, that it had very little lap, and was liable to work off, is apparent. Besides this, there was evidence that the light at that place was deficient. This state of testimony did not admit of holding that plaintiff must have had such knowledge of the circumstances and danger that he assumed the risk as a matter of law.

Plaintiff's testimony was also such as precluded the assumption by the court of the fact of contributory negligence. Nor would the testimony have warranted its assuming that plaintiff was not injured by reason of the board in question, but received his injury by tripping and falling over another board, that defendant furnished him a reasonably safe place to work, and that there was no negligence on the part of the defendant in reference to the board, nor the fact that the board was so placed that it could not have fallen as alleged, nor the fact that the board upon which plaintiff walked was not over the dugout. Therefore we overrule the ninth, tenth, and twelfth assignments.

The tenth assignment is that the undisputed testimony shows that, if the pit board was negligently placed over the pit as claimed, it was the act of a fellow servant. This issue was submitted by the court to the jury

in a very general way by a charge asked by defendant. This, however, would not preclude defendant from claiming exemption from liability if all the testimony showed that the act was that of a fellow servant of plaintiff, the question having been raised in the motion for new trial. Appellee asserts that the undisputed evidence shows that it was not the act of a fellow servant. We do not think we need examine the record further than to ascertain if enough appeared to raise the issue. Plaintiff testified that he was employed as a machinist's helper. That the only other helpers employed in the shop were two colored men. In all, there were about 15 men working on stationary machines, about 15 machinists, about 45 men altogether. That his duties were to clean engines and help machinists and assistant machinists, including those working on stationary machines. That everybody in the shop had control over him, from the foreman down, except the colored helpers, and with these he had no relations, and did not work with them, and never had. Appellee's brief states that no effort was made to contradict this testimony of plaintiff, but, whether this be so or not, his testimony on the subject was sufficient at least to require us to overrule the assignment, which asserts that the undisputed testimony showed that the act complained of was that of plaintiff's fellow servant. Under our statute plaintiff was not of the same grade as the others in the shop, excepting the two helpers, and with these he says he never worked. He certainly was not working with them at the time and place nor upon the same piece of work. *Long v. Ry. (Tex. Sup.) 57 S. W. 802.* It is true that he testified he was employed to do the same character of work as they, that is, whatever they were asked to do, and that at night they together put up the tools, and all swept out the place. His testimony also tended to show that the machinists were the ones who moved the pit boards around, and not the helpers. He had seen the machinists put the pit boards across the pit, but had never seen the helpers do so.

The thirteenth assignment complains of the refusal of a charge which would have assumed that defendant was not guilty of negligence in reference to the manner in which the board was placed. Consistently with what has already been said, this assignment must be overruled.

The fourteenth alleges that the main charge and special charge No. 8 asked by defendant were inconsistent, and the inconsistency prejudicial to defendant. There being no proposition in the assignment or elsewhere presented under the assignment, we would have to study out for ourselves the inconsistency, if any, intended, and the legal proposition sought to be invoked. Therefore we must decline to consider the assignment.

The fifteenth must be overruled from what has already been held in this opinion. The

propositions that there is absolutely no evidence that defendant placed across said pit the pit board, that the undisputed evidence is that the board was placed either by plaintiff or by a fellow servant, and that the board was not too short for reasonably safe use, cannot be successfully maintained.

We are unable to condemn the verdict as excessive. The fact that plaintiff was physically susceptible to rupture is not one that can avail defendant if this fall occasioned the rupture, which the jury could have found was the case. Plaintiff was 32 years of age, and, according to the testimony, the injury was permanent, and very materially affected his capacity to labor, and either caused him inconvenience and suffering, or was liable to bring on suffering at any time from exertion. There was testimony that hernia incapacitates a laboring man like plaintiff from the performance of physical labor from one-half to three-fourths. He was earning at the time \$1.40 a day. There was also testimony that a man with hernia is in constant danger, and in daily and hourly dread.

The judgment is affirmed.

On Motion for Rehearing.

(Feb. 10, 1904.)

The testimony in material respects different from what it was on the previous trial. The opinion on rehearing on that appeal, reported in 66 S. W. 337, shows the final conclusion of the court to have been that the evidence failed to show that the board in question was over the dugout, but showed that it was over the other portion of the pit. This is not the condition of the testimony in the present record.

Again, in the opinion referred to, stress was laid on the fact that if the board was over the dugout its length was such that if properly and equally adjusted it would have had a lap over such guard rail of as much as 2½ inches. Testimony here makes it appear that the lap would not exceed 1½ inches. In the course of its use it is very much more probable that the adjustment would be disturbed on one side or the other, permitting one end to have little or no rest on a guard rail.

As the evidence is here, we are unable to say that it is evident the accident grew solely out of the careless way in which the plank was placed, instead of the unsafe and insufficient length for the purpose intended.

WESTERN UNION TELEGRAPH CO. v. CHRISTENSEN.

(Court of Civil Appeals of Texas. Jan. 30, 1904.)

DELIVERY OF TELEGRAM—NEGLIGENCE—EVIDENCE—COMPETENCY—INSTRUCTION—CONTRACTS—PLEADING.

1. In an action for delay in delivering a telegram sent from Louisiana to Texas, defend-

ant's plea set up that the contract was made in Louisiana, and that any negligence occurred in such state, in transmitting the message, and that the greater part of plaintiff's claim was for mental suffering, which did not constitute a cause of action in Louisiana. *Held*, that it was error to sustain a demurrer to the plea.

2. In view of the pleadings, a contention that the failure of the telegraph company was a failure to perform a public duty, and that it having occurred in Texas, and the plaintiff residing there, the rights of the parties should be determined by the law of Texas, was untenable.

3. One traveling with the remains of his wife's father to a point where he was to be met by the wife missed connections with a train, and sent his wife a telegram stating when he would arrive. He informed the operator of the purpose of his trip. In an action for delay in delivering the message, plaintiff claimed as damages cost of telegram, one extra notice, three extra trips of undertaker, and mental suffering of his wife. *Held*, that the parties were in possession of sufficient facts to have brought such damages within their contemplation.

4. Plaintiff's petition setting out the facts was not subject to an exception that it showed plaintiff's wife in a state of mental anxiety before the message was sent.

5. Where, on appeal, the transcript is properly certified, and the record shows that the bill of exceptions was approved and filed during the term at which the cause was tried, the appellate court is not authorized to inquire into the question whether it was in fact so approved and filed.

6. Where, in an action against a telegraph company for delay in the delivery of a message, a witness testified to the time he delivered the message, and that he had written "12:30" on the counter delivery sheet at the time the message was delivered, it was error to admit the counter delivery sheet in evidence.

7. In an action against a telegraph company for delay in delivering a message addressed to the sender's wife at a certain street number in Dallas, a failure to send the message to plaintiff's residence, in West Dallas, was not negligence.

8. It is not negligence for a telegraph company to fail to transmit a message during the hours when its offices are closed, and not being operated under its rules as to office hours.

Appeal from District Court, Dallas County; Richard Morgan, Judge.

Action by Gus Christensen against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Reversed.

N. L. Lindsley (Geo. H. Fearons, of counsel), for appellant. H. P. Lawther, for appellee.

BOOKHOUT, J. Gus Christensen sued the Western Union Telegraph Company to recover damages for its failure to transmit and deliver the following telegraphic message: "Shreveport, December 1st, 1901. To Mrs. G. Christensen, No. 235 Elm Street, Dallas, Texas. Train late, will arrive in Dallas Monday afternoon. Best love. [Signed] G. Christensen." A trial resulted in a judgment for plaintiff, and defendant appealed.

1. Appellant complains of the action of the trial court in sustaining exceptions to its plea setting out the law of Louisiana—in ef-

¶ 8. See *Telegraphs and Telephones*, vol. 45, Cent. Dig. § 33.

fect, that the contract was a Louisiana contract, and governed by the laws of that state. The plea alleged, in substance, that the contract was made in Louisiana, and was therefore to be governed by the laws of that state; that the negligence of defendant, if any, consisted wholly and entirely by reason of defendant's acts in the state of Louisiana, in transmitting the message; that the greater part of plaintiff's claim was for mental suffering sustained by reason of appellant's failure to transmit and deliver the message within a reasonable time; and that, by the laws of Louisiana, as settled and construed by the Supreme Court of that state, mental suffering, when unaccompanied by physical pain, does not constitute a cause of action, and no recovery can be had therefor. The plea was verified by affidavit of counsel for appellant. The plaintiff interposed a general demurrer to this plea, which was sustained, and the plea stricken out. In this ruling we think there was error. This plea must be taken as true when tested by a general demurrer. It shows that the contract was made in the state of Louisiana, and that the breach, if any, occurred in that state. Generally, when no place of performance is expressly stated, or implied from the terms of the contract, the law of the place where made will govern. Beach on Mod. Law, § 592; Story on Conf. Laws, § 242. The plea not only alleges the making of the contract in the state of Louisiana, but goes further, and shows, at least inferentially, that it was to be governed by the laws of that state. It also alleges that the breach occurred in that state. As stated, the effect of the demurrer was to admit the facts set up in the plea as true, and challenged their sufficiency to constitute a good defense. The demurrer should have been overruled. Tel. Co. v. Preston (Tex. Civ. App.) 54 S. W. 650; Jones v. Oil Co. (Tex. Civ. App.) 72 S. W. 248; Life Ass'n v. Harris, 94 Tex. 35, 57 S. W. 635, 86 Am. St. Rep. 813; Telegraph Co. v. Cooper (Tex. Civ. App.) 69 S. W. 427. This case is distinguishable from the case of Telegraph Co. v. Blake (Tex. Civ. App.) 68 S. W. 526. There the case was tried on its merits, and it was fairly deducible from the facts that the contract was performable in Texas.

It is contended by appellee that the right of action against a telegraph company for its failure in the performance of its duty to transmit and deliver a message promptly does not rest upon contract merely, but rests upon a failure on its part to perform a public duty, and consequently it may be sued not merely for the breach of a contract, but for the commission of a tort, and that, the failure to deliver the telegram occurring in Texas, the plaintiff residing in Texas, and the defendant being a foreign corporation doing business under permit in Texas, the rights of the parties are to be determined by the laws of Texas. The courts of this state treat suits of this character as an action to recover dam-

ages for a breach of contract. Tel. Co. v. Coffin, 88 Tex. 96, 30 S. W. 896; Thomas v. Tel. Co. (Tex. Civ. App.) 61 S. W. 501. In view of the pleadings, we think the contention untenable.

2. It is insisted that the court erred in overruling defendant's special exceptions that the damages claimed to have been sustained were such as could not have been contemplated by the parties at the time the contract was made. There is no merit in this contention. The petition alleges that plaintiff left Lufkin, Tex., with the remains of his wife's father, to take the same to Dallas, Tex., for burial. His route was over the Houston East & West Texas Railroad to Shreveport, and from there over the Texas & Pacific Railroad to Dallas. Before leaving Lufkin he telegraphed his wife, at Dallas, that he would arrive in Dallas Monday morning, December 2d, on the west-bound train, with the body of her father. When he reached Shreveport he found the train over the Texas & Pacific going west was from six to eight hours late, which would prevent him from reaching Dallas until late in the afternoon of December 2d. He thereupon fully informed the defendant's operator at Shreveport of all that had happened, the character of the sickness of the deceased, the relationship of the parties, and the object and purpose of his trip, and thereafter sent his wife the message above set out. The plaintiff, in his petition, claimed the following damages as having been occasioned by the failure to transmit and deliver the telegram at Dallas: Cost of telegram, 40 cents; one extra notice, 90 cents; Loudermilk, the undertaker, three extra trips, \$33; and for damages to his wife, Anna Christensen, caused by the mental and physical suffering and distress and anxiety, in the sum of \$1,500—for all of which plaintiff asks judgment. The pleadings show that the parties were in possession of sufficient facts at the time of making the contract from which they could have contemplated that all the damages set out in the pleadings might result from a breach thereof. The pleading is not subject to the exception that it showed plaintiff's wife was in a state of anxiety and suffering mentally prior to the sending of the telegram sued upon, and that the failure to promptly transmit and deliver the same only increased and prolonged such mental suffering.

3. Appellee has cross-assigned errors, and asks that the judgment be reversed for the reasons set forth therein, and the cause be remanded. The first reads: "The court erred in admitting in evidence over plaintiff's objection the 'delivery slips' or memorandum purporting to show the time of the delivery of the telegram in question, as fully set out in said Gus Christensen's bill of exceptions No. 1." Appellant objects to the consideration of this cross-assignment for the reason the bill of exception upon which it is based was not filed until after the adjournment of

the term of court at which the cause was tried. The appellant has filed a motion requesting this court to strike out said assignment for this reason, which motion is verified by affidavits. The record of the case shows the bill of exception was approved and filed during the term at which the cause was tried. The transcript is properly certified. This court is confined to the record as made, and cannot hear testimony to correct the same. It is only as to questions that affect the jurisdiction of this court, that we are authorized to inquire into matters of fact. Rev. St. 1895, art. 998; *Ennis Mer. Co. v. Wathen*, 93 Tex. 622, 57 S. W. 946; *Willis v. Smith*, 90 Tex. 635, 40 S. W. 401; *Bogges v. Harris*, 90 Tex. 476, 39 S. W. 565. This question does not affect the jurisdiction of the court, but seeks to correct a transcript duly certified and filed in this court. The bill of exception shows that the defendant offered in evidence a paper purporting to be a delivery sheet and counter delivery sheet from its office for December 2, 1901. This counter sheet gave the number of the telegram, and to whom addressed, and the time of delivery as 12:30 p. m. December 2d. It was offered for the purpose of proving the time on said 2d day of December, 1901, when the telegram in question was delivered to Mrs. G. Christensen. To the introduction of this evidence the plaintiff, by his counsel, objected upon the ground that the witness Joe Gardner, who was then on the stand, had already testified that the telegram was delivered by him at 12:30 p. m.; that he had written the figures "12:30" opposite the name Mrs. G. Christensen on the counter delivery sheet offered in evidence; that he did this at the time that the telegram was delivered; that, while said delivery sheets might be consulted by the said witness Gardner for the purpose of refreshing his memory, they could not be introduced in evidence as independent testimony for the purpose of corroborating that of the witness Gardner, and were self-serving and inadmissible. But the court overruled the said plaintiff's objection, and suffered the said paper writing to be introduced in evidence, and the same was thereupon submitted to the jury in evidence. The action of the court in admitting this evidence was error. *Green. Ev.* (16th Ed.) vol. 1, §§ 120a, 120b.

4. The second cross-assignment complains of that portion of the charge reading as follows: "A failure to send said message to plaintiff's residence in West Dallas was not negligence. The failure to transmit said message from Shreveport to Dallas during the time that the wires were not being operated, under their rules as to office hours, was not negligence." The charge gave a full definition of negligence, and added the clause above quoted. It was not contended by appellee that the company was bound to deliver the message at his residence, in West Dallas. It seems to have been conceded that

a delivery to Mrs. Christensen, at No. 235 Elm street, fully met the requirements of the contract. The charge announced correct propositions of law, and there was no error in giving the same.

For the errors pointed out, the judgment is reversed and the cause remanded.

JUDGE et al. v. CURTIS et al.

(Supreme Court of Arkansas. Jan. 16, 1904.)

LANDLORD AND TENANT—LIEN ON CROPS—CONVERSION—LIABILITY OF CONVERSIONER—NOTICE OF LIEN—ATTACHMENT—CONTRACTUAL CLAIMS.

1. The liability to the landlord of one who knowingly receives from a tenant and sells crops subject to a landlord's lien may be treated as arising on an implied contract; and the landlord may maintain attachment under Sand. & H. Dig. § 325, which provides that attachments against nonresidents can be had only on claims arising on contract.

2. The absolute owner of property taken and sold by one who had converted it must sue at law for its value, but a mere lienor must proceed in equity, not for the value of the property, but to fix his lien on the proceeds in the hands of the wrongdoer.

3. Payment of rent for the previous year to the landlord's agent by mortgagees of the tenant's crops was sufficient to put the mortgagee on inquiry as to the tenancy, nonpayment of rent, and landlord's lien.

4. In a suit to fix the landlord's lien on the proceeds of a sale of the tenant's crop, if the rent claim and its amount are not established by proper proof, judgment for plaintiff will be reversed.

Appeal from Chicot Chancery Court; Marcus L. Hawkins, Chancellor.

Bill by W. E. Curtis and Alein C. Strut against J. J. Judge and F. F. Poston, trustees, and others. From a decree for complainants, defendants appeal. Reversed.

Frank P. Poston, for appellants.

BUNN, C. J. This is a bill in equity to fix a landlord's lien on proceeds of certain cotton, upon which he had a lien for rent, and to subject certain other property of Duffin Bros. & McGeehee, merchants of Memphis, Tenn., in Arkansas, to the payment of the amount so adjudged, and for other purposes.

In January, 1898, John Sabine Smith, a citizen of New York, was the owner, and had been for some time the owner, of a plantation in Chicot county, Ark., known as the "Florence Plantation," and had rented the same for the year 1897 to W. J. Smith, of that county. At this time he again rented the plantation to the said W. J. Smith for the year 1898 for the sum of \$1,800, and took therefor his two several promissory notes, each for \$900, one due and payable on the 15th November, 1898, and the other on the 15th day of December, 1898, and secured by his landlord's lien on said crop to be grown on said plantation for that year. In March next following, W. J. Smith arranged with the defendants Duffin Bros. &

McGeehee, general merchants of Memphis, Tenn., to furnish him moneys and supplies to enable him to carry on his farming operations during said year 1898 on said plantation. This arrangement was evidenced by a deed of trust executed by said W. J. Smith on the 1st March, 1898, to defendants Judge & Poston as trustees for the benefit of said Duffin Bros. & McGeehee, by which he conveyed to them for that purpose all the cotton, cotton seed, corn, fodder, and hay to be made on said plantation during that year, and also 20 head of horses and mules of W. J. Smith, then on said plantation, and of various descriptions. This deed of trust was filed for record on the 15th November, 1898. The amount secured, as named in the deed of trust, was \$4,000. When the cotton on said premises had been gathered, ginned, and packed, and made ready for the market, the defendant W. J. Smith began to ship the same to the defendants Duffin Bros. & McGeehee, at Memphis, and by the 20th January, 1899, had shipped to them, by steamboat, 91 bales, which was received by said merchants, and as soon as possible sold by them in the markets, and the proceeds, amounting to \$2,110, placed as a credit on the indebtedness of W. J. Smith, to them, secured as aforesaid. On being informed of this, plaintiff, on the 9th day of February, 1899, instituted this suit, by bill, in equity filed, with prayer for judgment against defendants Duffin Bros. & McGeehee for said cotton, and for cotton received by garnishee, J. P. Alender & Co., from subtenants, and for other and proper relief. The complaint is substantially to fix the landlord's lien on the amount for which defendants sold said cotton then in their hands, and will be so treated, under the doctrine of *Reavis v. Barnes*, 36 Ark. 575. W. J. Smith was summoned, and subsequently appeared and answered, controverting none of the essential or material allegations of the complaint however, and as to him all of the same are taken as confessed. Warning orders were made and published by the clerk against Judge & Poston, the trustees, who were shown to be nonresidents, and also, on same ground, against Duffin Bros. & McGeehee, and an attorney appointed to defend for them, who subsequently made a report of his action in the premises, to the effect that he had received a response to his communication from Judge & Poston, but none from Duffin Bros. & McGeehee. Judge & Poston, as trustees, filed their demurrer to the complaint, which being overruled, they then appeared in person and by attorney and filed their answer, to which plaintiff interposed demurrer. Upon the filing of the complaint, an affidavit for general attachment in equity against the property of defendants was filed, and order issued—as against W. J. Smith, because he had removed or was about to remove his property out of the state, not leaving enough to satisfy his creditors, and especially not enough to pay

his indebtedness to the plaintiff, and, as against the other defendants, because they were nonresidents. Under this order, 10 head of said horses and mules on the plantation, in the possession of W. J. Smith, were seized. Subsequently a special order of attachment was sued out, and the portion of said crops remaining on said plantation and in the possession of W. J. Smith was seized for the rent. All this property was sold by the sheriff and the receiver in the case under special orders, and the proceeds, less costs and expenses, were deposited as a fund, subject to further orders of court. On final hearing upon the evidence in the case and the record, the chancellor sustained the attachments, and the sales thereunder, and also the claim of plaintiff against Duffin Bros. & McGeehee for the amount of the sales of the cotton, and also decreed that plaintiff be subrogated to the rights of Duffin Bros. & McGeehee in said deed of trust, and that said proceeds of sale be appropriated to the payment of the rent notes sued on, interest, and costs.

It is contended by the trustees defendants (for the defendants Duffin Bros. & McGeehee make no defense, nor make their appearance in any manner, and the defendant W. J. Smith disclaims all intent) that the statute precludes a recovery on said general attachment, which is designated as the eighth subdivision of section 325 of the Digest (Sand. & H.), which is in these words: "Is about to sell, convey or otherwise dispose of his property with such intent. But an attachment shall not be granted on the ground that the defendant or any of them is a foreign corporation or non-resident of this state, for any claim other than a debt or demand arising upon contract." The question is then, is the liability of defendants Duffin Bros. & McGeehee to the plaintiff a debt or demand arising upon contract, or not? We think it must be so regarded, in this particular state of case. Ordinarily a plaintiff in a suit for conversion may waive the tort, and rest upon the right the law gives him against one who has deprived him of his property, or some right in respect thereto. This obligation of the converter which the law imposes upon him is an implied contract, and, waiving damages for the tort, the plaintiff recovers, if at all, on this implied contract. Whether or not in any given case the tort may be waived, and the implied contract remain, depends upon the facts and circumstances of the case. The rights and obligations of the parties, as the remedy, are to be determined by the nature of the transaction involved. The cause of action which the plaintiff has against another for taking and disposing of his property is but a demand arising upon a contract, not express, but one which the law implies, and makes binding upon the wrongdoer. There is apparently some conflict in the authorities on the subject, but the conflict is more apparent than real, for the difference is, after all, a difference in the facts in the

cases adjudicated, or mainly so, at least. The text-writers, in collating and commenting upon the decisions cited therein, very generally held that an implied contract of the class we are now considering comes within the exceptions named in the statute quoted, and therefore furnishes a basis for the attachment under the subdivision named. See sections 12, 13, Wade on Attachments. When the plaintiff is the absolute owner of the property taken and sold (for it must have been disposed of by the conversioner, to justify a suit for its value or the proceeds thereof; otherwise the property itself must be proceeded against), he must sue at law for the value of the property against the wrongdoer, and thus be indemnified for the loss he has been put to by the deprivation. *O'Reer v. Strong*, 13 Ill. 688; *Fuller v. Duren*, 36 Ala. 73, 76 Am. Dec. 318. Where the plaintiff has a lien on the property taken and sold by the conversioner, as in the case at bar, his remedy is in equity, not for the value of the property taken, for he is not in that case the owner thereof, but to fix his lien upon the proceeds of the property in the hands of the conversioner; it being an equitable doctrine that a lien may be fixed upon the proceeds of the property where the lien on the property itself has been destroyed by the wrongdoer. This principle is laid down in *Reavis v. Barnes*, 36 Ark. 575, by this court. The decisions as to the remedy for the two classes of relief are strongly confirmatory of the doctrine we have been considering of suits on implied contracts.

We are of the opinion that the evidence in this case shows that the defendants Duffh Bros. & McGeehee either had actual notice of the relation existing between John Sabine Smith, as the landlord, and W. J. Smith, as his tenant, and that the rents were owing and unpaid at the time they received the cotton, or that they were in possession of such knowledge of the facts as put them on inquiry, which, followed up, would have amounted to such actual knowledge. They had paid the rents for the previous year for W. J. Smith, toward the latter part of that year, to Byrnes, the agent of plaintiff. No charge is alleged to have been made, as between the parties, or even suggested, and in fact it is shown to the contrary, inferentially, if not directly. They paid the rents to Byrnes, and it is not reasonable to say they did so, not having ascertained who was Byrnes' principal.

It is contended by the appellants that the proof of the rent debt or claim is wanting, and that the loss of the notes sued on by copy has not been established by proper proof, and, in fact, that plaintiff has failed to make out by proper proof his claim for rents, and this contention is sustained by the record; that is, by the absence of the rent claim. This debt is, of course, material in the case.

The decree, therefore, is reversed, and the cause remanded, with leave to take further

proof as to the claim for rent, and whether or not the same has been paid in whole or in part, and what is owing thereon.

BEVERS v. STATE.

(Supreme Court of Arkansas Jan. 9, 1904.)
RAPE—ASSAULT—INDICTMENT—SUFFICIENCY—PUNISHMENT—FELONY.

1. An indictment for assault with intent to rape need not aver that the assault was committed with malice aforethought, either at common law or under Sand. & H. Dig. § 1866, providing that whoever shall feloniously "and with malice aforethought" assault any person with intent to commit rape shall be punished, etc.

2. Assault with intent to rape is a felony, and is punishable under Sand. & H. Dig. § 1866, providing that one who with malice aforethought assaults another with intent to commit rape shall be punished by imprisonment in the penitentiary, irrespective of whether the indictment charges "malice aforethought" or follows the common-law form.

Error to Circuit Court, Baxter County; Jno. W. Meeks, Judge.

Lee Bevers was convicted of assault with intent to rape, and brings error. Affirmed.

Lee Bevers was indicted by the grand jury of Baxter county for the crime of an assault with the intent to rape. The body of the indictment is as follows, to wit: "The said Lee Bevers, in the county and state aforesaid, on the 30th day of October, 1902, did unlawfully, forcibly, and feloniously make an assault upon one Rosa Belle Heiskell, with the unlawful and felonious intent then and there forcibly, unlawfully, and feloniously, and against her will and consent, to rape, ravish, and carnally know the said Rosa Belle Heiskell, she, the said Rosa Belle Heiskell, being a woman, against the peace and dignity of the state of Arkansas." The defendant demurred to the indictment for want of certainty, and, further, because it did not state facts sufficient to constitute an offense. The court overruled the demurrer, to which ruling the defendant duly excepted. The defendant thereupon entered his plea of guilty, and was sentenced to three years' imprisonment in the state penitentiary. He afterwards procured a writ of error to review the judgment of the circuit court, and the case is brought before us in that way.

Horton & South, for plaintiff in error.
Geo. W. Murphy, Atty. Gen., for the State.

RIDDICK, J. (after stating the facts). The only question raised by this proceeding is the sufficiency of the indictment to support the judgment. The facts alleged in the indictment show that if the defendant had succeeded in carrying into effect the intent with which he made the assault he would have been guilty of the crime of rape. It is then clearly sufficient, as a common-law indictment for the crime of an attempt to commit rape, for it alleges all the elements that go to make such a crime at common

law. But our statutes in reference to this crime provide that "whoever shall feloniously, willfully and with malice aforethought assault any person with intent to commit a rape * * * shall on conviction thereof be imprisoned in the penitentiary not less than three nor more than twenty years." Sand. & H. Dig. § 1866. By reason of this statute counsel for appellant contend that the indictment should have alleged that the assault was made with "malice aforethought." In this respect the statute is peculiar, but we are of the opinion that the indictment is sufficient without such an allegation. It is well settled in this state that an indictment for rape includes also an assault with intent to commit rape. *Pratt v. State*, 51 Ark. 167, 10 S. W. 233; *Davis v. State*, 45 Ark. 467. "Every attempt to commit a felony against a person," said this court in an early case, "involves an assault. Prove an attempt to commit such felony, and prove it to have been done under such circumstances that had the attempt succeeded the defendant might have been convicted of the felony, and the party may be convicted of an assault with intent to commit such felony." *McBride v. State*, 7 Ark. 374. For there is nothing in our statute that requires that indictments for the crime of rape shall allege that the assault or the act was committed with malice aforethought. Malice is not one of the elements that go to make the crime of rape, and it is unnecessary to allege or prove it to make out the crime, either under our statute or at common law. *Warner v. State*, 54 Ark. 660, 17 S. W. 6.

If it is not necessary to allege or prove malice in order to make out the completed crime of rape, we see no reason why it should be required to prove it in order to convict of the attempt to commit rape—an offense which is included in the greater offense, as one of its parts. Keeping in mind, then, that an allegation of malice is not required in an indictment for rape, it will be seen that the decision of this court holding that the crime of assault with intent to commit rape is included in every valid indictment for the crime of rape, and that under an indictment for rape the defendant may be convicted either of rape or of an assault with intent to rape, necessarily leads to the conclusion that neither is an allegation of malice aforethought essential to a valid indictment for an assault with the intent to commit rape.

Counsel for defendant contends, further, that if this be true that the crime must be treated as a misdemeanor only, for the reason that at the common law all indictable attempts, whether to commit felonies or misdemeanors, were only misdemeanors, but that would result in making a difference in the crime, and the punishment therefor turn simply on the form of the indictment. We are of the opinion that the indictment would be sufficient whether it followed the common

law or the statutory form, but in either case the punishment is regulated by the statute. Finding no error, the judgment is affirmed.

CLAY et al. v. BILBY.

(Supreme Court of Arkansas. Jan. 9, 1904.)

TAXATION—SALE OF LAND—SUIT TO SET ASIDE STALE DEMAND—WARNING ORDER—AFFIDAVIT OF PUBLICATION—IRREGULARITY—COLLATERAL ATTACK.

1. Where a plaintiff who has permitted taxes to remain unpaid on his real estate for 38 years sues to set aside a sale under the overdue tax act (Acts 1881, p. 63) 16 years after the sale was made, without showing that the taxes for which the land was sold were illegal or had been paid, or showing any other meritorious defense to the proceedings under the act, his demand is stale and without equity.

2. In proceedings for the sale of land under the overdue tax act (Acts 1881, p. 63), the affidavit of publication of the warning order is not insufficient on collateral attack because the affiant failed to swear that he was a publisher of the paper, that it was printed in the county named in the affidavit, and that it had a bona fide circulation therein for one month before the date of the first publication; these defects constituting mere irregularities, which did not render the decree of sale void.

Bunn, C. J., dissenting in part.

Appeal from Arkansas Chancery Court; John M. Elliott, Chancellor.

Suit by Matthew Clay and others against J. S. Bilby. From a decree dismissing the complaint, plaintiffs appeal. Affirmed.

Lewis & Ingram, W. A. Carpenter, and Parker & Parker, for appellants. John F. Park, James E. Gibson, and John B. Jones, for appellee.

BATTLE, J. Matthew Clay, D. D. Saunders, and E. V. McFarland instituted a suit in the Arkansas chancery court against J. S. Bilby, and asked the court to quiet title to certain land by setting aside a decree condemning the same to be sold under what is generally known as the "Overdue Tax Act," and by setting aside the sale thereof in pursuance of such decree. They alleged in their complaint that they were the owners of the land, and, without showing the proceedings of the court under which he claims title, stated that the defendant "is claiming or pretending to claim the title to said land by virtue of what is known as an 'overdue tax deed,'" and alleged in the same vague and indefinite way "that said overdue tax title is void * * * because the chancery court of Arkansas county, Arkansas, had no jurisdiction to render the alleged decree upon which the said title is based; that there was no publication or proof of publication of the warning order therein, as the law requires; and that there was absolutely no notice of the * * * pendency of said cause, either personal or constructive."

The defendant answered, and denied that plaintiffs were the owners of the land, and admitted "that he acquired title through a

sale under overdue tax proceeding; that the land was forfeited to the state, and on August 3, 1882, a complaint was filed, charging that taxes were due and the forfeiture void, and praying a lien, and summons was issued and served upon the State Auditor; that a warning order was issued, recorded * * * and duly published"; that the circuit court on the 9th day of February, 1883, decreed that the forfeiture to the state was void, and that certain taxes were due upon the land, and found the amount of the same and penalty and costs to be \$9.16, "and ordered and decreed the same to be a lien upon the land, and that the same be sold unless [the taxes, penalty, and costs] were paid within a day named in the decree; and appointed J. J. McEvoy commissioner to sell the land and execute the decree"; "that the lien was not paid, and the commissioner, after advertising the land according to law and the decree, sold the same at public sale for the amount of said lien and costs, and at the sale said lands were purchased by John T. Burns for the amount of the decree and costs, and said sale was duly approved by the court; and that said Burns sold and assigned his certificate of purchase issued to him by the commissioner to the Arkansas Real Estate Company, to which a deed was issued September 22, 1885, and said company sold said land to defendant by deed dated May 11, 1887."

And the defendant further alleged "that the plaintiffs have exercised no ownership over said land for thirty-eight years, and abandoned the land, and their claim is stale, and cannot be enforced in a court of equity."

The court, after hearing the cause upon its merits, dismissed the complaint for want of equity, and the plaintiffs appealed.

The land in controversy was forfeited to the state of Arkansas on account of the non-payment of the taxes assessed against the same. For 23 years no taxes were paid thereon. On the 3d day of August, 1882, a complaint was filed in the Arkansas circuit court pursuant to an act entitled "An act to enforce the payment of overdue taxes," approved March 12, 1881 (Acts 1881, p. 63), in which it was alleged that the forfeiture was void, and the plaintiff asked that the land be sold to pay the taxes due thereon. An order requiring all persons having any right or interest in the land to appear and show cause, if any they could, why a lien shall not be declared on the same for unpaid taxes, and why it should not be sold for non-payment thereof, in legal form, was entered on the record. A copy of it was published, and the following proof of the publication thereof was filed:

"I, J. P. Pointer, one of the publishers of the Arkansas Gleaner, a newspaper published in the State and county of Arkansas, do hereby solemnly swear, that the annexed and foregoing advertisement was published in said newspaper three weeks consecutively, to wit:

November 22d and 29th, and December 6th, 1882. J. P. Pointer, One of the Publishers of the Arkansas Gleaner.

"Sworn to before me, the 4th day of January, 1883. J. J. McEvoy, Clerk."

On the 9th day of February, 1883, the court set aside the forfeiture, the same being illegal, and ordered the land sold to pay the taxes on the same, and appointed a commissioner for that purpose. The land was sold on the 17th day of May, 1883, to John T. Burns, and the sale was approved by the court. On the 14th of April, 1890, this suit was brought to set the sale aside and to quiet title; lacking 1 month and 3 days of being 16 years after the sale was made.

The appellants failed to show that they had any meritorious defense in the suit instituted under the overdue tax act. They do not allege that the taxes for which the land was sold were illegal or paid. Not a single ground for equitable interposition appears. State v. Hill, 50 Ark. 458, 8 S. W. 401. Without one palliating excuse, they show themselves guilty of the grossest negligence. They knew their land was subject to taxation, and liable to be sold if the taxes were not paid, yet they waited 38 years before they offered to pay taxes. There is nothing in their case "to call forth a court of equity into activity."

But appellants say that the decree rendered in the suit instituted under the overdue tax act was absolutely void, because, in the affidavit filed to prove publication of the warning order, the affiant did not swear that he was a publisher of the Arkansas Gleaner, the newspaper in which it was published, and that such newspaper was printed in the county named in the affidavit, having a bona fide circulation therein for one month before the date of the first publication of the warning order, and that it should be treated as void upon collateral attack. Is this true?

The subject of impeachment of judgments of courts of competent jurisdiction was fully and well considered in Boyd v. Roane, 49 Ark. 397, 5 S. W. 704. In that case the court held that "since the enactment of the statute [Mansf. Dig. § 5201] declaring all judgments pronounced by any of the courts of this state against any one without notice absolutely void, the doctrine laid down in Borden v. State, 11 Ark. 519 [44 Am. Dec. 217], that the judgment of a superior court, rendered without notice, is not void, but only voidable, has been adhered to so often that it has become, in its application to analogous cases, a rule of property not to be disturbed by the courts"; that the statute applies to judgments pronounced in adversary suits, either in law or in equity; that such judgments without notice are absolutely void; that, in case of domestic judgments collaterally attacked, the question of notice or no notice must be tried by the court upon an inspection of the record only; and that, in the event the record is silent as to notice, the presumption is that notice was given, and

this presumption cannot be contradicted. *McLain v. Duncan*, 57 Ark. 53, 20 S. W. 597; *McConnell v. Day*, 61 Ark. 474, 33 S. W. 731.

The same rule has been substantially laid down by the courts of last resort in the following states: California, Maine, Michigan, Minnesota, Illinois, New Jersey, Massachusetts, Tennessee, South Carolina, Washington, Kentucky, Connecticut, Vermont, Missouri, and Texas. 1 *Bailey on Jurisdiction*, §§ 168, 169, 172a, 172b, 172c, and cases cited.

In *Settlemire v. Sullivan*, 97 U. S. 444, 448, 24 L. Ed. 1110, Mr. Justice Field, speaking for the court, said: "We do not question the doctrine that a court of general jurisdiction, acting within the scope of its authority—that is, within the boundaries which the law assigns to it with respect to subjects and persons—is presumed to act rightly, and to have jurisdiction to render the judgment it pronounces, until the contrary appears. But this presumption can only arise with respect to jurisdictional facts concerning which the record is silent. It cannot be indulged when the evidence respecting the facts is stated, or averments respecting them are made. If the record is silent with respect to any fact which must have been established before the court could have rightly acted, it will be presumed that such fact was properly brought to its knowledge. But if the record give the evidence or make an averment with respect to a jurisdictional fact, it will be taken to speak the truth, and the whole truth, in that regard; and no presumption will be allowed that other and different evidence was produced, or that the fact was otherwise than averred. 'If, for example,' to give an illustration from the case of *Galpin v. Page*, 18 Wall. 366 [21 L. Ed. 959], 'it appears from the return of the officer or the proof of service contained in the record that the summons was served at a particular place, and there is no averment of any other service, it will not be presumed that service was also made at another and different place; or, if it appear in like manner that the service was made upon a person other than the defendant, it will not be presumed, in the silence of the record, that it was made upon the defendant also.'" *Applegate v. Lexington & Carter County Mining Co.*, 117 U. S. 255, 270, 6 Sup. Ct. 742, 29 L. Ed. 892.

But this is not true in case of service by publication. In that case, no statute forbidding, parol evidence may be received to prove publication of notice; and, if the decree or judgment does not exclude the conclusion, the presumption is that sufficient and competent evidence was before the court to sustain its findings as to the publication of notice. *McLain v. Duncan*, 57 Ark. 49, 53, 20 S. W. 597; *Scott v. Pleasants*, 21 Ark. 364; *Porter v. Dooley*, 66 Ark. 1, 49 S. W. 1083; 1 *Bailey on Jurisdiction*, § 172g, and cases cited.

Where the statutes require jurisdictional facts in certain cases to appear of record, and they do not so appear, no presumption is

indulged in favor of the jurisdiction of the court. *Gregory v. Bartlett*, 55 Ark. 30, 17 S. W. 344, is an illustration. That was a suit brought under the overdue tax act. The statute required the clerk, upon the filing of the complaint, to enter an order on the record requiring all persons having any right or interest in the land described in the complaint to appear in court within 40 days thereafter, "then and there to show cause, if any they can, why a lien should not be declared on said lands for unpaid taxes, and why said lands shall not be sold for non-payment thereof," and to cause a copy of such order to be published in a certain time and manner. The clerk failed to enter the order on record, and it was held that the court acquired no jurisdiction, and the proceedings in the case were void, although the order was duly published. *Dick v. Foraker*, 155 U. S. 404, 15 Sup. Ct. 124, 39 L. Ed. 201.

In *Beidler v. Beidler* (Ark.) 74 S. W. 13, two of the defendants, being nonresidents, were not served with summons. No warning order for them to appear was made on the complaint, as the law requires, though one was published. The court in that case said: "The statute provides that, after it is shown that a summons cannot be served upon a defendant, 'the clerk shall make upon the complaint an order warning such defendant to appear in the action within thirty days from the time of the making the order.' Sand. & H. Dig. § 5679. This court has repeatedly held that a compliance with provisions like this is an essential prerequisite to the publication of a warning order, without which no jurisdiction as to such defendants can be acquired, and all proceedings as to them are void." But this statement was made in the case in which the clerk failed to make the warning order upon the complaint, when the case was here upon appeal, when the judgment of the court was directly attacked, and must be limited to such cases. *Gregory v. Bartlett*, supra, is cited to sustain the statement. A comparison of the facts and statutes in the two cases and the reasoning of the court in *Gregory v. Bartlett* seem to support the statement.

In *Gallagher v. Johnson*, 65 Ark. 90, 44 S. W. 1041, a doctrine not in harmony with previous rulings of this court was announced. That case was an action of ejectment by appellants against appellee to recover the possession of certain lands. The appellee claimed the lands under a sale made under a decree rendered in a certain suit instituted under the overdue tax act to subject them to sale for the payment of taxes, penalty, and costs due thereon. The warning order was entered on record as required by the act, and it was published, but in the affidavit made to prove publication "the affiant failed to state that his paper in which the warning order was published was a paper of bona fide circulation in the county for the period of one month next before the first insertion of said

warning order therein." In this the affidavit was defective. The court held that this defect rendered the sale void, "the court not having acquired jurisdiction to decree the same," and cited *Lusk v. Perkins*, 48 Ark. 238, 2 S. W. 847; *Gibney v. Crawford*, 51 Ark. 34, 9 S. W. 309; and *Cross v. Wilson*, 52 Ark. 312, 12 S. W. 576. But these cases do not sustain the court.

The case first cited was an action to compel a constable to receive a county warrant in payment of a fine, and the second was an action to compel a tax collector to receive county warrants in payment of taxes. The defense in both cases was that the county court had made an order requiring all persons holding county warrants to present the same to the court within a specified time, and that the warrants in question had not been presented within such time, and were therefore not receivable for any purpose. The order calling in warrants in the first case was held to be of no effect because it was not published in the manner prescribed by law, and in the other case there was no legal evidence of the publication. In both cases the court held that the county court, in calling in county warrants, acted under a special statutory authority, which must be strictly pursued, and, unless notice of the order making the call is given in the manner prescribed by the statute, the order is a nullity as to all warrants not presented in obedience to the call; and in the latter case it was held that, where the statute prescribes the manner in which the notice must be proved, it cannot be shown in any other manner.

The reasons upon which these cases are based are apparent. When county warrants are called in by the county court, the statute provides that it shall be the duty of the court to examine such as shall be presented, and to reject such part thereof as, in its opinion, the county is not justly and legally bound to pay; and, as to the warrants not presented, no action of the county court is required, but the statute provides that persons holding the same "shall thereafter be forever debarred from deriving any benefits from their claims." Before this penalty can be inflicted upon such persons, it is evident the conditions upon which it is imposed must first be shown. These conditions are: A certain order shall be made, a certain notice shall be given, and it must be proved by such evidence as the statute says shall be the only evidence of such fact. Hence this court held in the cases cited as it did.

Cross v. Wilson, the other case cited, was an action of ejectment. The plaintiff claimed title to the land in controversy under a commissioner's deed executed pursuant to a decree of the Pulaski chancery court against *Barkman and Candler*, foreclosing the state's lien for the purchase money. The statute in the case in which the decree was rendered provided that, if the return upon the process shows that the defendant is not found in the

county or is dead, "the clerk, upon the application of the prosecuting attorney, shall make and enter on the record an order which shall contain the title of the suit, the date and amount of the note or bond proceeded upon, and a description of the land upon which the lien is sought to be enforced, and warn the defendant to appear and make defense there to on the first day of the next term of such court, that commences more than sixty days from the date of such order." "A summons was issued, to which the sheriff made return that *Barkman* was dead, and that *Candler* did not reside in his county, and, from what he could learn, was also dead." Thereupon the following order was published (omitting caption): "The defendants, the legal representatives of *James E. M. Barkman* and of *James R. N. Candler*, are warned to appear in this court within thirty days and answer the complaint of the plaintiff, the State of Arkansas, for use of the school fund. [Signed] D. P. Upham, Clerk."

The order that the statute required to be made in order to give the court jurisdiction was not made. This court said: "The record of the cause in which the decree relied upon as the foundation of the appellant's title was rendered shows that it was based upon a warning order which does not state material facts required by the statute, and that proof of its publication is fatally defective. The decree was therefore void."

Porter v. Dooley, 66 Ark. 1, 49 S. W. 1083, is in conflict with *Gallagher v. Johnson*, supra, and in part overrules it. In that case an effort was made to set aside a decree confirming a tax title because it did not appear that the magistracy of the justice of the peace, before whom the proof of publication of the notice of the pendency of the proceeding to confirm was sworn to, was certified to by the clerk of the county court as required by the statute. This court held that the decree of confirmation was not void on collateral attack, the decree not excluding the conclusion that evidence other than that objected to was before the court upon the rendition of the decree. This conclusion was based in part upon the following quotation from the opinion in *Scott v. Pleasants*, 21 Ark. 364: "But it does not follow that the decree, though reversible upon appeal and for error on its face, must be held void, and consequently be disregarded when introduced collaterally. The decree of the court was made upon a matter over which it had jurisdiction, as held in *Evans v. Percifull*, 5 Ark. 424. * * * A decree pro confesso on constructive notice that is defective is as good as a like decree upon insufficient personal service, and such decree, when made final, cannot be collaterally questioned. * * * The court rendering the decree under consideration passed directly upon the evidence of publication of the notice. That was one of its clearest prerogatives, and, though it may be admitted that the court wrongfully decided,

its decision was simply an interpretation of the law that could have been corrected if made subject of direct review in this court."

The rule as to the impeachment of judgments of courts of competent jurisdiction was held to be applicable to decrees rendered in overdue tax proceedings in *McCarter v. Neil*, 50 Ark. 191, 6 S. W. 781.

In speaking of the jurisdiction acquired by courts under the overdue tax act, this court in that case said: "Now, authority over the res was conferred on the * * * court by the act of March 12, 1881, entitled 'An act to enforce the payment of overdue taxes.' And authority over the landowner was acquired by the filing of the complaint, stating that taxes were due on this particular tract, and by the publication of the required notice, which took the place of ordinary process to bring the parties into court. Actual seizure and possession of the land by an officer of the court were not directed, but the mere bringing of the suit was by law made equivalent to a seizure; being the open and public exercise of dominion over the land for the purposes of the suit."

Now, it further said in the same case: "Whether the tax decree [that is, a decree rendered in a proceeding under the overdue tax act] * * * was open to collateral attack, and could be treated as a nullity, depended on the circumstance whether or not the court which rendered it had jurisdiction over the subject-matter and over the parties concerned. For mere errors and irregularities the judgment could be assailed only in a direct proceeding, by petition in the same case to set aside, or by some proceeding in the nature of a review on error."

As to mere irregularities, this court, in *Webster v. Daniel & Straus*, 47 Ark. 131, 14 S. W. 550, held: "Courts can acquire jurisdiction over a defendant only by service of summons, actual or constructive, or of some other process issued in the suit, or by his appearance to the action in person or by attorney. And objections for mere irregularity in the process, or in the manner of its service, must be made in the action. They cannot be set up in a collateral proceeding. When a warning order from a justice of the peace has been properly published, the failure to make proof of the publication by the person and in the form prescribed by law is a mere irregularity, which will not defeat the jurisdiction, and cannot be taken advantage of in a collateral proceeding."

Our conclusion is that the defect in the affidavit made to prove publication of the warning order in this case was a mere irregularity, which did not affect the jurisdiction of the court, or the validity of the decree in question.

Decree affirmed.

BUNN, O. J. (dissenting). This opinion is confined to the question as to the sufficiency of the proof of publication of the notice in

78 S.W.—48

the overdue tax proceeding referred to in this record.

Previous to the decision of this court in the case of *Borden v. State*, 11 Ark. 519, 44 Am. Dec. 217, rendered at the January term, 1851, it appears that this court had held that where the record in any case failed to show affirmatively a previous notice, express or implied, the judgment was an absolute nullity. These decisions were overruled in *Borden v. State*, where it was announced that "when the judgment of a court of record and of general jurisdiction is collaterally drawn in question, jurisdiction of the subject-matter appearing, jurisdiction of the person is not a legitimate subject of inquiry in such collateral proceeding." In a few years, when the extreme doctrine of that case had begun to be felt in the litigation of the country, to wit, on the 17th February, 1859 (Acts 1858-59, p. 172), the following statute on the subject was enacted by the Legislature, to wit: "An act to prevent fraud and oppression, under color of judicial process.

"Section 1. Be it enacted by the General Assembly of the state of Arkansas: That all judgments, orders, sentences and decrees, made, rendered or performed, by any of the courts of this state, against any one without notice, actual or constructive, and all proceedings had under such judgments, orders, sentences or decrees, shall be absolutely null and void.

"Sec. 2. Be it further enacted: That in all cases where it appears, from a recital in the record of any such court, that such notice has been given, it shall be evidence of the fact."

No one can call in question the power of the Legislature to enact this statute. From the language of the first section, it plainly appears that no presumption in favor of the validity of a judgment can arise, but, without recitals at all as to notice, it would be absolutely null and void, and this would necessarily be the result whether on direct or collateral attack; but it is provided in the second section that, when it is recited in the record of the judgment that such notice has been given, it (such recital) shall be evidence of the fact. Whether this evidence is conclusive, or not, is a question I need not discuss here. It suffices to say that, from and after the passage of that act, no presumption in favor of the validity of judgment could be indulged unless there should be in the record a recital to the effect that such notice had been given, or words to that effect. Thus, where the record is silent as to notice, no such presumption arises, notwithstanding the rule may be different in the absence of a statute like ours. In *Boyd v. Roane*, 49 Ark. 397, 5 S. W. 704, in construing the statute I have quoted, this court said: "Since the enactment of the statute declaring all judgments pronounced by any of the courts of this state against any one without notice absolutely void, the doctrine laid down in

Borden v. State, 11 Ark. 519 [44 Am. Dec. 217], that the judgment of a superior court, rendered without notice, is not void, but only voidable, has been adhered to so often in its application to analogous cases that it has become a rule of property not to be disturbed by the courts." So far it would appear that the court was on the eve of overturning the statute itself, but, continuing, it said: "But this consideration [that a habitual ignoring of the statute had become a rule of property] does not hinder the application of the statute to judgments pronounced in adversary suits, either in law or equity; and such judgments, without notice, whether against infants or adults, are absolutely void." Practically, all suits are adversary suits, for what may be termed nonadversary suits are not suits at all, in the common acceptance of the term, such as *ex parte* proceedings, where adverse parties are not contemplated, and therefore no notice is required; in friendly suits, where the parties waive all questions of notice; and in proceedings in the probate courts, where the only notice required of the pendency of settlements is given by the clerk; and perhaps in some other peculiar proceedings. But the great body of our litigation constitute adversary suits, and all must fall under the rule of the statute that there is no presumption in favor of the validity of judgments of courts of record or any other courts unless the recitals are to the effect that notice has been given. This rule applies even in cases coming under the ordinary jurisdiction of such courts. It has always been the rule in cases of constructive notice that validate the judgment rendered thereon, and that there is no presumption in such cases in favor of the judgment. The doctrine was so held in *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959; *Gibney v. Crawford*, 51 Ark. 51, 9 S. W. 309; *Cissell v. Pulaski County (C. C.)* 10 Fed. 891. In the latter case the court said: "The affidavit, to prove the publication of a legal notice in judicial proceedings, must show that the paper in which the publication was made is one authorized to publish such notices, and that affiant sustains the relation to the paper required by the statute to authorize him to make the affidavit. When it is sought to conclude a party by constructive service by publication, every fact necessary to exercise jurisdiction based on such service must affirmatively appear in the mode prescribed by statute. If the proof of publication contained in the record is defective, it is not competent for any other court to receive parol testimony to supply the omission. The recital of due notice in the record of a proceeding under special statutory authority must be read in connection with that part of the record which gives the official evidence prescribed by statute. No presumption will be allowed that other and different evidence was produced; and, if evidence in the record will not justify the recital, it will be dis-

regarded." The statute which provides for the manner of giving notice in cases of calling in county warrants for examination, cancellation, and reissue is the very same as that applicable to overdue tax cases, and the proof of publication is exactly the same in both cases. In fact, the subject of legal notice and the publication thereof is a general statute applicable to all cases of constructive notice. *Gallagher v. Johnson*, 65 Ark. 90, 44 S. W. 1041, was therefore in strict accordance with all the leading cases on the subject. Where there is no presumption in favor of the judgment, as is the case in which special jurisdiction is conferred upon the court, the court has no jurisdiction, and can take none, unless the proof of publication and the notice are in strict conformity to the statute, and the essential facts conferring jurisdiction must affirmatively appear; otherwise the judgment rendered thereon is a nullity absolutely, and cannot withstand attack, either directly or collaterally, because the defect is jurisdictional.

Our attention is called to the case of *Porter v. Dooley*, 66 Ark. 1. 49 S. W. 1083, and it is contended that that case overturns *Gallagher v. Johnson*, *supra*. The proof of publication required to make was entirely different in some important particulars from the provisions of the general statute on the subject. That was a case of confirmation of tax titles, and came under the provisions contained in *Mansfield's Digest*. In that case, after stating that section 578 of *Mansfield's Digest* governed the proof of publication in that case, this court said: "It will be observed that section 578 of *Mansfield's Digest* does not preclude the idea that the mode of proof of publication of the notice is exclusive of other evidence of the fact of publication, but only says that, when made as therein required, it shall be taken and considered as sufficient evidence of the fact of publication, the date and number of insertions, and the form of such notice." The certificate of the official character of the justice of the peace before whom the proof of publication should be made had not been made in that case, and the court simply said that the proof of the official character of the justice of the peace was not the evidence. The case of *Settemier v. Sullivan*, 97 U. S. 444, 24 L. Ed. 1110, cited by the court, in my opinion, has very limited applicability to the case at bar, if any at all. It was a case in which a former case involved had been based upon a sheriff's return of an ordinary summons. The question was: Where a return of a sheriff failed to show that the sheriff had used ordinary diligence to find the defendant, but did state, however, that he had left a copy of the summons with defendant's wife at their place of abode, held, that the failure to state what effort the sheriff had made to serve the summons upon defendant, or what other service had been had, was fatal to the judgment founded thereon. That was a case

in which the trial court was in the exercise of its ordinary jurisdiction, and upon a defective service, as shown by the return. Other requirements of the statute in making such service and the return thereof were not contained in the recitals, and there was not only no presumption that these conditions had been complied with, but a presumption that they had not been. The case has no application to a case by constructive summons in this state.

SCHOOL DIST. NO. 27 v. WHEAT.

(Supreme Court of Arkansas. Jan. 9, 1904.)

SCHOOL DISTRICTS—OFFICERS—AUTHORITY—PRESUMPTIONS—CONTRACTS—EVIDENCE.

1. Where the secretary of a board of school directors changed the written contract with a teacher so as to cause it to call for a longer term, it would be presumed, in the absence of evidence, that the secretary had authority.

2. In an action against a school district, on a contract with a teacher, evidence held to show that there had been a contract calling for a 6-months school.

Appeal from Circuit Court, Jefferson County; Antonio B. Grace, Judge.

Action by F. H. Wheat against School District No. 27. From a judgment for plaintiff, defendant appeals. Affirmed.

S. J. Hunt and S. M. Taylor, for appellant. W. D. Jones and Bridges & Wooldridge, for appellee.

BUNN, C. J. The directors of the school district, J. H. Pilkington, J. H. Baldwin, and J. W. Harris, made a contract on the 22d day of May, 1900, with the appellee, T. H. Wheat, to teach a three-months school, commencing on the 4th day of June, 1900, at the rate of \$65 per month. This three-months school expired on the 24th of August, 1900. In the meantime J. H. Pilkington, one of the directors and the secretary of the board, altered the original contract, by changing the "three" to "six," making it to run six months instead of three months, as originally intended. Wheat, as a witness, testified that all of the directors told him that they had held a meeting at which they had agreed to extend his contract for a six-months school instead of a three-months school; that, when Pilkington had made the change in the contract as indicated, he (witness) took the same to the other two directors, Baldwin and Harris, and each said it was all right (meaning that the alteration was all right). Harris, one of the directors, testified that the meeting referred to was held in the latter part of June previously to select a teacher for the colored school of the district, but that, all being present and participating, they then and there ordered the time of Wheat's contract to be extended to six months; that the contract had already been changed from three to six months by Pilkington, and his action was approved; and that he (witness)

and Baldwin had another meeting, when and where, at the request of Wheat, they signed a new contract covering the time of the extension, but that Pilkington, the other director and the secretary of the board, came in about the close of the meeting, but declined to sign the new contract, for the reason that he held that the original contract as altered was sufficient to accomplish the same end as the new one did. There does not appear to be any material conflict in the testimony of the witnesses testifying on the subject.

On the 24th of August, 1900, the directors held another meeting, all being present, and addressed the following note to Wheat: "Mr. T. H. Wheat: Dear Sir: We, the board of directors, have held a meeting this morning, and decided to suspend your school until the 24th September, 1900. [Signed] J. H. Baldwin, J. H. Pilkington, James W. Harris, Board of Directors School District No. 27."

Wheat testified that Pilkington made the change in the original contract, and informed him that he had authority to do so from the board. There can be little question as to this, for it is not to be presumed that Pilkington, the secretary of the board, would have made the change without authority to do so, and thus have made himself criminally liable. All the evidence is to the effect that he was but carrying out the wishes of the other directors and himself as one of them in making the alteration. The alteration had the effect simply and only to make the school a six-months instead of a three-months school, and this was the effect of the new contract signed by Baldwin and Harris, a majority of the board, at a subsequent meeting.

The note addressed to Wheat on the 24th day of August, the last day of the three-months school, suspended the school for one month, and without doubt indicated that it was the understanding that the school was still to be the school of Wheat, and was but a recognition of the extension of the time for which his contract should run. Wheat obeyed the order of suspension, and at the end of the period of suspension presented himself at the schoolhouse, and proceeded to open the school, in what he conceived to be the intention expressed in the order of suspension, and at this juncture he was notified that he should deliver the possession of the schoolhouse to another teacher, who it appears had been selected to supersede him.

The contract for the additional three-months school, signed by Baldwin and Harris, a majority of the directors, and apparently the one served on him, had identically the same effect as did the alteration of the original contract made by Pilkington, the third director and the secretary of the board, which was also in evidence, and covered the same time, and called for the same salary. The question was one of fact merely; there was no prejudicial error in the instructions,

if, indeed, there was any error in the instructions; and the facts fully sustain the verdict of the jury and the judgment of the court thereon, and the same is affirmed.

COX et al. v. STATE ex rel. ATTORNEY GENERAL.

(Supreme Court of Arkansas. Jan. 2, 1904.)

PUBLIC OFFICERS—APPOINTMENT—POWER OF LEGISLATURE—OF GOVERNOR—CONSTITUTIONAL PROVISIONS.

1. As the Constitution not only contains no prohibition against the exercise of the appointing power by the Legislature, but, on the contrary, makes provision in certain contingencies for the election of certain officers by it (article 6, § 3), and provides for the mode of taking votes (article 5, § 14), it is competent for the Legislature, in cases not otherwise provided for, to exercise the appointing power; and hence Acts 1903, p. 249, providing for the appointment by the Legislature of a state capitol commission is valid.

2. Const. art. 5, § 14, providing for the mode of taking the vote when any officer, civil or military, shall be appointed by the Legislature, contemplates the appointment by the Legislature of officers other than those necessary to discharge its own duties.

3. The Governor has no inherent power, either by virtue of his office or by virtue of Const. art. 6, § 23, or the amendment, providing for the filling of vacancies in office until the next general election by executive appointment, which sections plainly apply only to elective offices, to appoint commissioners, such as members of a state capitol board, chosen for a particular temporary purpose.

Appeal from Circuit Court, Pulaski County; Edward W. Winfield, Judge.

Action in the nature of quo warranto by the state, on the relation of the Attorney General, against Thomas Cox and others. From a judgment of ouster, defendants appeal. Affirmed.

The General Assembly of 1903 passed an act for the purpose of completing the state capitol. Acts 1903, p. 248. The title of the act is "An act to provide for the completion of the state capitol building, and for other purposes." To carry into effect the purposes of the act, it created a board to be known as the "State Capitol Commission." It provided that the board should consist of five persons, to be elected by the Senate and House of Representatives in the manner provided in the act. This act was passed over the veto of the Governor, he having vetoed the bill on the ground that the Legislature had no power to select the commissioners provided for by the bill, and also for other reasons stated by him. After the passage of the act the Governor immediately appointed five commissioners to carry out the purposes of the act. The action of the Governor was ignored by the Legislature, and the two houses in joint session soon afterwards elected five commissioners as provided by the statute act. Afterwards the Attorney General brought in the circuit court of Pulaski

county an action in the nature of an action of quo warranto against the commissioners appointed by the Governor, asking that they be compelled to show by what authority they were attempting to act as a board of capitol commissioners, and that upon a hearing they be ousted. The defendants appeared, and filed their answer, setting up their appointment by the Governor. The case was tried by the circuit judge on an agreed statement of facts. He found the law to be in favor of the contention of the Attorney General, and gave judgment of ouster against the defendants, who took an appeal to this court.

Chas. Jacobson, for appellants. Geo. W. Murphy, Atty. Gen., Jno. M. Rose, and Chas. T. Coleman, for appellee.

RIDDICK, J. (after stating the facts). This is an action brought by the Attorney General against Thomas Cox and four other defendants, who were appointed by the Governor to serve as members of the board of state capitol commissioners, created by act of the last Legislature. The act in question provided that the members should be elected by the two houses of the Legislature in joint session. Acts 1903, p. 249. In pursuance of this provision of the act commissioners were duly elected by the Legislature. But the Governor, acting on the theory that the Legislature had no power to make such selection, and that the power to appoint the members of the board was vested in him, appointed the five defendants to serve in that capacity, and this action was brought to test the validity of the appointments made by the Governor. All parties wish to have the matter determined, and no objection is made to the form of the action or to the proceeding adopted, and we will proceed to consider the questions presented.

First, as to the power of the Legislature to make appointments to office. In the United States the general power to appoint officers is not inherent in the executive or in any other branch of the government. It is a prerogative of the people, to be exercised by them or that department of the state to which it has been confided by the Constitution. The Legislature has, we think, power to make appointments to office unless its powers in that respect are restricted by the Constitution either expressly or by implication. *Hovey v. State*, 119 Ind. 886, 21 N. E. 890; *People v. Hurlbut*, 24 Mich. 64, 9 Am. Rep. 103; *State v. George*, 22 Or. 142, 29 Pac. 356, 16 L. R. A. 737, 29 Am. St. Rep. 586; *People v. Freeman*, 80 Cal. 233, 22 Pac. 173, 13 Am. St. Rep. 122, and extended and full discussion found in note; *Cooley, Const. Lim.* (6th Ed.) 104-133; 23 Am. & Eng. Ency. Law (2d Ed.) 340. Now, an examination of our Constitution will show that it not only contains no general or express prohibition against the exercise of the appointing power by the Legislature, but it affirmatively shows that it was

the intention of the framers of the Constitution to permit the Legislature to exercise such power to a limited extent. This is shown by the provision to the effect that if in an election for Governor, Secretary of State, Treasurer, Auditor, or Attorney General two or more candidates for either of said offices shall receive an equal number of votes, then one of those persons receiving the highest votes "shall be chosen by the joint vote of both houses of the General Assembly." Article 6, § 3, Const. 1874. It is shown also by the section which declares that "whenever an officer, civil or military, shall be appointed by the joint or concurrent vote of both houses, or by the separate vote of either house of the General Assembly, the vote shall be taken viva voce, and entered on the journals." Article 5, § 14. The contention that this section refers only to the officers of the General Assembly, such as clerks, pages, and others necessary to discharge the duties of that body, does not seem to be borne out by the language used. Why should it speak of the appointment of officers, "civil or military," if that was the meaning? We do not recall any military officer attached to the Legislature, or to either of its branches, and we think that the language used is too broad to justify the construction contended for. It is, of course, not usual to have vacancies in office filled by appointment made by the General Assembly, and under our Constitution there are many offices which could not be filled in that way. But, though not the usual method, the language of the Constitution above quoted shows that the framers of that instrument intended that it might be done in some cases not otherwise provided for, and this is not the only instance in which such power has been exercised by the Legislature. It is well known that the last Legislature made provision for digesting the statutes of the state, and appointed both a digester and an examiner to do the work required. The act by which these appointments were made by the Legislature was approved by the Governor, who thus inferentially approved the contention that the Legislature has in some cases power to make appointments, and that a statute which attempts to confer this power is not necessarily unconstitutional and void on that account. Acts 1903, p. 414.

We are, then, of the opinion from the language of the Constitution itself that the Legislature may to some extent, in cases not otherwise provided for, exercise the appointing power. It is also plain, we think, that the Governor has no inherent power, by virtue of his position as chief executive of the state, to make these appointments. If he has such power, it must be because the Constitution has conferred it upon him, and thus, inferentially at least, forbidden the Legislature to make them.

The next question, then, is whether the power to appoint commissioners to serve on a board such as the one created by this act

has been conferred upon the Governor by the Constitution in such a way as to prohibit the Legislature from making the appointments. There are only two sections of the Constitution quoted by counsel for appellants as conferring this power upon the Governor. One of these is as follows: "When any office, from any cause, may become vacant, and no mode is provided by the Constitution and laws for filling such vacancy, the Governor shall have the power to fill the same by granting a commission, which shall expire when the person elected to fill said office, at the next general election, shall be duly qualified." Article 6, § 23. The other section quoted is one of the amendments to the Constitution, and is in the following language, to wit: "The Governor shall, in case a vacancy occurs in any state, district, county or township office in the state, either by death, resignation or otherwise, fill the same by appointment, to be in force until the next general election." Both of these provisions, by their terms, plainly refer to elective offices—to those state, county, township, and other offices the incumbents of which are selected by election at regular intervals. This is shown by the fact that each of those sections limits the term of the appointee of the Governor appointed under them to the time when the person elected to the office at the next general election shall qualify and assume the duties of the office; thus making it plain that they refer to elective offices. Neither of these sections, we think, has reference to commissioners such as the members of the state capitol board; a board created for a special purpose, the members of which are not elective, and whose terms and offices will both expire with the completion of the work for which the board was created. If no mode for the selection of this board had been provided, it may be that the Governor would have had the power to make the appointments, but we need not concern ourselves with that matter here, for in this case the statute expressly points out the method by which these commissions shall be selected.

We do not think it necessary to undertake to define very precisely what is meant by the term "public officer," as counsel has invited us to do, for, whether the members of this board can be said to be public officers or not, it is certain that, though the duties devolving upon them are of great importance, the positions they hold are of such a peculiar and limited kind that they do not come within the provisions in reference to the regular officers of the state found in the Constitution. As we see it, there is nothing in the Constitution which forbids that the members of such a board shall be selected by the Legislature. The method of selecting the members of such boards is a matter to be determined by the Legislature, which can leave it to the Governor to make the appointments, or can, if deemed safe, make them itself. We are therefore of the opinion that the Legislature

had the right to provide for the selection of the state capitol board in the way pointed out by this act, and that the appointment by the Governor of these defendants to serve as members of that board was without any authority in law to support it, and conferred no power whatever upon them to act as such board.

The judgment of the circuit court was, in our opinion, right, and it is therefore affirmed.

KETTERN v. STATE.

(Supreme Court of Arkansas. Jan. 2, 1904.)

WINE — SALE WITHIN THREE MILES OF SCHOOLHOUSE — VIOLATION OF COUNTY COURT'S ORDER—CONSTRUCTION OF STATUTES.

1. Sand. & H. Dig. § 4877, authorized county courts to prohibit the sale of intoxicating liquors on petition of the inhabitants within a radius of three miles of any school or church, such order to continue in force for two years. Acts 1895, p. 86, amended this section so as to extend the order until, on petition of the inhabitants, the court should revoke it. Acts 1897, p. 107, § 2, provided that, when the county court was petitioned to prohibit the sale of liquors, the petition might specify all kinds of liquor, or might specify wine only, or might except wine. Section 3 provided that if it should appear that the people of a three-mile district were not opposed to the sale of wine, and if there was no provision in special acts or orders of courts prohibiting its sale, then it should be lawful for any person growing grapes or berries to make wine thereof and sell it, except in districts where the people had voted or petitioned against its sale. Acts 1899, p. 137, § 1, provided that any person growing grapes or berries might make wine thereof and sell it, and provided that "the people shall have a right to petition the county court to prohibit the sale of native wine as now provided by law, but native wine shall not be included under section 4877 of Sand. & H. Dig., unless by a special petition against wine." *Held*, that an order promulgated by a county court, on petition of the inhabitants of a three-mile district, on January 2, 1899, prohibiting the sale or giving away of vinous and other liquors within the district by the growers of grapes and berries, etc., was within the purview of Acts 1899, p. 137, though that act was not passed until March 29th; and hence a sale of native wine within such district, though after the act of March 29, 1899 (Acts 1899, p. 137), was punishable as a violation of the court's order.

Appeal from Circuit Court, Pope County; Wm. L. Morse, Judge.

M. Ketterm was convicted of selling wine in violation of law, and appeals. Affirmed.

Dan B. Granger, for appellant. Geo. W. Murphy, Atty. Gen., for the State.

BUNN, C. J. This is an indictment for selling one gallon of wine within three miles of the public school building on block 6, in the town of Atkins, in Pope county, Ark. To this indictment defendant interposed a demurrer, which the court overruled, to which ruling the defendant at the time excepted. Trial was had by the jury on the evidence in the case. The court gave the following charge to the jury, to wit: "Gentlemen of

the jury, the testimony is not contradicted that the defendant sold wine to Mr. Lewis. The testimony is not contradicted that the sale was within three miles of the schoolhouse at Atkins, and the order of the county court has been proven in evidence before you. So there is not anything for you to do, as I take it, but to write out the verdict of guilty." This the jury did return, a verdict of guilty. To which charge of the court the defendant at the time excepted, and then asked the court to give the following instruction, to wit: "The jury are instructed that this prosecution is for an alleged violation of an order of the county court of Pope county, Arkansas, made on the 2d day of January, 1899, under section 4877, Sand. & H. Dig. (known as the three-mile law), and the act approved June 26, 1897 (Acts 1897, p. 107), regulating the sale of wines, said order prohibiting the 'sale or giving away of vinous, spirituous or intoxicating liquors, within a radius of three miles of a school house located on block six, in the town of Atkins, Arkansas, including all compounds commonly called tonics or bitters, by the growers of grapes and berries and the manufacturers of the same, either by themselves or agent'; and that by the terms of the act approved March 29, 1899 (Acts 1899, p. 137), native wines made by the producer, from grapes and berries grown in this state, can be sold by the producer without license, and cannot be prohibited by the county court, except on a special petition to prohibit the sale of native wines. And if you find from the evidence that defendant sold wine as alleged in the indictment, and that said wine was native wine, made by the defendant from grapes or berries grown in this state, and that said sale was after the 29th day of March, 1899, then you will acquit the defendant, unless you further find from the evidence, beyond a reasonable doubt, that there was an order made by the county court of Pope county since the 29th day of March, 1899, and prior to the sale of the wine, on a special petition, prohibiting the sale of native wine in said territory." The court, over the objection of defendant, refused to give this instruction, and to the ruling of the court the defendant excepted. After verdict against him as aforesaid, defendant filed his motion to set aside the verdict and for a new trial, which being overruled, he took exceptions and appealed to this court.

The motion for new trial sets up, as ground, that the court erred in overruling the defendant's demurrer to the indictment, erred in giving directions to the jury to return a verdict of guilty, and in refusing the instruction asked by the defendant, and that the verdict was contrary to the law and the evidence. We apprehend that the direction of the court to the jury, and the refusal of the court to give the instruction, raise the only question in this case, for the same point, in effect, was raised by the demurrer to the indictment, assuming that the same was a general demur-

rer. The original "blind tiger" act, expressed in section 4877, authorized a prohibition of the sale or giving away of any vinous, spirituous, or intoxicating liquors of any kind, on the petition of a majority of the inhabitants of the territory included within a radius of three miles of any institution of learning or church, but no reference was made to the sale or giving away of native wine. Section 2 of the act entitled "An act to regulate the sale of wine," approved June 26, 1897, contains this provision on the subject of the sale of wine: "When the county court is petitioned to prohibit the sale of liquors under the three mile law, the petition may specify all kinds of liquors as now provided by law, or may specify wine as the only liquor to be prohibited, or may except wine from the petition." Section 3 of the same act is: "If it shall appear that the people of any county, township or ward of a city or of any 'three mile' district under the operation of present laws as modified by the two preceding sections, are not opposed to the sale of wine, and if there be no provisions in special acts or orders of courts prohibiting the sale of wine, then it shall be lawful for any person who grows grapes or berries, to make wine thereof, and without license sell the same in quantities not less than one-fifth of a gallon anywhere in the state, except in counties, townships, wards of cities or three mile districts, or under districts under special acts, where the people have voted or petitioned or secured special laws against the sale of wine." This provision relieved the makers of wine from the effects of the prohibition of all other intoxicating liquors where the prohibition of the sale of wine was not express and definite. Its evident meaning was to protect domestic makers of wine, although not so expressed in terms. The act of March 29, 1899, in the first proviso to the first section, had this provision: "That the people shall have the right to petition the county court to prohibit the sale of native wine as now provided by law [evidently referring to the provision of the 26th June, 1897, on the subject], but native wine shall not be included under section 4877 of Sand. & H. Dig., unless by special petition against wine." This special petition was made against wine on the 2d January, 1899, and the order of prohibition made on that day by the county court, in exact conformity with the act of 26th June, 1897, the law in force when the act of March 29, 1899, was enacted. We cannot, therefore, escape the conclusion that the prohibitory order of the county court was within the purview of the act of March 29, 1899, passed after the order was made, and was a prohibition against the sale of all kinds of wine, including native wine. Had the order of the county court been made under the old three-mile law, formulated as section 4877 of the Digest, it would not have been good as against native wine, for the petition and order thereon must conform to the later law of 1897, which re-

quired that wine should be stated specifically as the subject of the prohibition asked and granted.

In this connection it will be observed that the old three-mile law, as set forth in section 4877 of the Digest, provides that the prohibitory order of the county court shall remain in force and effect for two years from the date of the making thereof. That section was amended by the act approved April 1, 1895 (Acts 1895, p. 86), and in the latter act the prohibitory order of the county court in such cases is made to run and to be in force in the district for a period of two years from the date of the same, and until, upon a petition of a majority of the adult inhabitants of such territory, the courts shall make an order nullifying and revoking said former order. So the law, as it now stands, makes a prohibitory order of the county court to continue in force until, upon proper petition, the county court affirmatively sets aside the same and permits the sale. This being the state of the law, as applicable to this case, there was no error in the direction of the circuit court to the jury to return a verdict of guilty upon the facts admitted and uncontroverted.

Affirmed.

FURTH v. STATE.

(Supreme Court of Arkansas. Jan. 23, 1904.)
GAMBLING DEVICES—SEARCH AND DESTRUCTION—STATUTES—UNCERTAINTY—REPEAL—CONSTITUTIONAL LAW—JURY TRIAL.

1. Requiring one who intervenes in proceedings by the state for seizure and destruction of gambling devices to testify over his objection that it might tend to criminate him is not ground for reversal, his testimony not having such tendency, and the other evidence leaving no doubt as to the facts.

2. Sand. & H. Dig. § 1618, declaring it the duty of judges of the supreme and circuit courts, and of justices of the peace, on information given or on their own knowledge, or where they have reasonable ground to suspect, to issue their warrant to some peace officer directing a search for gaming devices therein mentioned, and directing that on finding any such they shall be publicly burned by the officer, is not void for uncertainty and ambiguity.

3. The Wilson act, an act to suppress and punish gambling (Acts 1901, p. 114), is not inconsistent with, and does not cover, the entire subject-matter of Sand. & H. Dig. § 1618, providing for search for and destruction of gambling devices, so as to repeal such section.

4. Sand. & H. Dig. § 1618, authorizing seizure and destruction of gambling devices, is not unconstitutional because not providing for a jury, it being a summary proceeding under the police power for the suppression of the nuisance of gambling, in which case there was no right at common law to a jury trial.

Appeal from Circuit Court, Pulaski County; Robert J. Lea, Judge.

Proceedings by the state for the seizure and destruction of gambling devices. R. A. Furth intervened. From an adverse judgment, he appeals. Affirmed.

On June 6, 1903, upon affidavit filed before Judge R. J. Lea, judge of the Sixth Judicial

Circuit of the state of Arkansas, stating that certain gambling devices, commonly called a "roulette wheel," or "rouge et noir," also crap table, also chuck a luck, also faro bank table, also race horse wheel or book maker's wheel, are now kept at 109 South Main street, on second floor, in the city of Little Rock, in said county of Pulaski and state of Arkansas, contrary to the statute in such cases provided, and praying a warrant for search for them, and that, if found, the sheriff forthwith proceed to publicly burn the same, according to law, the judge issued his warrant commanding the sheriff to seize and hold the same to be dealt with according to law, and for the further orders of the court, and to summon the party in possession of the property to appear before him in 10 days, and show cause, if any, why such gambling devices should not be condemned and destroyed according to law. The warrant was served, the gambling devices seized, and the appellant, R. A. Furth, filed before the judge a sworn petition to be allowed to intervene, claiming that said judge had no authority or jurisdiction; that he was the owner of the property seized; that the same was not such as the law makes it a crime to keep and exhibit; that said property can be and is used for lawful and ordinary purposes, and is of great value as property that is used for legitimate purposes. Permission was given him to intervene. The testimony of witnesses was taken as to the character and use made of the property, and we think that it was clearly shown that the articles seized—being two tables—were gambling tables, made for the purpose of being used as gambling tables; that they had been used and kept, and were used and kept, as gambling tables; and that they were of but little value and use except as gambling devices. The appellant, Furth, was sworn as a witness, and objected and refused to testify, on the ground that his evidence might tend to criminate him; but his objection was overruled, and he was compelled by order of the court to answer questions propounded by the court, the court stating to him at the time that, if he asked him any question the answer to which would tend to criminate him, he might decline to answer it; and he objected to testifying, and, his objection being overruled, he excepted. The appellant moved for a jury trial—that the issues be tried by a jury—which was denied, and he excepted. The issues were determined by the court for the appellee. The appellant filed a motion for a new trial, which was overruled, and he excepted and appealed to this court. He gave bond and obtained a supersedeas.

Fulh, Fulh & Fulh, J. A. Gray, and F. T. Vaughan, for appellant. E. W. Kimball, J. A. Comer, and Geo. W. Murphy, Atty. Gen., for the State.

HUGHES, J. (after stating the facts). The objection that there is reversible error in the

court's overruling the objection of the appellant to giving testimony in the case on the ground that it might tend to criminate him is not tenable, we think, for the following reason: It does not appear to us that the testimony he gave would tend in fact to criminate him. But without the testimony of the appellant the evidence otherwise is such that no reasonable doubt can be entertained that the devices were gambling devices, kept and used for gambling, practically alone, and that they were kept and used in violation of the statute. The appellant contends that the act providing for this proceeding is void, because sections 1618, and 1619, of Sandels & Hill's Digest are unconstitutional, because they are uncertain and ambiguous. We do not consider this objection sound. These sections read as follows: Section 1618, Sand. & H. Dig., says: "It is hereby made and declared to be the duty and required of the judges of the Supreme Court, the judges of the circuit courts and of the justices of the peace, on information given or on their own knowledge, or where they have reasonable ground to suspect, that they issue their warrant to some peace officer, directing in such warrant a search for such gaming tables or devices hereinbefore mentioned or referred to, and directing that, on finding any such, they shall be publicly burned by the officer executing the warrant. Such warrant may be substantially in the following form." Here follows the language of the warrant. Though the meaning of this action might have been made plainer by particularity in the use of language, it is easily understood by any one who does not want to misunderstand, and the court has no difficulty in determining what it means, and this objection on account of uncertainty is not sustained. Section 1619 only provides for the fees of the officer executing the warrant to be paid by the person keeping such gambling devices in case they are adjudged to be burned. There is no uncertainty in this section.

We do not think these sections are repealed by what is known as the "Wilson Act" (Acts 1901, p. 114). We do not think the two acts inconsistent, or that the Wilson act covers the entire subject-matter of these sections in such manner as to amount to a repeal, or that the Legislature intended by the latter act to repeal the former act.

The objection that the act in question does not provide for a jury is a serious one. But this is a proceeding in rem of a civil nature. It is a summary proceeding in the exercise of the police power of the state, under a statute passed to suppress the nuisance of gambling. Gambling was a nuisance at common law, and in such case trial by jury was not a right at common law. It is only in cases where a jury could be demanded as a matter of right at common law that the refusal of a jury under our Constitution is ground for reversal.

The contention is made here that the Legis-

lature had no right or power to enact this statute. We understand that it is competent for the Legislature to provide by statute for the suppression of nuisances by a summary proceeding, and to authorize the destruction of gambling devices, the use of which constitutes a nuisance. The principle is settled in case of the *Garland Novelty Co. v. The State* (Ark.) 71 S. W. 257, which case counsel for appellant asked this court to reconsider and modify, so as to confine its ruling to cases where not only the devices seized are nuisances per se, but where the facts are, confessedly, that such property is used for gambling purposes only, and cannot be used for any other. This we cannot do. This case stands on its own facts, and announces correct principles of law.

To maintain the constitutionality of the statute under consideration the doctrine of what is known as the "Fish Net Case," 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385, is justly invoked, which, in effect, decides that statutes providing for the abatement of nuisances by the destruction of the means used in carrying them on without a judicial trial and without notice is not unconstitutional, and that a party is not by them deprived of his property without due process. In this case the court says: "The summary abatement of nuisances without judicial process or proceeding was well known to the common law long prior to the adoption of the Constitution, and it has never been supposed that the constitutional provision in this case was intended to interfere with the established principles in that regard. But the owner of gambling nuisances is not necessarily deprived of a right to trial by jury by this summary proceeding. The burden of proof may be changed. But he has his remedy in replevin or in trespass." The court said in this case that when the property was of little value it might be destroyed without a judicial trial, but that where it was of great value it would be dangerous to give such power to an officer. In this case the evidence tends to show that these gambling devices were of very small value, and that they were practically of no use save for gambling purposes, and that there was no market for such devices.

Finding no error, the judgment is affirmed.

MEADOWS v. STATE.

(Supreme Court of Arkansas. Jan. 23, 1904.)
CRIMINAL LAW—NEW TRIAL—REFUSAL TO GRANT CONTINUANCE.

1. A new trial for refusal to grant a continuance was properly denied, in a prosecution for forgery, where it appeared on the motion that the testimony for which the continuance was asked was directly in conflict with defendant's testimony on the trial.

Appeal from Circuit Court, Crawford County.

Hugh F. Meadows was convicted of forgery, and appeals. Affirmed.

J. E. London and W. H. Neal, for appellant. G. W. Murphy, Atty. Gen., for the State.

BUNN, C. J. This is an indictment for forgery and uttering a forged instrument, and, omitting caption, reads thus:

"The grand jury of Crawford county, in the name and by the authority of the state of Arkansas, accuse Hugh F. Meadows of the crime of forgery, committed as follows, to wit: The said Hugh F. Meadows, on the 5th day of February, 1903, in the county of Crawford aforesaid, did unlawfully, feloniously, and fraudulently forge, counterfeit, and alter a certain writing on paper, the substance of said writing being as follows, to wit: 'Fort Smith, Feby. 5, 1902. Received of H. F. Meadows, two hundred dollars, payment on Carlisle Piano'—with the intent then and there fraudulently and feloniously to cheat and defraud the said Charles Botefur, Charles N. Davis, and John B. Edwards in their legal rights, and obtain from said Charles Botefur, Charles N. Davis, and John B. Edwards the possession of their property. The said writing on paper aforesaid has been withheld or destroyed by act or procurement of said defendant, H. F. Meadows, against the peace and dignity of the state of Arkansas.

"The grand jury of Crawford county, in the name and by the authority of the state of Arkansas, accuse said Hugh F. Meadows of the further crime of uttering a forged instrument, committed as follows, to wit: The said H. F. Meadows on the 5th day of February, 1902, in said county of Crawford, did unlawfully, feloniously, and fraudulently utter and publish to John B. Edwards, Charles Botefur, and Charles N. Davis, as genuine, a certain forged, counterfeit, and altered writing on paper, purporting to be a receipt, the substance of which was as follows, to wit: 'Fort Smith, Ark. Feby. 5, 1902. Received of H. F. Meadows, two hundred dollars, payment on Carlisle Piano'—with the intent then and there fraudulently and feloniously to cheat and defraud the said John B. Edwards, Charles Botefur, and Charles N. Davis of the possession of their property; the said H. F. Meadows then and there well knowing said writing to be forged, counterfeited, and altered as aforesaid. Said writing has been withheld or destroyed by the act or procurement of said H. F. Meadows."

The evidence showed that the defendant had previously purchased a Carlisle piano from Botefur, through his agent, Davis, for the sum of \$252; the seller reserving title in himself until full payment should be made as follows, to wit: \$84 on the 5th November, 1902; \$84 on the 5th November, 1903; and \$84 on the 5th November, 1904; making in the aggregate the sum of \$252. It appears

¶ 1. See Criminal Law, vol. 15, Cent. Dig. § 2334.

also from the testimony that a cash payment of \$10 in addition was given by Meadows at the time of the sale, and this receipt is the subject of the forgery and utterance of forged instrument named in the indictment; the testimony tending to show that the figure (10) ten had been altered to the figures (200) two hundred. The piano was left in the possession of defendant, and the notes were subsequently assigned to John B. Edwards, and on presentation for payment said receipt was tendered as a payment of so much upon the piano. The usual contract of sale and the notes were put in evidence on the trial of this cause.

On the calling of the case, appellant moved for a continuance on the ground of the absence of W. H. Roberts, by whom he alleged he expected to prove that at the time Davis, a witness for prosecution, delivered the piano to defendant, he saw Davis and defendant go into a room where the piano was, and heard Davis tell defendant he would like to have a larger cash payment than he received; that defendant then asked Davis how much he would allow him off for cash; that Davis replied, "Ten per cent," and that defendant then said, "I will pay you two hundred dollars, and you send my notes back, and we will fix the rest up;" that Davis agreed to do so, and that defendant then paid him some amount—several bills; that Davis wrote a receipt, and gave it to defendant, and that it was for \$200; that Roberts was located at Texarkana, and that no subpoena had been issued for him because he (appellant) did not, until indictment, learn that he was within the jurisdiction of the court, and could not procure him any other way in so short a time; that he believed that, if Roberts was present, he would swear to the statements set out, and that they were true. In his testimony in this case, defendant stated: "I may have said, when I testified in the case of John B. Edwards against me, that there was no one but my wife and Elisha Stevens present, but I recollect that Milt Doss and Pink Richardson were present when the piano was delivered. Whether they saw the money or not, I do not know." In his testimony he does not say that W. H. Roberts was present. On the contrary, his name not being included in the list of those whom he says were present, the inference is that he was not present on the occasion of the payment of the money named, and the delivery of the piano. The refusal of the court to grant a continuance on account of the absence of the witness Roberts, alleged in the motion therefor to have been present when the money was paid, was made one of the grounds for setting aside the verdict and granting a new trial, and, when that motion was made, the conflict between the testimony in the case and the affidavit for continuance was then made apparent; and the testimony showing that Roberts was not present when the money was paid, etc., overturns the state-

ment in the motion for continuance, and sustains the refusal of the same.

The judgment of the trial court is therefore affirmed.

VOWELL v. STATE

(Supreme Court of Arkansas. Jan. 23, 1904.)

HOMICIDE—IMPEACHING TESTIMONY—EXCLUSION—PREJUDICIAL ERROR—JURY—PREJUDICE—CONVERSATIONS—EXPRESSION OF OPINION.

1. In a prosecution for homicide the exclusion of impeaching testimony was not prejudicial where, had it been admitted and the witness wholly discredited, the evidence was so manifestly in support of the verdict that it could not have been affected thereby.

2. When a juror was seen conversing with an outsider, so that prejudice might arise, it devolved on the state to show that the conversation was harmless and without prejudice.

3. A juror's conversation with an outsider was shown to be without prejudice when its subject was shown to be a domestic matter foreign to the subject of the trial.

4. Where a juror, in homicide, stated on his voir dire that he had not formed or expressed an opinion as to guilt or innocence, the discovery after trial of a previous statement made by him that, if what he had heard was true, defendant ought to be hanged, was not ground for setting aside the verdict, where the juror denied recollection of ever having made the statement, and stated that if he made it he spoke from the merest rumor, for he knew nothing of the facts personally or by information, and never had any opinion as to guilt or innocence until he made up his verdict.

Appeal from Circuit Court, Greene County: Allen R. Hughes, Judge.

Mart Vowell was convicted of murder in the first degree, and appeals. Affirmed.

L. Hunter, J. D. Block, and Lamb & Gantney, for appellant. Geo. W. Murphy, Atty. Gen., for the State.

BUNN, C. J. This is an indictment for murder in the first degree, heard and determined, on change of venue from the Western District of Clay county, in the Greene circuit court, resulting in a verdict and judgment for murder in the first degree as charged.

The evidence in the case fully sustained the verdict of the jury, and the only defense on the facts was that the deceased had made threats against the life of the defendant, and that these threats had been communicated to the defendant before the killing. The jury had this question before them, and determined against the contention of the defendant. But it is objected by the defendant that the court erred in not admitting the offered testimony of Sudie Vowell, daughter-in-law, and another witness by the name of Keller. Sudie Vowell offered to testify that "I was at Mart Vowell's house on Saturday after the killing, and saw Russell Williams there," and the following question was propounded to her: "Tell the jury whether or not, upon that occasion, Russell Williams, either in words or substance, stated that Allen Love

joy [brother of deceased] had it in for, and was threatening to kill, because he, Russell Williams, had told Mart Vowell of the threats Lovejoy [the deceased] had made against him, Mart Vowell; and, if he didn't look out, he, Russell Williams, would get him [Allen Lovejoy]." The court refused permission to the witness to answer this question. The only object to be obtained by the answer to this question was to show that on that occasion Russell Williams had thus made statements as to the threats made by the deceased against the defendant which were contradictory of his statements on the same subject made while on the witness stand. This evidence was not offered to prove the threats, for it would have been inadmissible for that purpose, it being hearsay, but it was offered to impeach the testimony of Russell Williams. Had it been admitted, and had Williams thereby been thoroughly discredited in the minds of the jury, yet the evidence on the whole case is so manifestly in support of the jury's verdict that we cannot see how the verdict could have been affected in the least by it.

Another important question raised is with reference to the disqualification of G. W. Kirby, one of the jurors that tried the case. It appears from the affidavit of one Wyatt, filed with the motion for a new trial, that on the day of the trial, while the jury, of which Kirby was a member, were passing through the courthouse yard in a body and in charge of a deputy sheriff, they passed near the affiant and another man, and that Kirby left the other jurors, and had a three-minute conversation with one Tom Simms, an outsider, but that said conversation was in such a low tone that affiant could not hear what was said; that, when the deputy sheriff called Kirby back to the other jurors, said Simms followed him up and continued the conversation. In such case, where prejudice might arise, it devolves upon the state to show that the conversation was harmless and without prejudice. It was shown in this case that the subject of the conversation was a domestic matter entirely foreign to the subject of the trial. This was a sufficient showing on the part of the state to remove the objection.

The next objection to the qualification of this juror was that, having stated on his voir dire that he had not formed and expressed an opinion as to the guilt or innocence of the defendant, yet, notwithstanding this statement, it was discovered after the trial that he had previously expressed such opinion against the defendant. That while on a fishing outing with some friends previous to his selection on the jury, and after the killing, this juror had said, in the presence of one or more of his friends, that if what he had heard was true the defendant ought to be hanged, or would be hung, or words to that effect. Kirby on oath stated in response to this, after the trial, that he had not the

slightest recollection of ever having made the statements, in this connection, attributed to him, and, if he had ever done so, he spoke from the merest rumor, for he knew nothing of the facts of the case personally, or from information derived from any one having any personal knowledge of the facts of the case; and, furthermore, that he had no recollection whatever of ever having ever made such statement when he was acting as a juror in the case, and that he had never had any opinion on the subject of the guilt or innocence of the defendant until he had made up his verdict thereon. In the case of *Casat v. The State*, 40 Ark. 511, this court said (quoting from the syllabus): "Objection to a juror for having expressed an opinion of the prisoner's guilt came too late after the verdict, unless, upon proper examination as to his qualification as a juror, he has by concealment or prevarication imposed himself upon the panel." Everything in the evidence is opposed to the idea that this juror, by concealment or prevarication or otherwise, had imposed himself upon the panel in this case, or in any manner endeavored to do so, and this in effect was the finding of the trial judge. In *Hardin v. State*, 68 Ark. 53, 48 S. W. 904, this court, in regard to opinions of jurymen formed from rumor, said: "This, of itself, does not disqualify, unless it appears that the juror entertains some prejudice against the defendant." Certainly no prejudice appears in this case, but, if anything, the want of it. This subject is considered in a very learned opinion in *State v. Anderson* (Mont.) 37 Pac. 1, and the conclusion of the court in that case was to the same effect as to opinions formed and expressed by a juror before trial.

This disposes of all the questions involved. The judgment is affirmed.

HARRISON v. STATE.

(Supreme Court of Arkansas. Jan. 9, 1904.)

CRIMINAL LAW—INFANT—CRIMINAL CAPACITY—PRESUMPTION—FORGERY—EVIDENCE.

1. A boy of 13 is presumed incapable of committing crime, and it devolves on the state to show him to have mental capacity enough to know right from wrong in reference to the offense charged.

2. A check or draft drawn by defendant on a bank not indebted to him, and signed with the name by which defendant was generally known, was no forgery.

Appeal from Circuit Court, Crawford County; Jephtha H. Evans, Judge.

Simon Harrison was convicted of uttering a forged instrument, and he appeals. Reversed.

Simon Harrison was indicted for forgery and uttering a forged instrument at the June term, 1903, of the Crawford circuit court. He

¶ 1. See Criminal Law, vol. 14, Cent. Dig. § 741; Infants, vol. 27, Cent. Dig. § 172.

was acquitted of the forgery, and convicted of uttering a forged instrument. He filed a motion for a new trial, which was overruled, to which he excepted, and appealed to this court. The instrument he is charged with uttering, as set out in the indictment, is in the following words and figures, to wit:

"2Van Buren, Ark. 189./ No.

"Crawford county Bank pay to Jim Bairrett or bearer \$550. S. a. Barret, pu/ub Dollars. Crawford County Bank Building.

"Campbell."

The evidence in the case showed that the defendant was a negro boy 13 years old. There was no evidence introduced, and no attempt made to show, that he knew right from wrong in relation to the offense of uttering a forged instrument, but the testimony tended to show that he was not bright, that he was backward, and at times did not seem to be right. It also appears from the evidence that the boy was generally known by the name of Campbell, which name was signed to the check or instrument alleged to have been forged and uttered as genuine.

Chew & Fitzhugh, for appellant. Geo. W. Murphy, Atty. Gen., for the State.

HUGHES, J. (after stating the facts). The court is of the opinion that the testimony in the case fails to show that the defendant was amenable to the law for uttering a forged instrument, as he was as shown by the evidence only of the age of 13 years, and there was no evidence that he had sufficient intelligence to know right from wrong in relation to the offense with which he was charged. "An infant under 12 years of age shall not be found guilty of any crime or misdemeanor." Sand. & H. Dig. § 1442. The law presumed the boy 13 years of age, incapable of committing a crime, and it devolved on the state to show that he had mental capacity and intelligence enough to know right from wrong in reference to the offense with which he was charged. In this the state failed, and the presumption of his incapacity, in the absence of such proof, must prevail. In *Dove v. State*, 87 Ark. 261, it is said that "where the accused is between the ages of 12 and 14 the common-law presumption still prevails, that he or she is not *doli copax*, or capable of discerning between good and evil, until the contrary is affirmatively shown by the evidence." No witness was examined as to the intelligence of appellant, or as to his knowledge of right and wrong, good and evil.

The defendant was charged with uttering a forged instrument, which instrument is shown to have been signed "Campbell." The proof in the case shows that the appellant was generally known as "Campbell." It therefore appears that the instrument was not forged, but was simply an instrument—check or draft—drawn by appellant on the bank, and signed by him by a name by which he was generally known, and was not paid

by the bank, which owed him nothing, and with which he had no funds on deposit. This was not forgery.

Reversed, and remanded for a new trial.

BLANKS v. CRAIG et al.

(Supreme Court of Arkansas. Dec. 19, 1903.)
DEEDS—DESCRIPTION—INTEREST OF HEIRS—
AFTER-ACQUIRED TITLE.

1. Where a grantor conveyed all his interest in certain real estate described, and also "any interest in any lands by will or otherwise in the estate" of S., and at the time the deed was made the grantor had an undivided one-third interest in the land as an heir of S., such deed did not pass an interest in the land which the grantor subsequently acquired by the death of another heir.

2. Sand. & H. Dig. § 699, providing that if any person shall convey real estate, and at the time shall not have the legal estate in the land, but shall afterwards acquire the same, such after-acquired estate shall pass to the grantee in the deed, does not apply to or affect interest subsequently acquired by a grantor which he had not previously attempted to convey.

Appeal from Ashley Chancery Court; Marcus L. Hawkins, Chancellor.

Suit by W. L. Blanks against R. E. Craig, as executor, etc., and others. From a decree in favor of defendants, complainant appeals. Affirmed.

Mary A. Sumner died in 1891. At the time of her death she was the owner of certain lands in Ashley county. She left surviving her, as her heirs, Daniel E. White, a son, and Sallie E. Terrell, a daughter, and certain grandchildren, the children of her son W. J. White, who died previous to her death. She left a will, which, so far as the lands in controversy are concerned, was afterwards found to be invalid and of no effect. In 1893, while the contest concerning the validity of the will was still pending, Daniel E. White, for a valuable consideration, sold and conveyed by quitclaim deed his interest in the lands to W. L. Blanks. The language of the granting clause in the deed is as follows: "We, Dan. E. White and Lilly White, his wife, for the consideration named, do hereby grant, sell, and quitclaim unto said William L. Blanks and unto his heirs and assigns forever the following lands lying in Ashley county Arkansas, to wit: My interest in and to the north half of the southwest quarter of section 17, township 19 south, range 4 west [and other lands described], also any interest in any lands by will or otherwise in the estate of Mrs. Mary A. Sumner." After this deed was executed, Sallie E. Terrell, a sister of Daniel E. White, died intestate and without issue, and Daniel E. White inherited one half of her estate, and the children of W. J. White the other half. The other facts are sufficiently stated in the opinion.

Wells & Williamson, Jno. M. Moore, and W. B. Smith, for appellant. Pugh & Wiley and Robt. E. Craig, for appellees.

RIDDICK, J. (after stating the facts). This is a controversy concerning the title to land that was once owned by Mary A. Sumner. Another branch of the case has been before this court before, and a fuller history of the case can be had by reference to the opinion in that case. *Blanks v. Clark*, 68 Ark. 98, 56 S. W. 1063.

Blanks, as shown in the statement of facts, had in 1893 purchased the interest of D. E. White in the estate of his mother, Mary A. Sumner. In 1894, after this deed was executed, Sallie E. Terrell, a sister of White, and the owner of a third interest in the estate of their mother, also died. Half of her one-third interest was inherited by D. E. White, and the other half by the children of W. J. White. After the case was remanded, Blanks obtained leave to amend his cross-complaint, and he set up a claim to the interest in the lands formerly owned by Mary A. Sumner that Daniel E. White inherited from his sister, Sallie E. Terrell. This was a one-sixth interest in those lands, and Blanks claimed it by virtue of the provision in the deed executed by D. E. White conveying to him all his "interest in any lands by will or otherwise in the estate of Mary A. Sumner." But in order to determine what that deed conveyed, we have only to ascertain what the interest of D. E. White was in the estate of Mary A. Sumner at the time this deed was executed, for there is nothing in the language used that purports to convey more than the title he then owned. It is admitted by the agreed statement of facts that he only owned at that time an undivided one-third interest, and this is all the interest that passed by the deed. The interest that D. E. White subsequently inherited from his sister, Sallie E. Terrell, did not pass by the deed, for at the time it was executed Mrs. Terrell was living, and D. E. White had no interest in the land owned by her. The statute, which in some cases vests in a grantee an estate to the land conveyed which may be afterwards acquired by the grantor, has no application here, for the deed did not purport to convey any interest which D. E. White might in future inherit from his sister, Mrs. Terrell. The statute only affects interest in land which the grantor has conveyed or which his deed purports to convey. It does not affect interests afterward acquired by the grantor which he has not previously conveyed or attempted to convey. *Sand. & H. Dig. § 699*.

We are of the opinion that the judgment of the chancery court was right, and it is therefore affirmed.

WILLYARD v. STATE.

(Supreme Court of Arkansas. Jan. 16, 1904.)

CRIMINAL LAW—TRIAL—REMARKS OF COUNSEL.

1. On appeal from a conviction before a justice, the prosecuting attorney, in argument,

stated that the defendant had been tried before a justice where he resided, and had been convicted, "and they could see from that what the jury thought of the case," and repeated the remark after an objection to it had been sustained. The evidence was conflicting. *Held* prejudicial error.

2. On appeal from a conviction before a justice of an assault on defendant's 13 year old daughter, the prosecuting attorney, in argument, stated that the defendant, in the trial before the justice of the peace, "winked and nodded" at his daughter while she was on the witness stand. There was no evidence to sustain the assertion, and the daughter was one of defendant's principal witnesses, and the evidence was conflicting. *Held* prejudicial error.

Error to Circuit Court, Sebastian County; Styles T. Rowe, Judge.

G. F. Willyard was convicted of assault and battery, and he brings error. Reversed.

Robert A. Rowe, for plaintiff in error.
Geo. W. Murphy, Atty. Gen., for the State.

BATTLE, J. G. F. Willyard was accused before a justice of the peace of an assault and battery, committed by unlawfully whipping his daughter, Dessie Willyard, a girl about 13 years old. He was convicted, and appealed to the circuit court. He was tried and convicted in that court, and appealed to this court.

In the trial before a jury, five witnesses were introduced and testified in behalf of each party. The testimony was conflicting. The verdict of the jury depended on the witnesses they believed.

In his argument before the jury, the prosecuting attorney stated that the defendant had been tried before a justice of the peace where he resided, and had been convicted, "and they could see from that what the jury thought of the case."

The defendant objected to the statement, and the court sustained his objection, and the prosecuting attorney thereafter repeated it. There was no evidence adduced to sustain it. In the course of the same argument he told the jury that the defendant, in the trial before the justice of the peace, "winked and nodded" at his little girl, Dessie, while she was on the witness stand testifying. There was no evidence to sustain this assertion. The defendant objected to it, and the court sustained his objection.

The remarks of the prosecuting attorney to the effect that the defendant had been tried for the same offense for which he was then on trial before a jury of the neighborhood in which he resided, in a court of a justice of the peace, were improper and prejudicial. His repetition of them after the court had sustained defendant's objections was calculated to impress them upon the minds of the jury, and cause them to attach more importance to them than they otherwise would, and, in the conflict of the evidence, were calculated to cause the jury to decide against the defendant; they believing that a jury composed of his neighbors, knowing him and the witnesses, was better

qualified than they to decide what credit should be given to the testimony of each witness, when in fact the witnesses and testimony in the trial before the justice of the peace might not have been the same as in the trial in the circuit court.

One of the defendant's principal witnesses was his little daughter, Dessie. The prosecuting attorney attacked her testimony. The impeachment was calculated to cause the jury to believe that she was prompted by her father as to how and what she should testify, and to impair the confidence of the jury in her veracity, and, on account of the conflict of the evidence, was prejudicial.

Reverse and remand for a new trial.

KILLIAN v. STATE.

(Supreme Court of Arkansas. Jan. 16, 1904.)
ATTORNEYS — ADMISSION TO BAR — SETTING ASIDE LICENSE — APPEAL — PRESUMPTION.

1. The circuit court had power, on its own motion, at the same term at which it had granted one a license to practice law, to set aside the order.

2. On appeal from the setting aside, on the court's own motion, of an order granting a license to practice law, it would be presumed that there were good grounds for the court's action.

Error from Circuit Court. Boone County; Elbridge G. Mitchell, Judge.

Error by R. B. Killian to the Boone circuit court to review an order setting aside an order granting plaintiff in error a license to practice law. Affirmed.

J. M. Brice and Pace & Pace, for plaintiff in error. Geo. W. Murphy, Atty. Gen., for the State.

BUNN, C. J. The petitioner filed his application for license to practice law in the Boone circuit court, and the courts of the state inferior thereto. The good character for intellectual and moral qualifications, his age and citizenship, were vouched for by a qualified attorney of the court, and a committee was appointed to examine him as to his professional qualifications; and the committee reported that they had performed that duty, and recommended that the applicant be granted a license in accordance with the prayer of his petition. The report was adopted by the court on presentation by the committee, and license ordered to be issued, and the same was accordingly done, and certificate granted to the applicant.

A few days afterwards, and during the same term, on its own motion, the court set aside its former order granting the license, and made an order revoking the same. The last order was made in the absence of the petitioner, and without notice to him; and he thereupon sued out a writ of error to the Boone circuit court, in this court, and the matter thus comes up for our consideration on the record presented.

The circuit court had control of its proceedings during the term, and the power to recall any order or judgment it may have previously made in the term, with or without assigning reasons therefor, and the presumption is that it had good grounds for its action in the premises. The record does not show us whether or not the case against the appellant was such as entitled him to notice of the order denying him license.

Affirmed.

FLEMING v. STATE.

(Supreme Court of Arkansas. Jan. 16, 1904.)

CRIMINAL LAW—SURPRISE OF DEFENDANT—FAILURE TO MOVE FOR POSTPONEMENT—APPEAL—WAIVER.

1. A defendant surprised by the testimony of a state's witness, but failing to move for a postponement, cannot complain of the surprise on appeal.

Appeal from Circuit Court, Miller County. Joel D. Conway, Judge.

Will Fleming was convicted of an assault with intent to kill, and appeals. Affirmed.

J. O. H. Bush, for appellant. Geo. W. Murphy, Atty. Gen., for the State.

BATTLE, J. Will Fleming was indicted for an assault with intent to kill. He was tried before a jury, and convicted, and appealed to this court.

There was evidence to sustain the verdict of the jury. It is unsatisfactory as it appears to us. But the judge of the trial court and the jury, who heard it, had better opportunities than we have to know the weight to which it was entitled, and they evidently considered it sufficient. We will not, therefore, disturb the verdict on account of it.

Appellant says that he was surprised by the testimony of a witness who testified in behalf of the state. But he made no application for a postponement of the trial in order that he might repair the damage done him by the unexpected testimony. He took his "chance of a verdict in his favor in spite of the surprise, without an effort to repair the injury while yet he may," and "must abide his election to stand the hazard of the verdict." Nickens v. State, 55 Ark. 547, 18 S. W. 1045; Overton v. State, 57 Ark. 62, 20 S. W. 590.

Affirmed

ST. LOUIS, I. M. & S. RY. CO. v. STEPHENS.

(Supreme Court of Arkansas. Jan. 9, 1904.)

LIMITATIONS—DAMAGES TO CROPS—RAILROADS—INSUFFICIENT DRAINS.

1. Where a crop was damaged by flooding, owing to the obstruction of creeks and drains by a railroad embankment, openings having been

¶ 1. See Limitation of Actions, vol. 23, Cent. Dig. § 305.

left in the embankment, which afterwards proved insufficient, limitations against an action for damages ran from time of the injury, and not from the construction of the embankment.

Appeal from Circuit Court, Craighead County; Felix G. Taylor, Judge.

Action by Letitia Stephens against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Letitia Stephens is the owner of 80 acres of land in Craighead county, upon which is her dwelling house and farm. The land lies east of the railroad track of the St. Louis, Iron Mountain & Southern Railway Company, the nearest point of the land being one-eighth of a mile distant from the railroad. A creek running in a southeasterly direction by her land is crossed by the railroad a short distance west of her land. This creek, during recent years, has overflowed her farm, and has caused considerable injury to the crops growing thereon. Mrs. Stephens claims that this is due to the negligence of the railroad company in not constructing its roadbed with sufficient openings where it crosses certain other drains and sloughs not far from the creek, whereby it forces into this creek water that would otherwise be carried off by those other drains and sloughs, and for the further reason that the company negligently changed the course of the creek in such a way as to make an abrupt curve in the channel thereof just below where the railroad crosses it, thus causing the water of the creek in times of high water to overflow its banks, and to injure the crops growing on the farm of plaintiff. She brought this action to recover for the injury to such crops in the years of 1898 and 1899. On the trial she recovered a judgment for \$366.50, from which judgment the company appealed.

Dodge & Johnson, for appellant. Lamb & Gautney, for appellee.

RIDGICK, J. (after stating the facts). It is conceded that the evidence in this case is sufficient to sustain the judgment, but the defendant contends that the action is barred by the statute of limitations, and this is so if the statute commenced to run at the time the road was constructed. Now, the evidence shows that the creeks and drains which plaintiff claims were obstructed by the construction of the railroad were not completely closed thereby. Openings were left, which afterwards proved to be insufficient, but this was not known at the time the road was constructed. Whether or not they would prove to be so was uncertain, so that it could not be known at that time that the construction of the road in that way was necessarily injurious to the land of plaintiff. In this respect the case is different from the cases of *Railway v. Anderson*, 62 Ark. 360, 35 S. W. 791, and *Railway v. Morris*, 35 Ark. 622, and the statute

of limitations on plaintiff's right of action for injury to the crop growing on her land did not commence to run until the injury happened. *Railway v. Biggs*, 52 Ark. 240, 12 S. W. 331, 6 L. R. A. 804, 20 Am. St. Rep. 174; *Railway v. Yarbrough*, 56 Ark. 612, 20 S. W. 515.

The amendment to the complaint which the court permitted the plaintiff to make, and of which the defendant complains, made no material change in the cause of action, and was a matter within the discretion of the court.

Judgment affirmed.

DEUTSCH v. DUNHAM & NELSON.

(Supreme Court of Arkansas. Jan. 16, 1904.)
SALES — EXECUTORY CONTRACTS — TRANSFER OF TITLE — CONDITIONS PRECEDENT — REPLEVIN — WHO CAN MAINTAIN.

1. A contract for the sale of uncut timber, to be sawed by the sellers according to the purchaser's orders, piled at a certain siding in a good and workmanlike manner, to be inspected green, and paid for once a month—the prices being agreed upon and fixed according to the grade of lumber—was merely executory, and title under it did not pass until the inspection was made.

2. Where there was no delivery of lumber under an executory contract for its sale, and the sellers refused to abide by the buyer's inspection, the making of which was a condition precedent to the transfer of title, the buyer could not maintain replevin for the lumber, but his remedy, if any, was for damages for the breach of the contract.

Appeal from Circuit Court, Lee County; Hance N. Hutton, Judge.

Action by Albert Deutsch against Dunham & Nelson. From a judgment for defendants, plaintiff appeals. Affirmed.

McCulloch & McCulloch, for appellant. H. F. Roleson and N. W. Norton, for appellees.

BATTLE, J. Albert Deutsch commenced an action of replevin against Dunham & Nelson to recover the possession of certain oak and gum lumber described in his complaint. The defendants denied that he was the owner or entitled to the possession of the lumber. The issues were tried by a jury, and a verdict was rendered for the defendants, and the plaintiff appealed.

The oak lumber was claimed by appellant under a written contract between him and appellees dated March 27, 1899, which is as follows:

"This is to witness a contract this day entered into by and between Albert Deutsch, party of the first part, and J. P. Dunham and D. L. Nelson, parties of the second part, in consideration of six hundred dollars in cash paid to them by said A. Deutsch, the receipt of which is evidenced by a note for like amount, secured by a mortgage on the mill bought by said Dunham & Nelson and known as the Nash Mill, and other consid-

¶ 2. See *Sales*, vol. 42, Cent. Dig. § 1140.

erations hereinafter named, do sell to said A. Deutsch all the output and cut of red oak, white oak and ash lumber sawed by their said mill on the Choctaw & Memphis Railroad in St. Francis county, Arkansas, and in case of change of ownership of the mill, this contract shall remain binding on the purchaser. The said lumber to be sawed by said Dunham & Nelson according to the orders of said A. Deutsch, to be piled at the siding of the Choctaw & Memphis railroad in a good and workmanlike manner and properly crossed, using proper foundations and dry piling strips, giving plenty of ventilation and loaded on cars according to the wishes of said A. Deutsch whenever desired by him. Following are the prices agreed on between the parties of the first and second parts, to wit: [Here follows list of prices for different kind and grades of lumber.] The plain white oak and ash to be sawed as much as possible $2\frac{1}{2}$ inches and over thick as possible without disadvantage and it shall be optional with party of the second part whether the culls shall be included or not, the lumber to be inspected green and paid for once a month less the usual two per cent. for cash."

The prices agreed upon in the written contract were to be paid for 16 different kinds and grades of lumber. The \$600 was loaned by appellant to appellees to purchase the mill mentioned in the contract, and has been returned to him.

Evidence tending to prove, substantially, the following facts, was adduced: Two men were sent by appellant, at different times, to appellees' mill to examine lumber sawed by them. George Lorraine was first sent to examine gum lumber. The lumber was not piled. He estimated the amount, and refused to include in his estimate certain culls. Appellees objected, and refused to accept his inspection, and declined to deliver the lumber to appellant. Albert Lorraine was the other man. The lumber examined by him was not in piles, but in stocks. He estimated the quality of lumber sawed. He says that there was no way to determine from his estimate the value of the lumber. Appellees objected to his examination of the lumber, and refused to accept it and to deliver the lumber to appellant, but sold it to other persons. The parties failed to agree upon inspection, and no satisfactory inspection was made. Appellant offered to send other inspectors, but all his offers were declined.

Appellant agreed that appellees might sell the gum lumber to other persons, and they did so.

Appellant's contention is stated in his brief as follows: "That as soon as the lumber was sawed and delivered at the place of delivery stipulated in the contract, and appellant had offered to inspect and pay for same, the sale

was complete, and the contract was no longer executory, but executed, and that the title had passed to appellant, so that he could sue for possession." Is this contention correct in this case?

The contract upon which appellant bases his claim to the lumber in controversy was executory. At the time it was entered into, the lumber was not in existence. It was thereafter to be sawed by appellees according to the orders of appellant, and to be well piled at the siding of the Choctaw & Memphis Railroad in a good and workmanlike manner. The prices to be paid were agreed upon and fixed according to grade of lumber. It was "to be inspected green and paid for once a month, less the usual two per cent. for cash."

The contract being executory, it is clear that appellant could not be compelled to accept the lumber until he had an opportunity to inspect it in order to ascertain whether it was such as appellees stipulated to saw. 2 Mechem on Sales, §§ 1210, 1211, 1375, and cases cited. It is equally clear that the inspection was necessary in this case to ascertain the grades of the lumber, in order to determine the amount to be paid according to the stipulated prices. Both parties were interested in, and protected by, the stipulation that an inspection should be made. Hence it was required, and, on account of the purposes for which it was evidently to be made, became a condition to be performed before the title to the lumber vested in appellant, and a complete sale to him was made. For it is not reasonable to suppose that the appellant intended to bind himself to receive and pay for all the lumber that appellees might manufacture. It was stipulated in the contract that the lumber he agreed to purchase should be sawed according to his orders. And it is not reasonable to presume that appellees intended to deliver the lumber before it was graded according to the prices agreed upon, and the amount to be paid therefor should be ascertained and fixed, and thereby subject themselves to the risk of loss, disagreements, and litigation that might follow.

There was no delivery of the lumber to appellant, actual or constructive. The transfer of the title to the property depended upon the intention of the parties. There was evidence adduced tending to prove that the title to the lumber should vest in appellant, and that it was not appropriated to the contract. Appellees refused to abide or accept the inspection of appellant's employees. Under all these circumstances, appellant was not entitled to maintain his action of replevin. His remedy, if any, was an action on the breach of contract for damages.

Affirmed.

SULEK et al. v. McWILLIAMS et al.

(Supreme Court of Arkansas. Dec. 19, 1903.)

MORTGAGES—FORECLOSURE — DECREE — TIME OF OBJECTIONS—INTERVENTION—APPEAL.

1. The decree of a chancellor will not be reversed for insufficiency of the evidence unless there is a clear preponderance of the evidence against it.

2. An offer by mortgagors to contest a decree of foreclosure by a supplemental answer and cross-complaint after nothing remained by way of completing execution of the decree save to have the sale confirmed, was too late.

3. After nothing remained to complete the execution of a decree foreclosing a mortgage except to confirm the sale, the attorneys for the mortgagor, who were not parties to the proceedings, filed a complaint amounting to a request to be allowed to intervene, stating that they had bought one-half of the lands prior to the institution of the proceedings, and that the mortgagor had sold his interest to a stranger, and asking that the stranger be made a party, and the notes and mortgage canceled. *Held* that, as they were not parties, and would not be concluded by the decree, and as the facts existed and were known to them before the suit, a demurrer was properly sustained.

Appeal from Prairie Chancery Court: Jno. M. Elliott, Chancellor.

Bill by John McWilliams and others against Anton Sulek and others. From a decree for plaintiffs, defendants appeal. Affirmed.

This is an appeal from a decree in the Prairie chancery court foreclosing a mortgage given by Anton Sulek and his wife, Anna Sulek, to Geo. C. Lewis, on the 16th of January, 1899, upon lands therein described, to wit, the west half of section 29, and the east half of section 30, all in township 1 south, range 5 west, in Prairie county, Arkansas, which mortgage was made to secure to send Lewis the payment of six notes for \$800 each, and interest thereon, in the aggregate \$4,800; and which said mortgage and notes had been transferred and assigned by the said Geo. C. Lewis on the 19th of January, 1899, to the appellee Jno. McWilliams for the purpose of securing the payment of the sum of \$3,000, which said Lewis owed to the said McWilliams. The said notes and mortgage were delivered by the said Lewis to the said appellee McWilliams. After stating these facts substantially in his complaint, and that said debt of \$3,000 and interest remained unpaid, the appellee McWilliams prayed for a decree of foreclosure against Anton Sulek and wife, Anna, and for judgment against Geo. C. Lewis for \$3,000 and interest, and for the sale of the lands if judgment should not be paid in a certain time. Geo. C. Lewis was made a plaintiff. The defendants Anton and Anna Sulek answered separately, admitting the execution of the notes for \$4,800 as alleged, and the mortgage to secure their payment, but alleged that the notes were given to Lewis to secure the payment of a usurious claim. He states in his answer: That in the year 1896 they owed the Farmers' Savings Building & Loan

Association the sum of \$——, and that said association had obtained a decree against their land, and had advertised the land for sale to satisfy the same. That at the same time there was another mortgage against the land for the sum of \$1,050 to M. F. Lentz. That, desiring to pay off these claims, and having no money to pay the same, they applied to Geo. C. Lewis for a loan of money to pay said judgment and mortgage, and that Lewis agreed to let them have the money, provided they would execute a mortgage on the same property to secure him. That they signed and executed the mortgage to secure him. That, instead of drawing up the notes and mortgage for the sum of \$4,212.60, the sum of said decree and mortgage, they were made out for the sum of \$4,800, so that Lewis might receive more than 10 per cent. on the money so advanced to or for the said defendants as aforesaid, and that said sum of \$4,800 was to draw interest at the rate of 10 per cent. per annum. George C. Lewis answered, and admitted each allegation of the complaint as true, and prayed to be made a party plaintiff against defendants Sulek and wife; adopts the complaint of McWilliams and makes it part of his complaint against Sulek and wife; and states that the consideration for which said notes and mortgage were given was the amount of the Lentz mortgage for \$1,612.52, which he had bought and paid for, and which had been assigned to him, and the sum of \$3,162.60, the amount of a decree against the Sulek lands, which he controlled, and under which the lands had been sold, and purchased by the Farmers' Saving & Building Association, which sale had not been confirmed; that at the instance of Sulek he bought the Lentz mortgage for \$1,050, through Sulek, which amounted on the 5th of September, 1898, to \$1,864.19, and that there was due on the association's debt \$3,429.77, and due him \$25 fee for procuring divorce for Sulek's daughter—all of which amounted to \$5,318.96; that he bought the Lentz mortgage at a discount, paying therefor \$1,050, and as a matter of favor, merely, to Sulek, allowed Sulek one-half the discount, or \$407.09, when they settled on the amount for which Sulek gave the mortgage to him. Sulek, in answer to Lewis, says that Lewis was to lend him the money to buy the mortgage of Lentz, and that he bought for himself at \$1,050, and that Lewis charged him the \$407.09 in addition to 10 per cent. interest on the amount in the mortgage. The evidence in the case was conflicting as to whether the money advanced by the plaintiff Lewis was a loan to Sulek, or whether Lewis bought the Lentz mortgage, through Sulek, on his own account. There was some evidence leading to support the contention of each as to this, which was an important and material question in the case. The chancellor decided in favor of the plaintiffs, and we cannot say that the reasonably clear preponderance of the testimony is

against that finding. We think it well supported by the evidence. He found for plaintiffs, and ordered a sale of the lands in controversy, and they were sold accordingly, and purchased by the plaintiff McWilliams. After the sale, and before its confirmation, the defendants Sulek and wife, by leave of the court, filed in court a writing, which they called supplemental answer and cross-complaint, which seems rather a proposition to further continue the controversy already determined. At the same time McClintock and Lankford, who, as attorneys, had conducted the defense in the cause for Sulek and wife, also asked leave and were allowed to file a writing alleging that they had bought one-half of the lands in controversy some time prior to the institution of this suit, and that one Reinch had deceived Sulek, and had bought his interest in the lands, and received a deed from him and wife for the same, and asking that Reinch be made a party and required to answer, and that the deed to him be set aside, and that the decree in the case be set aside and the notes and mortgage to Lewis be canceled and held for naught. This they call a supplemental complaint, but it seems to be a request to be allowed to intervene in the case after it was decided. A demurrer was sustained to this offer of Sulek and wife, and also to that of McClintock and Lankford, and on motion their papers were stricken from the files of the court, to which they excepted. Sulek and wife having excepted, also, to the main decree in the case, it is brought up here for review.

McClintock & Lankford and Bradshaw & Helm, for appellants. J. W. & M. House, for appellees.

HUGHES, J. We are of the opinion that the evidence in the case sufficiently supports the decree of the chancellor, and that there is not a reasonably clear preponderance of the evidence against the decree, without which this court will not reverse it. The offer of Sulek and wife to contest the decree after its rendition was too late. The decree had been partly executed, and it only remained to have the sale made in accordance with it confirmed. The offer of McClintock and Lankford to be allowed to intervene was made after the decree had been executed, and the facts they relied on were in existence and known to them before the suit was brought. They were not parties to the suit, and, if they have rights in the subject-matter of it, they are not concluded by the decree. Sulek and wife had sold all the interest they had, if any, in the lands involved, to Reinch, and had no longer any interest in the case. The demurrer in this behalf was properly sustained; also the motion to strike.

Finding no reversible errors in the case, the decree of the chancellor is in all things affirmed.

KIRKLAND et al. v. STATE.

(Supreme Court of Arkansas. Jan. 30, 1904.)

INTOXICATING LIQUOR—ILLEGAL SALES—SUMMARY CONDEMNATION—NATURE OF PROCEEDINGS—TRIAL BY JURY.

1. Act Feb. 13, 1899 (Acts 1899, p. 11), entitled "An act to suppress the illegal sale of liquor and to destroy the same when found in prohibited districts," and which makes it the duty of the chancellor, circuit judge, justices of the peace, mayors, and police judges, on information, personal knowledge, or reasonable grounds of belief that liquor is kept in a prohibited district, to be sold contrary to law, to issue a warrant to a peace officer, directing him to search for the liquors, and to publicly destroy the same, "provided that any person on whose premises such liquor may be found shall be entitled to his day in court before said property shall be destroyed," practically makes the keeping of liquors in a prohibited district a public nuisance, to be abated by summary process, and does not require a jury trial in condemnation proceedings under the act.

2. The constitutional provision that the right of trial by jury shall remain inviolate does not prevent the Legislature from dispensing with trial by jury, in a statute providing for summary proceedings to abate a public nuisance, such as Acts Feb. 13, 1899 (Acts 1899, p. 11), providing for the condemnation and destruction of liquor illegally kept for sale.

3. Nor does the constitutional provision that no person shall be deprived of life, liberty, or property without due process of law have that effect.

4. Acts Feb. 13, 1899 (Acts 1899, p. 11), providing for the condemnation and summary destruction of liquor illegally kept for sale, prescribes a civil proceeding, so that a mere preponderance of evidence is sufficient to sustain it.

Appeal from Circuit Court, Jackson County; Frederick D. Fulkerson, Judge.

Proceedings by the state against C. C. Kirkland and another for the condemnation of liquor illegally kept for sale. There was judgment of condemnation, and defendants appeal. Affirmed.

J. W. & J. M. Stayton, Stuchey & Stuchey, Gustave Jones, and Jos. W. Phillips, for appellants. Geo. W. Murphy, Atty. Gen., W. V. Thompkins, G. A. Huthouse, and S. D. Campbell, Pros. Atty., for appellee.

BATTLE, J. A proceeding was instituted under an act entitled "An act to suppress the illegal sale of liquor and to destroy the same when found in prohibited districts," approved February 13, 1899 (Acts 1899, p. 11), section 1 of which, so far as it is necessary to set it out in this opinion, is as follows: "It is hereby made and declared to be the duty of the chancellors, circuit judges, justices of the peace, mayors and police judges, on information given or on their own knowledge, or when they have reasonable grounds to believe that alcohol, spirituous, ardent, vinous, malt or fermented liquors, or any compound or preparation thereof commonly called tonics, bitters or medicated liquors of any kind, are kept in any prohibited district to be sold contrary to law, or have been shipped into any prohibited district to be sold contrary to law, that they issue a warrant, directed to some peace officer, directing in such war-

rant a search for such intoxicating liquors, specifying in such warrant the place to be searched, and directing such officer on finding any such liquors in any prohibited district to publicly destroy the same, together with the vessels, bottles, barrels, jugs or kegs containing such liquors: * * * provided, that any persons on whose premises or in whose custody any such liquor may be found under warrant of this act, shall be entitled to his day in court before said property shall be destroyed."

The proceeding was commenced as follows: "On the 22d of March, 1901, J. E. Wilmans made an affidavit before the clerk of the Jackson circuit court that certain liquors were then kept in a building—No. 500 East First street—in the city of Newport, to be sold contrary to law, and the building was then used and controlled by C. C. Kirkland and Ol Kirkland, and was in a prohibited district, and asked that the liquors be seized and destroyed according to law.

On the 23d of March, 1901, the prosecuting attorney filed an information based upon this affidavit, and prayed for a warrant commanding the seizure of the liquors, and for their condemnation.

A warrant for the seizure of the liquors, and a summons commanding the Kirklands to appear and show cause why the same should not be publicly destroyed, were issued. The warrant was executed.

On the 12th of July, 1901, at the term of the Jackson circuit court next ensuing, C. C. and Ol Kirkland filed their answer, denying that the liquor was kept in the district to be illegally sold, and alleging that it was the property of the Kirkland Liquor Company, a firm composed of C. C. Kirkland, M. E. Kirkland, and H. O. Snyder, and that D. O. Kirkland was their manager.

"On the same day the Kirkland Liquor Company filed a claim for the liquor, in which they denied that it was kept in the prohibited district for illegal purposes, and alleged that they had been engaged in the retail liquor business in Newport during the year 1900, and, on failure to procure license, they transferred their business to Bald Knob, in White county, Arkansas, where they were licensed retail liquor dealers; that just before their removal the business portion of Bald Knob was destroyed by fire, and they were unable to procure a place to store their stock of liquor, but only such as was needed for immediate use, and they kept a part of it stored in the room formerly occupied by them as a saloon, and, having had the premises leased for a term of years, they used the room (No. 500) as a warehouse until they could store it at Bald Knob."

"On the 15th of July the state filed an amendment to its complaint, in which it alleged at the time of the seizure of the liquor in controversy, and prior and subsequent thereto, liquor was illegally sold in and on premises No. 504 East First street, and said

illegal business was conducted in the name of R. T. Simmons, as to the general public, under a license issued by the United States to J. O. Jameson & Co.; that premises No. 504 was a part of the same building in which was also No. 500, and was connected therewith, and that the whole of such premises was, at the time of the seizure under the control of D. O. Kirkland, the manager of claimants; that the liquor in No. 500 was used in connection with the business in No. 504, and in collusion with Simmons, and with the knowledge, consent, connivance, and procurement of Kirkland and claimants—and prayed as before."

Appellants and D. O. Kirkland answered, and denied all the allegations in the amendment.

A jury was impaneled to try the issues of fact in the case. The court and jury heard the evidence adduced by both parties. At the close of it the court ordered the jury to return a verdict in favor of the state, as follows: "We, the jury, find that the liquors seized under the said warrant, and in controversy in this case, were kept in a prohibited district, to be sold contrary to law, and find for the plaintiff;" and they did so.

Thereupon the court rendered judgment in accordance therewith, and ordered the sheriff to publicly destroy the liquors, and the claimants appealed.

Appellants contend that issues in proceedings under the act of February 13, 1899, must be tried by a jury, and that the rule in criminal cases must be applied, and it must be proved beyond a reasonable doubt that the liquors are or were kept in or shipped into a prohibited district to be sold contrary to law, and that by the action of the court they were deprived of both these rights. Were they entitled to a jury?

The act of February 13, 1899, in every respect, treats, and virtually and in effect declares, the keeping and shipping intoxicating liquors in and into a prohibited district, to be sold contrary to law, to be a public nuisance.

It does not provide that a regular action or suit shall be instituted for the enforcement of its object. No complaint or writing of any kind need be filed, according to its terms. The warrant may be issued upon knowledge or reasonable belief, and by the judges of many courts of different jurisdiction and procedure. The sittings of three of them—justices of the peace, mayors, and police judges—are frequent and at no stated times fixed by the statutes. One class of them—chancellors—are judges of courts of equity, in which issues of fact in proceedings to abate a nuisance, and in controversies of an equitable nature, can be tried by the chancellor without a jury; indicating thereby that juries are not required, for why should they not be required in one case, and made necessary in all others? Indeed, the act does not, unless it be inferentially, provide for a trial

in any court. Without expressly vesting jurisdiction in any, it authorizes chancellors, circuit judges, justices of the peace, mayors, and police judges to issue the warrant. In fact, the whole act indicates that the Legislature intended that the nuisance should be speedily abated by summary process. Section 3 of the act strengthens this conclusion, and is as follows: "That if any suit shall be brought against any officer or his bondsmen, or any other person, to recover for any liquors, vessels, barrels, bottles, jugs or kegs destroyed under the provisions of this act, it shall be a complete defense to such suit for such officer, bondsman or other person to show to the satisfaction of the court or jury that such liquors so destroyed were being sold contrary to law, or were kept to be sold contrary to law, or had been shipped into any prohibited district to be sold contrary to law, or that any portion of the liquors so destroyed had been a part of any liquor so sold contrary to law, or kept to be sold contrary to law, and upon such showing being made, such officer, bondsman or other person shall not be liable for the liquor, vessels, barrels, bottles, jugs or kegs so destroyed."

The proceedings prescribed by the act are a warrant, directed to some peace officer, directing a search for the liquors, specifying the place to be searched, "and directing such officer on finding liquors kept for sale in any prohibited district to publicly destroy the same, together with the vessels, bottles, barrels, jugs or kegs containing such liquors"; the seizure of the liquors; and return of the warrant. In addition to this, it further provides "that any person on whose premises or in whose custody any such liquor may be found under warrant of this act, shall be entitled to his day in court before said property shall be destroyed." In *Ferguson v. Josey*, 70 Ark. 94, 98, 66 S. W. 345, 346, the court, in construing this proviso, said: "This clearly means that the owner of such liquor shall be entitled to a fair and legal trial, with all the usual incidents thereto, for the purpose of ascertaining and determining whether his property has been forfeited, before it shall be destroyed; that he or his agent in legal custody shall have notice of the charge of the guilty purpose upon which his property is declared to be unlawfully held, a time and opportunity to prepare his defense, an opportunity to meet the witnesses against him face to face, and the conflict of the legal presumption of innocence." The latter clause of the sentence quoted enumerates usual incidents of a fair and legal trial. A jury is not mentioned, and it is not necessary to constitute a fair and legal trial. In no case is a trial by jury expressly or impliedly required, or necessary to a full and complete enforcement of the act.

But appellants contend that a trial by jury is a right guaranteed by the Constitution, and that it was not within the power of the Legislature to deprive them of it in this case. It is true that the Constitution provides that

"the right of trial by jury shall remain inviolate," and that no person shall "be deprived of life, liberty or property, without due process of law." But it is well settled that it is only to cases at common law in which the issues of fact were triable by jury, and perhaps such as are of similar or analogous nature, that the guaranty relied upon by the appellants extends. A jury trial is not necessary to constitute due process of law in every case. *Govan v. Jackson*, 32 Ark. 553; *Williams v. Citizens*, 40 Ark. 290.

Parties in the following cases and proceedings are not entitled to a trial by jury: Proceedings for contempt (*Neel v. State*, 9 Ark. 259, 50 Am. Dec. 209); contested elections (*Govan v. Jackson*, 32 Ark. 553); actions for the possession of an office under the Code (*Wheat v. Smith*, 50 Ark. 266, 7 S. W. 161); exceptions to an account of a guardian in probate court (*Crow v. Reed*, 38 Ark. 482); proceedings to disbar an attorney (*Ex parte Wall*, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552); proceedings to condemn land for right of way for railroads under the Constitution of 1836, which did not provide for trial by jury in such cases (*Cairo & Fulton Railroad Co. v. Trout*, 32 Ark. 17); suits in equity to abate a public nuisance (*Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; *Ellenbecker v. District*, 134 U. S. 31, 10 Sup. Ct. 424, 33 L. Ed. 801; *Littleton v. Fritz*, 65 Iowa, 488, 22 N. W. 641, 54 Am. Rep. 19); other suits of an equitable nature (*Hinkle v. Hinkle*, 55 Ark. 583, 18 S. W. 1049); and other cases.

Vagrants and drunkards "may be lawfully detained and deprived of liberty without jury. Such has been a lawful procedure in cases time out of mind under the common law." Brannon on the Fourteenth Amendment, p. 309. Taxes can be imposed, and property may be seized and sold for the purpose of collecting it, without suit, action, or jury trial. Cooley on Constitutional Limitations (6th Ed.) p. 587. "A municipal corporation may summarily, without suit or warrant, in some cases, if not all, remove a public nuisance, without jury trial or legal proceeding other than the order of its council." *Gaines v. Waters*, 64 Ark. 609, 44 S. W. 353; *Waters v. Townsend*, 65 Ark. 613, 47 S. W. 1054.

Jury trials are not necessary in summary proceedings, unless the statute requires it. 4 Bl. Com. 280; 24 Am. & Eng. Ency. of Law (1st Ed.) 498; *Chambers v. Stringer*, 62 Ala. 596; *Francis v. Weaver*, 76 Md. 457, 25 Atl. 413. In *Govan v. Jackson*, 32 Ark. 553, it was held that "it is competent for the Legislature to dispense with a jury in the case of a contested election, and a provision for the trial of such cases in a summary way has that effect."

We therefore conclude that it was within the power of the Legislature to dispense with a jury trial in the summary abatements of public nuisances, and it has done so in this case.

Appellants contend that the proceedings

prescribed by the act of February 13, 1899, are of a criminal nature, and that the allegation that the liquors in controversy were kept in a prohibited district, to be sold contrary to law, must be proved beyond a reasonable doubt. Are they criminal proceedings?

A similar question was discussed and decided in *State v. Barrels of Liquor*, 47 N. H. 374. In that case the court said: "This is a proceeding in rem for the condemnation of the liquor and vessels. No penalty or fine is to be imposed upon the person who keeps the liquor with intent to sell, under this proceeding. All that is done, or that can be done, under this complaint, is to settle the question whether the liquor, vessels, etc., shall be condemned as forfeited to the county, or shall be delivered to the claimants, or restored to the place from whence they were taken. It is a proceeding that cannot be commenced by indictment, and the complaint which is made in the first instance is in the nature of a libel, * * * and not in the nature of a criminal complaint against any person, but is simply a proceeding in rem against the liquor, etc., for their condemnation as forfeited property. * * *

"This class of cases are to be considered and tried as civil cases are tried. The question involved is only as to the title to property, like other questions in civil causes. It is only when some crime or misdemeanor is charged upon an individual that all reasonable doubt of the guilt of the accused must be removed. But here no one is accused of any crime. In fact, it is not a proceeding against any person. * * * All issues will be decided upon the preponderance of evidence."

Chief Justice Marshall, in "a trial of an information to declare the forfeiture of a ship for having exported arms and ammunition in contravention of law," said: "We are unanimously of the opinion that it is a civil cause. It is a process in the nature of a libel in rem. It does not, in any degree, touch the person of the offender." *United States v. La Vengeance*, 3 Dall. 297, 1 L. Ed. 610.

"In a case declaring the forfeiture of gunpowder for having been kept in violation of law," Chief Justice Shaw, speaking for the court, said: "The court are of opinion that a libel sued as a process in rem for a forfeiture is in the nature of a civil action, and that either party may file exceptions in matter of law." *Barnacoat v. Gunpowder*, 1 Metc. (Mass.) 230.

Mr. Justice Story said: "It is not true that informations in rem are criminal proceedings. On the contrary, it has been solemnly adjudged that they are civil proceedings." *Anonymous Case*, 1 Gall. 23, Fed. Cas. No. 444.

Mr. Waples, in his work on Proceedings in Rem, says: "Admiralty causes against vessels or goods for forfeiture, revenue cases, and all species of proceedings in rem, against things guilty, hostile, or indebted, are well settled to be civil, and not in any sense criminal, actions." Section 25, and cases cited.

So we think that the proceeding prescribed by the act of February 13, 1899, is civil, and that a preponderance of the evidence is sufficient to sustain it.

The evidence in this case is sufficient to sustain the finding of the court and the verdict of the jury.

Judgment affirmed.

BREWER v. STATE.

(Supreme Court of Arkansas. Jan. 16, 1904.)

HOMICIDE—VENUE—CHANGE—SUFFICIENCY OF TRANSCRIPT—ARRAIGNMENT AND PLEA—NECESSITY—JURY—COMPETENCY—CURE OF ERROR—EVIDENCE—CONFESSIONS—JUSTIFICATION—KILLING OF INNOCENT PERSON.

1. A change of venue was had from the county where the crime was committed to another county. The record showed an order of the transferring court, dated August 25th, for the change, directing the clerk to make out and transmit to the court of trial a complete transcript. The certificate of the clerk of the transferring court showed that the transcript was made and certified August 28th. The record of the trial court showed the docketing and numbering of the case, and the trial on September 4th. Both parties appeared and announced ready for trial, and no objection was made till appeal that the transcript was not filed with the trial court on time. *Held*, that it sufficiently appeared from the record and circumstances that the transcript was filed in due time, although there was no file mark in the record showing the date of filing the same.

2. That defendant was put on trial without a formal arraignment and plea of not guilty is no ground for reversing a conviction of homicide, in the absence of any suggestion of prejudice.

3. In homicide, any error in holding a talesman, who was afterwards peremptorily challenged by defendant, competent, was cured when the court accorded defendant an additional peremptory challenge.

4. In homicide there was no error in permitting the prosecuting attorney to peremptorily challenge a juror after he had been accepted, when the juror informed the court that he had conscientious scruples against capital punishment.

5. Where defendant had made a confession to the effect that on the day deceased was killed two masked men had compelled him to pilot them to deceased's house, and told him to leave, threatening to kill him, and officers who arrested defendant told him that it would help him if he told who the men were, a further confession, made by defendant under promise of protection, but not asked for by the officers, that he (defendant) killed deceased under orders of the masked men, was voluntary and admissible.

6. The killing of an innocent person is not justified by the unlawful compulsion of third parties rendering such act necessary to save one's own life.

7. While the jury must consider all parts of a confession, they need not believe such portions thereof as seem to them unreasonable.

8. A compulsion that can reduce or mitigate the crime of murder must be more than a fear of future harm. It must appear that there was no alternative for defendant except to kill deceased or lose his own life.

9. Where the court instructs the jury that, to constitute murder, the killing must have been done with malice aforethought and premeditation, it need not repeat those elements of the crime in each paragraph of the charge.

Appeal from Circuit Court, Greene County; Allen N. Hughes, Judge.

H. N. Brewer was convicted of murder in the first degree, and appeals. Affirmed.

The defendant, H. N. Brewer, was indicted by the grand jury of the Eastern District of Clay county, for the murder of Bud Dortch. Dortch was a bachelor, who lived in a cabin on a small farm in that county. On the night of the 19th of last August, J. L. Dortch, a cousin, went over to spend the night with him. Dortch was not at home when he arrived, but, expecting that he would be there some time during the night, the cousin remained there the entire night. As Dortch was still absent, the cousin, knowing that he seldom left home for a whole night without notifying some of the family, became alarmed, and notified others of the family and the neighbors. Search was made, and his body was found about 150 yards from the house, lying face upwards, with several shot wounds in the face and head. Gun wads that were found near the body and the number of wounds indicated plainly that Dortch had been killed by a charge from a shotgun fired by some one lying in wait behind a fence near a pathway along which Dortch was walking at the time he was killed. Tracks were discovered where the assassin had crouched waiting for his victim. These tracks led from the place where the shot had been fired to the body, and then returned, and led off into the woods, where the nature of the ground prevented them from being traced. It was known to members of his family and to some others that Dortch was in the habit of keeping in a pocketbook which he carried in his pocket about \$50. He kept the pocketbook fastened by a string tied around it. Neither the pocketbook nor money was on his person, but a string like the one he usually tied it with was found near. One of his pockets was partly pulled outward, as if something had been taken from it. There was no clue to identify the one who killed him, except the tracks, and a proposition was made by some one to send for bloodhounds to follow them. Parties went to Rector, the nearest town, to telephone to parties to bring bloodhounds. The hounds were not obtained, but the rumor that they would be placed on the trail to run down the murderer led to a confession by the defendant, and to his subsequent arrest and conviction. The defendant was a young married man, who lived some three or four miles away from where Bud Dortch was killed, and was one of those who knew that Dortch was in the habit of carrying money on his person. He had previously borne a good character, and no one suspected him of the crime. But a short time after the body of Dortch was found one Williams, an acquaintance of the defendant, Brewer, and who lived with the father-in-law of Brewer, went to the home of Brewer, and

told him about the discovery of the body of Bud Dortch, and stated that they were going to put bloodhounds on the trail of the party that killed him. Williams was with Brewer several hours, going with him over to a mill, and they talked a great deal about the death of Dortch. During this conversation Brewer told him that he would tell him something, but he must keep it a secret. He then said that on the day Dortch was killed two men armed with double-barrel hammerless shot-guns came up to him while he was walking around his field, and compelled him to show them the way to where Bud Dortch lived; that he obeyed, and led them through the woods to where Dortch lived, but that they failed to find Dortch. These men told him he said that there would be three men killed there in three days, and then ordered him to leave, telling him, if he ever mentioned it, he would be killed. He told Williams he was afraid for this to be told, as these men might kill him for it. When it became known that Brewer had made such a statement, an order was made for his arrest. The arrest was made by the coroner and the town marshal of Rector. After the arrest was made, these officers asked him about the parties that forced him to go to the home of Dortch. At first he denied knowing anything about them, or about such a circumstance. But on the question being repeated he stated that it was true. He repeated, in substance, to them the confession he had previously made to Williams; in addition thereto saying that as the men who had him in custody went along through the woods they frequently stopped to rub something on the bottom of their shoes. After he had repeated this confession they told him that he ought to tell who these parties were, and that, if he would do so, "it would help him out." After they had asked him several questions about the matter, he told them that he had something to tell them, and would do so if they would stay with him. They told him that they would do so, and he thereupon confessed that he shot Dortch, but stated that he was compelled to do so by parties who had him in custody. To quote the language of one of these witnesses, he said that "two masked men, armed with hammerless guns, caught him back of his field, and made him go with them over there to show them the way, and they made him go through the woods, and when they got over there one of them said, 'Yonder he comes now,' and they gave him a gun, and made him shoot Bud Dortch." He further stated in the confession that at the time he fired he was behind the fence, kneeling on one knee and foot, and that he aimed at the head, but did not see Dortch after he fell; that the men ordered him to leave at once, threatening to kill him if he ever told it. There was some other evidence showing that the defendant was out with a shotgun on the day Dortch was killed, and that on his return he had no game, but stated that he

had shot at a very large horned owl, but did not kill it. This is, in short, the material part of the evidence upon which the defendant was indicted, tried, and convicted of murder of the first degree. The case was tried in Greene county on a change of venue. The defendant appealed, and the other facts are stated in the opinion.

J. H. Hill, L. Hunter, and J. D. Block, for appellant. Geo. W. Murphy, Atty. Gen., for the State.

RIDDICK, J. (after stating the facts). This is an appeal from a judgment convicting the defendant of murder in the first degree and sentencing him to be hung. The crime was committed in Clay county, but the trial was had in Greene county on a change of venue. The first point made for a reversal of the judgment is based on the contention that the Greene circuit court had no jurisdiction, for the reason that the transcript of the record of the Clay circuit court for the Eastern District was never filed in the Greene circuit court. But the transcript of the record on file here from the Greene circuit court is complete, and shows a complete record of the proceedings in the case both in the Clay and Greene circuit courts. The certificate of the clerk of the Greene circuit court attached to this record shows that the transcript of the Clay circuit court which he has copied in the record is on file in his office. It is true that there is no file mark copied in the record showing the exact date upon which the transcript from the Clay circuit court was filed. But, while the indorsement of the clerk upon a transcript that it has been filed is evidence of that fact, yet the transcript may have been filed and no indorsement made, or the indorsement may have been made, and not copied in the record sent to this court. Whenever the transcript is duly deposited with the clerk in his office to be kept on file, it has been filed within the meaning of the law. 8 Ency. Plead. & Prac. 923. Now, the clerk should, we admit, have made this indorsement as a matter of evidence, and should have copied it into the transcript. But it does not follow because he did not do so that the transcript was not filed; on the contrary, we think the whole record, taken together, indicates that it was filed in due time. The record here shows that the order for a change of venue was made by the Clay circuit court on the 25th day of August, 1903, and the order, among other matters, directs that the clerk of that court "forthwith make out a full and complete transcript of all records," etc., "and immediately transmit the same, duly certified under seal of the court, to the clerk of the Greene circuit court." The certificate of the clerk of the Clay circuit court copied in the record here shows that this transcript was made and certified on the 28th day of August, 1903. The record of the trial in the Greene circuit court shows that the case had been placed on the

docket of that court for trial, and was numbered 189, and that the trial took place on September 4, 1903. The defendant was present in person, as well as represented by able counsel. Both parties announced ready for trial. The charge was stubbornly contested, and after the conviction a motion for new trial was filed, in which many grounds were alleged why the judgment should be set aside. But neither before nor after the trial was any objection made on account of the transcript not being filed in time. The first time such an objection is made is in the brief of counsel for appellant filed in this court. Now, the jurisdiction of the Greene circuit court depended mainly upon the order made by the Clay circuit court for the Eastern District ordering the venue changed to Greene county. It is beyond doubt that such order was made, and made in due form, on the application of the defendant. The jurisdiction was perfected by the filing of the transcript of the record in the Greene circuit court, though, as before stated, the exact date of the filing does not appear. But we think it is unreasonable to believe that this case would have been placed on the docket of the Greene circuit court for trial, or that both parties would have consented to trial, or that the court would have permitted a trial, had no transcript of the indictment and order for change of venue been in that court. When we consider the whole record, and the fact that no objection was made below, we feel convinced that the officers did their duty in this respect, and that the transcript was filed in due time. In the case of *Burris v. State*, 38 Ark. 221, the court calls attention to a defect of this kind, but it will be noticed that the judgment was not reversed on that account. For the reasons stated, the contention of appellant on this point must be overruled.

The second contention is that the judgment should be reversed because the defendant was put on his trial without a formal arraignment and plea of not guilty. There are several decisions that support that contention in the earlier Reports of this court, but those cases have been overturned by later decisions. The court said in a recent case that the record "shows that the appellant was represented by competent counsel, that he voluntarily announced himself ready for trial, and that the case was treated as at issue upon a plea of not guilty. The defendant was accorded every right that he could have availed himself of under the most formal record entry of his plea." The court thereupon held that there was no prejudice. This decision was, we think, clearly correct, and applies here. No suggestion of any prejudice having resulted from the failure to make a formal arraignment and plea, there is, under our statute, no ground for reversing the judgment on account of the lack of such formalities. *Hayden v. State*, 55 Ark. 342, 18 S. W. 239.

The next assignment of error relates to the qualification of certain talesmen summoned to serve on the jury. Several of them said that they had formed opinions from reading the account of the crime in a newspaper, but that they could and would disregard these opinions, and try the case on the evidence alone. We find nothing in the record here that would justify us in overturning the finding of the presiding judge that these men were competent to serve on the jury. It is true that the answers of one of them (S. J. Troxell) are not quite clear to us. In his answer to one of the questions propounded he stated that the opinion he had formed would have no effect on his verdict, but in other answers to other questions he seems to say that, if the evidence was conflicting and close, he would give some weight to the rumors that he had heard. We do not think that he meant this, but the examination was closed without giving him a chance to fully explain himself. But we need not discuss the question further for the reason that none of these talesmen served on the jury, and the only effect of holding either of them competent was to cause the defendant to use one of the peremptory challenges which the statute permits. But the record shows that before the jury was complete the presiding judge offered to allow the defendant one more peremptory challenge than the statute allows, in order, as he said, "to cure any possible error in passing on qualifications of jurors." This offer was made after the defendant had exhausted all his peremptory challenges, and was accepted by the defendant, who thereupon challenged another juror. So far as the record shows, this action of the court placed the defendant in the same position he would have been had talesman Troxell been excused for cause, and cured any possible error made by the court in holding that he was competent. It was just the same as if the court had said: "I have changed my opinion, and now hold that the challenge for cause made by the defendant should be sustained, and will for that reason allow an extra challenge."

Before the jury was complete, the court permitted the prosecuting attorney to peremptorily challenge J. P. Cathey after he had been examined and taken on the jury; but the reason for this was that the juror had informed the court that he had conscientious scruples against capital punishment. The action of the court was therefore not an arbitrary act, but based on reasons which justified it, and no error was committed. *Allen v. State*, 70 Ark. 337, 68 S. W. 28.

It is next insisted that the court erred in admitting the confession of the defendant made to the officers who arrested him. In the case of *Hardin v. State*, 66 Ark. 61, 48 S. W. 904, we said that: "When a prisoner is merely exhorted to tell the truth, or when he is only admonished that he had better tell the truth, and no hope is held out that the

punishment will in consequence be mitigated, any confession thereupon made will be admissible." Now, it must be remembered that at the time the defendant was arrested he had already made one confession to the effect that on the day that Dortch was killed two armed men wearing masks on their faces had compelled him to pilot them through the woods to where Dortch lived, and then had told him to leave, threatening to kill him if he ever told about it. This strange story led to his arrest, and when he was arrested the officers very naturally asked him who those men were. At first he hesitated to speak about the matter, but, on the question being repeated, he said that it was true that two men had forced him to take them to Dortch's place on the day he was killed. The officers then very truthfully told him that it would help him out if he would give the names of these men. He thereupon told them that if they would protect him he would tell them something, and on their telling him that they would do so he confessed that he shot Dortch, but said that he did it under orders from two masked men that had him in custody. The officers did not ask him who killed Dortch, but only who the men were that went with him over to where Dortch lived. He then told them that he would tell them something "if they would stay with him," and they promised to do so. This was not a promise that the punishment would be mitigated, but a promise that they would protect him against a mob or violence of that kind. The evidence was, we think, amply sufficient to support the finding that the confession was voluntary.

The only remaining questions relate to the instructions given by the court to the jury. The court refused to instruct the jury that, if the defendant shot Dortch under compulsion by third parties to save his own life, they should acquit, but, on the contrary, told them that, though one may lawfully kill an assailant if it be necessary to save his own life, he cannot lawfully slay an innocent third person, even to save his own life, but ought to die himself, rather than take the life of an innocent person. The question presented by the exception to this ruling has been discussed by text-writers more often than by the courts. But we feel very certain that unlawful compulsion of the kind set up as a defense in this case is not a sufficient justification for taking the life of an innocent person. *Sand. & H. Dig. § 1448*; *Arp v. State*, 97 Ala. 5, 12 South. 301, 19 L. R. A. 359, 38 Am. St. Rep. 137; *Reg. v. Tyler*, 8 Car. & P. 616; *Reg. v. Dudley*, 14 Q. B. Div. 273; 4 Blackstone, § 30. Whether, under some circumstances, compulsion of that kind might go to reduce the grade of the offense and in mitigation of the punishment, we need not stop to inquire, for, if we shall concede that this was so, the evidence here does not establish any such compulsion. The only evidence to prove compulsion was a

confession made by defendant. While all parts of the confession must be considered, yet the jury were not required to believe such portions of it as seemed to them unreasonable and improbable. And, though they found that Brewer killed Dortch, they no doubt rejected the improbable story that he did so under compulsion by armed men, who walked through the woods with masks on their faces, stopping occasionally to rub on the bottom of their shoes a red-looking liquid, which they kept in a bottle. This part of the confession was certainly uncorroborated, and was first concocted and told by Brewer to one of his friends under the belief that bloodhounds were about to be put on the trail. It was no doubt an effort on his part to put forth some plausible excuse that might shield him in the event he was run down and arrested. But if we take this confession as literally true, it does not show that defendant had no other option except to lose his own life or take that of Dortch. He said that two men armed with a shotgun and pistol captured him, and compelled him to pilot them to the Dortch place, and then gave him one of the shotguns, and ordered him to kill Dortch; but he does not show why, after getting possession of the gun, he did not turn upon them, and defend himself. The tracks where defendant lay in wait showed that only one man was there, and the circumstances indicated that besides Dortch there was present at the time he was killed only the man who fired the shot. A compulsion that could reduce or mitigate such a crime must have been more than a fear of future harm, it should appear that the danger of resisting such a force was immediate and impending. The confession does not locate the position of the masked men at the time the shot was fired, or show that there was no alternative for the defendant except to kill Dortch or lose his own life. For this reason we think that the presiding judge was fully justified in telling the jury that under these circumstances compulsion was no justification or excuse for the crime charged.

It is said that in this instruction the jury were not told that, to make out the offense of murder in the first degree, the killing must have been done with malice aforethought and premeditation; but that is of no moment, for the jury were in other instructions told that these elements were necessary to justify a conviction for that crime, and it was unnecessary to repeat it in each separate paragraph of the charge. Besides, the overwhelming and uncontroverted proof showed that Dortch was assassinated by some one who lay in ambush for him near a pathway along which he was accustomed to go to and from his field. The question in the trial below then was not so much whether the killing was done with malice aforethought, premeditation, and deliberation, for there was no room for dispute about that, but whether the defendant was the person who committed the deed.

On the whole case we find no prejudicial error, and are convinced that the judgment was right. It is therefore affirmed.

ST. LOUIS SOUTHWESTERN RY. CO. v. GRAYSON, Collector of Taxes.

(Supreme Court of Arkansas. Jan. 9, 1904.)

LEVEES—DISTRICT AND TERRITORIAL LIMIT—SPECIAL ACT—CONSTITUTIONAL LAW—DEMURRER.

1. Acts 1901, p. 27, establishing a drainage district for the purpose of maintaining a particular levee, and providing that it shall include the "track and roadbed" of a certain railroad, includes the right of way of such railroad.

2. Acts 1901, p. 27, establishing a drainage district for the purpose of maintaining a particular levee, is not invalid because the same result could have been accomplished by a general act.

3. Acts 1901, p. 27, establishing a drainage district for the purpose of maintaining a particular levee, does not suspend the general law on the subject contained in Sand. & H. Dig. §§ 1208-1232.

4. The presumption is that a general act was not intended to repeal a private special act, though the general act contains a clause repealing all acts inconsistent with it.

5. Act 1901, p. 27, establishing drainage district for the purpose of maintaining a particular levee, is not repealed by Acts 1903, p. 278, relating to the reclamation of lands by the construction, widening, altering, or deepening of any ditch, drain, or water course, since the former is a special, and the latter a general, act.

6. The fact that Acts 1901, p. 27, establishing a drainage district for the purpose of maintaining a particular levee, does not provide for the interested party to have a day in court, does not violate Const. U. S. Amend. 14, § 1, providing that no person shall be deprived of property without due process of law.

7. The truth of the allegation in a suit for injunction against the enforcement of taxes levied under Acts 1901, p. 27, establishing a drainage district for the purpose of maintaining a particular levee, that plaintiff's land will not be benefited by the improvement, is not admitted by demurrer.

Appeal from Greene Chancery Court; Edward D. Robertson, Chancellor.

Suit by the St. Louis Southwestern Railway Company against Addison Grayson, collector of taxes. From a decree for defendant, plaintiff appeals. Affirmed.

The General Assembly of the State of Arkansas, at its session held in 1901 (page 27 of the Acts of 1901), passed an act establishing a drainage and levee district. The first section is as follows: "Section 1. That all portions of the territory of Clay and Greene counties lying east of the St. Louis Southwestern Railway, including the track and roadbed of said railway, and west of the St. Francis river, and north of the southern boundary line of township eighteen, north, be established and constituted a drainage and levee district for the purpose of maintaining the levee now in existence in said territory." Section 11 reads as follows: "There shall be levied and collected, and the same is hereby levied, on all the lands sub-

¶ 4. See Statutes, vol. 44, Cent. Dig. §§ 226, 235.

ject to taxation in said drainage and levee district for the year 1901, five mills on each dollar of the assessed value of said lands for the said year for state and county purposes, which levy or tax shall be by the clerks of said counties of Clay and Greene, respectively, extended upon the tax books, for said year, in making out and preparing the same, and the same shall be collected by the collectors of said counties, respectively, at the time of collection of state and county taxes, and of said amount the sum of one mill, or so much thereof as shall be necessary, shall be expended in said levee, and the remainder shall be expended in collecting and maintaining said ditch, and said collectors shall settle with said boards as to the amount collected by them, respectively, and pay the same over to the treasurer of the board upon its order." Section 12 reads as follows: "If the amount assessed for the year 1901, under the above section, shall not be sufficient to complete and maintain said ditch and levee, said board shall have power to levy such amounts from year to year, as they may think proper, not to exceed five mills on the dollar of the assessed value of the land in said district, which shall be placed on the tax books, collected and accounted for, and paid over as is directed by the preceding section. Provided, the taxes of each year shall be levied and assessed and filed in the clerk's office of the counties of Clay and Greene, in time for the clerk to enter the same on the tax books for each year the same may be levied or assessed." Under the provisions of this act the clerk of Greene county extended against the right of way, roadbed, track, ties, and trestles in Greene county in 1901 a tax of 5 mills on the dollar of the assessed valuation of the same, north of township 18, aggregating about \$303. On the 4th day of April, 1902, the railway company filed a complaint in the Greene county chancery court against the appellee, Addison Grayson, and alleged that it was a railway company; that it owned and operated a railway line through Greene county; that its line of road had been duly assessed, and that state, county, school and road taxes had been duly extended against it, which sum it would pay; that the clerk had indorsed a warrant on the collector's books authorizing and directing him to collect state, county, school, road, ditch, and levee taxes; that the property was not liable for the levee and ditch taxes; that the act under which they were levied was unconstitutional and void, and that an attempt to enforce the same was in violation of article 14, § 1, of the Constitution of the United States, and an attempt to take property without due process of law; that neither the construction of the levees mentioned, nor the digging of the ditches and drains mentioned, nor the maintenance of either, would in any way benefit the plaintiff or its property (the roadbed, right of way, or tracks mentioned), either directly or

indirectly; that the levees provided for and mentioned did not come within four miles of any of its property or of its right of way; that the ditch or drain provided for in said act did not run within two miles of its roadbed or right of way and tracks; and that the tax levied was excessive—and prayed for an injunction enjoining the collector from collecting any part of the tax levied for ditch and levee purposes. The commissioners appointed to carry out the purpose of the act were made parties, and they, with the collector, filed an answer and cross-bill, in which they alleged that the tax assessed under the drainage act against all property within the territory in Greene county aggregated \$651, and that the plaintiff was liable for \$303 of that sum, and prayed for judgment for the same. After the answer and cross-bill were filed, by consent, a demurrer was filed to the complaint upon the ground that it did not state facts sufficient to entitle the appellant to the relief for which it prayed. Upon a hearing the court sustained the demurrer. Plaintiff elected to stand upon its complaint, and the same was by the court dismissed at appellant's costs, and judgment rendered in favor of the appellee for the sum of \$303.24, from which an appeal was taken.

Saml. H. West and J. C. Hawthorne, for appellant. R. E. L. Johnson, W. S. Luna, and Rose, Hemingway & Rose, for appellee.

HUGHES, J. (after stating the facts). The defendants contend that the act levying this tax (Acts 1901, p. 27) is not broad enough to be construed to include the right of way; that the words "including the track and roadbed of said railroad," as used in the first section of said act defining the boundaries of said district, do not include the real estate or right of way. We are of the opinion that the words the "roadbed and track," as used in the said first section, were intended by the Legislature to, and do, include the right of way. The statute of this state relating to the assessment and valuation of railroad property for taxation provides as follows:

"Sec. 6468. Such person, company or corporation shall also state the fair and actual aggregate value of the whole railroad, taking into consideration, in estimating and fixing such value, the entire right of way, as given by the charter of the company or statutes of the state; and also taking into consideration and estimating everything of any character whatever situated upon such right of way, and appurtenant to such railroad, which adds to the value of such railroad as an entire thing."

"Sec. 6471. Such railroad * * * shall be held to be real estate for the purposes of taxation and denominated 'railroad track' * * * and when advertised and sold for taxes, no other description will be necessary."

Sand. & H. Dig.

The statute having provided that railroad shall be assessed and taxed as a whole, and not having in this instance provided any other mode of assessment, we must conclude that the first section of the act under consideration was intended by the Legislature to include the right of way, and that its assessment was therefore proper.

The law treats a railroad and its appurtenances as one entire thing. *Applegate v. Ernst*, 3 Bush, 648, 96 Am. Dec. 272. A part of a railroad cannot be sold under execution. *Kansas City Ry. Co. v. Waterworks Imp. Dist.*, 68 Ark. 379, 59 S. W. 248.

The appellant contends that the act is invalid because the same result could have been accomplished by a general act. But whether a special act is necessary is a matter within the discretion of the Legislature. *Boyd v. Bryant*, 35 Ark. 78, 37 Am. Rep. 6; *Davis v. Gaines*, 48 Ark. 371, 3 S. W. 184; *State v. Sloan*, 66 Ark. 579, 53 S. W. 47, 74 Am. St. Rep. 108.

It is said that the act of 1901 suspends the general law, as contained in sections 1203-1232 of *Sandels & Hill's Digest*, in relation to drains and ditches. The act of 1901 was passed for the purpose of maintaining a levee and constructing a ditch. This act of 1901 does not exactly cover the same purpose of the former statute, and, we think, was not intended to, and does not, suspend the former in *Sandels & Hill's Digest*.

It is also contended that the act of 1901 has been repealed by the act of 1903 (Acts 1903, p. 278) relating to the reclamation of lands by the construction, strengthening, widening, altering or deepening of any ditch, drain, or water course. The act of 1901 is a special act, and the act of 1903 is a general act; and it is held that the presumption is that a general act was not intended to repeal a prior special act, even though the general act contains a clause repealing all acts inconsistent with it. *Chamberlain v. State*, 50 Ark. 137, 6 S. W. 524; *Endlich, Interpretation of Statutes*, § 223 et seq. There does not seem to be any intention in the act of 1903 that it shall contain all the law on the subject of the act. *State v. Kirk*, 53 Ark. 339, 13 S. W. 925; *Kountze v. Omaha (Neb.)* 88 N. W. 117.

Counsel for appellant say that "the act does not provide for an interested party to have a day in court." The act provides for the assessment to be made upon "the assessed value of said lands, for said year for state and county purposes." The assessment for state and county purposes is made by the board of railroad commissioners, and, according to *St. Louis Railroad Co. v. Worthen*, 52 Ark. 529, 13 S. W. 254, 7 L. R. A. 374, the railroad company had its day in court, and no other notice was necessary, and this though no appeal from the decision of the board is provided for. When the assessment is made by the Board of Railroad Commissioners, it is considered in the nature of a

judgment, which the railroad company is estopped to question. *Gossett v. Kent*, 19 Ark. 602; *Welty on Assessments*, § 20, note 3, and cases cited. The Legislature has full and complete power of legislation, except as prohibited by the Constitution of the state or the Constitution of the United States. In *Williams v. Eggleston*, 170 U. S. 304, 311, 18 Sup. Ct. 617, 619, 42 L. Ed. 1047, it is said: "Neither can it be doubted that, if the state Constitution does not prohibit, the Legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district, and what property shall be considered as benefited by a proposed improvement. And in so doing it is not compelled to give notice to the parties resident within the territory, or permit a hearing before itself, one of its committees, or any other tribunal, as to the question whether the property so included within the taxing district is in fact benefited." In *Spencer v. Merchant*, 125 U. S. 345, 8 Sup. Ct. 921, 31 L. Ed. 763, Mr. Justice Gray said, in affirming the judgment of the New York court, that "the Legislature may commit the ascertainment of the sum to be raised, and of the benefited district, to commissioners, but is not bound to do so, and may settle both questions for itself, and, when it does so, its action is necessarily conclusive and beyond review. No hearing would open the discretion of the Legislature, or be of any avail to review or change it. * * * The judicial department cannot prescribe to the legislative department limitations upon the exercise of its acknowledged powers." See, also, *Fallbrook Irrigation District v. Bradley*, 164 U. S. 176, 17 Sup. Ct. 56, 41 L. Ed. 369; *McGehee v. Mathis*, 21 Ark. 40; *Carson v. St. Francis Levee District*, 59 Ark. 528, 27 S. W. 590; *Parsons v. District of Columbia*, 170 U. S. 55, 18 Sup. Ct. 521, 42 L. Ed. 943. Judge Cooley, in his work on *Taxation*, says: "The whole subject of taxing districts belongs to the Legislature. So much is unquestionable. The authority may be exercised directly, or, in case of local taxes, it may be left to local boards or bodies. * * * If the Legislature has fixed the district, and levied the tax for the reason that, in the opinion of the legislative body, such district is plenteously benefited, its action must, in general, be deemed conclusive." Again, at page 53, he says: "The clause recited from *Magna Charta* does not imply the necessity for judicial action in every case in which the property of the citizen may be taken for public use. On the contrary, a legislative act for that purpose, when clearly within the limits of the legislative authority, is of itself the law of the land; and an act providing for the levying of taxes, and the means of their enforcement, is, as we have seen, within the unquestioned and unquestionable power of the Legislature. It is therefore the law of the land, not merely in so far as it lays down a general rule to be observed, but in

all the proceedings and all the process which it points out or provides for in order to give the rule full operation." Cooley on Taxation, p. 53.

The complaint states that the lands of the plaintiff will not be benefited by the improvement, and the contention seems to be that the demurrer admits this to be a fact. But this is not admitted by the demurrer. "Nor does a demurrer admit allegations which are legally impossible or contrary to legislative enactment, or which the law does not allow to be proved." 6 Enc. of Pleading & Practice, p. 338.

The decree of the chancellor is in all things affirmed.

CABLE v. JONES.

(Supreme Court of Missouri, Division No. 1.
Feb. 10, 1904.)

SPECIFIC PERFORMANCE — ALTERATION OF CONTRACT — EFFECT — EVIDENCE — SUFFICIENCY.

1. A person who has signed a contract to convey land cannot escape liability thereon by a subsequent alteration thereof made by his agent, without consulting him, and with the intent to defraud the purchaser.

2. Where, in a suit to enforce a contract whereby defendant agreed to convey land to plaintiff, it appeared that the contract was certain and capable of performance, and was signed by defendant, and that subsequently defendant's agent, without consultation with him, altered the terms thereof, that the purchaser declined to accept the contract as altered, but insisted on defendant performing the contract as originally signed, and that the purchaser tendered the purchase money and demanded a deed, the chancellor was warranted in decreeing specific performance.

Appeal from Circuit Court, Jackson County; J. H. Slover, Judge.

Suit by Amanda Cable against Samuel R. Jones. From a decree for plaintiff, defendant appeals. Affirmed.

Henry Smith, for appellant. O. A. Lucas, for respondent.

MARSHALL, J. This is a proceeding in equity to compel the defendant to specifically perform his contract to sell to the plaintiff lot 1 of McLain's Woodland Park, on the southeast corner of Twenty-Ninth street and Woodland avenue, in Kansas City, having a front of 51 feet, by a depth of 130 feet. The answer is a verified plea of non est factum, and a general denial. The plaintiff secured a decree in the circuit court, and the defendant appealed. No errors of law are assigned; the defendant's whole contention is that the trial court erred in its finding of fact.

Briefly stated, the controversy is this: The defendant owned the land in question, and had placed it in the hands of J. A. McLaughlin for sale at the price of \$500. McLaughlin advertised it for sale at \$600. The plaintiff wanted to buy it, and her husband, acting for her, entered into negotiations with McLaughlin

to buy it, and offered him \$400 for it. McLaughlin reported the offer to the defendant, and he told McLaughlin he would take \$425 for it, and that he (McLaughlin) might have all he could get over that amount. McLaughlin then told plaintiff's husband he could have it for \$450, and he said to get up the contract. When McLaughlin brought the contract to Mr. Cable, he said he was not satisfied whether or not the contract covered the special taxes. Mr. Cable says that, when McLaughlin told him he had the property for sale, the first question he asked him was whether the price covered the paving and sewer taxes, and McLaughlin said they were all paid, but, if not, they would be paid. McLaughlin denies that anything of the kind took place. At any rate, Mr. Cable and Mr. McLaughlin went to the office of Mr. Lucas, Mr. Cable's attorney, and he objected to the contract that Mr. McLaughlin had drawn up, and the latter went and got a printed form of a contract, and Mr. Lucas changed it and drew up a contract, which contained this provision: "The seller also agrees to pay all state, county and municipal taxes, general and special, and all assessments now a lien on said property, excepting taxes for the year 1901 and thereafter, and all assessments for public parks not now due and payable, which are to be assumed and paid by the buyer." The contract so drawn was given to McLaughlin to be signed by Jones, the defendant. McLaughlin took the contract to Jones, and he signed it just as it was written, he says, without reading it. After he signed it McLaughlin took the contract so signed by Jones to Cable, and he said he still was not satisfied about the special taxes, that they might be a lien although not issued, and asked him to let the matter rest until the next evening, which McLaughlin agreed to. Cable consulted his attorney about it, and he advised that the taxes were a lien, and that the contract was all right, and that Jones would have to pay them. Cable saw McLaughlin and told him the contract was all right, and to bring it out to his house, and his wife would sign it and pay the \$50 required by the contract to be paid at once. At that time the contract was just as Mr. Lucas had written it, and contained the provision that the seller should pay the special taxes, and was signed by Jones. McLaughlin, however, did not come that night. The next day Cable saw McLaughlin, and asked him why he had not come. He answered: "Well, after you consulted a lawyer and you found out that the taxes are to be paid, Mr. Jones don't want to pay them, and he won't stand with the contract." Cable replied: "Mr. McLaughlin, he has already signed the contract, and we have never talked about anything else but that he should pay the taxes. That is our contract, and I insist on it. I have been to the expense of employing a lawyer, and I insist on the contract." McLaughlin replied, "If that is the case I will bring it

out to the house to-night." McLaughlin says that after Mr. Lucas drew up the contract he took it to Jones and he signed it, and after he had the talk with Cable about the taxes he spoke to Mr. Thornhill about it, and asked him if Jones would be liable for the taxes under the contract, and Mr. Thornhill said he would be. Then McLaughlin asked Thornhill what he should put in the contract to make it so Jones would not have to pay the taxes, and Thornhill told him to write the words "which are now due and payable" after the word "property" in the clause of the contract above quoted, and McLaughlin then wrote these words in the contract. The clause would then read: "The seller also agrees to pay all state, county and municipal taxes, general and special, and all assessments now a lien on said property which are now due and payable," etc. The special taxes were at that time a lien, but under the charter of the city were payable in four annual installments, and were therefore not then "due and payable." So that the contract as drawn by Mr. Lucas required Jones to pay the special taxes because they were then a lien, whereas the change made by McLaughlin after Jones signed the contract did not require Jones to pay the special taxes, because, although they were a lien, they were not then due and payable. McLaughlin says he made a copy of the contract for Jones after he had signed it. Jones produced this copy and offered it in evidence, and it did not contain the words, "which are now due and payable," but was an exact copy of the contract as Mr. Lucas had drawn it. On the evening of the day on which Cable had insisted on the contract being carried out, McLaughlin went to Cable's house, as he had agreed, and took the contract. The evidence is overwhelming that Cable asked McLaughlin if the contract was just as it was drawn by Mr. Lucas, and McLaughlin answered, "Precisely." McLaughlin denies this, however. Cable first started to get a pen and ink to have the contract signed, but stopped, and said, "Maybe we had better read the contract." When he read it and came to the clause McLaughlin had inserted, he stopped, and told McLaughlin that was not in the contract as Mr. Lucas had drawn it. McLaughlin replied that it was. Cable then charged McLaughlin with trying to deceive him, and with having put that clause in the contract after Jones signed it, and demanded that it be erased. McLaughlin at first refused to do so. Cable then said that unless it was erased his wife would not sign it, and that he would hold McLaughlin responsible for the trouble he had been put to in the matter. McLaughlin then said he would erase it, and did so, and Mrs. Cable signed the contract, and the \$50 was paid to him, and he left. McLaughlin says he was coerced into erasing it, not by any demonstration of force, but because Cable said if he would not do so there would be trouble "right now," and he did not want any trou-

ble. Under the terms of the contract the seller had 10 days to furnish an abstract of title. When this was not done, Cable called on McLaughlin and asked him why it had not been done. McLaughlin replied that Jones would not pay the special taxes, and that Jones said the erasure of the addition to the contract "killed the contract." Thereafter Cable tendered Jones the \$400, balance of the purchase money, and demanded a deed. Jones refused to accept the money or to make the deed. Hence this suit. The chancellor found for the plaintiff, and that McLaughlin had been guilty of a spoliation of the contract after Jones signed it, and decreed specific performance.

1. The facts in this case, compressed into a small compass, are, clearly, that Jones wanted to sell the land at \$500. McLaughlin wanted a commission for selling, so he advertised it at six hundred. Cable offered \$400, and McLaughlin reported the offer to Jones, and he said he would take \$425, and McLaughlin could have all he could get over that sum. McLaughlin then offered it to Cable at \$450, and Cable accepted the offer. McLaughlin drew up a contract of sale, which Cable did not think sufficiently covered the payment of taxes by the seller. So Cable and McLaughlin went to the office of Mr. Lucas, and he drew up the contract sued on, by using a printed blank that McLaughlin furnished, and making the necessary changes. This contract required Jones to pay all taxes that were a lien on the property. All parties knew that some public improvements had been made, and Cable asked McLaughlin if they had been paid for. He replied that he thought they had been, but, if not, they would be paid. McLaughlin took the contract to Jones, and he signed it. He then took it to Cable, who still expressed doubts whether the contract was explicit enough on the question of the taxes, and asked to have the matter laid over until the next day, which was done. McLaughlin did not come to Cable's house the next day, and, when Cable went to him to find the reason, McLaughlin said Jones would not pay the taxes. Cable insisted upon the contract being carried out, and McLaughlin promised to come to his house that night and have it signed. Then McLaughlin consulted Thornhill about it, and upon his advice that Jones would be liable for the taxes under the contract, and upon his advice as to what was necessary to do to make Cable liable for the taxes, McLaughlin inserted the words "which are now due and payable" in the contract. He did this without consulting Jones or any one else in interest. When he took the contract to Cable's house, in response to Cable's inquiry if the contract was just as Lucas had drawn it, McLaughlin answered, "Precisely." Cable had misgivings, however, and read it and discovered the spoliation, and charged McLaughlin with having changed it. McLaughlin still insisted that it was just as Lucas had drawn it. Cable

then charged McLaughlin with trying to deceive him, and with having changed the contract after Jones had signed it, and demanded that the addition made by McLaughlin be erased. At first McLaughlin refused to do so; but upon Cable telling him that he would hold him responsible for the trouble and expense he had been put to, McLaughlin erased the words he had added, the money was paid, and the contract was signed.

The whole controversy is as to who shall pay the special tax. The record does not clearly show how much that amounted to. There is no room for doubt that the agreement was that the purchaser was to get a clear title, and that the seller should pay the special taxes, if they had not already been paid. The contract as drawn by Mr. Lucas, and as agreed to by Cable and McLaughlin, and as signed by Jones, expressly so provided. The change was made by McLaughlin after Jones signed it, and without consultation with him, and McLaughlin's subsequent conduct clearly shows that he intended to deceive and trick Cable, and his conduct when his fraud was discovered, and his lame pretense that he eliminated the fraud by reason of Cable's coercion, conclusively establish that the chancellor was right in rejecting his testimony and in finding for the plaintiff. In the face of all this, the defendant invokes what was said by this court in *Kelly v. Thuey*, 143 Mo., loc. cit. 434, 45 S. W. 302: "Hitherto we have tolerated no alteration in the contract; and we have always regarded and still regard any change on the face of the paper as a nullifying alteration. By thus holding we intend to make the payees or obligees of money-bearing or title-bearing obligations honest, whether that disposition accords with their natural inclinations or not. Of course, by these remarks we do not refer to cases of spoliation by a stranger, nor to filling blanks purposely left to be filled or authorized to be filled." That rule is wise and wholesome, but as McLaughlin was the spoliator it does not lie in the mouth of the defendant to ask that the rule be enforced as a shield to his wrong.

The remedy of specific performance lies within the sound judicial discretion of the chancellor. *Paris v. Haley*, 61 Mo. 453; *Veth v. Gierth*, 92 Mo. 97, 4 S. W. 432; *Pomeroy v. Fullerton*, 131 Mo. 581, 33 S. W. 173. The contract sought to be enforced must be certain, definite, and capable of being performed. *Mastin v. Halley*, 61 Mo. 196; *Mastin v. Grimes*, 88 Mo. 478; *In re Ferguson*, 124 Mo. 574, 27 S. W. 513; *Warren v. Costello*, 109 Mo. 344, 19 S. W. 29, 32 Am. St. Rep. 669; *Underwood v. Underwood*, 48 Mo. 527; *Cherbonnier v. Cherbonnier*, 108 Mo. 252, 18 S. W. 1083. The contract in this case measures up to the full requirements of the rule, and the finding of the chancellor is the only finding that the evidence warrants.

The judgment of the circuit court is affirmed. All concur.

MAGNER v. CITY OF ST. LOUIS.

(Supreme Court of Missouri, Division No. 1.
Feb. 10, 1904.)

CITY OFFICERS—REMOVING ASSISTANTS.

1. A city ordinance creating the office of commissioner of public buildings, defining his duties, which relate only to public building, authorizing appointment by him of janitors, watchmen, engineers, and firemen, and providing that all janitors, engineers, or other persons appointed by him may be removed by him and the president of the board of public improvement when the interests of the city require it, does not give power to remove inspectors, whom a later ordinance, imposing on such commissioner the duty of inspecting private buildings in the course of construction, empowered him to appoint to aid him in the performance of his new duties.

2. Though, at the time one is appointed inspector to assist the commissioner of public building in the duty of inspecting private buildings in the course of construction, an ordinance is in force prescribing a yearly salary and a term of four years for inspectors, so that he is within St. Louis City Charter, art. 4, § 43, defining the term "officers" to include all persons holding any city situation with an annual salary or for a definite term, he ceases to be an officer, as regards mode of removal, on the repeal of such ordinance and the substitution of another giving such inspector only a monthly salary and no definite term.

3. Under St. Louis City Charter, art. 4, § 14, providing that assistants of any officer shall hold their positions during good behavior, unless otherwise provided by ordinance, but may be removed for cause by the mayor, or by the officer under whom they work, at his pleasure, an officer may remove his assistant without any assignment of cause or without consultation with any one.

Appeal from St. Louis Circuit Court; Jno. A. Talty, Judge.

Action by John Magner against the city of St. Louis. Judgment for defendant. Plaintiff appeals. Affirmed.

Leverett Bell, for appellant. Chas. W. Bates and Benj. H. Charles, for respondent.

VALLIANT, J. Plaintiff sues to recover a sum which he claims was due him for salary as inspector in the department of public buildings in the city of St. Louis, from which position, he avers, he was unlawfully excluded. His appointment was in writing, as follows:

"St. Louis, October 30, 1899.

"Hon. Henry Ziegenhein, Mayor, St. Louis

—Dear Sir:

I have the honor to submit herewith for your approval the following appointment in accordance with the provisions of Ordinance No. 18,964, John Magner for inspector in the Department of Public Buildings.

"Respectfully, C. F. Longfellow,

"Commissioner of Public Buildings.

"Approved: Henry Ziegenhein, Mayor."

The order for his removal was also in writing, as follows:

"October 31, 1900.

"Mr. John Magner, City—Dear Sir: You are hereby notified that your services as in-

spector of buildings will not be required by the city of St. Louis after October 31, 1900, and the undersigned being of the opinion that the interests of the city require it, does hereby, under the provisions of section 12 of the Municipal Code of St. Louis, remove you from your said employment and duties of inspector, said removal to take effect at the time aforesaid.

"Respectfully, L. C. F. Stemme,

"Deputy Commissioner Public Buildings.

"Approved: Robert E. McMath, President."

The plaintiff's proposition is that he was a city officer, and subject to be removed only on charge and specification, trial, and conviction.

The following are the provisions of the city charter which are referred to by the counsel on either side as bearing on the plaintiff's proposition:

Section 5, art. 4: "Any elected city officer may be suspended by the mayor and removed by the council for cause; and any appointed officer may be removed by the mayor or council for cause. In either case the mayor shall, temporarily fill the vacancy except as hereinafter provided."

Section 43, art. 4, after requiring all city officers, before entering on their duties, to take the oath of office and give the bond therein specified, declares: "The term 'officers' whenever used in this charter, shall include all persons holding any situation under the city government or its departments with an annual salary or for a definite term of office."

Section 14, art. 4: "The assistants of any officer shall hold their position during good behavior, unless otherwise provided by ordinance, but may be removed for cause by the mayor, or by the officer under whom they work, at his pleasure."

Section 45, art. 4: "The assembly shall have power by ordinance passed by a vote of two-thirds of the members elect of each house, to create any other office which it may deem necessary, and to provide for the manner of filling the same."

Section 28, art. 4: "The municipal assembly shall, by ordinance define the duties of all city officers, and may change, increase or diminish them in a manner not inconsistent with this charter."

Section 26, art. 8, confers on the mayor and assembly power, by ordinance not inconsistent with the Constitution and laws of the state or of the charter, "to regulate and provide for the election or appointment of city officers required by this charter, or authorized by ordinance and provide for their suspension or removal; and they shall establish the salaries of all officers and the compensation of all employes, excepting day laborers and jurors and witnesses, respectively for their services: provided that the salary of no officer shall be changed during the term for which he is elected or appointed

and that no officer receiving a salary shall receive any fees or other compensation for his services."

Section 32, art. 8, confers on the assembly the power to transfer in whole or in part the duties appertaining to any office to another office.

The following are the provisions of the city ordinances that bear on the case:

The office of commissioner of public buildings was created by Ordinance 10,371, approved September 23, 1877. By that ordinance the commissioner is denominated an "officer," to receive a salary of \$1,800 a year, and to hold his office for a term of four years. His duties as therein specified relate only to the public buildings of the city. The only appointments he is authorized by that ordinance to make are of janitors, watchmen, engineers, and firemen. Section 7 of that ordinance is as follows: "All appointments of janitors, engineers, or other persons by the commissioner of public buildings shall be subjected to the approval of the president of the board of public improvements, and may be removed by the mayor for cause, or by the commissioner and president of the board of public improvements whenever the interests of the city require it." That is now section 12 of the Municipal Code.

In 1892, the duties which theretofore, under section 5, art. 11, of the charter, had devolved on the chief of the fire department "to inspect all buildings in the course of construction and to cause to be carried into effect all ordinances relating thereto," were transferred to the commissioner of public buildings by Ordinance 17,188, and by that ordinance authority to appoint inspectors was conferred on the commissioner: "There shall be five inspectors of buildings appointed by the commissioner of public buildings, to be approved by the mayor, who shall be practical builders, and whose salaries shall be payable in monthly installments, at the rate of twelve hundred dollars per annum each. Said inspectors shall give bond to the city of St. Louis for the faithful performance of their duties, in the sum of five thousand dollars each, with two good and sufficient sureties to be approved by the mayor and council. The first appointments of inspectors of buildings shall be for the term ending on the first Tuesday in April, eighteen hundred and ninety-five, and thenceforward the appointment shall be made for the term of four years." That clause was literally re-enacted as part of Ordinance 18,964 in 1897, except that the number of inspectors was increased to six.

By Ordinance 19,908, approved December 23, 1899 (plaintiff's appointment was October 30, 1899), the section of Ordinance 18,964 containing the clause just quoted was repealed, and a new section enacted in lieu thereof, which, as to the subject of that clause, is

as follows: "There shall be six inspectors of buildings appointed by the commissioner of public buildings, to be approved by the mayor, who shall be practical builders, and whose salaries shall be one hundred dollars per month each, payable monthly. Said inspectors shall give bond to the city of St. Louis for the faithful performance of their duties in the sum of five thousand dollars each, with two good and sufficient sureties, to be approved by the mayor and council. The first appointments of inspectors of buildings shall be for the term ending on the first Tuesday in April, eighteen hundred and ninety-five."

By Ordinance 10,981, approved April 8, 1900, the position of deputy commissioner of public buildings was created, who was authorized to perform the duties of the commissioner in his absence.

The plaintiff's evidence tended to show that the sum of \$13,000 had been appropriated by the municipal assembly for the support of the department of public buildings for the fiscal year ending April 8, 1901, and that on November 1, 1900, there remained unexpended of that sum \$5,091.69, on February 1, 1901, \$2,216.70, and on March 1, 1901, \$958.37.

The judgment was for the defendant, and the plaintiff appeals.

The evidence as to the money in the treasury appropriated to the use of the department was doubtless introduced by the plaintiff to show that his removal was not made necessary for lack of money to pay his salary. Judging from the ratio of diminution of the fund from November 1st to March 1st, it would seem that, if the plaintiff had been retained on the pay roll, the appropriation would not have defrayed the expenses of the department for the time specified. But we do not deem that as very important, because, if the plaintiff is otherwise entitled to recover in this suit, the fact that there was not enough money appropriated to pay him will not defeat his claim. The form of the letter of removal signed by the deputy commissioner and approved by the president of the board of public improvements shows that they thought that their power to remove was to be found in section 7 of Ordinance 10,371, now section 12 of the Municipal Code, above quoted. But in that they were mistaken. That section is a part of the original ordinance creating the office of commissioner of public buildings and defining his duties, and, as we have seen, the duties there defined relate only to the care of the public buildings of the city. The appointments he was then authorized to make were of janitors, watchmen, engineers, and firemen. The authority there given to remove had reference only to those employes the commissioner was by the ordinance authorized to appoint. That ordinance was passed in 1877. It was not until 1892 when Ordinance 17,188 was passed

transferring from the chief of the fire department to the commissioner of public buildings the duty of inspecting private buildings in the course of construction, and enforcing ordinances relating thereto. It was then that the power was given to the commissioner to appoint inspectors to aid him in the performance of his new duties.

The authority to remove "janitors, engineers or other persons," given in section 7 of Ordinance 10,371 (now section 12, Municipal Code), has no application to this case.

Plaintiff refers to section 5, art. 4, of the charter, in reference to the removal of city officers, and contends that by its terms, as construed by this court in *State ex rel. v. City of St. Louis*, 90 Mo. 19, 1 S. W. 77, an officer of the city, whether elected or appointed, can be removed only for cause, which means on conviction after due trial on charges and specifications. Conceding for the argument that that is the proper construction of that section, the question arises is an inspector of buildings an officer of the city within the meaning of that section? Reading the section in immediate connection with the other sections with which it is grouped, it seems to relate, in its primary application at least, to the officers of the city government called for by the charter, each one of whom is named in the article. These were the officers in the minds of the framers of the charter when they were writing that article. If those provisions now cover the plaintiff's position, it is because they have been extended by ordinance to meet such a case. There is nothing in the nature of the duties which the inspector of buildings had to perform that would distinguish his position from that of a mere employe. The ordinance which authorized his appointment prescribed no duties to be performed, and it leaves the inference that he was merely appointed to assist the commissioner in the preference of the new duties therein laid upon him—that he was a mere assistant to the commissioner. But, according to the plaintiff's argument, the nature of the duties he was to perform is of no consequence in determining whether or not he was a city officer, because section 43, art. 4, defines the term "officers," as used in the charter, "to include all persons holding any situation under the city government or its departments with an annual salary or for a definite term." And in that connection the plaintiff refers to section 1 of Ordinance 18,964, above quoted, which was in force when he was appointed, and which prescribed a salary of \$1,200 a year and a term of four years for the inspectors. The plaintiff's title to the position he held was derived from that ordinance. He claims no higher source. The power to enact an ordinance is the power to repeal it. The commissioner himself could not hold his position if the assembly should repeal the ordinance under which the

office exists. Even though appointed for a definite term, if the ordinance should be repealed his official existence would be at an end. That is the category into which the plaintiff's case falls. The section of the ordinance under which he was appointed which prescribed his salary at \$1,200 a year and his term of four years was repealed shortly after he entered into his place, and, in lieu thereof, another section was adopted which gave an inspector of buildings a monthly salary only and no definite term. After the repeal of section 1 of Ordinance 18,964, the plaintiff had no continuing right to the position which he had obtained under that section, and if he had any right to be an inspector at all it was under and by virtue of the ordinance that was adopted in place of the repealed one. No one questions the authority of the assembly to repeal an ordinance creating an office, or that the effect of the repeal is to abolish the office. At the time the plaintiff was removed there was neither an annual salary nor a definite term fixed to his position. The position was therefore not converted into an office by force of section 43, art. 4. We can see nothing in the so-called office of inspector of buildings to distinguish the incumbent from a mere assistant to the commissioner. The charter expressly recognizes assistants to public officers; it does not recognize them as officers holding place by independent title, but does recognize the fact that, to render the service efficient, the officer who is responsible for the work of his office should have the right to appoint and dismiss his assistants at pleasure. Section 14, art. 4, is as follows: "The assistants of any officer shall hold their position during good behavior unless otherwise provided by ordinance, but may be removed for cause by the mayor, or by the officer under whom they work at his pleasure." Under that charter provision the commissioner had authority to remove the plaintiff from this position of inspector without assigning any cause and without consulting any other officer. We therefore hold that the plaintiff was lawfully dismissed from his position, and that he is not entitled to recover.

These questions have all been decided by our St. Louis Court of Appeals, and the law clearly laid down in opinions by Judge Bland and Judge Barclay. State ex rel. v. Longfellow, 93 Mo. App. 364; State ex rel. v. Longfellow, 95 Mo. App. 680, 69 S. W. 598; State ex rel. Magner v. Longfellow, 95 Mo. App. 668, 69 S. W. 599. The last case cited was that of this plaintiff seeking a mandamus against the commissioner of public buildings to pay the claim now in suit. The trial court held correct view of the case.

The judgment is affirmed.

BRACE, P. J., and ROBINSON, J., concur.
MARSHALL, J., concurs in the result.

78 S.W.—50

CENTER CREEK MIN. CO. v. FRANKENSTEIN.

(Supreme Court of Missouri, Division No. 1.
Feb. 10, 1904.)

LANDLORD AND TENANT—TENANCY AT WILL—CREATION OF RELATION—INSTRUCTIONS.

1. A mere occupancy of land, with the knowledge but without the consent of the owner, does not create a tenancy at will.

2. Defendant occupied land belonging to plaintiff, without the latter's consent, and, on being called upon to make some arrangement with reference to the further occupation, agreed to pay rent for the time the land had been occupied, and it was stipulated that if the agreed rent was paid by a certain date defendant might continue in occupation. *Held*, that no tenancy at will was created merely by the agreement prior to the payment of the rent.

3. That plaintiff began an ejectment suit against defendant before the time set for payment of the amount agreed upon as rent for the past occupation might be an excuse for not performing the conditions which would create a tenancy; but it could not create a contract of lease.

4. It is error to give instructions having no foundation in the evidence.

Appeal from Circuit Court, Jasper County;
Jos. D. Perkins, Judge.

Action by the Center Creek Mining Company against Arthur Frankenstein. From a judgment for defendant, plaintiff appeals. Reversed.

W. R. Robertson, for appellant. Howard Gray, for respondent.

BRACE, P. J. This is an action in ejectment to recover possession of a small lot of ground in the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ section 17, township 28, range 32, in Jasper county, described in the petition by metes and bounds. The petition is in common form. The answer is a general denial. The case was tried before a jury. Verdict and judgment for the defendant, and plaintiff appeals, assigning for error the instructions given, and the admission of incompetent evidence, for the defendant, and the refusal to give certain instructions for plaintiff. The respondent files no brief.

On the trial the defendant admitted that he was in possession of the premises, and that the plaintiff is the owner thereof, and sought to defeat a recovery on the ground that he was a tenant at will of the plaintiff at the time suit was brought. To support this defense, evidence was introduced tending to prove that the aforesaid 40-acre tract was mining land within a mile of Webb City. That prior to the 1st of January, 1900, a number of lots had been inclosed and small houses built thereon, of which the lot in question was one, and of which fact the plaintiff had knowledge. That on the lot in question was a small boxhouse of one room 12x14 feet. That about that date defendant purchased the house from "a couple of young men called the Gray boys." That the house was then vacant. That the defendant went into the

possession of the same without the knowledge or consent of the plaintiff, and thereafter continued in the occupancy of the same. That there were a number of houses on the tract occupied. That some time prior to the 9th day of May, 1900, the plaintiff employed W. R. Robertson, Esq., a lawyer, to adjust the relations between the plaintiff and such occupants. That in pursuance thereof a notice was mailed to each of such occupants, of one of which the following is a copy:

"Webb City, Mo., May 9, 1900.

"James Brown, Carterville—Dear Sir: The Center Creek Mining Company has employed me to obtain possession of its land occupied by you. If you desire to adjust the matter without litigation, please call at my office over Exchange Bank before the 11th inst. and submit such proposition as you desire to make for that purpose.

"Yours truly, W. R. Robertson."

The defendant testified that he received the notice addressed to him, that as it gave him only one day's time he went to the office of Mr. Robertson as soon as he received it, which he thinks was on Thursday, and, as to the interview then had between them, testified as follows: "Q. Did you go to see him? A. I went as soon as I got the notice, and seen Mr. Robertson. Q. Tell the jury what conversation or arrangement you had with Mr. Robertson. A. Well, the claim was \$1 a month back rent for a year, and as I wasn't living there the year before—I lived in the Indian Territory the year before—I didn't feel justified in paying the rent for the time I was in the Indian Territory, paying rent on a piece of ground here, so I told him so. 'Well, then,' he said, 'we will drop that, and we will just make it one dollar a month from the time you moved in.' I told him that would be all right, and I believe it amounted to \$8, if I am not mistaken—from the time I moved in until the time I went to his office, that was. 'Well,' says he, 'can you pay it right now?' and I told him 'No,' I didn't have the money, but I could pay it Monday morning, as we were paid late on Saturday night, after dark mostly; that I couldn't make it until Monday morning. 'Well,' says he, 'if you come here Monday morning before 8 o'clock and bring me the money, it is all right, for at 8 o'clock I got to go to court and will not be here.' I told him I will be there faithfully 8 o'clock Monday morning. Friday I got notice that he had sued, and I had to appear at Joplin court." And further testified that he did not return to the office of Mr. Robertson on the following Monday morning, or at any time thereafter, because on Friday he was served with process in this action. The day on which the notice was dated and mailed was Wednesday, the 9th of May, 1900. The 11th was the following Friday. The following Monday was May the 14th, and this suit was instituted on Wednesday, the 16th of

May. This is the substance of the pertinent evidence in the case.

The court refused an instruction asked by the plaintiff that no tenancy at will had been proven in the case, and, among others, gave the following instructions for the defendant:

"(5) The court instructs the jury that in order to constitute the defendant a tenant at will it is not necessary that the jury find that there was an express contract between the plaintiff and the defendant, or the person under whom the defendant claims, that he could occupy the premises in controversy as the tenant of the plaintiff, but the jury are instructed that an implied agreement to occupy would be sufficient; and if the jury find from the evidence that the defendant occupied the premises in controversy for the period of several months, and that the plaintiff knew of such occupancy and made no objection thereto, then from such facts the jury may find that the defendant occupied the premises with plaintiff's consent, as a tenant at will of the plaintiff.

"(6) The court instructs the jury that if they find from the evidence in this case that during the time the defendant occupied the premises in controversy the plaintiff, by its officers or agents, knew of such occupancy and made no objection thereat, and attempted to collect rent from the defendant, and that the plaintiff and defendant disagreed as to the amount of rent the defendant should pay for the use of such premises, then the jury would be authorized from such facts to find that the defendant occupied said premises with plaintiff's consent and as a tenant of the plaintiff, and, if they so find, the verdict should be in favor of the defendant.

"(7) The court instructs the jury that if they find from the evidence that the plaintiff, by and through its agent, W. R. Robertson, agreed that the defendant might occupy the premises sued for if he would pay rent, for the time he had occupied the same, at the rate of one dollar per month, and also that he was to pay one dollar a month for the future rent of said premises, and that he was given until the following Monday to pay his rent, and that said Robertson was authorized by plaintiff to make such agreement, and that before said Monday this suit was brought, the verdict should be in favor of the defendant."

The law applicable to the facts of the case is stated by the text-writers: In 1 Taylor on Landlord and Tenant (8th Ed.) § 21, as follows: "The mere occupancy of property does not necessarily imply the relation of landlord and tenant, for if no rent has been paid, and no concurrent act of the parties, or other circumstance, exists from which consent to a tenancy on the part of the owner can be inferred; or if the consent was conditional and has since been forfeited—as tenancy cannot arise from mere occupation; and if a man gets possession of a house without the privity of the owner, although the parties may after-

wards enter into a negotiation for a lease, but differ about the terms and the negotiation goes off; or if, after being let into possession under an agreement to sign a written lease and find surety for the rent, he does neither—no species of tenancy is created, but the occupant in either case becomes a mere trespasser." And in 18 Am. & Eng. Encycl. of Law (2d Ed.) as follows: "If one enters upon the land of another without right, and not in subordination to the title of the owner, he is a mere trespasser, and the relation of landlord and tenant is not created between such occupant and the owner, so as to authorize either the former to claim the rights of a tenant, or the latter to claim the rights of a landlord. After a person has entered upon land without right, the relation of landlord and tenant may of course subsequently arise by implication, and it has generally been held that such relation arises when the occupant admits the title of the owner of the land, and agrees to hold in subordination to his title. Still, mere negotiations between the occupant and the owner, which have no result, and which do not amount to a recognition of the owner as landlord, will not create the relation of landlord and tenant."

Applying these principles to the instructions given for the defendant on the evidence in this case, each of them will be found to be erroneous. By No. 5, the jury are told that from the mere occupancy of the premises by the defendant for several months, i. e., from about January 1st to the 9th of May, 1900, without objection, and with the knowledge of the plaintiff, the plaintiff's consent to such occupancy could be implied, and the relation of landlord and tenant created, although the undisputed evidence of both parties was that such occupancy was without the consent of the plaintiff, that no communication was ever had between them in any manner whatever prior to the 9th of May, and that no rent had ever been paid; and there was no evidence of any concurrent act or circumstance tending to show such consent. This proposition is absurd as applied to the evidence in the case; and to imply consent from mere knowledge and silence, when there is no obligation to speak, is equally absurd as an abstract proposition. There is no such facile mode as this of converting a trespasser into a tenant without the consent of the owner.

By the other two instructions a relation of landlord and tenant between the parties is predicated upon the negotiations testified to by the defendant between him and Mr. Robertson which might have resulted in a contract by which the defendant would have become a tenant of the plaintiff if he had appeared at the office of Mr. Robertson on the Monday morning following the interview and performed the conditions agreed upon, but which resulted in nothing by reason of his failure to so appear and perform those conditions then or at any time thereafter; therefore no tenancy could be implied from those negotiations.

Hence these instructions are both erroneous. The first is further erroneous in that there was no evidence to sustain the hypothesis that the defendant and Robertson disagreed as to the amount of rent defendant should pay; on the contrary, the evidence of the defendant himself was positive as to their agreement as to amount, and there was no evidence to the contrary. The other of these instructions is also erroneous in that there was no substantial evidence tending to prove that the suit was brought after the interview between defendant and Robertson, and before the following Monday. There is a conflict in the evidence of defendant on this subject, some of it tending to prove that the interview was on Thursday the 10th of May, and some of it that it was on Thursday the 17th of May. The suit was brought on the 16th of May. If the first theory be correct, then the suit was brought after the Monday on which the defendant agreed to return; if the other be correct, then the suit was brought before the Monday on which defendant was to return, and before the Thursday upon which the interview was had; but in neither event was the suit brought after the interview, and before the Monday on which defendant was to return. But this is a matter of minor importance, for in any view thereof, while the bringing of the suit might in one view furnish a reason, or at least an excuse, for the defendant's not returning and performing the conditions by which a contract of tenancy between him and the plaintiff would have been created, it could not have the effect of creating such a contract. The court erred in giving these instructions, and also in refusing the instruction for plaintiff aforesaid, which was tantamount to an instruction to return a verdict for plaintiff, and would have been better in that form.

For these errors the judgment will be reversed, and, as the plaintiff now here waives its claim for damages and monthly rents and profits, the cause will be remanded to the circuit court, with directions to enter up judgment for the plaintiff for the possession of the premises. All concur.

SHARP et ux. v. NATIONAL BISCUIT CO.

(Supreme Court of Missouri, Division No. 1.
Feb. 10, 1904.)

APPEAL—CONFLICTING EVIDENCE—REVIEW—
NEGLIGENCE—DEATH OF MINOR—DAMAGES—
STATUTES—INSTRUCTIONS—CONSTITUTION—
JURIES—SELF-EXECUTING PROVISIONS.

1. A verdict on conflicting testimony will not be disturbed on appeal.

2. Rev. St. 1899, § 2866, provides that, in an action for the death of a minor, the jury may give such damages as they may deem fair and just to the surviving parties who may be entitled to sue. In an action by parents for the death of a child, the court instructed that the measure of damages was what the child would

¶ 2. See Death, vol. 15, Cent. Dig. § 114.

have earned until he became 21, minus the cost of his support, clothes, and maintenance. *Held*, that inasmuch as, under the statute, the parents were entitled to damages for the loss of the comfort, society, and love of the child, which they were not given by the instruction, it was more favorable to defendant than it was entitled to.

3. Acts 1899, p. 382, amending Const. art. 2, § 28, provides that a jury in courts not of record may consist of less than 12 men, as may be prescribed by law; that a two-thirds majority of such number prescribed by law may render a verdict; that, in the trial by jury of civil cases in courts of record, three-fourths of the members of the jury concurring may render a verdict; and that a grand jury shall consist of 12 men, 9 of whom may find an indictment. *Held*, that the provision was self-executing, in so far as it applied to grand juries and juries in courts of record in civil cases, but not self-executing as applicable to juries in courts not of record.

Appeal from Circuit Court, Jackson County; Edw. P. Gates, Judge.

Action by Elijah P. Sharp and wife against the National Biscuit Company. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Harkless, O'Grady & Crysler, for appellant. Latashaw & Latashaw and S. S. Gunlack, for respondents.

MARSHALL, J. This is an action under the statute for damages caused to the plaintiffs by the death of their infant son, George Calvin Sharp, five years of age, by being run over by one of defendant's wagons on July 18, 1899, on Sixth street, between McGee and Oak streets, in Kansas City. The plaintiffs recovered a judgment for \$1,500, and the defendant appealed.

The negligence charged in the petition is that the driver of the wagon compelled the child to jump from the wagon, and in consequence he was run over and killed. The answer is a general denial, with special pleas of contributory negligence of the child, and of the parents, the plaintiffs, in allowing the child to be on the street, and of trespass by the child upon the defendant's wagon. The reply is a general denial.

1. The accident occurred on July 18, 1899, on Sixth street, near Oak street, and nearly in front of the stores of High and Lutz. The wagon was a heavy bread wagon. The body of the wagon was raised about three feet above the ground, and had doors on each side, with steps extending toward the ground. The driver's seat was near the front, and had a hood over it, with glass windows on each side. The driver was delivering bread, and stopped in front of the stores aforesaid. Sixth street runs east and west, and he stopped his wagon on the south side of the street, with the team fronting west. He was in the stores quite awhile, and while there a number of boys were climbing on the wagon. Some neighbors ordered the boys to get off, which they did, but afterwards climbed on it again. When the driver came out of one of the stores to go into the other, he saw the

boys on the wagon, and he said to one of them—Freddie Lutz—"Get off, or I will kick you off." The driver knew that the boys were in the habit of climbing on the wagon, and the testimony for the defendant is that he carried a whip to drive the bigger boys off of the wagon, but did not use it on the small boys. When the driver came out of the store, he got on the wagon and drove off. When he had gotten about ten steps, the deceased fell off of the wagon, and was run over. The evidence is conflicting as to whether the deceased was on the step on the north side of the wagon at the time the driver got on the wagon, or whether he got on the step after the driver got on the wagon. It is also conflicting as to whether the driver knew that the deceased was on the step or not. The evidence on behalf of the plaintiff is that the child was on the step, and that the driver knew it, and said to him, "Get off, or I will knock you off," and that the child answered, "Wait a minute, and I will," but that, instead of waiting, the driver immediately started the team, and cut back once or twice with the whip at the child, and that the child dodged the blow and fell. The evidence for the defendant is that the child got on the step after the driver got on the wagon, and that the driver did not know he was there, and, by reason of the construction of the wagon, and the hood over the driver's seat, he could not see the child, and that he did not say anything to the child, and that he did not strike at him. The defendant's evidence is conflicting as to whether he had a whip that day. By consent of the parties, the wagon was brought to the courthouse, and the jury permitted to examine it, and to test whether the driver could see the child on the step or not. There was likewise a sharp conflict in the evidence as to whether the parents permitted the child to play in the street, and as to his proclivity to climb upon wagons. Nine witnesses testified for the plaintiffs, and thirteen for the defendant, exclusive of character witnesses. Most of them were eyewitnesses to the accident. Their testimony is as conflicting as it is possible for testimony to be. To draw it mildly, somebody was mistaken. The jury believed the plaintiffs' witnesses. Under such circumstances, their finding of fact is conclusive on this court. *James v. Insurance Co.*, 148 Mo. 1, 49 S. W. 978.

2. The defendant contends that the plaintiffs' instruction as to the measure of damages is erroneous, and bases the contention upon *Hennessy v. Bavarian Brewing Ass'n*, 145 Mo. 104, 46 S. W. 966, 41 L. R. A. 385, 68 Am. St. Rep. 554, which defendant says changed the law in this state. The instruction told the jury that the measure of the plaintiffs' damages was what their son would have earned until he became 21 years old, minus the cost of his support, maintenance, and clothes. It is claimed that the logic of *Hennessy v. Bavarian Brewing Association*,

supra, is that this is not the proper measure of damages, but that the true rule is stated in Nagel v. Railroad, 75 Mo., loc. cit. 665, 42 Am. Rep. 418—such amount as the jury deem fair and just. The language of the statute (section 2866, Rev. St. 1899) which transmits the right to the parents in such cases is that "the jury may give such damages, not exceeding five thousand dollars, as they may deem fair and just, with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue, and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect or default." The case of Hennessy v. Brewing Ass'n, supra, did not involve the question of the measure of damages at all. The only question involved or decided in that case was, who is entitled to maintain an action under the statute for the death of a child under age? In that case the mother of the child brought the suit. The child's father was dead, and the mother had married again, and the stepfather had admitted the child into his family. It was contended that the mother could not sue, because the stepfather was entitled to the earnings of the child, and the stepfather could not sue, because he was given no such right at common law or by the statute. It was held that the mother was entitled to sue, because the statute expressly conferred the right, and this, too, even if she was not entitled to the child's earnings. The fact was referred to that some cases, under statutes like ours, held that the measure of damages is the loss of services of the child, minus the expense of maintenance, plus the expense of medical attendance during the child's last illness and of the funeral, but it was said that such considerations do not determine who can maintain the action; and the case of Parsons v. Railroad, 94 Mo., loc. cit. 296, 6 S. W. 464, was cited, wherein this court, per Brace, J., held that the right is a transmitted right, and does not depend upon the question of loss of services. But whilst this is true, and while it is likewise true that in the cases of Nagel v. Railroad, 75 Mo., loc. cit. 665, and in Geismann v. Electric Co., 73 S. W., loc. cit. 657-661, this court approved instructions which were couched in the general language of the statute, and which made no reference to loss of services, it does not follow that the defendant is entitled to a reversal of this case because of the character of the instruction complained of. The statute permits a recovery of "such damages as the jury deem fair and just, with reference to the necessary injury resulting from such death, to the surviving parties who are entitled to sue." The court, at the request of the plaintiffs, limited the damages in this case to the loss of services, less the support of the child, and, at the request of the defendant, excluded anything for wounded feelings or grief. "The necessary injury" referred to in the statute

may or may not include the net loss of services, but it also covers other injuries besides loss of services. It includes loss of the comfort, society, and love of the child. In this case the parents lost both, and were entitled to compensation for both. The instruction limited their recovery to the first. It therefore favored the defendant to that extent, and hence the defendant cannot complain. The Hennessy Case did not change the law in this state. What is therein said, and the logic of the decision, is strictly in line with the rule as to the measure of damages laid down in Nagel v. Railroad, 75 Mo., loc. cit. 665; Parsons v. Railroad, 94 Mo., loc. cit. 296, 6 S. W. 464; and Geismann v. Electric Co. (Mo. Sup.) 73 S. W., loc. cit. 661. This case was tried below upon a more limited or restricted right in the plaintiffs, but as it was more beneficial to the defendant than the rule laid down in the cases cited, the defendant cannot complain. The cases cited also dispose of the defendant's subcontention under this head that there was no proof of the earning capacity of the child, nor of the ages of the parents, for they hold that proof of that character is unnecessary, that it would be mere matter of opinion, and that the jury would have to fix the amount anyway.

3. The defendant's eighth and tenth instructions were properly refused—the eighth because it was a comment upon the evidence in only one particular, and that a matter of dispute; and the tenth, because there was abundant evidence to take the case to the jury upon the question of whether the driver compelled the child to jump off of the wagon to avoid being struck by the whip.

4. The defendant's other contention is that the amendment to the Constitution allowing nine of a jury to return a verdict is not self-enforcing, and, as the Legislature has not enacted any law carrying it into effect, it is inoperative. The amendment changed section 28 of article 2 of the Constitution so as to make it read: "The right of the trial by jury, as heretofore enjoyed, shall remain inviolate, but a jury for the trial of civil and criminal cases in courts not of record, may consist of less than twelve men as may be prescribed by law; and that a two-thirds majority of such number prescribed by law concurring may render a verdict in all civil cases; and that in the trial by jury of all civil cases in courts of record three-fourths of the members of the jury concurring may render a verdict. Hereafter a grand jury shall consist of twelve men, any nine of whom concurring may find an indictment or true bill." Acts 1899, p. 382. The difference between self-enforcing constitutional provisions and those requiring legislation to make them effective is clearly illustrated by this amendment. Permission is given therein to the General Assembly to enact a law under which a jury in a court not of record may consist of less than 12 men, two-thirds of whom may render a verdict. But as to the

courts of record in civil cases, three-fourths of the jury are authorized to render a verdict, and three-fourths of a grand jury are given the right to return an indictment. No legislative action is needed as to the latter classes. A law passed by the Legislature could not confer any more right than is expressly conferred by the amendment, and the fact that, as to juries in courts not of record, legislative action is expressly required, while in courts of record no such action is called for, is the surest and most convincing argument that no legislative action was intended as to the latter. In *Fuss v. Spaunhorst*, 87 Mo. 256, this court had before it section 27 of article 12 of the Constitution, which makes it a crime, "the nature and punishment of which shall be prescribed by law," for any officer of a banking institution to receive deposits after he knows it is insolvent, and which makes any such officer individually responsible civilly for such deposits, and it was there said: "The cases are exceptional where constitutional provisions enforce themselves. Ordinarily the labors of the convention have to be supplemented by legislation before becoming operative. Of course, if it be evident from the terms employed in any particular provision of the organic law that it shall go into force forthwith, without awaiting ancillary legislation, it will become an imperative judicial duty to thus declare." Accordingly it was held that the whole section was not self-enforcing. Thereafter, in *Cummings v. Winn*, 89 Mo., loc. cit. 58, 14 S. W. 512, the question again came before this court, and the decision in the *Spaunhorst* Case was referred to; and it was unanimously held that the first portion of the section, that made it a crime, "the nature and punishment of which shall be prescribed by law," was clearly not self-enforcing, but needed legislative action to prescribe the nature and punishment of the offense, but that the latter provision of the section, which made such officer civilly liable for such deposits, was self-enforcing, and needed no legislative aid. Consult, also, *State v. Sattley*, 131 Mo., loc. cit. 483, 33 S. W. 41. The general rule as to whether the provisions of the Constitution are self-enforcing is thus stated in 6 Am. & Eng. Enc. of Law (2d Ed.) p. 912: "Constitutional provisions are self-executing where there is a manifest intention that they should go into immediate effect, and no ancillary legislation is necessary to the enjoyment of the right given, or the enforcement of the duty imposed. * * * In case a constitutional provision is ambiguous, and the words employed do not plainly evince an intention that the provision is to be self-executing, the court, in construing it, will resort to other aids than the mere language employed." Judge Cooley states the rule to be: "A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be en-

joyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law." Cooley's Const. Lim. (7th Ed.) p. 121. Without pursuing the subject further, it is plain that section 28 of article 2 of the Constitution, as amended, is self-executing, so far as it applies to juries in civil cases in courts of record, and so far as it applies to grand juries, but that it is not self-executing so far as it applies to juries in courts not of record. Under this conclusion, the contention of the defendant in this regard is not well taken.

The result necessarily follows that the judgment of the circuit court must be affirmed. It is so ordered. All concur.

WHEAT v. CITY OF ST. LOUIS.

(Supreme Court of Missouri, Division No. 1.
Feb. 10, 1904.)

OBSTRUCTION IN STREET—ACCIDENT TO TEAM —CONTRIBUTORY NEGLIGENCE.

1. One who, knowing of an obstruction in a street, rising three feet above the street level, which he had driven past daily for a year, is barred from recovery by contributory negligence, as a matter of law; he having run onto it, and been tipped over, either by letting his horse go where it would, or by driving without looking, though he thought he had passed the obstruction, or his mind was so engrossed with other matters that he did not think about it at all.

Appeal from Circuit Court, St. Louis County; Jno. W. McElhinney, Judge.

Action by David E. Wheat against the city of St. Louis. Judgment for plaintiff. Defendant appeals. Reversed.

Chas. W. Bates and Benj. H. Charles, for appellant. Wm. H. O'Brien, B. R. Brewer, and Robt. A. Holland, Jr., for respondent.

MARSHALL, J. This is an action for \$10,000 damages for personal injuries sustained by the plaintiff on November 19, 1898, by his milk wagon running over and being upset by a manhole to a public sewer in Vernon avenue, in the city of St. Louis, nearly opposite 4635 Vernon avenue. The plaintiff recovered a judgment for \$1,000, and the defendant appealed. The negligence charged in the petition is that the city constructed and maintained a manhole to a sewer in the street, which projected 8 feet above the level of the street, and which was about 6 feet in circumference, and had earth piled around the manhole, which was 9 feet and 6 inches in diameter at the base, and sloped towards the top, which, it is alleged, was a dangerous obstruction. The answer is a general denial and a plea of contributory negligence. The facts are these: Vernon avenue is only 1 block long, and ex-

¶ 1. See *Municipal Corporations*, vol. 28, Cent. Dig. § 1577, 1578.

tends from West End avenue to Walton avenue, and is 80 feet wide. About a year before the accident the city had constructed a sewer near the center of the street, preparatory to constructing the street. The top of the manhole was made to conform to the grade of the street when it was constructed, but is about 3 feet above the level of the street in its present condition. This left a driveway on the north of the manhole 8 feet 4 inches wide, and one on the south of the manhole 12 feet 10 inches wide. When the city finished building the sewer, the appropriation for the improvement of the street ran out, and the work had to be stopped. So this condition had existed for about a year before the accident occurred. The plaintiff was employed by the Union Dairy Company as a driver of one of its milk wagons, and had been delivering milk in that neighborhood for over five years, and on Vernon avenue for over a year. He had to deliver milk to a regular customer at No. 4635 Vernon avenue, and an irregular customer on the opposite side of the street. That was the end of his route, and, when he delivered milk to these customers, he turned and came east again. The manhole stood in the center of the street, and nearly opposite to the steps that lead up into the premises No. 4635 Vernon avenue. The plaintiff knew all about the manhole, and had seen it and driven around it every day for a year, sometimes west of it, and sometimes turning east of it. On the morning of the accident he drove to 4635 Vernon avenue, and got out and delivered milk. When he got out of the wagon, he hung the reins up on a hook at the top of the wagon, which held the horse so he could not move without pulling the wagon by his mouth. He says his horse knew the way as well as he did, and did not need to be guided, and he frequently let him go along without directing him, and he knew where to stop. After delivering the milk, he got into the wagon and took the reins off of the hook, and the horse started. He says he does not remember whether he turned the horse, or whether he let the horse turn of his own accord. At any rate, the horse turned the wagon to go east again, and, in so doing, ran up on the pile of earth surrounding the manhole, upset the wagon, and the plaintiff was hurt. He says it was about 6 o'clock in the morning, and that, while it was after daybreak, the morning was dark and foggy, but not so much so as to prevent his seeing the manhole if he had looked. Other witnesses said that, while it was foggy, one could see across the street, and any one could see the manhole. The plaintiff says that he thought he had passed the manhole, and consequently was not looking for it. At the close of the plaintiff's case, and again at the close of the whole case, the defendant demurred to the evidence. The court overruled the demurrers, and the defendant excepted, and relies solely upon this ruling upon this appeal.

The contention of the defendant is that the

city was guilty of no negligence in constructing and maintaining the manhole in the condition shown, but that, even if it was, its negligence was not the proximate cause of the injury, but that the plaintiff well knew the fact and the condition, and was guilty of such contributory negligence as bars a recovery. On the other hand, the plaintiff contends that, while he knew of the existence and condition of the manhole, and might have seen it and avoided it, still he was not obliged to keep it in mind, but had a right to think of something else, and that his mind was engrossed with his work, and he thought he had passed the manhole, and therefore he was guilty of no contributory negligence. The city had a clear legal right to build the sewer, and to leave it projecting 3 feet above the natural level of the unimproved street, and so that it would conform to the established grade of the street when it was improved. But it took the risk in so doing of some one who was unacquainted with its existence and condition, and who was traveling along the street in the nighttime, when he could not see the obstruction, running against it and being injured. Such a person would be entitled to recover, because as to him the city was negligent, and he was not. But the plaintiff does not fall within this rule, for he knew all about the manhole, and it was light enough at the time of the accident for him to see it; and, by the exercise of ordinary care, he could easily have avoided it, just as he had done every day, about the same hour of the day, for a year. It is not clear whether the plaintiff let the horse turn without guidance, or whether he directed him; but, in either event, he is responsible for the wagon striking the mound around the manhole and being upset, for, by the exercise of any care whatever, he could have avoided it. It is true, as claimed by the plaintiff that no one is precluded from traveling a highway in which he knows there are obstructions or defects, and on which he has business, and his knowledge of the condition of the street will not conclusively bar his recovery. *Barr v. Kansas City*, 105 Mo. 550, 16 S. W. 483; *Market v. St. Louis*, 56 Mo. 189; *Buesching v. Gas Co.*, 73 Mo. 219, 39 Am. Rep. 508; *Loewer v. Sedalia*, 77 Mo. 431; *Staples v. Canton*, 69 Mo. 592. But whilst this is true, the person who knows of such defects, and is injured, must use reasonable care while traveling along such defective street, and that care must increase in proportion to his knowledge of the risk. *Foster v. Swope*, 41 Mo. App. 137. And such knowledge of the danger is admissible to prove contributory negligence. *Flynn v. Neosho*, 114 Mo. 567, 21 S. W. 908. As was well said by Lord Ellenborough, C. J.: "A party cannot cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be right. * * * One person being in fault will not dispense with another's using ordinary care for himself. Two things

must concur to support this action—an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff." *Butterfield v. Forrester*, 11 East, 60. And this court approved the rule so laid down, in an opinion per Gantt, P. J., in *Sindlinger v. Kansas City*, 126 Mo. 315, 28 S. W. 857, 26 L. R. A. 723, and, speaking of the rule, said: "This is the general rule of law as to contributory negligence, which applies, as of course, to actions brought by travelers for injuries received by reason of defects or obstructions upon the highway. *Beach on Contributory Negligence* (2d Ed.) § 246. Ordinarily the question whether the plaintiff, under all the circumstances, has been guilty of contributory negligence, is one for the jury. *Loewer v. Sedalla*, 77 Mo. 431. But if the evidence elicited to establish the contributory negligence of plaintiff admits of no other fair inference than that he was negligent, and that his own negligence contributed directly to, or was, in other words, the proximate cause of, the injury, then it becomes one for the court, and a demurrer to the evidence will be sustained." The same rule was recognized in *Wiggin v. St. Louis*, 135 Mo. 558, 37 S. W. 523, and in *Cohn v. Kansas City*, 108 Mo. 387, 18 S. W. 973.

The plaintiff in this case knew of the obstruction in the street, and knew that by the exercise of ordinary care he could avoid striking it while traveling along the street. His act in striking it was therefore, per se, contributory negligence. *City of Erie v. Magill*, 101 Pa. 616, 47 Am. Rep. 739; *Schaeffer v. Sandusky*, 33 Ohio St. 246, 31 Am. Rep. 533; *City of Quincy v. Barker*, 81 Ill. 300, 25 Am. Rep. 278; *Church v. Howard City*, 111 Mich. 298, 69 N. W. 651, 66 Am. St. Rep. 396; *Town of Salem v. Walker (Ind.)* 46 N. E. 90; *Tuffree v. State Center*, 57 Iowa, 538, 11 N. W. 1; *Yahn v. Ottumwa*, 60 Iowa, 433, 15 N. W. 257; *Benton v. Phila.*, 198 Pa. 396, 48 Atl. 267; *Nebraska Tel. Co. v. Jones (Neb.)* 81 N. W. 435; *Moore v. Richmond*, 85 Va. 545, 8 S. E. 387; *Walker v. Reidsville*, 96 N. C., loc. cit. 385, 2 S. E. 74; 7 Am. & Eng. Enc. Law (2d Ed.) p. 412.

The contention of the plaintiff that he had a right to have his mind so engrossed in his business that he did not think of the obstruction, or thought he had passed it, is wholly untenable. Persons traveling on a highway are charged with a duty to exercise reasonable care to observe and avoid obstructions and defects. They have no right to be so engrossed in their own affairs as to be negligent of their own safety. As was well said by Campbell, C. J., in *Hutchins v. Priestly, etc., Co.*, 61 Mich. 252, 28 N. W. 85, in speaking of a man who walked into an elevator shaft, instead of a door close to it: "The only explanation of his conduct is—what there is no difficulty in gathering from his own testimony, although he does not seem to be aware of it—that he is one of those persons who pay little heed to their surroundings, and go

hither and thither on their errands absent-minded, or thinking only of some particular object, and shutting their eyes to everything else. Such inattention is sometimes dangerous to the person himself, and quite as often to his neighbors. It is a want of that ordinary care which the safety of society requires all sane persons of mature age to exercise, and for which they are civilly responsible. Business could not be carried on without this requirement." The rule has recently undergone review in other jurisdictions. In *Cowie v. Seattle*, 62 Pac. 121, the Supreme Court of Washington held that "a person who is perfectly familiar with the condition of a sidewalk in which a defect exists has no right, while using it, to act on the ordinary presumption that it is in good condition." In *Cloney v. Kalamazoo (Mich.)* 83 N. W. 618, 4 Mun. Corp. Cas. 640, the syllabus is as follows: "In an action for injuries to a pedestrian caused by his stepping into an unguarded excavation made in a cross-walk of a city street in tearing up the pavement of the street for the purpose of repaving, it appeared that plaintiff knew that the work was being done at or near the crossing where the accident occurred, and, having seen the work going forward, must have been aware that such excavations were being made, and though it was at night, he could have readily seen the excavation before stepping into it, as there was an arc light hanging over the street near such point, besides other lights in the vicinity. Plaintiff testified that he was observing a team at the time, and that he was not aware that the work was being done exactly at the crossing. Held, that a verdict should have been directed for the defendant city." To the same effect are *Dale v. Webster Co.*, 76 Iowa, 370, 41 N. W. 1, where the plaintiff knew of the defect, and walked along without looking where he was going; *Tuffree v. State Center*, 57 Iowa, 538, 11 N. W. 1, where the plaintiff drove in one direction, and was looking and talking to persons in another direction; *Tasker v. Farmingdale*, 91 Me. 521, 40 Atl. 544, where the plaintiff was absorbed in looking at an electric car, and gave no thought to the dangers on the road, and drove a wheel of her conveyance over the end of a culvert; *Gilman v. Deerfield*, 15 Gray, 577, where the plaintiff knew of the defect in the highway, and while thinking of something else, and, temporarily unmindful of the defect, drove into it; *Tel. Co. v. Jones (Neb.)* 81 N. W. 435, where the plaintiff knew of the defect, and, while thinking of something else, drove over a stump in the road. In short, the rule is supported not only by the almost universal trend of authority, both English and American, but also by the plainest principles of right and justice. While the city owes the citizen the duty to keep the highways reasonably safe for persons to pass over, the citizen owes the city the duty to use his God-given senses, and not to run into obstructions

that he is familiar with, or which by the exercise of ordinary care he could discover and easily avoid. And while the city may be negligent in the discharge of its duty, the citizen may also be negligent in the discharge of his duty. And if both are negligent, and their negligence contributes to the injury, there can be no recovery. And if the plaintiff's negligence necessarily contributes to the happening of the injury, there can be no recovery. Such is clearly this case. The negligence of the city had continued for a year. The plaintiff knew it, and by the exercise of ordinary care he had avoided injury from it every day, and about the same hour every day, for a year. He could have avoided it on the day of the accident if he had exercised ordinary care. He was negligent in letting the horse turn unguided, or in so guiding him as to strike the obstruction he knew was there. Without his contributory negligence, no injury would have resulted to him from the negligence of the city. He made out no case for the jury. The demurrers to the evidence should have been sustained.

The judgment is reversed. All concur.

WILHITE et al. v. WOLF et al.

(Supreme Court of Missouri, Division No. 1.
Feb. 10, 1904.)

WIDENING HIGHWAY—PROCEEDINGS—JURISDICTION—PETITION—REPORT OF COMMISSIONERS.

1. A petition to a county court stated that the undersigned freeholders, "three of whom reside within the immediate neighborhood of the following described proposed widening of public road, pray that said public road be widened from its present width," etc. Following the description it stated "that said public road has been an established highway for more than twenty years," and prayed "for the widening of said road," etc., and that "a survey of such proposed widening" might be ordered. *Held* to definitely disclose a purpose to widen an existing road.

2. A statement in the report of commissioners in proceedings to widen a road that a landowner asked a specified sum as damages sufficiently showed that he had refused to relinquish his land.

3. The jurisdiction of a county court to widen a road depends on a petition therefor, and notice of its presentation, as provided by Rev. St. 1899, §§ 9414, 9415, and it cannot be affected by any subsequent irregularity in the proceedings.

Appeal from Circuit Court, Boone County; Jno. A. Hockaday, Judge.

Proceedings on petition of J. L. Wilhite and others to widen a road. From a judgment of the circuit court affirming a judgment of the county court as to an assessment of damages, L. S. Wolf and others, remonstrators, appeal. Affirmed.

W. H. Truitt, Jr., and N. T. Gentry, for appellants. Webster Gordon, for respondents.

ROBINSON, J. This is a proceeding under the statutes, begun in the county court of Boone county by petition and notice, to have widened an old road of that county to the uniform width of 40 feet, a part of said road up to that time being 35 feet wide, and the remaining portion thereof being only 25 feet wide. The proposed change in the road sought by the petition resulted in the taking of about 1½ acres of the appellant's land. In due course the commissioners appointed by the court to assess damages to the landowners who refused to give the right of way for the purpose of widening said road made their report, and the appellant, among others, filed objections thereto, and upon a trial by a jury in the county court his damages for the land taken was assessed the same as by the commissioners at \$16.33. Thereupon the court ordered the road opened and widened as prayed for in the petition, and the appellant here alone took an appeal to the circuit court of Boone county, where, upon a new trial therein, his damages were assessed by a jury in that court at \$18.33, and the judgment of the county court in all things else was by the circuit court approved and affirmed. From the judgment of the circuit court, the case has been brought to this court on appellant's appeal.

Appellant's contention here is that the proceeding before the county court was insufficient to give that court jurisdiction to act in the premises to order the change in the road sought, and the particulars in which he claims that want of authority in the county court are: First, that the petition filed with the court failed to disclose definitely whether the purpose of the petitioners was to have opened up a new road, or to have changed the width of an old existing road; and, second, that in the road commissioners' report to the county court it was not stated that the appellant herein had refused to relinquish the right of way sought for said purposes, for so much of the land to be taken as was owned by him, and until this fact was set out and shown in the road commissioners' report, the county court had no authority to proceed further in the premises.

Appellant's first contention is utterly without support in the facts of the case, and why it has been suggested, in the face of the plain language of the petition filed with the county court, we are unable to understand. The petition reads, "To the Honorable, the County Court of Boone County, Missouri: We, the undersigned twelve freeholders of the townships hereinafter named, three of whom reside within the immediate neighborhood of the following described proposed widening of public road, pray that said public road be widened from its present width, which is from twenty-five to thirty-five feet in width, to a width of forty feet, having its points of beginning and termination, course and intermediate points as follows, to wit. [Here follows a description of the road.]" Following

this description, the petition continues: "That said public road has been an established highway for more than twenty years, and that the undersigned petitioners pray the honorable county court of Boone county for the widening of said road above described and set out at the expense of the county; that the proposed widening of said described road is necessary, and of public utility, and that the same runs through and along the lands hereinafter mentioned and described, together with the names of the owners thereof. And now, therefore, your petitioners pray that a survey of such proposed widening of said described road to the width of forty feet may be ordered," etc. This reproduction of the petition is the best answer that can be made to appellant's charge of its want of definiteness in the particular named, and with this done we will pass to appellant's second contention, without comment as to the effect of a petition filed with the county court, defective in the manner suggested by appellant.

As to appellant's second contention—that the county court's authority to proceed further with its inquiry when the road commissioners failed to state in their report that appellant had refused to relinquish the right of way to so much of the land as was owned by him along the route of the road, and that all after actions and orders by the county court in the proceedings were without jurisdiction and void—we think him in error, both as to his conclusion of what are the facts and in his application of the law to the facts as he has assumed them to be. Though not properly preserved in the record for our examination, we find in appellant's statement and brief filed herein what purports to be a copy of the road commissioners' report to the county court, and from it appellant's second contention is shown to be without foundation in the facts of the case. While in this report it is not, in direct words, recited that appellant refused to relinquish the right of way sought to so much of the land as was owned by him along the course of the road, yet in that report, following immediately the description of appellant's land to be taken, and its amount in acres given, is found this recitation: "Said Wolf asks one hundred and fifty dollars damages." This, when the purpose of the report is considered, could mean nothing less than that the appellant, Wolf, as one of the landowners along the route of the road to be widened, refused to give or relinquish the right of way sought. It was a statement not only that the appellant refused to relinquish the right of way, but it embodied his reason for so doing, and told how and for what amount that relinquishment could be obtained by the court or agent for the county, or by those petitioning for the improvement; and the report did secure to the appellant the very right which the statute was designed to confer upon all those who were shown to be unwilling to

give or relinquish the right of way for the proposed road improvement over and along their land—the right to have damages assessed by jury. We think the language of the commissioners' report, as found copied in appellant's brief, a most vigorous statement of appellant's refusal to relinquish the right of way for the proposed road, and we would most certainly conclude that the county court must have so understood and construed its meaning, if we felt called upon to examine into the action of that body on this appeal. Thus we find appellant's second contention is predicated upon a state of facts not existing in the case before us. But if we should agree that the report of the road commissioners made to the county court had been properly preserved in the record, and in it no statement was to be found that appellant had refused to relinquish the right of way to that part of the land owned by him through which the road passed, we could not agree with appellant that this omission from the commissioners' report was fatal to the court's further jurisdiction in the premises, or that all after orders or judgments of the county court therein, as well as the judgment of the circuit court, where the proceeding was taken on appeal, were *coram non judice*, and void. Appellant has confused the jurisdictional steps essential to be taken by petitioner in order that the county court might become invested with authority and jurisdiction to proceed in the matter of determining whether a proposed change in a road should be made with matters the court and its officers are directed to do, in the exercise of its jurisdiction acquired, to determine how and under what conditions the proposed change should be made.

Without questioning the general proposition asserted and discussed by appellant's counsel in their brief filed herein, that all essential facts conferring jurisdiction upon county courts to establish or widen a designated road must affirmatively appear upon the face of the proceeding begun to accomplish that end, and that, if those essential jurisdictional facts are not shown upon the face of the record of that court, all subsequent proceedings in such court, as well as in the circuit court, where the proceeding has been taken by appeal, are alike void and of no effect, we cannot follow appellant into the extreme of asserting, as his position here has led him, that every error of omission that may appear to have occurred during the progress of the court's inquiry, will affect the court's authority over the proceeding, or will operate to render void all after orders or judgments therein. The county court's jurisdiction to hear and determine whether the proposed change in the road should be made was complete when the petition properly signed by the requisite number of qualified citizens of the township through which the road ran, as provided in section 9414, Rev. St. 1899, had been filed with the court, and

the notice of its intended presentation, as provided in section 9415 of same statute, was shown. This done, the machinery of the court was set in motion to work out the purposes sought by the petition. This being done, the power and authority for the court's action in the premises was not thereafter depending upon whether it proceeded correctly or incorrectly, wisely or unwisely. The authority of the court to act, and to act upon correct lines, involved its right to act erroneously. If a court, with authority to act in a given proceeding, has acted erroneously; if it has taken proof of facts by way of oral declaration that should have been presented to it through a written report of one of its officers, or in any other way has failed to follow the direction of the law in the conduct of the inquiry before it—that erroneous action or conduct of the court, if properly preserved and presented to an appellate court, may be ground for reversing the judgment obtained in the first court; but in so doing the question of the court's jurisdiction to act in the premises is not involved.

The appeal herein is wholly without merit, and the judgment of the circuit court should be affirmed, and it is so ordered. All concur.

MEINERS et al. v. MEINERS et al.

(Supreme Court of Missouri. Division No. 1.
Feb. 10, 1904.)

WILLS — CONSTRUCTION — "UNDIVIDED ONE-THIRD" OF PROPERTY.

1. A will, after making provision for payment for the services of a daughter-in-law of the testator, bequeathed stipulated sums to each of three adult sons who resided away from home. Testator then devised to three other sons "the undivided one-third in all my real estate," etc. Thereafter all the residue of the personal property was bequeathed to the same three sons. *Held*, that the devise of realty was of an undivided one-third to each of the three sons, and not an undivided one-third to the three jointly.

Appeal from St. Louis Circuit Court; O'Neil Ryan, Judge.

Action by August Meiners and another against John Meiners and others. From a judgment for plaintiffs, defendants appeal. Reversed.

Stewart, Cunningham & Elliot, for appellants.

Seneca N. & S. C. Taylor and Chas. Erd, for respondents, cited the following cases: *Hall v. Stephens*, 65 Mo., loc. cit. 673, 27 Am. Rep. 302; *Farish v. Cook*, 78 Mo., loc. cit. 218, 47 Am. Rep. 107; *Nichols v. Boswell*, 108 Mo., loc. cit. 151, 15 S. W. 343; *Watson v. Watson*, 110 Mo., loc. cit. 171, 19 S. W. 543; *Elliott v. Topp*, 63 Miss., loc. cit. 142; *Burke v. Lee*, 76 Va. 386; *Couch v. Eastham*, 29 W. Va. 784, 8 S. E. 23; *Gray v. Pearson*, 6 H. L. C. 61; *Edgerly v. Barker* (N. H.) 31 Atl. 900, 28 L. R. A. 328; *Young v. Robertson*, 2 Scotch App. 1108; 2 Story, Eq. Juris.

§ 1047b; 2 Jarman on Wills, 726; 4 Kent, Comm. 537; *White v. Crawford*, 87 Mo. App. 262, loc. cit. 268; *Given v. Hilton*, 95 U. S. 591, 24 L. Ed. 458; *Hancock's Appeal*, 112 Pa. 532, 5 Atl. 56; *Selbert v. Wise*, 70 Pa. 147; *Cody v. Bunn's Ex'r*, 46 N. J. Eq. 131, 18 Atl. 857; *Bonnell v. Bonnell*, 47 N. J. Eq. 540, 20 Atl. 895; *Perkins v. Mathes*, 49 N. H., loc. cit. 110; *Barrus v. Kirkland*, 8 Gray, 513; *In re Woodward*, 117 N. Y., loc. cit. 525, 23 N. E. 120, 7 L. R. A. 367.

VALLIANT, J. This is a suit for the partition of real estate. The property was owned in his lifetime by Herman Meiners, who died January 16, 1900, leaving five sons, who are the parties here, plaintiffs and defendants. The controversy arises out of the different construction the parties have placed on the will of their father. The testator was 73 years of age, of German nationality, but could read and write and speak English. The inventory of his personal property showed it to be worth \$36,205.60. The value of the real estate in question was about \$25,000. At the date of the will he had six sons, viz., William, Henry, August, John, Herman, Jr., and Aloysius. These were his only children. The last two were twins, and were minors at the death of their father, but became of age before the trial of the case. Henry died before his father. The five others survived, and they are the parties to this suit; William and August being plaintiffs, and the three others defendants. The will is as follows:

"In the name of God, Amen. I, the undersigned, Herman Meiners, of the City of St. Louis and State of Missouri, of sound and disposing mind, do make, publish and declare this my last will and testament.

"Item 1. I will, and direct that my funeral expenses and just debts be paid with convenient speed.

"Item 2. I will, give and bequeath to my daughter-in-law, Kate Meiners, the sum of \$7 per month from now on for her services as housekeeper, or so long as she acts in that capacity, as per our verbal agreement.

"Item 3. I will, give and bequeath to William Meiners the sum of \$4,000.00; and to my son, Henry Meiners, the sum of \$50.00. To my son, August Meiners, the sum of \$4,000. To Rev. William Reichenbach, now in Mendota, Illinois, the sum of \$500. To the Upper Council of the St. Vincent de Paul Society, St. Louis, Missouri, for the use of St. Josephs, \$200. To the German St. Vincent Orphan Association, St. Louis, Missouri, the sum of \$200. To the pastor of St. Joseph's Catholic Church, St. Louis, Missouri, German congregation, the sum of \$300.00 for holding masses for the repose of the immortal souls of my deceased wife and myself. To the Little Sisters of the Poor, St. Louis, Missouri, the sum of \$200.00. All of the above bequests mentioned in this clause shall be paid within two years after my demise and bear no interest, except the bequest

for holding masses, which shall be paid sooner.

"Item 4. I will, give, bequeath and devise to my sons, John, Herman, Jr., and Aloysius, the undivided one-third in all my real estate, houses numbered 1438, 1440 and 1442 on the east side of N. Tenth street; also houses numbered 1322 and 1324 on the east side of N. Tenth street, St. Louis, Missouri, with all improvements thereon.

"Item 5. All the balance and residue of my personal property I will and bequeath to my sons, John, Herman, Jr., and Aloysius.

"Item 6. I appoint my son, John Meiners, trustee for my minor children, Herman, Jr., and Aloysius, during their minority. He shall file no bond as such trustee.

"Item 7. I will and ordain that in the event that any of the various legatees contest this will, or any legacy therein mentioned, the party so contesting shall be barred and receive no benefit from the estate.

"Item 8. I nominate, constitute and appoint my son, John Meiners, executor of this will. He shall file no bond as such executor.

"Witness my hand and will this 24th day of January, 1896. Herman Meiners."

The controversy is over the meaning of item 4; the plaintiffs contending that thereby only an undivided one-third of the real estate is devised to the three sons therein named, leaving two-thirds undisposed of, to descend to the five sons as heirs; the defendants contending that it is a devise of an undivided one-third to each of them, and consequently a devise of the whole. The trial court took the plaintiffs' view of the subject, and rendered judgment accordingly. The defendants appeal.

There is not much, if any, difference of opinion between the learned counsel regarding the principles of law discussed in their brief. To find the intention of the testator must be the main purpose of our search, and that intention we must find from the will itself. We may resort to outside evidence to learn the conditions under which the will was made, for the purpose of placing us in the position of the testator, that we may view the subject from the standpoint from which he viewed it; but, viewing the subject from that standpoint, we must find from the will alone the testator's meaning. *McMillen v. Farrow*, 141 Mo. 55, 41 S. W. 890; *Clotilde v. Lutz*, 157 Mo. 439, 57 S. W. 1018, 50 L. R. A. 847.

It is also the law that words in a will must be given their ordinary meaning and grammatical construction, unless it is manifest from the whole instrument that they were used in a different sense; and this leads to the further proposition that the intent is to be gathered from the whole instrument, so that, if a literal construction of a particular clause would render it a discord in the whole will, we should not give it that construction if it is reasonably susceptible of another that would bring it into harmony. For au-

thorities to sustain these propositions of law, we refer to the briefs of the learned counsel, which will appear in the report of this case.

If we conclude that the plaintiffs' interpretation of the clause in question is correct, then we must say that it was the testator's intention to leave two-thirds of his real estate undisposed of, to descend to his heirs as the law might direct. When a man makes a will that is fairly susceptible of being construed into a testamentary disposal of his whole estate, it will be so construed, in preference to construing it to be a case of partial intestacy. *Watson v. Watson*, 110 Mo. 164, 19 S. W. 543; *Hurst v. Von De Veld*, 158 Mo. 239, 58 S. W. 1056; *Willard v. Darrah*, 168 Mo. 660, 68 S. W. 1023, 90 Am. St. Rep. 466; *Robards v. Brown*, 167 Mo. 447, 67 S. W. 245.

This will was written at the dictation of the testator, whose native language was German, yet who could read, write, and speak English. The will shows that his social and religious affiliations were German. Those are facts to be considered when we are asked to apply the rules of English syntax to sentences framed by him. When the will was written he had six sons, three of whom were living with him—Henry, who has since died, and the two youngest, who were then minors. Henry's wife also lived with him and kept his house. She is named in the will. The three other sons seem to have been in business, and lived elsewhere. That he did not intend to divide his estate equally between his children is shown in every feature of the will. That he intended to dispose of his whole estate is also shown by the whole instrument. He starts out with the solemn statement that it is his last will and testament. It is in fact the last expression of his wish in reference to the division of his property among his children. After directing that his personal expenses and debts be paid, he turns to the objects of his bounty, and gives to each, by name, the share of his estate he intended him and her and them to have. After his funeral expenses and general debts, he remembers his obligations to his daughter-in-law Kate, the wife of his son Henry, and makes a bequest to her, which he distinguishes from a mere gratuity by specifying that it is in recognition of her services as housekeeper. Then he turns to the objects of his bounty, naming first his three older sons, giving to two of them \$4,000 each, and to one only \$50, and in the same clause makes certain charitable bequests. The two sons to whom he gave the \$4,000 legacies were grown men, living away from him, and presumably established in business. Why he was more liberal to them than he was to Henry, we have no right to inquire. It was his will, and that is all we are entitled to know. So far as the testator's intention is expressed on the face of this will, those legacies comprised all of his estate that those sons were to have. If they are entitled

to anything more, it is because the will omits to dispose of all the estate; and, before we can say that the will omits to dispose of all the estate, we must say that by this fourth clause he intended to give only one third of the property therein specified to his three younger sons jointly, and leave two-thirds undisposed of; that is, that he intended by the use of the language there appearing that each of those three sons should take an undivided ninth by the will, and an undivided one-fifth of two-thirds by inheritance. No possible motive is suggested for such a peculiar intentional disposal of the property as would result from that interpretation of the language. The learned counsel for respondents are correct in saying that, in order to deprive the heir of his inheritance, it must not only appear from the will that the testator did not intend him to take any portion of the estate, or that he intended him to take only a specified portion, but the will must also give the property to some one else. Cases above cited sustain that proposition. Therefore, even if in the third clause the testator had said that the legacies therein given to his three older sons should constitute all that they were to have of his estate, yet, if he left property undisposed of by the will, those three sons would share in the inheritance of it. Unless all the real estate named in the fourth clause is devised to the three sons therein named, these plaintiffs are entitled to their shares by inheritance.

The language of the fourth clause is, "I will, give, bequeath and devise to my sons John, Herman, Jr., and Aloysius the undivided one-third of all my real estate," etc. Did the testator by those words intend to give to John, Herman, and Aloysius each one-third of the property specified, and thus dispose of all of it, or did he intend to give them each one-ninth, and leave undisposed of the other two-thirds? His intention is what we are seeking to find, and, when we find it, we must give it effect, even if we have to supply a word, provided the word does no violence to the text, but only clears the doubtful meaning. If we should cut this clause out of the body of the will, and read it alone, we would hold that the plaintiffs' interpretation of it was correct. But we have no right to do that. We must consider the purpose of the testator, which runs through the will from its beginning to its end. We have already discussed the clauses which precede. Let us now look at those which follow this fourth clause: "Item 5. All the balance and residue of my personal property I will and bequeath to my sons, John, Herman, Jr., and Aloysius." That is the last gift in the will. Why is that residuary clause limited to personal property? Why does it not include real estate? It indicates that the testator recognized that he had not up to that time disposed of all his estate. It also indicates a purpose to do so, and,

since he therein treats the residue as consisting of personal property only, it goes to show that he considered the real estate already disposed of. The sixth clause also shows a continuing anxiety for the three last-named sons as distinguished from that for the three older ones, for whom he had provided in the third clause. In the sixth clause he appoints John trustee for his younger brothers, and exhibits such confidence in him that he directs that no bond as such trustee be required, and in the eighth clause appoints John his sole executor, and requires no bond. There was evidence on the part of the plaintiffs to show that there was no lack of love and confidence from the father to these three older sons. That may be so. The discrimination against them in the will may have been dictated more by their father's judgment than his affection. Finally the seventh clause indicates a strong desire that there should be no contest of the will. Unless the testator was conscious of discrimination, and that it might create dissatisfaction, why should he anticipate a contest? In that clause he wills that, if any one contests the will, he shall be barred from all share in the estate. All the clauses—both those preceding and those following the fourth clause—indicate that the testator understood that his whole estate was covered by his will. When he said that those three sons were to have an undivided third of his real estate, he meant that each was to have an undivided third. Any other construction would upset the whole plan of the will, and defeat the testator's intention.

The judgment is reversed, and the cause remanded to the circuit court, with directions to enter judgment for the defendants dismissing the plaintiffs' bill. All concur.

CITY OF TARKIO v. LOYD.

(Supreme Court of Missouri, Division No. 1.
Feb. 10, 1904.)

COURTS—APPEAL—JURISDICTION—CONSTITUTIONAL QUESTION—STATE SUBDIVISION—CITY ORDINANCES—JUDICIAL NOTICE.

1. That a city was a party to a prosecution for the violation of an ordinance did not give the Supreme Court jurisdiction of an appeal, the city not being a political subdivision of the state within the constitutional provision relating to such jurisdiction.

2. On appeal from a judgment dismissing a prosecution under a city ordinance, the Supreme Court had no jurisdiction on the ground that a constitutional construction was involved, where it appeared that the motion to dismiss was based on several grounds in addition to the constitutional ground, and the record did not show the ground on which the motion was sustained.

3. Courts of general jurisdiction do not take judicial notice of city ordinances.

4. On appeal to the circuit court in a prosecution for a violation of a city ordinance an unauthenticated paper purporting to be a copy of an ordinance, among the papers filed by the police judge, was no basis for a constitutional construction of the ordinance.

¶ 3. See Criminal Law, vol. 14, Cent. Dig. § 708; Evidence, vol. 20, Cent. Dig. § 42.

Appeal from Circuit Court, Atchison County; Gallatin Craig, Judge.

W. R. Loyd was prosecuted for violating an ordinance of the city of Tarkio, and from a judgment of the circuit court on appeal dismissing the prosecution the city appeals. Transferred to the Kansas City Court of Appeals.

W. R. Littell, for appellant. James Moran, for respondent.

BRACE, P. J. The defendant was tried, found guilty, and fined \$25 in the police court of said city on the following complaint:

"Complaint. State of Missouri, County of Atchison, City of Tarkio, ss. In the Police Court of Tarkio, Missouri, before Thomas Weir, Police Judge, April 24, 1901. The City of Tarkio, Plaintiff, against W. R. Loyd, Defendant. W. R. Loyd, Defendant, to City of Tarkio, Mo.—Debtor. To the violation of the city ordinance requiring persons engaged in soliciting orders from house to house for the future delivery of goods, wares or merchandise without a city license,—one hundred dollars. In this to-wit: that the said W. R. Loyd, on or about the 22nd day of April, 1901, at the City of Tarkio, and within the corporate limits thereof, did then and there unlawfully engage in the business of soliciting orders, from house to house, for the future delivery of goods, wares, merchandise, without first obtaining a city license. All of which is contrary to said ordinance in such cases made and provided, and against the peace and dignity of the said city of Tarkio. F. M. Meek.

"F. M. Meek makes oath and says that the facts and allegations contained in the foregoing complaint are true as therein stated. Subscribed and sworn to before me this 24th day of April, 1901.

"Thomas Weir, Police Judge."

Thereupon the defendant filed his affidavit for appeal to the circuit court of Atchison county, and a letter as follows:

"Tarkio, Mo., April 29, 1901.

"Thomas Weir, Tarkio, Mo.—Dear Sir: Mr. C. F. Enright of the Mo. Valley Trust Co., St. Joseph, Mo., writes me he will arrange for a bond for \$300 for one W. R. Loyd and I write this to say that I will stand good for said Loyd until you get a bond for the amount of \$300, I will stand good for his appearance to the extent of \$300 until you have a good bond for that amount.

"R. M. Stevenson."

And the appeal was granted. Afterwards there was filed in the office of the clerk of said court a copy of the entries on the police judge's docket, with the affidavit for appeal, the complaint and letter aforesaid, and a paper purporting to be a copy of a section of an ordinance as follows:

"Copy of Section No. 142a of the Ordinance of the City of Tarkio. 'Sec. 142a. Whosoever

shall go from place to place for the purpose of soliciting or taking orders for the future sale or delivery of any goods, wares or merchandise, except books, charts, maps, and stationery, is hereby declared to be a mercantile agent. Provided that this ordinance shall not apply to owners or other persons who shall sell, solicit or take orders for the future delivery in wholesale lots to retail dealers, of any goods, wares or merchandise.'"

Afterwards, in the circuit court, the plaintiff filed a motion to dismiss the appeal on the ground that the defendant had failed to file an appeal bond as required by law, and the defendant filed a motion to dismiss the case, which, omitting caption, is as follows:

"Now at this day comes the above-named defendant and moves the court to dismiss the above-entitled action and discharge the defendant, and for reasons therefor assign unto the court the following causes: First. Because the ordinance pleaded is void, in this: that it attempts to discriminate between different kinds of business. Second. Because the information does not state facts sufficient to constitute a cause of action. Third. Because the information is defective, in this: it fails to call defendant attention to any laws or ordinance that he has violated. Fourth. Because the information is vague, indefinite, and uncertain, and nowhere apprises the defendant of the laws or ordinances that he has violated that renders him liable to plaintiff in the sum of one hundred dollars or in any other sum. Fifth. Because the information does not inform the defendant of the nature or cause of the action or accusation against him. Sixth. Because the information does not charge the defendant with the commission of any offense known to the law, or with the doing of any act or acts that can or could be declared illegal by ordinance. Seventh. Because the information does not negative the fact that the defendant was not the owner of the goods, wares, and merchandise for which he was soliciting orders; nor does it negative the fact that he was not a wholesale dealer, nor that the goods, wares, and merchandise were not books, charts, maps, and stationery; and nowhere apprises the defendant of the nature or character of his alleged offense; and renders it impossible for him to prepare a defense to same. Eighth. Because the information fails to designate the section or sections, chapter or chapters, of ordinances violated. Ninth. Because the information was not sworn to as required by law. Tenth. Because, upon the face of the record, this court is without jurisdiction."

Afterwards, on the 3d of June, 1901, defendant filed an appeal bond, and on the same day these motions coming on to be heard, without any evidence being introduced, the court overruled plaintiff's motion to dismiss the appeal, and sustained the defendant's motion to dismiss the case, with-

out stating the ground upon which the motion to dismiss was sustained, and discharged the defendant. Afterwards the plaintiff filed a motion to set aside the order sustaining the motion to dismiss the case, assuming therein that the motion to dismiss was sustained on the first ground therein stated; and, the motion to set aside having been overruled, plaintiff appealed, and the case was sent to this court.

The jurisdiction of this court to determine the case does not appear upon the record. The plaintiff is a city of the fourth class, but is not a political subdivision of the state, and this court has no jurisdiction on that ground. *Kansas City v. Neal*, 122 Mo. 232, 26 S. W. 695; *St. Charles v. Hackman*, 133 Mo. 634, 34 S. W. 878; *Kansas City v. Zahner*, 138 Mo. 453, 40 S. W. 103; *Parker v. Zeisler*, 139 Mo. 288, 40 S. W. 881; *Water Co. v. Webb City*, 143 Mo. 493, 45 S. W. 279; *City of Hannibal v. Bowman*, 167 Mo. 535, 67 S. W. 214.

The protection of the Constitution was not invoked nor denied the plaintiff in the trial courts, nor does it appear from the record that a constitutional construction was essential to the determination of the case, and this court has no jurisdiction on that ground. *State ex rel. v. Smith* (Mo. Sup.) 75 S. W. 468, where all the cases to date are cited.

For aught that appears in the record, the case may have been decided upon some other than the first of the 10 grounds contained in the defendant's motion to dismiss. It is not seen how it could well have been decided on that ground, as there was no ordinance cited or set out in the complaint, no ordinance offered or given in evidence, and, no ordinance having been either pleaded or proven, there was no ordinance before the court that could have been declared void, for it is well settled law in this state that courts of general jurisdiction will not take judicial notice of city ordinances. *City of St. Louis v. Roche*, 128 Mo. 541, 31 S. W. 915, and cases cited. The unauthenticated slip of paper purporting to be a copy of one section of an ordinance of the city, found among the papers filed by the police judge, was no evidence upon which to predicate judicial action, and could not furnish a basis for judicial constitutional construction.

As there are no other grounds than those suggested upon which the jurisdiction of this court could possibly be founded, the case should be transferred to the Kansas City Court of Appeals, and it is accordingly so ordered. All concur.

DOHMEN v. SCHLIEF et al.

(Supreme Court of Missouri, Division No. 1.
Feb. 10, 1904.)

CONTRACTS—TRUSTS—CONSTRUCTION—ACTION
—EVIDENCE—DEED—DELIVERY—NECESSITY.

1. A contract whereby one agreed, in consideration of a transfer of money to him by the

other party, to pay the other party a certain sum monthly during the other's life, and on his death to pay the sum transferred to designated persons, was a mere personal obligation, and there was no trust created.

2. In an action on a contract alleged to have been made by defendant, a deed executed by defendant, reciting the contract, and creating a trust for performance of the contract, was of no effect; it not having been delivered, but having remained in defendant's possession.

3. Where a deed, reciting the execution of a contract by the grantor, for failure to deliver, is not binding on the grantor, the statements in the deed are of no force or effect.

Appeal from Circuit Court, Osage County; Jno. W. McElhinney, Judge.

Action by Ludwig Dohmen against Albert Schlief and others. From a decree in favor of defendants, plaintiff appeals. Affirmed.

Ryors & Vosholl, for appellant. Pope & Vaughan, for respondents.

MARSHALL, J. This is an action for an accounting, wherein the petition alleges that there is due the plaintiff the sum of \$7,069.44. There was a judgment for the defendants, and the plaintiff appealed.

The facts are as follows: The plaintiff is a very old man, being considerably over 80 years of age. On the 20th of September, 1882, and for many years prior thereto, he had lived with his brother-in-law C. W. Holtschneider and his wife, a sister of the plaintiff. He had notes executed to him by said Holtschneider which aggregated, to wit, \$4,457. Being desirous of securing a permanent home with his said relatives, he, on the day stated, entered into a written agreement with his said brother-in-law whereby it was agreed that he would deliver up to his said brother-in-law and his said wife, Regina, said notes, in consideration of which he (said brother-in-law) agreed to pay plaintiff during his natural life the sum of \$30 per month, of which \$10 was to be applied to the payment of the board and lodging of plaintiff in his brother-in-law's house as long as plaintiff continued to live at his house, and at plaintiff's death the said brother-in-law was to pay the principal represented by said notes as follows: To Mary Porth, daughter of Regina Holtschneider, the sum of \$1,000; to Jennie Reilly, daughter of said Regina, the sum of \$1,000; to Ludwig Reilly, son of said Jennie Reilly, the sum of \$200; to Henrietta Schlief, daughter of said Regina, the sum of \$1,200; and the remainder to said Regina. It is alleged in the petition that Regina signed this agreement, but this is expressly denied in the answers, and there is no competent evidence in the record that she ever did so. The petition alleges that in this way a trust fund was created, and that said C. W. Holtschneider and Regina became thereby trustees, and it is contended that they thereby charged their real estate with said trust. But as Regina did not sign said agreement, and did not at that time own any

real estate, it cannot be successfully contended that she so created any trust, either personal to herself, or as to any real estate. It is also plain that there was no trust created by said C. W. Holtschneider that would attach to his real estate, but that it was a simple contract to board and lodge plaintiff, and to pay him a certain sum per month for life, and after his death to pay the principal sum to the persons named, which contract was in no proper sense a personal trust, but was a plain personal obligation to pay money and furnish board and lodging. Thereafter the plaintiff continued to reside with C. W. Holtschneider, but how long the evidence does not disclose. It was shown, however, that he has received, in all, from C. W. Holtschneider, Regina, and the executors of the wills of their estates, only the sum of \$250 in money. C. W. Holtschneider died testate on May 13, 1883, leaving certain real estate in St. Louis to his daughter Jennie Reilly, and the balance of his estate in Osage, Maries, Miller, and Cole counties, and in the city of St. Louis, to his wife, Regina; but the will expressly states that he is unable to give a particular description of it, and no attempt was made in this case to give a description of either the whole or any part thereof. The plaintiff offered in evidence a copy of an agreement that is alleged that have been made on September 10, 1886, between Regina Holtschneider and Henry Porth, her son-in-law, in which it is recited that C. W. Holtschneider and Regina made the agreement with the plaintiff of September 20, 1882, hereinbefore referred to, which provided for the board of plaintiff, etc., and then recited that, for the purpose of carrying out the contract, said Regina conveyed to said Porth all the real estate in the city of St. Louis which she acquired under the will of her husband (no other description is given), and whereby she provided further that the property should remain subject to her control and disposition during her life, and after her death it should be subject to the control and disposition of said Porth. She directed further that after her death her executors or administrators, out of personal estate, should pay the money directed to be paid by said contract of September 20, 1882, and that, "in default" of such payments, said Porth should sell the real estate conveyed by the agreement, and pay the same. This paper was dated September 10, 1886, but the uncontradicted evidence is that it was not signed until June 13, 1892, when it was signed by said Regina Holtschneider and Henry Porth, and acknowledged by said Regina; but it was never delivered by said Regina to said Porth, nor to any one else, nor did said Porth ever have possession of it, but it remained in the possession of said Regina as long as she lived, and after her death it was found by Porth's wife among her papers in her trunk. Upon this showing the chancellor found the fact to be that the instrument had never

been out of the possession of Regina at any time, and, never having been delivered, it was of no legal force.

The estate of C. W. Holtschneider was fully wound up years ago, and the plaintiff exhibited no claim against it. Regina Holtschneider died testate on January 2, 1900, leaving a legacy of \$50 to her daughter Jennie Reilly, and bequeathing all the balance of her property to her daughters Mary Porth and Henrietta Schlieff, equally. Her will follows the language of her husband's will, and refers to property in Osage, Maries, Miller, and Cole counties, and in the city of St. Louis, and declares that she is unable to give a particular description of it. After her death the plaintiff instituted this action against her three daughters, Henrietta Schlieff, Mary Porth (and their husbands), and Jennie Reilly, and the latter's son, Ludwig Reilly, and against the executors of Regina's estate. As stated, the chancellor entered judgment for the defendants, and the plaintiff appealed.

The plaintiff predicates a right to recover upon two premises: First, that C. W. Holtschneider and Regina, his wife, entered into the contract with the plaintiff of September 20, 1882; and, second, that Regina recognized that contract, and provided an estate upon which it should be a charge, by her agreement or deed to Henry Porth, dated September 10, 1886, and acknowledged June 13, 1892. The defendants deny that Regina ever signed or executed the contract of September 20, 1882, and there is no evidence whatever that she ever did so, unless her statement in the deed of September 10, 1886, that she executed the contract with her husband, is evidence against her and her representatives that she did so. The trial court found that the deed of September 10, 1886, was never delivered by Regina, and this finding is in accordance with the uncontradicted evidence in the case. This being true, the deed was of no force or validity in law. It follows, therefore, that the statement therein contained that she executed the contract of September 20, 1882, with her husband, amounts to nothing, and is not binding upon her or her representatives. The contract of September 20, 1882, was not produced or offered in evidence, and its absence is not accounted for; and there is no evidence as to its contents, or, in fact, that there ever was such a contract at all. And if it were not for the admissions of the answer that such a contract was made by plaintiff with C. W. Holtschneider, there would be no foundation in the case for any reference to such a contract. This, however, does not help the plaintiff's case, for the answers expressly deny that Mrs. Regina Holtschneider ever signed the contract or was a party to it, and it is her heirs and her estate that are sought to be held liable in this action. There is therefore no evidence whatever to show that Regina Holtschneider ever entered into any

such a contract, and hence her representatives cannot be held liable by reason of any contract between her and the plaintiff.

The only other pretended foundation for the claim is the deed of September 10, 1886, to Henry Porth. But as this instrument was never delivered by her to Porth or to any one else, but remained in Regina's possession during her life, and was found among her papers after her death, it never ripened into a legal instrument, and no one acquired any rights whatever under it. Delivery is necessary to make a deed or other written obligation effective and binding. *Hall v. Bank*, 145 Mo. 418, 46 S. W. 1000; *Powell v. Banks*, 146 Mo. 620, 48 S. W. 664; *Mudd v. Dillon*, 166 Mo. 110, 65 S. W. 973. "An undelivered deed is of no more effect than if it were not signed." *McVey v. Carr*, 159 Mo. 648, 60 S. W. 1034.

The plaintiff therefore wholly failed to make out any case, and the trial court properly entered a judgment for the defendants, and its judgment is affirmed. All concur.

STONE v. COOK et al.

(Supreme Court of Missouri, Division No. 1.
Feb. 10, 1904.)

WILLS—CONTEST—RIGHT OF ACTION—ESTOPPEL BY ACCEPTANCE OF LEGACIES—RETURN OF AMOUNT RECEIVED—NECESSITY—PLEADING—DEFENSE OF ESTOPPEL—RAISING BY DEMURRER.

1. The acceptance of legacies under a protest that the will was invalid, and because the legatee would be entitled under the law to more of the estate, estops the legatee to contest, in the absence of any claim that the acceptance was induced by fraud or deception.

2. An allegation in the petition of a legatee contesting a will that she was ready and willing to pay into court the amount received, or to have it deducted from her share of the estate, if the will be set aside, is insufficient to bring her within the rule entitling her to contest, for that requires that it shall be actually paid into court on or before filing suit.

3. On the faith of plaintiff's acceptance of benefits under a will which she sought to contest, the major portion of which arose from the residue of the estate, the executors paid special legacies to other persons, and she stood by and saw them do so. She thereupon attempted a contest on an offer to pay into court only the amount received by her. *Held* that, notwithstanding the statutory limitation had not expired, the executors would suffer by a revocation, under such circumstances, and the proceedings therefore fell within the rule denying the right to contest in case of unreasonable delay.

4. The defense of estoppel may be raised by demurrer where the essential facts appear in the petition.

Appeal from Circuit Court, Audrain County; E. M. Hughes, Judge.

Action by Mary Stone against E. C. Cook and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Geo. Robertson, for appellant. Fry & Rodgers and E. C. Kennan, for respondents.

MARSHALL, J. This is an action under the statute to contest the will of William T. Cook. The plaintiff is a daughter of the testator, and the defendants are the other children, grandchildren, daughter-in-law, and executors of the deceased. The will was executed on December 17, 1895. Shortly thereafter the testator died, and the will was probated in March, 1896. By the first item of the will, the testator bequeathed to his grandson E. C. Cook 160 acres of land to enable him to support and care for his invalid mother. By the second item of the will, the testator bequeathed to his daughter Martha Corner, 80 acres of land. By the third item of the will, the testator bequeathed to his daughter Mary Stone, the plaintiff, a legacy of \$500, provided that sum could be realized from the sale of his interest in certain land, which was subject to a mortgage for \$1,750 and interest, and, at all events, he directed that, if \$500 could not be so realized, she should have the excess over the amount necessary to pay the mortgage. By the fourth item of the will, the testator directed that his storehouse and lot in Laddonla be sold, and out of the proceeds the sum of \$50 a year, for six years, be paid to the trustees of the Methodist Church, to be used by them to pay the pastor's salary. By the fifth item of the will, the testator bequeathed to two granddaughters the sum of \$85 each, to buy a watch, as a token of affection of their departed grandmother. By the sixth item, the testator set apart the sum of \$100, the interest on which he directed to be used to keep in repair the graves of the testator and his family. By the seventh item, the testator bequeathed the residue of his estate to his daughter Mary Stone, the plaintiff, Martha Corner, the defendant, and his daughter-in-law, the widow of his deceased son, William R. Cook. After reciting the relationship of the parties litigant, and after setting out the will in full, wherein the testator declares himself to be 91 years old and of sound mind, the petition charges that at the time the will was made the testator was old, feeble of body, and was of unsound mind and incapable of making a will, and then charges that the will was procured by the undue influence of the grandson E. C. Cook, and of the daughter-in-law, and of a witness to the will. The petition then states that the will was admitted to probate in Audrain county at the March term, 1896, of the probate court. The petition then alleges that the plaintiff received from the executors the special legacy of \$500 bequeathed to her by the third item of the will, and also received \$600 under the seventh item of the will, being one-third of the residuum of the estate, but says she received said amounts under protest, insisting that she received said sums only because, under the law, she was entitled to one-third of the estate, which she says would amount to \$4,000; and she avers that she is ready and willing (she

¶ 4. See *Estoppel*, vol. 19, Cent. Dig. § 298.

omits to say able) to pay said sums so received into court, or to have them deducted from her share of the estate, if the will is set aside. The prayer of the petition is that issue be joined as to whether or not the will is the will of William T. Cook. The suit was made returnable to the September term, 1901, of the Audrain circuit court. The defendants demurred to the petition on the ground that it does not state facts sufficient to constitute a cause of action, in this: First, because it shows on its face that it was not instituted within five years after the will was probated in common form, and hence is barred by limitations; and, second, because the petition shows on its face that the plaintiff accepted the benefits accruing to her under the will, and is therefore estopped to deny or contest the validity of the will. The circuit court sustained the demurrer, the plaintiff refused to plead further, judgment was entered for the defendants, and the plaintiff appealed.

The pivotal question here involved is whether the plaintiff, having received the legacies bequeathed to her by the will, can be heard to contest the validity of the will, upon bringing into court the sums she has received under the will. The fact that she received the legacies under protest, or under a claim that they constituted only a part of what she was entitled to by law, outside of the will, is wholly immaterial, and avails nothing. *Pollman v. St. Louis*, 145 Mo. 551, 47 S. W. 563; *McCormick v. Transit Railroad Co.*, 154 Mo. 191, 55 S. W. 252; *McCormick v. St. Louis*, 166 Mo., loc. cit. 345, 346, 65 S. W. 1038. *Woerner's Am. Law of Adm'n*, vol. 1 (2d Ed.) marg. p. 500, says: "But since a person cannot hold under a will, and also against it, one who accepts a beneficial interest under a will thereby bars himself from setting up a claim which will prevent its full operation at law or in equity; and such person will not, therefore, be allowed to contest a will unless he return the legacy received." The general rule laid down in the text is supported by the following cases cited in the notes to the text: *Smart v. Easley*, 5 J. J. Marsh. 215; *Herbert v. Wren*, 7 Cranch, 370, 3 L. Ed. 374; *Preston v. Jones*, 9 Pa. 456; *Smith v. Guild*, 34 Me. 443; *Hyde v. Baldwin*, 17 Pick. 303; *Benedict v. Montgomery*, 7 Watts & S. 238, 42 Am. Dec. 230; *Smith v. Smith*, 14 Gray, 532; *Van Dwyne v. Van Dwyne*, 14 N. J. Eq. 49; and *Fulton v. Moore*, 25 Pa. 468. To the same effect is *Syme v. Badger*, 92 N. C. 706. In all these cases it is held, without qualification, that one who accepts a benefit under a will or deed thereby elects to take under the instrument, and is estopped thereafter from contesting the validity of the instrument. Nothing is said in any of these cases about the right of such person to bring into court the benefits so received, and thereupon to contest the instrument. However, in *Holt v. Rice*, 54 N. H., loc. cit. 402, 20 Am. Rep.

138, while the general rule is announced and affirmed, it is held that one who has received a benefit under a will may pay the amount so received into court, and thereafter contest the will, though it is said, "Under circumstances of delay, connected with other circumstances, it has been held to preclude the party from contesting the will afterwards," and it was allowed in that case because there had been no great delay. In *Miller's Appeal*, 159 Pa., loc. cit. 575, the contesting legatee was required to pay the money received into court before he was permitted to proceed; and it was held that where the acts set up are equivocal, or were done in ignorance of the rights of the doer, or where they consist merely of the receipt of a pecuniary legacy, and the money is returned before the appellant proceeds beyond the entry of his appeal [which is like our proceedings to contest the will], they will not amount to an estoppel." In the *Matter of Soule*, 1 Con. Sur., loc. cit. 54, 3 N. Y. Supp. 259, the sufficiency of a mere offer to refund, contained in a petition to contest a will, is discussed, and held to be insufficient, and that nothing short of an actual payment into court of the benefits received before the filing of the petition will entitle a beneficiary under a will, who has received benefits thereunder, to repudiate and contest the will.

In the *Matter of Peaslee*, 73 Hun, loc. cit. 114, 25 N. Y. Supp. 940, the rule is so admirably stated as to justify the following excerpt therefrom: "It is a well-settled proposition in law, as well as in equity, that he who accepts and retains a benefit under an instrument, whether deed, will, or other writing, is held to have adopted the whole, and to have renounced every right inconsistent with it. The rule has found expression in many actions, and with widely differing facts. A few of them only will be referred to. In *Chipman v. Montgomery*, 63 N. Y. 234, which was an action in the Supreme Court to obtain a judicial construction of a will, and for an accounting, Judge Allen, speaking for the court, said: 'Two of the plaintiffs have received, in whole or in part, the legacies given them by the will, and, having accepted the benefits of the provision made for them, cannot be heard in opposition to other parts of the instrument, except by proof of circumstances showing that they had not intelligently elected to take under the will, rather than in opposition to it, and a return of all that has been received by them.' And he quoted with approval Lord Redesdale's decision in *Birmingham v. Kirwan*, 2 Sch. & Lef. 444, that this rule of election is applicable to every species of instrument, whether deed or will, and to be a rule of law as well as equity. The rule is also asserted in *Havens v. Sackett*, 15 N. Y. 365, and in *Mills v. Hoffman*, 92 N. Y. 181, which was an appeal from a decree of the surrogate's court compelling an administrator to account; the objection overruled by that

court being that the petitioner was barred because of an entry of judgment in which she was a party defendant, although an infant, and the subsequent distribution of the estate in pursuance of the judgment, by which the moneys came into the hands of her guardian, and upon her majority to her. After this latter event the judgment was vacated and set aside, as to her, on the ground that the appointment of a guardian ad litem to represent her had been irregular, and the Court of Appeals held that she was estopped from controverting in the surrogate's court the judgment under which she had received benefits. In *Matter of Soule*, 1 Con. Sur. 18 [3 N. Y. Supp. 259], the right of a legatee who had received moneys under a will to claim revocation of probate without making full restitution to the executors was denied. Numerous cases have arisen under wills where this principle has been applied. *Hamblett v. Hamblett*, 6 N. H. 333; *Van Duyne v. Van Duyne*, 14 N. J. Eq. 49; *Weeks v. Patten*, 18 Me. 42 [36 Am. Dec. 696]; *Smith v. Guild*, 34 Me. 443; *Hyde v. Baldwin*, 17 Pick. 303; *Smith v. Smith*, 14 Gray, 532; *Bell v. Armstrong*, 1 Adams, Ecc. R. 365; *Braham v. Burchell*, 3 Adams, Ecc. R. 243. The learned counsel for the appellant, while citing no authorities asserting a contrary proposition, has carefully analyzed and elaborately discussed nearly all the cases we have cited, in order to make it appear that they are distinguishable from the case at bar. In their facts they are different from this case, and they differ from each other; but they all tend to make good the assertion which may be found running through the books—that he who receives money or property, or a benefit of any kind, under an instrument, whatever its character or his relation to the maker of it, cannot question the instrument, in whole or in part. But the appellant urges that the reason for the rule does not apply in this case, and therefore the rule should not obtain. Here he says no injury can result to the executors or any one else because the petitioner is permitted to contest the will while retaining the \$7,000 which she received from the executors, because, if the will be set aside, she, as one of the next of kin, will be entitled to receive a larger sum of money than \$7,000, and therefore the executors can be amply protected by the surrogate. It may be true that, if the contest should proceed, it would so turn out, but of that we are not assured. It does not appear that, should the petitioner be successful in her contest, as a result her mother's intestacy will be established. There may be other and prior wills in existence, the validity of one of which may be established, with the possible result that the petitioner will not receive thereunder a legacy sufficient in amount to make good the advancement to her by these executors. Certainly the contrary cannot be safely assumed. The fact that the petitioner received this money and expended it before becoming aware of the facts which encour-

aged her to enter upon a contest of the will may perhaps be unfortunate for her. If misfortune it be, it arises, of course, from the necessities which induced her to expend the money. Where a person asks that a rule be not applied, on the ground that the reason upon which it is founded is not present, the burden rests upon him to establish clearly the facts which he relies on to support his contention. The petitioner took the money and used it, and until she puts the parties in a position where, whatever the result may be, no one can be the loser because of the payments originally made to her, she is not in a situation to attack the will."

The general doctrine of election is well stated in 11 Am. & Eng. Enc. Law (2d Ed.) p. 59, and the note to the text, on page 60, contains a reference to a multitude of cases showing that the rule is almost universal. And on page 98 the same author says: "Applying the principle that knowledge is essential to constitute a valid election, it is established that where the act is induced by deception or fraud, or where the person electing acted under an ignorance of the facts or under a misapprehension of his rights, and innocent third parties will not suffer by a revocation, the act may be revoked or set aside. But such election can be revoked only by restoring the property received under it." And at page 78 the author says that, while some courts hold that a married woman cannot elect, other courts hold to the contrary, and, in any event, if she seeks to revoke the election, she must bring the benefits she has received into court. In *Fox v. Windes*, 127 Mo., loc. cit. 511, 30 S. W. 325, 48 Am. St. Rep. 648, this court quoted the rule laid down by *Herman on Estoppel* as follows: "The doctrine of election is founded upon the principle that there is an implied condition that he who accepts a benefit under an instrument must adopt the whole of it, conforming with all its provisions, and renouncing every right inconsistent with them. The principle is recognized and established in this country almost precisely the same as in England, and rests upon the equitable ground that no man can be permitted to claim inconsistent rights with regard to the same subject, and that any one who claims an interest under an instrument is bound to give full effect to that instrument as far as he can. A person cannot accept and reject the same instrument, or, having availed himself of it as to part, defeat its provisions in any other part; and this applies to deeds, wills, and all other instruments whatever. 2 *Herman on Estoppel & Res Judicata*, § 1028, p. 1156. See, also, 2 *Story's Eq. Jur.* (13th Ed.) § 1080. This doctrine of elections, which prevents the assertion of repugnant rights, is but an extension of the law of equitable estoppel. 1 *Herman on Estoppel & Res Judicata*, p. 11."

The sum of the matter, then, is that, as a general rule, one who has received a benefit under a deed, will, or other instrument cannot thereafter contest its validity, but the

general rule is subject to this qualification: That if the benefit was received without a knowledge of his right to elect between the benefit so conferred and of his right to the property outside of the deed, will, or instrument, or if he was induced by fraud or deception to accept the benefit conferred by the instrument, he may revoke the election, and contest the validity of the instrument, and claim under the law, provided that innocent third persons will not suffer by a revocation and provided there has been no unreasonable delay in exercising the right of revocation, and provided he pays into court the benefits received. Apply this rule to the case at bar, and the case is easily solved. It expressly appears from the face of the petition that the plaintiff knew that she had a right to elect to take under the will or by operation of law at the time she received the legacies, for she says she "accepted the same under protest, and insisted that the will was invalid, and only received the same because, under the law, she would be entitled to one-third of the entire estate—a sum and an amount much larger than the amount received by her as herein stated." Therefore the plaintiff acted with full knowledge of her legal right of election, and there is no charge that she was induced to accept the benefit by any fraud or deception. It does not appear how long she waited after receiving the benefit before she attacked the validity of the will. The allegation that she is ready and willing to pay the amount received into court, or to have it deducted from her share of the estate, if the will is set aside, is not sufficient to bring her within the rule which entitles one to contest an instrument after receiving a benefit under it, for the rule requires that the benefit received shall be actually paid into court at or before the filing of the suit. In addition to this, innocent third persons will suffer if she is allowed to revoke her election upon returning the benefits she has received. The major portion of the benefits she has received arose out of the residuum of the estate. That means that all the special legacies had been paid before such residuum was ascertained and paid. These special legacies arose solely out of the will, and, without the will, that money would have gone to other persons. Upon the faith of the plaintiff's acceptance of the benefits conferred upon her by the will, the executors paid out the special legacies to other persons. The plaintiff stood by and saw the executors do so. If the plaintiff should now be permitted to have the will set aside, upon payment into court of the benefits received by her, the special legacies paid by the executors would be lost to them, for the money so expended would go to the heirs, of whom the plaintiff was one. Thus the executors would suffer by a revocation. It is true that the statute permits a will to be contested at any time within five years after its probate in common form, and the statute contemplates that the estate may

or will be wound up before that time, and persons who take under a will know that the estate thus derived is liable to be divested by a successful attack thereafter upon the will. But whilst this is true, the lawmakers never intended to permit a legatee under a will to accept the benefits conferred by the will, and then stand by and see the estate wound up, or practically wound up, and then begin proceedings to contest the will, upon returning only the amount received by the contesting legatee. Such a proceeding falls within the rule that denies the right to contest where there has been unreasonable delay. In short, it is plain from the petition that the plaintiff thought she could accept the benefits, and then contest the will, and simply have the benefits received deducted from her share of the estate after the will was set aside. By so doing she stood to gain everything if she succeeded, and to lose nothing if she failed, in the contest proceedings. The law does not sanction such a speculative proceeding. It follows that the plaintiff has not shown herself entitled to maintain this action.

It is contended, however, that estoppel is an affirmative defense, and cannot be raised by demurrer. Estoppel is an affirmative defense, and so is coverture and the statute of limitations, and contributory negligence, and payment, and release, and many others, and such defenses must be expressly pleaded in the trial court. But where the facts constituting such defense affirmatively appear on the face of the petition, the question can be raised by demurrer to the petition just as effectually and equally as scientifically as by answer or plea. The petition in this case stated the facts upon which the defense of estoppel is predicated, and it would seem as if the pleader had invited a determination by the inexpensive and speedy method of a demurrer in order to avoid the costly and tedious method of raising the same question of law by an answer and a trial. Wherever or however the essential facts appear, all else is a question of law, and can be raised by any of the methods provided for the determination of questions of law.

This conclusion makes it unnecessary to decide whether, since the adoption of the married woman's acts, the five-year limitation for instituting suits to contest wills applies to a married woman.

The judgment of the circuit court is affirmed. All concur.

PATTON v. FOX et al.

(Supreme Court of Missouri, Division No. 1.
Feb. 10, 1904.)

EJECTMENT—DEEDS—DESCRIPTION—INSTRUCTIONS—EVIDENCE—ORDER OF PROOF—DISCRETION OF COURT—SECONDARY EVIDENCE.

1. The general description in a deed fixing the boundaries of the land conveyed by governmental monuments and a natural object will

prevail over a description, by metes and bounds, obviously erroneous.

2. Where the evidence on the issue of adverse possession was conflicting, the usual instruction as to the line to which defendant claimed and as to which he had testified was proper, as this was a matter to be determined by the jury according to all the facts in evidence.

3. Under the direct provisions of Rev. St. 1899, § 933, when it is shown to the court that a deed acknowledged and recorded as required by statute is not within the power of the party wishing to use the same, the record thereof may be read in evidence by the adverse party.

4. The court, in permitting plaintiff in ejectment to introduce in evidence, while defendant was being cross-examined, the record of a deed to him, tending to show that the deed conveyed no title to him to the land in dispute, did not abuse its discretion.

Appeal from Circuit Court, Pike County; David H. Eby, Judge.

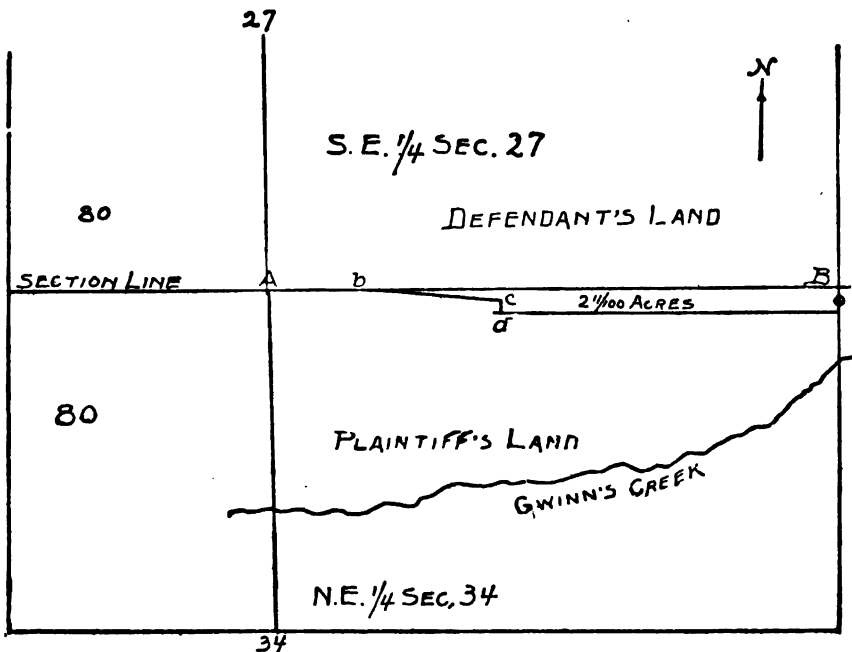
Action by Thomas W. Patton against Otto Fox, and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Pearson & Pearson, for appellants. Dempsey & McGinnis and J. D. Hostetter, for respondent.

BRACE, P. J. This is an action in ejectment against the defendant James H. Patton and his tenant, Otto Fox, to recover the possession of a small irregular tract of land, described by metes and bounds in the petition, containing $2\frac{11}{100}$ acres, situate in the N. E. $\frac{1}{4}$, section 34, township 52, range 1 E., in Pike county, the shape and location of which is shown by the following diagram, the land in dispute being within the lines b, c, d, e, B, b, on the diagram:

The petition is in common form; the answer a general denial and a plea of the statute of limitations. The case was tried before a jury. Verdict and judgment for the plaintiff, and the defendant appeals, assigning as error instructions given and evidence admitted for plaintiff.

By deed dated the 12th day of February, 1872, William W. Jamison, executor of Samuel Jamison, deceased, by virtue of the power vested in him by the last will and testament of said deceased, conveyed the N. E. $\frac{1}{4}$, section 34, township 52, range 1 E., to Thomas D. Patton, John E. Forgey, F. W. Patton, and the said defendant James H. Patton. Afterwards, by deed dated March 12, 1873, the said Thomas D. Patton, John E. Forgey, F. W. Patton and defendant James H. Patton conveyed a part of said quarter section to the plaintiff, described in said deed as follows: "All of the Jamison farm that lies north of Gwinn's Creek in Section 34, Township 52, Range 1 East, commencing at a stone corner the same being the N. W. corner of this tract. Thence south 24.52 links to a stake near Gwinn's Creek; thence N. $68\frac{1}{2}$ degrees E. 18.46 chains to a stake; thence N. $80\frac{1}{4}$ degrees, East 7.00 chains; thence N. $20\frac{1}{2}$ degrees E. 8.30 chains to a stake; thence north $69\frac{1}{2}$ degrees E. 14.75 chains to the center of said creek; thence north 15 degrees E. 2.67 chains to a stone corner; thence north 89 degrees and 50 minutes W. 41.47 chains to the place of beginning containing $58\frac{87}{100}$ acres more or less." Afterwards, in the years 1878 and 1881, the defendant James H. Patton acquired the S. E. $\frac{1}{4}$, section 27, township 52, range 1 E.



known as the "Wells and Rogers Land." The lands of plaintiff and defendant, as respectively held by them under these three deeds, are shown on the diagram in their relation to each other and to the land in question.

1. At the request of the plaintiff the court gave the following instructions to the jury as to the legal effect of said deeds:

"No. 2. The court instructs the jury that if you find from the evidence in the cause that the 2.11-acre tract in controversy in this suit is a part of the northeast quarter of section 34, township 52 N., range 1 E., north of Gwinn's creek, then the legal effect of the deeds from Samuel Jamison, executor, to defendant J. H. Patton, T. D. and F. W. Patton, and John E. Forgey, and from those four last named to the plaintiff, read in evidence, was to convey and carry the title to said 2.11-acre tract to the plaintiff; and the legal effect of the deeds read in evidence to defendant to the Wells land and Rogers land mentioned in evidence was not to carry or convey title to any portion of said 2.11-acre tract to defendants.

"No. 3. The court instructs the jury that the deed made March 12, 1873, by defendant J. H. Patton and F. W. Patton, Thomas D. Patton, and John E. Forgey to the plaintiff, Thomas W. Patton, read in evidence, vested the legal title in plaintiff to all of the Jamison's land in the N. E. quarter of section 34, township 52 N., range 1 E., from Gwinn's creek to the section line on the north.

"No. 4. The court instructs the jury that the deeds read in evidence to defendant, conveying to him the Wells land and the Rogers land, did not convey to him any portion of the northeast quarter of section 34, township 52 N., range 1 E.

"No. 5. The court instructs the jury that, under and according to the deeds read in evidence in this cause, the true boundary line between the Jamison land in the N. E. $\frac{1}{4}$, section 34, township 52, range 1 E., acquired by plaintiff in 1873, and the Wells land and the Rogers land mentioned in evidence on the north, was the section line."

We fail to discover any material error in these instructions, which were confined to the legal effect of the deeds. Unquestionably the defendant by his deeds acquired no title to any land in the northeast quarter of section 34, and the only question is whether the court committed error in holding that the section line between sections 27 and 34 was the northern line of the plaintiff's land, and the boundary line between his land and that of the defendant's, and the court committed no error in so holding, if the general description contained in the deed of March 12, 1873, from the defendant and others to the plaintiff, ought to prevail over the description by metes and bounds immediately following it. That it ought to so prevail, is, we think, beyond question under the well-settled law in this state. *Rutherford v. Tracy*, 48 Mo. 825,

8 Am. Rep. 104; *Thomson v. Thomson*, 115 Mo. 56, 21 S. W. 1085, 1128; *Calloway v. Henderson*, 130 Mo. 77, 32 S. W. 34; *Presnell v. Headley*, 141 Mo. 187, 43 S. W. 278; *Whitaker v. Whitaker*, 175 Mo. 1, 74 S. W. 1029. All the reasons assigned in these cases and in the authorities therein cited for subordinating the description by metes and bounds to the general description contained in the deed obtain in this case: First. The boundaries in the general description are fixed by governmental monuments and a natural object. Second. The boundaries by metes and bounds is obviously erroneous. The first and last lines thereof were evidently intended to be the same lines fixed by the general description, but in endeavoring to reach one of the governmental monuments, to wit, the section corner of the northeast corner of section 34, from which the last line was drawn, a mistake was made in the courses and distances by which they failed to reach that corner, and that line was projected from a point south of that corner to the beginning. Third. The northern boundary of the Jamison farm in section 34, township 52, range 1 E., was the section line between sections 34 and 27, and the intention to convey all of said farm in said section north of Gwinn's creek to that line, is manifest on the face of the deed, on the authorities cited; and for these reasons, or any of them, the general description ought to prevail over the description by metes and bounds in plaintiff's deed. In declaring the effect of the deeds, there was no error in characterizing the section line aforesaid as the "true boundary line between the Jamison land in section 34 and the defendant's land in section 27."

2. The evidence upon the issue of adverse possession was conflicting, and that issue was submitted to the jury on approved instructions, only one of which was given for the plaintiff, and of which the only complaint made is that there was no evidence on which to base it. There is nothing in this complaint. The instruction was the usual one as to the line to which the defendant claimed, as to which he himself testified both as to his acts, possession, and intention, and, as this was a matter to be determined by the jury according to all the facts and circumstances in evidence in the case, it was entirely proper that this instruction should have been given.

3. While the defendant was being cross-examined on this subject, the plaintiff, in connection therewith, offered the record of defendant's deeds to his land in section 27 in evidence, to the admission of which the defendant objected on the ground that it was not the best evidence, it having been shown that the original deeds were in existence and no notice given to produce them, but it also having been shown by the evidence of the defendant himself that the deeds were not in the power of the plaintiff, but in the control

and possession of the defendant. The objection was overruled, and the deeds admitted in evidence. There was no error in this. The deeds were acknowledged and recorded as required by statute (Rev. St. 1899, c. 11, § 933), which provides that: "When it shall be shown to the court by the oath * * * of anyone knowing the fact, that such instrument is * * * not within the power of the party wishing to use the same, the record thereof * * * may be read in evidence without further proof." Nor was there any error in introducing them on the defendant's cross-examination. The order in which evidence may be introduced is largely within the discretion of the trial judge, and there was no abuse of that discretion in this instance.

From what has been said it is apparent that the court committed no error in refusing defendant's instruction in the nature of a demurrer to the evidence, and, as to the preponderance thereof, the verdict of the jury, approved by the trial judge, is conclusive upon this court. Finding no reversible error in the record in the trial of the case, the judgment of the circuit court will be affirmed, and it is so ordered. All concur.

STATE ex rel. FLENTGE, Tax Collector, v. GAWRONSKI et. al.

(Supreme Court of Missouri, Division No. 1. Feb. 10, 1904.)

TAXATION—JUDGMENTS—SUPREME COURT—DIRECT APPEAL—REVIEW.

1. Where, on appeal from an order denying a motion to quash an execution on a judgment for the collection of taxes, the appeal record contained no information as to the judgment or the petition on which it was founded, the order could not be reviewed.

2. A motion to vacate a judgment for taxes and quash an execution thereon on the ground that defendant was only 10 years old when the judgment was rendered, and that no guardian ad litem was appointed for him, did not involve a construction of the revenue laws of the state, nor title to realty, and hence an order denying the same was not appealable directly to the Supreme Court.

Appeal from Circuit Court, Cape Girardeau County; Henry C. Riley, Judge.

Action by the state, on the relation of E. W. Flentge, as tax collector, etc., against John Gawronski and others. From an order overruling a motion to quash an execution, defendants appeal. Case transferred to St. Louis Court of Appeals.

Robt. L. Wilson and Frank E. Burrough, for appellants. John A. Hope, for respondent.

VALLIANT, J. This is an appeal from an order of the circuit court overruling a motion to quash an execution. The record

before us shows first a motion by Flora C. Gawronski "to quash the execution issued on the judgment in the above-styled cause, and to vacate said judgment" upon the ground that she was at the time the judgment was rendered, and still was when the motion was filed, a minor, and had no guardian, and there was no guardian ad litem appointed for her. That motion was overruled. Then another motion was filed in the name of the minor by J. W. Morrison, who, it was averred, had been appointed "guardian of the person and estate" of the minor after the rendition of the alleged judgment, which motion was also to quash the same execution and vacate the judgment on the same grounds as stated in the former motion. The evidence in support of the motion is set out in the transcript of the record. That motion was also overruled, and from that order this appeal was taken.

By the statements in the briefs of the counsel we are informed that the judgment to which the motions related was rendered in the circuit court in a suit wherein the state, at the relation of the tax collector of Cape Girardeau county, was plaintiff, and John Gawronski and Flora Gawronski were defendants, the object of which was to collect the state and county taxes on certain real estate in the petition mentioned; that the summons was served on both defendants, but they did not appear, and the court rendered judgment against them for the taxes, amounting to \$46.65, and awarded a special execution to issue to sell the land to satisfy the judgment. But the record before us gives us no information as to the judgment or the petition on which it was founded. Appellant contends that the judgment was invalid, and the motion to set it aside and quash the execution ought to have been sustained, because it was rendered against a minor who had no guardian to represent her interests. Appellant also contends that the cause is within the jurisdiction of this court, because the judgment sought to be vacated is for taxes, and therefore the consideration of the case involves the construction of the revenue laws of the state. Since the record before us does not show what the suit was about, or what the judgment was, we can take no cognizance of it. But, even if we resorted for information to the statements in the briefs of counsel outside of the record, we can find no case that is within the jurisdiction of this court. A consideration of the motion to vacate the judgment and quash the execution on the ground that the appellant was only 10 years old when the judgment was rendered does not involve a construction of the revenue laws of the state; neither is title to real estate involved.

We have no jurisdiction of the case, and it is therefore transferred to the St. Louis Court of Appeals. All concur.

STATE ex rel. MILLER, Collector, v.
SHRYACK.

(Supreme Court of Missouri, Division No. 1.
Feb. 10, 1904.)

TAXATION—BANKING COMPANIES—PROPERTY
SUBJECT—SHARES OF STOCK—
AGAINST WHOM TAXED.

1. Laws 1886, p. 134, c. 2, § 27, provided that persons owning stock in corporations should not be required to deliver to the assessor a list thereof, but the president thereof should deliver to the assessor a list of all the shareholders. Section 28 required the corporation to pay the tax assessed against the shareholders. Laws 1871-72, p. 90, § 35, modified section 27 so as to provide that the property of corporations should be assessed as the property of individuals, and to require the president of the corporation, in making the list of the shareholders, to state the actual cash value of the stock and property of the corporation, which value should be assessed as personal property. Act April 1, 1891 (Laws 1891, p. 195), modified section 35, and required the value of the real estate and fixtures to be deducted from the estimate of the value of the stock, and made the real estate and fixtures taxable against the corporation direct, and permitted the stockholders to show any impairment of the value of the stock. Act April 9, 1895 (Laws 1895, p. 242), modified the preceding provisions by providing that the property of corporations should be assessed and taxed in their corporate names, by requiring the president of the corporation to merely furnish to the assessor a list of all shares of stock therein, and by making the value of the real estate only taxable against the corporation. *Held*, that under the law of 1895 the real estate of banking companies must be assessed against the corporation, the personal property must not be assessed at all, and the shares of stock must be assessed in the names of the shareholders.

Appeal from Circuit Court, Johnson County; Wm. L. Jarrott, Judge.

Action by the state, on the relation of Franklin Miller, collector of Johnson county, against M. C. Shryack. From a voluntary nonsuit taken on the court sustaining a demurrer to the evidence, plaintiff appeals. *Affirmed*.

J. W. Suddath, for appellant. Jas. A. Kemper, for respondent.

MARSHALL, J. This is an action, under section 987, Rev. St. 1899, by the collector of Johnson county, to collect from the defendant, as a stockholder, director, and trustee in liquidation of the Farmers' & Merchants' Bank of Warrensburg, the sum of \$385.11, the taxes for 1899 that were assessed against the bank. After the usual and necessary averments in ordinary tax cases, the petition alleges that on April 24, 1899, the bank dissolved, leaving these taxes unpaid, and that the defendant was a director and a stockholder, owning 10 shares, of the par value of \$100 each, and that he received \$1,000 as his share of the capital stock upon the dissolution, and that, as such stockholder and trustee, the sum of \$30,000 of the money of the bank passed through his hands to the stockholders, and hence, under the statute, he is liable for these taxes. The answer admits that the bank was a corpora-

tion organized under the laws of this state, and that the defendant was a director and stockholder, as charged, and then denies generally the other allegations in the petition. Upon the trial the plaintiff introduced the back tax bill, which was as follows:

"Back Tax Bill."

"Warrensburg, Mo., April 9, 1900.

"State of Missouri, County of Johnson—*sa*: I, Franklin Miller, Collector of the revenue within and for the County of Johnson, in the State of Missouri, do hereby certify that the following amounts of back taxes remain delinquent in favor of the several funds for the several years, on the personal property assessed against and in the name of Farmers' and Merchants' Bank, as hereinafter set forth, to wit:

	Year 1899.	
Valuation	20,115	
Co. Tax		\$ 59 29
Co. Int. and Sinking F'd.....		79 41
Wbg. Twp. Int. Tax.....		60 00
Comm. Road Tax.....		20 18
Comm. School Tax.....		144 82
Ch. House Tax.....		60 00
Total		\$356 06
Penalty		14 24
Collector's Com.		14 81
Total		\$385 11

"In witness whereof, I have hereunto set my hand at the City of Warrensburg, in said County and State, this 9th day of April, 1900. Franklin Miller, Collector of the revenue within and for the county of Johnson, State of Missouri."

The case was tried upon the following agreed statement of facts: "For the purpose of the trial of this case, and to save time, it is admitted by the defendant that Franklin Miller was at the time of the filing of the petition in this case, and now is, the legally commissioned, qualified, and acting collector of the revenue within and for said county of Johnson and state of Missouri; that on the 24th day of April, 1899, the said corporation, the Farmers' & Merchants' Bank, dissolved; that at the time of the dissolution of the said corporation, the Farmers' & Merchants' Bank, there were moneys and funds on hand belonging to said corporation, subject to the payment of its debts, and after the payment of all debts, except this alleged debt, for distribution among the stockholders, in the aggregate sum of thirty thousand (\$30,000) dollars, and that after the payment of all debts against said corporation, except this, there was the said sum of \$30,000 for distribution among the stockholders; that said sum passed through the hands of the board of directors of said corporation, of which said board said defendant, M. C. Shryack, was at said time a member, and one of the trustees in winding up the business of said corporation; that said corporation and this defendant has at all times failed to pay, and still fails to pay, the alleged taxes sued for in this action; and that the alleged taxes here sued for have

never been paid. Employment of attorney as alleged in petition admitted."

The defendant demurred to the evidence; the court sustained the demurrer; the plaintiff took a nonsuit, with leave, and, after proper steps, appealed to this court.

Counsel for defendant says that the case "was and is defended upon the theory that an assessment of the shares of stock cannot be made against the bank in which they are held, for the reason that they are not the property of the bank, but belong to the individual shareholders." The assessment in this case is not preserved in the record. The back tax bill, however, recites that it is for taxes "on the personal property assessed against and in the name of Farmers' & Merchants' Bank." And the petition alleges that "there were assessed and levied upon the moneys, capital stock, furniture and fixtures, and personal property, of said Farmers' & Merchants' Bank," etc., the taxes sued for. It is apparent, therefore, that the assessment and levy was direct upon the money, capital stock, and personal property of the bank, in the name of the bank, and not upon the shares of stock of the bank in the names of the stockholders. The question, therefore, is whether such an assessment and levy is valid under the laws of this state. A brief review of the development of the law in this state as to the taxation of property owned by banks and other corporations will serve to explain the law as it now stands upon the statutes of this state.

By sections 27 and 28 of chapter 2, p. 134, Laws 1866 (Sess. Acts Adj. Sess. 1865), it was provided as follows:

"Sec. 27. Persons owning shares of stock in banks and other incorporated companies, taxable by law, are not required to deliver to the assessor a list thereof; but the president, or other chief officer of such corporation, shall deliver to the assessor a list of all shares of stock held therein, and the names of the persons who hold the same.

"Sec. 28. The taxes assessed on shares of stock embraced in such list shall be paid by the corporations respectively, and they may recover from the owners of such shares the amount so paid by them, or deduct the same from the dividends accruing on such shares; and the amount so paid shall be a lien on the shares respectively and shall be paid before a transfer thereof can be made."

These sections were a part of the act approved March 19, 1866, which revised the whole revenue laws of the state. The law remained the same until the act approved March 30, 1872 (Laws 1871-72, pp. 80 to 137), was enacted. That act also revised the revenue laws of the state. Section 27 of the act of 1866 was omitted, and section 35, p. 90, was enacted in lieu thereof, as follows:

"Sec. 35. The property of manufacturing companies and other corporations named in chapter sixty-nine of the General Statutes of Missouri, and of all other corporations, the

taxation of which is not otherwise provided for by law, shall be assessed and taxed as the property of individuals. Persons owning shares of stock in banks or any joint stock institution or association doing a banking business or any insurance company, whether of fire, marine, life, health, accident or other insurance, incorporated under or by any law of the United States or of this state, are not required to deliver to the assessor a list thereof; but the president or other chief officer of such corporation shall, under oath, deliver to the assessor a list of all shares of stock held therein, and the names of the persons who hold the same, and shall also state the actual cash value of such stock and all the property belonging to such corporations. In estimating the value of such stock and property, the officer making the same shall estimate and include all reserve funds, undivided profits, premiums or earnings, and all other values belonging to such corporations, which cash value shall be assessed and taxed as other personal property. Insurance companies or any corporations doing business on the mutual plan without capital stock, shall make like returns of the net value of all assets or values belonging thereto, which net value shall be assessed and taxed in like manner. Private bankers, brokers, money brokers and exchange dealers shall in like manner make a return of all moneys or values of any description invested in or used in their business, which shall be taxed as other personal property: provided, however, that the license hereafter required to be paid by such bankers, brokers and dealers, in addition to such taxes, shall not exceed one hundred dollars per annum."

Section 28 of the act of 1866, requiring the corporation to pay the tax assessed against the shareholder, was carried into the act of 1872 without change, and became section 36 (page 91) of that act. The law as thus enacted remained the same and passed into all the revisions until and including the Revised Statutes of 1889, where section 35 appears in *ipsisssimis verbis* as section 7538, and section 36 appears as section 7540, Rev. St. 1889; and that section has remained the same ever since, and is section 9155, Rev. St. 1899. By the act of April 1, 1891 (Laws 1891, p. 195), section 7538, Rev. St. 1889, was repealed, and a new section, with the same number, enacted in lieu thereof, as follows:

"Sec. 7538. The property of manufacturing companies and other corporations named in article eight, chapter forty-two, and of all other corporations, the taxation of which is not otherwise provided for by law, shall be assessed and taxed as the property of individuals. Persons owning shares of stock in banks, or any joint stock institution or association doing a banking business, or any insurance company, whether of fire, marine, life, health, accident or other insurance, incorporated under or by any law of the Unit-

ed States or of this state, shall not be required to deliver to the assessor a list thereof; but the president or other chief officer of such corporation, institution or association shall, under oath, deliver to the assessor a list of all shares of stock held therein and the names of the persons who hold the same, with the face value thereof, [and shall also deliver to the assessor a complete statement of all reserve funds, undivided profits, premiums or earnings, and all other values belonging to such corporations, companies, institutions or associations. And such statement of shares of stock, together with the statement of reserve funds, undivided profits, premiums or earnings and other values so delivered to or furnished the assessor, shall, for the purposes of taxation, be treated as that amount of money, less the taxable value of the real estate and fixtures, subject to the right of the parties in interest, to show the impairment of such shares of stock before the board of equalization. Private bankers, brokers, money brokers and exchange dealers shall make like returns and be assessed and taxed thereon in like manner as herein above provided.] Insurance companies or any corporations or associations doing business on the mutual plan without capital stock, shall make like returns of the net value of all assets or values belonging thereto, which net value shall be assessed and taxed in the manner hereinbefore provided: provided, however, that the license hereafter required to be paid by any such bankers, brokers and dealers, in addition to such taxes, shall not exceed one hundred dollars per annum."

The change made by this act is indicated by the words inclosed in the brackets, which are here inserted for the purpose of making them conspicuous. The substantial change thus made was to deduct the value of the real estate and fixtures from the estimate of value to be placed on the stock, and to make the real estate and fixtures taxable against the corporation direct, and to permit the stockholders to show any impairment of the value of the stock.

Under these statutory provisions, this court uniformly held that the personal property of a bank or other corporation, not otherwise provided for, should not be assessed against the bank, but that the stock should be assessed and taxed against the shareholders in their individual names, but that the corporation should pay the tax, and recover it from the shareholder, and that only the real estate should be assessed against the bank. *City of Stanberry v. Jordan*, 145 Mo. 371, 46 S. W. 1093, and cases cited; *State ex rel. v. Jefferson City*, 160 Mo. 640, 61 S. W. 676, and cases cited.

Section 7538, Rev. St. 1889, as amended by the act of 1891, was repealed, and a new section, with the same number, enacted in lieu thereof, by the act of April 9, 1895 (Laws 1895, p. 242), as follows:

"Sec. 7538. The property of manufacturing companies and other corporations named in article 8, chapter 42, and all other corporations, the taxation of which is not otherwise provided for by law, shall be assessed and taxed as [such companies or corporations in their corporate names.] Persons owning shares of stock in banks, or any joint stock institution or association doing a banking business, or any insurance company, whether of fire, marine, life, health, accident or other insurance, incorporated under or by any law of the United States or of this state, shall not be required to deliver to the assessor a list thereof, but the president or other chief officer of such corporation, institution or association shall, under oath, deliver to the assessor a list of all shares of stock held therein, and the face value thereof, [the value of all real estate, if any, represented by such shares of stock, together with all reserved funds, undivided profits, premiums or earnings, and all other values belonging to such corporations, company, institution or association; and such shares, reserved funds, undivided profits, premiums or earnings, and all other values so listed to the assessor, shall be valued and assessed as other property, at their true value in money, less the value of real estate, if any, represented by such shares of stock.] Private bankers, brokers, money brokers and exchange dealers shall make like returns, and be assessed and taxed thereon in like manner, as hereinbefore provided. Insurance companies, or any corporations or associations doing business on the mutual plan, without capital stock, shall make like returns of the net value of all assets or value belonging thereto, which net value shall be assessed and taxed in the manner hereinbefore provided: provided, however, that the license hereafter required to be paid by any such bankers, brokers and dealers, in addition to such taxes, shall not exceed one hundred dollars per annum. [It is hereby made the duty of the county clerk to include in his abstract of the assessors' books required to be sent to the state auditor, valuation of all property assessed under this section, under the head of 'Corporate Companies,' and in addition thereto he shall make out from the lists delivered to the assessor as above provided, and send the same to the State Auditor to be laid before the State Board of Equalization, on or before the 20th day of February in each year, an abstract of the assessment of all corporations or persons doing a banking or insurance business in his county, showing the name of each bank and insurance company, the number of shares of stock and their face value, amount of reserve funds, undivided profits, premiums or earnings, and all other value, together with the assessed value thereof, also the value of real estate deducted as above provided, and the assessed value of such real estate as shown by the real estate book.] Approved, April 9th, 1895." Laws 1895, p. 242.

The words in brackets show the changes thus made in the act of 1891, which are as follows: First, the act of 1891 required that the property of corporations "shall be assessed and taxed as the property of individuals," whereas the act of 1895 required that the property of corporations "shall be assessed and taxed as such companies or corporations in their corporate name"; second, the act of 1891 required the president or other chief officer to deliver to the assessor "a list of all shares of stock held therein and the names of the persons who hold the same," whereas the act of 1895 omitted the words "and the names of the persons who hold the same"; third, the act of 1891 provided that the taxable value of the real estate and fixtures should be deducted from the value of the property to be taxed against the shareholders, and should be taxed against the corporation direct, thus making a part of the personal property taxable against the corporation, whereas the act of 1895 omitted the words "and fixtures," and thus provided that only the value of the real estate should be taxed against the corporation, leaving the value of the fixtures, like all the other personal property, to be taxed against the shareholders. This is further emphasized by the additional provision, inclosed in brackets, which was added to the law by the act of 1895 at the end of the section. The act of 1895 was carried into the revision of 1899, and is section 9153 thereof.

The question, therefore, is whether the act of 1895 has so changed the law as to require all the property of a corporation to be assessed direct to the corporation, in the corporate name, instead of having the shares assessed to the shareholders personally, and only the real estate assessed to the corporation. At first blush, it might seem that the act of 1895 intended to make such a change. The fact that the first sentence of the act of 1891, and of all prior laws, required the property of corporations to be assessed and taxed as the property of individuals, and that the act of 1895 struck out the words "as the property of individuals," and substituted therefor the words "as such companies or corporations in their corporate name," and that the act of 1895 struck out the provision of the act of 1891 which required the president of the corporation to furnish "the names of all persons who hold" stock therein, might, without further analysis of the act, furnish some foundation for the contention that such was the intention of the act of 1895. But in spite of those changes in the phraseology of the law, a closer scrutiny of the act of 1895 will clearly demonstrate that such was not the intention of the lawmakers, or that, if it was, they wholly failed to carry that intention into effect, or to so provide. Several conclusive reasons prove that this is so. In the first place, if the act of 1895 intended to have all corporate property assessed direct to the corporation, the law-

makers would have said so in so many words, and would have stopped with the first sentence of that act. If such had been their intention, no possible reason or sense can be discerned for enacting the balance of the act. If the property was meant to be assessed against the corporation, the provision requiring the president to furnish a list of the shares of stock, and their face value, would be perfectly useless. So, likewise, would be the provision requiring the value of the real estate to be deducted. For in such event the real estate, as well as the personal property, would be assessed against the corporation direct; and who were the stockholders, or what was the value of their shares, would be of no moment. The fact, therefore, that these provisions were left in the act of 1895, clearly shows that the Legislature did not intend to make the change suggested. But there are other cogent reasons for believing that the Legislature did not so intend. It will be observed that prior to the act of 1891 nothing was said in the law about deducting the value of the real estate, and assessing the value thereof against the corporation direct, and that the act of 1891 provided for the first time that the value of the real estate and fixtures should be so deducted, and that the act of 1895 omitted the provision as to the fixtures, and left it so that only the value of the real estate should be deducted. There was a reason for such changes, and it was this: Section 5219, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3502], under which alone a state has any power to tax national banks, provides as follows: "Nothing herein shall prevent all the shares in any association from being included in the valuation of personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located; but the Legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to two restrictions, that the taxation shall not be at a greater rate than is assessed upon other monied capital in the banks of individual citizens of such state, and that the shares of any national banking association owned by non-residents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of the associations from either state, county or municipal taxes, to the same extent, according to its value, as other real property is taxed." Prior to the passage of this act the federal Supreme Court had uniformly held that no state could tax any property or share of a national bank, because such banks were instruments of the national government. The Supreme Court of the United States holds that there is property in shares of stock which is distinct from the property of the corporation. *People v. Tax Com'rs*, 4

Wall. 244, 18 L. Ed. 344; *Bank v. Tennessee*, 161 U. S. 134, 16 Sup. Ct. 456, 40 L. Ed. 645. The section of the federal laws quoted has undergone adjudication by the Supreme Court of the United States in many cases, but for the purposes of this case it is only necessary to refer to *Aberdeen Bank v. Chelalis Co.*, 166 U. S. 440, 17 Sup. Ct. 629, 41 L. Ed. 1069; *Owensboro National Bank v. Owensboro*, 173 U. S. 664, 19 Sup. Ct. 537, 43 L. Ed. 850; and *Third National Bank of Louisville v. Stone*, 174 U. S. 432, 19 Sup. Ct. 759, 43 L. Ed. 1035. It is sometimes said that there is a conflict between the first and the two last cases cited, but a critical examination of those cases shows that it is not only a mistake to so construe them, but that the Supreme Court of the United States did not so regard them, for it was not even considered necessary in deciding the second case to refer to or discuss the first case, and the third case is based solely on the second. The rule announced in those cases is that "this section, then, of the Revised Statutes, is the measure of the power of a state to tax national banks, their property and franchises. By its unambiguous provisions, the power is confined to a taxation of the shares of stock in the names of the shareholders, and to an assessment of the real estate of the bank. Any state tax, therefore, which is in excess of, and not in conformity to, these requirements, is void." Accordingly a tax upon the personal property of a national bank to the bank, and not upon the shares of stock in the names of the shareholders, was held to be void. That court further holds that the form, as well as the substance, of the statute, must be followed, and that no equivalents are permissible. The underlying reason of the rule is that the capital and much of the property of a national bank are exempt from taxation by the federal laws, and the shares of stock and the real estate are not exempt, but may be taxed by the express permission of Congress. This clearly shows why the lawmakers in Missouri have always provided for taxing the shares of stock in a corporation in the names of the shareholders, instead of laying the tax direct upon the property of the corporation. This also explains why the act of 1891 provided for deducting the value of the real estate and fixtures, and assessing them against the bank. The lawmakers were trying to arrange it so as to conform to the national banking act. They made a mistake in assessing fixtures as well as real estate against the bank, and one of the manifest purposes of the act of 1895 was to correct the mistake, and make the state statute conform to the federal statute, so as to tax the real estate alone to the corporation, and to lay a tax on the shares of the stockholders in the names of the stockholders, and not to tax the personal property of the bank at all. It is too clear to admit of doubt that this was the purpose and intention of the act of

1891, as well as of the act of 1895. The lawmakers were trying to arrange it so as to reach the taxes on national banks authorized by the federal statute quoted. Any other construction placed upon this act would have the effect to exempt all real estate and shares of stock in a national bank from taxation, and clearly the Legislature had no such intention. In spite, therefore, of the change of the language employed in the first sentence of the law, the conclusion is inevitable that the true meaning of the act of 1895 is that the real estate shall be assessed against the corporation, the personal property of the corporation shall not be assessed at all, and the shares of stock shall be assessed in the names of the shareholders. Thus the domestic corporations and the national banks are put on the same basis, there is no discrimination, and the letter and form and substance of the power conferred by the federal statute are observed. The bank in question is a domestic bank, but the law is the same as to it that it is as to national banks. After the assessment is thus made against the shares of stock in the names of the shareholders, it is legal to make the bank pay the tax, and recover it from the stockholders. Section 9155, Rev. St. 1890; *National Bank v. Commonwealth*, 9 Wall. 353, 19 L. Ed. 701; *Aberdeen Bank v. Chelalis Co.*, 166 U. S. 440, 17 Sup. Ct. 629, 41 L. Ed. 1069. The tax in this case was against the property of the bank, of every kind, direct, and not as the statute requires. The assessment, therefore, was void.

The judgment of the circuit court is right, and is affirmed. All concur; BRACE, P. J., in the result.

JAMISON v. CONTINENTAL CASUALTY CO.

(Court of Appeals at St. Louis, Mo. Feb. 2, 1904.)

ACCIDENT INSURANCE — POLICY — CONSTRUCTION — LIMITED LIABILITY CLAUSE — OBVIOUS DANGERS — UNNECESSARY EXPOSURE — BURDEN OF PROOF — EVIDENCE — DECLARATIONS OF INSURED — WEIGHT.

1. Where, in an action on an accident policy, the petition alleged that, on the day mentioned, insured sustained personal bodily injuries through external, violent, and purely accidental causes within the policy, which injuries solely caused his death within two days after the accident, in that, while he was employed as a railroad bridgeman, he was struck on the head with some hard substance, inflicting a mortal wound, from which he died, but that plaintiff could not give a more particular description of the circumstances of the accident, because they were to him unknown, the petition was not objectionable for failure to allege that the mortal wound was received by accident, in that plaintiff disclaimed knowledge of how it was caused.

2. Where an accident policy insured deceased in the maximum indemnity if death resulted from a hazard incident to his duties as a railroad bridgeman, a subsequent clause providing that the company should not be liable for more than \$100 in case insured lost his life from unnecessary exposure to danger or to obvious

risks did not apply to a death from a "casualty to which insured was exposed" in the performance of his duties as a bridgeman.

3. In an action on an accident policy providing for a limited indemnity in case insured lost his life from unnecessary exposure to danger or to obvious risk of injury, the burden of proof that insured met death in such a manner as to bring such clause into operation was on the defendant.

4. Deceased was stationed at a particular bridge to flag trains approaching the same. He went there with his lantern on a particular night, and the next morning his body was found a short distance from the railroad track. Blood stains could be traced from there to the track, and deceased's hat was found on the track cut in two. When found, and just before his death, while in a semiconscious condition, deceased stated, in answer to suggestive questions, after they were repeated to him, that he had been struck by a train while asleep. Held, that such facts did not establish, as a matter of law, that deceased met his death by unnecessary exposure to danger, within the terms of an accident policy limiting the indemnity under such circumstances to \$100.

5. Where, after deceased had been found lying near a railroad track in a semiconscious condition, he stated, in answer to suggestive questions, which had to be repeated to him before he answered, merely by saying, "Yes," that he had been hit by a train, and had been asleep, and that he did not know how he happened to go to sleep, and shortly thereafter he died from wounds received from a supposed collision with a train, deceased's statements under such circumstances were not entitled to weight in determining whether he unnecessarily exposed himself to danger, within the terms of an accident policy.

Appeal from Circuit Court, Texas County; L. B. Woodside, Judge.

Action by George H. Jamison against the Continental Casualty Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

L. D. Grover, for appellant. Lamar, Barton & Lamar, for respondent.

GOODE, J. The plaintiff sued an accident insurance company, on a policy of insurance, to recover \$1,000. The policy was taken by Oscar Jamison in favor of his father, the plaintiff. The contract contained, among other things, a stipulation that the company would pay to the plaintiff \$1,000 if the insured, during the life of the policy, should meet death by external, violent, and purely accidental means. The deceased was employed by the Gulf, Colorado & Santa Fé Railroad Company, and was killed, presumably, by being struck by a train. He was a bridge carpenter, but had been detailed to flag trains and see that their speed was reduced to four miles an hour before they passed over the company's bridge No. 266. At 6 o'clock in the evening of April 15, 1902, he left Sanger, a station on the railroad in the state of Texas, with orders to go to the bridge and flag all trains that came along. He was not seen again until the next morning, and was then found lying about 50 feet from the west side of the bridge, and 20 feet south of it. He

had a large wound in the back of his head, and bruises on the left side of it, and on his right leg between the hip and the knee. There was evidence to show he had tottered to that spot after being struck by the train. Blood was detected on the ties near the bridge, and footprints and blood stains were traced from the track to where he lay. His lantern was near the ties, and his hat on the track, cut in two. The answer, besides a general denial, pleaded that the deceased was sent to the bridge to flag trains, which duty required him to keep awake, and to stand on the east side of the bridge, but that he unnecessarily exposed himself to danger, and to obvious risk of injury, by going to sleep on the track, or so near the track as to be struck by a passing train.

1. The point is made against the petition that it does not state that the mortal wound was received by accident, but, on the contrary, disclaims any knowledge of how it was caused. The petition states that on the day mentioned the "insured sustained personal, bodily injuries, through external, violent, and purely accidental causes, within the terms of said policy, which injuries, solely and independently of all other causes, resulted in the death of said Oscar Jamison within ninety days of the accident, to wit, within two days thereof, in that, while he was employed as a bridgeman, as aforesaid, he was struck upon the head with some hard substance, inflicting a mortal wound, from which he, Oscar Jamison, died on the — day of April, 1902." That language is precise and full enough to constitute a good averment that the insured met death by an "external, violent, and purely accidental cause." The only basis for the attack on the petition is this sentence following the above allegation: "A more particular description of the circumstances of said accident cannot here be given, because they are to the plaintiff unknown." The petition avers a mortal wound in the head, accidentally received, caused the death of the insured, and ought not to be held insufficient because it goes further, and states that the pleader was ignorant of the circumstances of the tragedy. The pleading was proof against an attack before verdict. But none was made until after verdict, when the petition is to be more generously regarded, and no requirement imposed, except that it must be inferable from its express averments that the deceased was killed by accidental violence. *Munchow v. Munchow*, 96 Mo. App. 553, 70 S. W. 386. Unquestionably, enough is stated to justify that inference, if, indeed, the fact is not positively alleged, and we think it is alleged.

2. The principal defense rests on a term of the policy which stipulated that the amount to be paid if the insured lost his life, or received any of certain designated injuries, "from unnecessary exposure to danger or to obvious risk of injury," should be \$100. The casualty company tendered that sum, and

¶ 3. See Insurance, vol. 28, Cent. Dig. § 1664.

contents that thereby it fully discharged its liability, as the evidence conclusively established that the deceased was killed from exposing himself to unnecessary danger, and to a risk which was obvious. This contention raises these questions: What is the meaning of the term of the policy invoked as a defense? Is the inference inevitable from the evidence that the deceased came to his death under circumstances that make said term control the company's liability? It was not the intention of the parties to the contract of insurance to exempt the company from payment of the maximum indemnity—\$1,000— if death resulted from a hazard incident to the duties of the insured as a bridgeman. This appears from the first clause of the policy, which says the insured "is entitled to indemnity on the basis of his liability to accident in the occupation of bridgeman, in the event of personal, bodily injuries." By virtue of that provision, all casualties to which the insured was exposed in the performance of the duties of a perilous avocation plainly came within the scope of the agreement to pay the full indemnity in case of accidental death.

The first point of doubt is as to what sort of negligence on the part of the insured, contributing to his death, would entitle the company to pay the minimum liability, and whether merely inadvertent conduct would be sufficient to do so, or only a conscious incurring of needless risk. Apart from the adjudications on the question, I should be inclined to the opinion that, as a main purpose in taking a policy of accident insurance is to procure indemnity against the consequences of the insured party's carelessness and oversights, a stipulation against "exposure to unnecessary danger or to obvious risk of injury," excludes from the force of the policy accidents occasioned by that positive sort of negligence which in personal injury litigation falls within the doctrine of assumed risk, and consists of knowledge of a danger, and willingness to encounter it, but does not exclude such as happen from the mere failure of the insured to shun a danger unknown to him, which might have been known by due care, or what is denominated "contributory negligence." This view would require, to bring into operation the minimum indemnity clause of the policy, volition on the part of the insured in needlessly exposing himself to danger as in cases where the word "voluntary" is used. It seems to me, the intention of the contract implies liability for an accident unless there was a voluntary assumption of unnecessary risk—an assumption of the risk not, of course, in the expectation of being hurt, which would amount to self-inflicted injury, but in the expectation of encountering the danger, and avoiding injury from it. This view is countenanced to some extent by the adjudications, but the decisions turn so largely on the particular language of the policy construed that exactly apposite precedents

are scarce. The cases dealing with the subject which I have examined may be classified, according to the language of the policies, as follows: First. Cases like the present one, in which the qualifying word "voluntary" is not found, but the exemption is for "exposure to unnecessary danger or obvious risk of injury." *Cornish v. Ins. Co.*, L. R. 23 Q. B. Div. 453; *Tuttle v. Ins. Co.*, 134 Mass. 175, 45 Am. Rep. 316; *Sawtelle, Adm'r. v. Assurance Co.*, 15 Blatchf. (U. S.) 214, Fed. Cas. No. 12,392. Second. Those where in the clause of the policy construed was that the insured should exercise "due diligence for his safety," or words of similar import. *Stone's Adm'r's v. Casualty Co.*, 34 N. J. Law, 371; *Duncan v. Mut. Acc. Ass'n* (Super. N. Y.) 13 N. Y. Supp. 620; *Tooley v. Assurance Co.*, 3 Bliss (U. S.) 399, Fed. Cas. No. 14,098; *Badenfeld v. Ins. Co.*, 154 Mass. 77, 27 N. E. 769, 13 L. R. A. 263. Third. Those wherein the exemption was for willful or wanton exposure to unnecessary danger. *Schneider v. Ins. Co.*, 24 Wis. 28, 1 Am. Rep. 157; *Providence, etc., Co. v. Martin*, 32 Md. 314. Fourth. Those in which the clause invoked as exempting the company from liability provided an exemption if the insured voluntarily exposed himself to unnecessary danger. *Bean v. Employers', etc., Corp.*, 50 Mo. App. 459; *Schneider v. Ins. Co.*, 58 Wis. 13, 16 N. W. 47, 46 Am. Rep. 618; *Mfg. Indemnity Co. v. Dorgan*, 58, Fed. 945, 7 C. C. A. 581, 22 L. R. A. 620; *Burkhard v. Ins. Co.*, 102 Pa. 262, 48 Am. Rep. 205; *Keene v. Acc. Ass'n* (Mass.) 36 N. E. 891; *Marx v. Ins. Co.* (C. C.) 39 Fed. 321; *Duncan v. Mut. Acc. Ass'n* (Super. N. Y.) 13 N. Y. Supp. 620; *Travelers' Ins. Co. v. Jones*, 80 Ga. 541, 7 S. E. 83, 12 Am. St. Rep. 270; *Equitable Ins. Co. v. Osborn*, 90 Ala. 201, 9 South. 809, 13 L. R. A. 267; *Shaffer v. Ins. Co.* (Ill.) 22 N. E. 589. It is apparent that in the third and fourth classes of cases merely inadvertent negligence is excluded from the force of the exemption clause; that in the second class, where the proviso is for the exercise of diligence by the insured to secure his safety, the intention is to induce circumspection and caution, and exempt the company from responsibility for accidents due to the insured's negligence. Opinion in cases of the first class are in point in the consideration of this one, for the reason that the language construed was similar to what we have here. An examination of those opinions shows that, while the courts have been careful in most instances to guard themselves against saying that any negligence of the insured which would defeat an action against the party that caused his injury, on the score of contributory negligence, would likewise defeat an action on the policy, they hold that a provision against exposure to unnecessary danger may be violated by his negligence of a certain degree. If, then, negligence constitutes a defense to this action, as those authorities declare, it

follows that decisions on clauses providing that the insured must exercise due diligence for his personal safety are somewhat in point, for negligence is, of course, a defense under that kind of a stipulation.

Some of the precedents will be analyzed, to deduce the rule they prescribe. In *Cornish v. Ins. Co.*, supra, a farmer, while driving a wagon across a railway track, was killed by a train which he could have seen if he had been paying attention to what he was doing. The words relied on to exonerate the company were "the exposure of the insured to obvious risk of injury," and the Court of Queen's Bench held that the clause excluded from the force of the policy two classes of accidents: First, those arising from the exposure of the insured to a risk obvious to him at the time; second, those arising from a risk that would have been obvious to him if he had attended with reasonable care to his surroundings. The court declared it was not prepared to say that injuries caused by the negligence of the insured were in all cases exempt, but only that the policy did not protect him against the consequences of a risk which would have been obvious enough if he had been paying the slightest attention to his acts. The effect of that decision is that, although the danger was not in fact known to the insured, yet, if he was grossly negligent in not knowing it, he was so far at fault as to come within the exemption. In *Tuttle v. Ins. Co.*, supra, the company was exonerated if the insured party exposed himself "to obvious or unnecessary danger," and he was required to "use all due diligence for his safety." He was killed while running along a railway track at night, in front of a moving train, for the purpose of getting on another train traveling on a parallel track. Under these circumstances, the insured was held to have been guilty of exposing himself to obvious danger. The court said: "The conduct of the deceased was such as, in the words of Mr. Justice Colt, 'is condemned by the general knowledge and experience of all prudent men, and is conclusive on the question of due care.' The danger was obvious; the exposure, too, was unnecessary; the want of due diligence clear." Again: "If a person voluntarily places himself in a position where he is exposed to an obvious danger, and the precise injury happens to him which there is reason to fear, it cannot fairly be held that the language of this policy was not intended and understood to be applicable to such a case." Although in that instance the policy did not require a "voluntary" exposure to unnecessary danger, it is plain that the insured both unnecessarily and voluntarily exposed himself. In *Sawtelle's Adm'r v. Assur. Co.*, supra, the decedent was killed by falling from a platform of a car at night while the train was in full motion; his fall being caused either by his riding on the platform, or passing from one car to another. The language of the exempt-

ing clause was that no claim should lie against the company for death or injury "in consequence of exposure to unnecessary danger, hazard, or unnecessary venture." The decedent was held to have been guilty of negligence, within the meaning of the exemption, and that there was no question for the jury. This case decides that "negligence" and "exposure to unnecessary danger" are equivalent terms, and, apparently, that any negligence on the part of the insured which would have been a defense to an action against the railroad company would be a defense to an action on the policy. In *Tooley v. Assur. Co.*, 3 Biss. 399, Fed. Cas. No. 14,098, the policy provided that the insured should not neglect "to use due diligence for self-protection," and it was held that "it was his duty to use that degree of caution and diligence which a prudent man would use under the circumstances in which he was placed." In *Keene v. Accident Ass'n*, 36 N. E. 891, the Supreme Court of Massachusetts had to deal with a policy providing against voluntary exposure to unnecessary danger, and also that the certificate holder must use "all due diligence for his personal safety and protection." The former proviso was held to include a voluntary, but not an involuntary, exposure to unnecessary danger; that is, a conscious and intentional exposure—something the insured was conscious of, and willing to take the risk of. Due diligence to be exercised by the insured was said to mean, not that he must guaranty himself against accidents, or that he could not recover for an accident to which some want of care on his part might contribute. He was not required to use all possible diligence, but all due diligence. The opinion further said that due diligence is not inconsistent with inadvertence, nor running such risks as prudent or cautious persons would run. In that case the deceased had been killed by getting off a car at a station, and passing across some tracks with an umbrella hoisted so as to obstruct his view, with the result that he was struck by some freight cars which had been shunted along one of the tracks. It was held to be a question for the jury whether he had violated the policy. Some of the decisions based on policies stipulating against a voluntary exposure to unnecessary danger are more radical as to the negligence necessary to prevent a recovery, and require an intentional act which a person of ordinary prudence would pronounce dangerous; that is, an act done with knowledge of its dangerous character. *Burkhard v. Ins. Co.*, supra. In *Schelderer v. Ins. Co.*, supra, the exemption was for voluntary exposure to unnecessary danger; and the facts were that the plaintiff, who was traveling on a train, fell asleep, and, while he was in a doze, not knowing or realizing what he was doing, arose from his seat, walked to the platform of the car, and fell off. This act was held not to come within the

exemption. In *Mfg. Indemnity Co. v. Dorgan*, supra, the insured, while ill, had gone on a fishing trip, and was afterwards found lying in a brook, face downwards, and dead. The court had to pass on the meaning of "voluntary exposure to danger," and it was held that such an exposure was something beyond the ordinary—wanton exposure or gross carelessness; that a less degree of negligence would not exempt the company. In *Marx v. Ins. Co.* (C. C.) 39 Fed. 321, the insured was killed by falling from the platform of a car while the train was running. He had gone on the platform because he was suffering from overheating and nausea. The platform was said to be a dangerous place, but it was for the jury to determine whether, the circumstances considered, he unnecessarily exposed himself to danger in riding there.

Viewing the facts of the present case, so far as they are known, in the light of the foregoing authorities, some of which make a negligent exposure to danger, even when the insured was ignorant that it was impending, a defense, we will endeavor to ascertain whether the argument of the defendant that the deceased was conclusively proved to have been guilty of negligence is sound. In the first place, it is to be observed that the burden of proof was on the defendant to show the insured, Oscar Jamison, met death in a way that would bring into operation the policy's minimum indemnity clause. The legal presumption is that he was not negligent, but was observing due care, and the company must establish that he was so far at fault as to exonerate it from payment of the full indemnity. This was decided in an apposite case. *Meadows v. Ins. Co.*, 129 Mo. 76, 31 S. W. 578, 50 Am. St. Rep. 427. See, also, *Freeman v. Ins. Co.*, 144 Mass. 572, 12 N. E. 372; *Badenfeld v. Ass'n*, 154 Mass. 77, 27 N. E. 769, 13 L. R. A. 263. What facts were proven on which to rest the argument that the deceased was to blame for his death? That the body was found a short distance from the railroad track, with wounds on it; that blood stains could be traced from there to the track; and that the deceased's hat was on the track, cut in two—may be said to show he was killed by a train. But his avocation exposed him constantly to the danger of being thus killed, and that was one of the risks insured against. He may have been struck while performing his duty carefully and according to his best judgment, and is not conclusively shown to have been careless by the fact that he was so near the track as to be hit by a train, though this does prove he was in a dangerous position. *Erickson v. R. R.*, 171 Mo., loc. cit. 658, 71 S. W. 1022. The recited facts did not so completely overcome the legal presumption that, when killed, he was in the exercise of due care, as to take the issue from the triers of the facts. This was decided in *Meadows v. Ins. Co.*, supra. In that case the company was not liable if the

insured was hurt from voluntary exposure to unnecessary danger, and he was further bound to use due diligence for his personal safety and protection. The question arose as to whom the burden of proof was on to show the exempting clauses took effect, and it was ruled, as stated, to be on the insurance company. The further question was whether the company made sufficient proof that the deceased was negligent by showing certain facts. The deceased was found on a railway track, with his body cut diagonally across; the legs lying between the rails, and the trunk outside. He had got into Chillicothe during the night, and inquired about getting to St. Joseph, and was told he could leave at 4:20 a. m. He was further told there was a freight train that would not carry passengers; but he said he was a stockman, and it would carry him. He then left the Wabash Station, and started across some railway tracks on which trains were moving. Shortly afterwards a scream was heard, as of some one in distress, and at the same time the noise of a train was heard. The insurance company contended the only reasonable inference from those facts was that Meadows lost his life in attempting to pass between the cars of a moving train, in violation of his agreement not to expose himself to unnecessary danger. In dealing with this contention, the Supreme Court held that, while that theory might be true, the facts were insufficient to overcome, as a matter of law, the presumption that he was exercising due care, but were for the jury to weigh. In *Badenfeld v. Acc. Ass'n*, supra, it was asserted to be an irresistible inference that the insured fell while leaving a train which was in motion. On this contention the Supreme Court of Massachusetts held that, granting the proposition to be true, it would not conclusively establish that the deceased was negligent, but whether or not he was negligent would depend on the circumstances under which he left the moving train, "and there would be no presumption that the circumstances were such as to make it negligence." Numerous cases to the same effect might be cited, but those are sufficient for the present purpose, and they establish the proposition that the circuit court could not, from the circumstances above stated, properly have drawn the conclusion, as a legal inference, that Oscar Jamison was killed while exposing himself to unnecessary danger or to obvious risk of injury.

What is relied on further and principally in this connection is the testimony of one of the persons who discovered the deceased the morning after he was wounded, that the deceased said to him he had been struck by a train while asleep. We will notice presently the character of this evidence, with a view to determining the weight that ought to be given to it. But, granting the declaration was true, and that the deceased fell asleep, the inquiry arises whether that was such

negligence on his part as to constitute, under all circumstances, exposure to unnecessary danger. The duty of the deceased was to remain at the bridge, watch for trains, and flag them. If he fell asleep while at his post, we think there is a possibility that he did so shamelessly. Instances are numerous in which allroad men who were exhausted from being worked overtime have been suddenly overpowered by sleep at their posts, quite against their wish or intention. If Oscar Jamison lay down, or otherwise disposed himself to go to sleep, where he knew he would be hurt by a train if one passed, he was guilty of taking an unnecessary risk, and the fact would prevent recovery of the full indemnity. If he fell asleep, the case is like some of those cited above, in which a passenger fell off a train. The fact may have been, or not, according to the circumstances, exposing himself to unnecessary danger. That is to say, it was a question for the jury, or for the court acting as a jury. He may have sat down during his vigil at a point out of danger, have fallen asleep, and moved, while asleep, into danger. We can indulge no presumption in regard to the matter.

The testimony supposed to prove the defendant was asleep when struck by the train was given by a witness who saw him in the morning of April 15th, after he had been injured the night before. The witness said that Jamison was then in a semiconscious condition, and testified further as follows: "I first aid to him when I approached him—put my hand on his breast and said, 'What in the world is the matter?' He opened his eyes and looked at me, but didn't speak until I repeated the question, and then said he didn't know. I asked him then if he had been hit by the train; repeated the question before he answered it. He said he had. I asked him then if he had fallen asleep; repeated this question before he answered it. He said: 'Yes.' I asked how he came to go to sleep. He said he didn't know. Q. Where was Jamison at the time this conversation was held, with reference to the place where you found him? A. He was lying right where I first found him. Q. Who was present when said conversation was held? A. Only he and myself." From the testimony, it seems that the deceased was in such a stupor while the witness talked to him as to render it very doubtful if he understood what was said to him or by him. When first asked what was the matter, and after the question had been reiterated, he said he did not know what was the matter; and his other replies may have been mechanical assents to the inquiries addressed to him. He had been in an unconscious condition for some hours, and died shortly afterwards, and in that state was as likely as not to give an affirmative response to a suggestive question. We think the circuit court might justly have attached little importance to the statements of the deceased as proving that he was killed

while asleep on the track. Assuredly, those statements do not establish that fact so conclusively as to make it our duty to determine it contrary to the finding below.

The judgment is affirmed.

BLAND, P. J., and REYBURN, J., concur.

WOLFSBERGER v. MORT et al. (FRITSCH, Interpleader.)*

(Court of Appeals at St. Louis, Mo. Feb. 2, 1904.)

FRAUDULENT CONVEYANCES—TRANSACTIONS BETWEEN HUSBAND AND WIFE—EVIDENCE—SUFFICIENCY.

1. Evidence examined, and held to show that a part of the money used by a judgment debtor's wife in purchasing a piano, attached as his property, was received from him.

2. An insolvent debtor cannot systematically give practically all earnings to his wife, and thereby allow her to accumulate property in her own name, which, if acquired by him, would be subject to levy.

3. In proportion as a husband's money is used for the purchase of property by his wife in her own name she holds the same in trust for him, and it may be subjected to a judgment against him.

Appeal from Circuit Court, St. Louis County; J. W. McElhinney, Judge.

Action by Robert Wolfsberger against Jesse Mort and another to recover on a judgment aided by attachment. Lena Fritsch interpleaded therein, claiming the attached property, and from a judgment in favor of plaintiff she appeals. Affirmed.

Geo. L. Edwards, for appellant. E. H. Wolfsberger, for respondent.

BLAND, P. J. The evidence is that on January 2, 1897, Jesse Mort borrowed of plaintiff \$200, and gave his promissory note therefor, due six months after date, with Emil Fritsch as security. The note was not paid at maturity, and plaintiff brought suit thereon before a justice of the peace, and on September 11, 1901, recovered a judgment against both Mort and Fritsch for the principal and interest (\$256.40) then due. The judgment was not paid. In 1902 Mrs. Fritsch, the interpleader, and wife of Emil Fritsch, was advised by her physician to go to Colorado Springs, Colo., for the benefit of her health. She, preparatory to removing with her husband and children to Colorado Springs, advertised her personal property for sale on June 21, 1902. The plaintiff brought suit on his judgment (on the note) in the circuit court of St. Louis county, and in aid of the suit sued out a writ of attachment against Emil Fritsch. The officer to whom the writ of attachment was delivered seized a lot of personal property as the property of Emil Fritsch, found in the house where he resided

*Rehearing denied February 16, 1904.

¶ 2. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. § 341.

with his wife and children, in the city of Kirkwood, St. Louis county. A grand piano was one of the articles attached by the officer. Fritsch and wife gave a forthcoming bond for the property, and it was returned to them. Mrs. Fritsch filed her interplea, claiming the attached property as her separate and individual property. The allegations of the interplea were denied by plaintiff, and the issues thus made were submitted to the court sitting as a jury, who, after hearing the evidence, found that the interpleader had purchased the piano partly with her separate means and partly with the means of her husband, Emil Fritsch; that of the latter's money \$237.50 was used in the purchase of the piano; and adjudged the attachment a lien on the piano for the payment of that sum, giving to interpleader the right to discharge the lien on the payment of said sum of \$237.50. From this judgment the interpleader appealed to this court.

The title to none of the property attached is involved on this appeal except the piano. The evidence shows that at the time of the marriage of Mrs. Fritsch to her husband (1891) she had saved a few hundred dollars from her earnings; that with this money Mrs. Fritsch purchased a lot in the city of Kirkwood, taking the deed to herself. After purchasing the lot, she borrowed a thousand dollars, giving as security a deed of trust on the lot executed by herself and husband. With this money she erected a dwelling on the lot, in which she and her husband resided until the day the attachment was levied. The \$1,000 borrowed were paid mostly by a new loan of \$900 secured as was the first loan. This debt has not been paid. The evidence shows that the management and control of their household affairs was given over entirely by Fritsch to his wife; that all purchases of furniture and household goods were made by her in her name, and were claimed by her as her separate property. Mrs. Fritsch's evidence tends to show that she kept roomers or boarders from time to time, did some fancy work by which she earned some money, and received from her husband from month to month during their marriage small sums of money earned by him at his trade, and that all the surplus saved from these sources was deposited in bank by her to her individual account. No estimate of the amount received by her from boarders and roomers was given at the trial, nor of the income from her fancy work. It is shown that Emil Fritsch earned about \$25 per week at his trade. He and his wife testified that he furnished the money to pay for the maintenance of the family, consisting of himself, wife, and several children; but no estimate is given of what it cost to maintain the family. It is shown that for several years prior to the levying of the attachment Mrs. Fritsch kept her deposit account in a bank at Kirkwood, and that both she and her husband drew checks against that account (the checks

drawn by her husband being signed "Lena Fritsch, by Emil Fritsch"), and that at the date of the levying of the attachment there was a balance of \$400 to the credit of Mrs. Fritsch in the bank. The evidence is that the piano was bought by Mrs. Fritsch on July 15, 1899, for \$525; that she paid \$300 cash, gave two notes—one for \$58 and the other for \$59—and an old piano valued at \$50 for the balance of the purchase price; that the bill of sale for the piano was made to her; and that she afterwards paid the two notes. Fritsch was a barber, and owned no property except the furnishings of his barber shop, worth about \$100.

We think the evidence clearly shows that much of Mrs. Fritsch's bank deposit was of money received from her husband. The evidence is so indefinite as to the amount she earned by her own labor as to make it impossible to form any just estimate of it; but from her testimony we think the inference is reasonable that her earnings were wholly insufficient to make up half of the amount it is shown she deposited from time to time in bank. But it is contended that, as the evidence shows Emil Fritsch had no property except the furnishings of his barber shop, and as he did not at any one time give to his wife money that was subject to be taken on execution or attachment, no fraud was committed against the plaintiff as his creditor. If this contention is good law, then an insolvent debtor may give over to his wife his monthly earnings in small sums, and the latter may deposit these gifts in bank to her individual credit, or purchase therewith property in her individual name, and in this manner in time accumulate a large bank account, or acquire in her own right a large amount of property, free and exempt from the claims of her husband's creditors, when, if the money had been deposited by him, or the property purchased in his own name, it would have been subject to levy. It is the law that a husband has the right to give his personal services and skill to the management of his wife's property without any other consideration than the support of himself, and that the results of his labor on his wife's property are not subject to levy. *Seay v. Hesse*, 123 Mo. 450, 24 S. W. 1017, 27 S. W. 633; *Gruner v. Scholz*, 154 Mo. 415, 55 S. W. 441; *State ex rel. v. Jones*, 83 Mo. App. 151; *Hibbard, Spencer, Bartlett & Co. v. Heckart*, 88 Mo. App. 544. He may also give his wife personal property when such gift is not in fraud of his creditors. *Bank v. Simpson*, 152 Mo. 638, 54 S. W. 506; *Sanguinett v. Webster*, 127 Mo. 32, 29 S. W. 698; *Thomas v. Thomas*, 107 Mo. 459, 18 S. W. 27; *Bettes v. Magoon*, 85 Mo. 580. But it seems to us that to permit an insolvent husband having creditors to systematically and continuously give his wife practically all his earnings, and to allow the wife with these gifts to acquire in her own name, and for her separate use, personal property, and hold it exempt from the just demands of the cred-

itors of her husband, when, if the same property had been acquired directly by the husband, it would have been subject to levy, would work a gross fraud on the husband's creditors. The learned circuit judge, as is shown by the declarations of law given and refused, concluded that gifts made in the manner indicated by Fritsch to his wife were fraudulent as to plaintiff. We think this was the correct view of the law. *Shanklin v. McCracken*, 151 Mo. 587, 52 S. W. 339. We think, furthermore, that the evidence abundantly sustains the finding of the trial court that a portion of Fritsch's money was used in the purchase of the piano, and that the trial court correctly held that, in the proportion his money was used in payment for the piano, the interpleader held the piano in trust for him, and correctly subjected his interest to the payment of plaintiff's judgment. *Jones v. Elkins*, 143 Mo. 647, 45 S. W. 261.

The judgment is affirmed. All concur.

FENDERSON v. MISSOURI TIE & TIMBER CO.

(Court of Appeals at St. Louis, Mo. Feb. 2, 1904.)

TRANSFER OF TITLE BY FOREIGN WILL—EVIDENCE OF—PROBATE—NECESSITY—PRESUMPTION FROM RECORD—DEED—CONSTRUCTION—NAME OF GRANTOR—QUESTION FOR COURT.

1. Rev. St. 1899, §§ 4634, 4635, authorize devises by foreign wills of real estate in the state, and provide that authenticated copies of such wills "and the probate thereof" shall be recorded and admitted in evidence the same as if executed and proved in the state. Held to expressly require proof of the probate of such a will, as well as exemplified copy thereof, in order to prove a transfer of title thereby.

2. The duly authenticated record of a foreign will affords no presumption that it was duly proved, so as to dispense with proof of such fact in support of a title to land depending thereon.

3. Where it appears possible to read the name of the grantee as written in a deed as either "Mack" or "Mock," it is for the court to determine which was intended.

Appeal from Circuit Court, Ripley County; J. L. Fort, Judge.

Action by John Fenderson against the Missouri Tie & Timber Company. From a judgment for plaintiff, defendant appeals. Reversed.

Dinning, Hamel & Dinning, for appellant. Thos. F. Lane, for respondent.

GOODE, J. Action for damages for trespass on lands by cutting and removing trees from it. The land was wild, and not in the actual possession of any one; but plaintiff asserts the right to maintain this action by virtue of the constructive possession which he says he had as owner of the fee. Both parties claim under Jacob Van Wormer as the common source of title—the plaintiff under a warranty deed executed by said Van Wormer in his lifetime to Chas. C. Mack,

and subsequent transfers of the title to the plaintiff; the defendant under a quitclaim deed from the heirs of Van Wormer. In plaintiff's chain of title is the will of William Armstrong. This will was executed February 22, 1886, in Bradford county, Pa., where Armstrong resided. It is an essential link in plaintiff's title, and the only question of moment in the case is whether or not the certified copy of the will from the office of the register of wills of Bradford county, which was introduced by the plaintiff, was sufficient evidence to show that the title to the land passed by the will to Emeline Armstrong, the devisee. The document introduced comprises a copy of the will of William Armstrong, with the attesting clause, signed by two witnesses, and the certificates of Wm. J. McCabe, register of wills of Bradford county, and A. C. Fleming, president judge of the court of common pleas or orphans' court for Bradford county. The execution and attestation of the will complied with the statutes of this state, and the authentication of the copy complies with the act of Congress. But the plaintiff offered nothing, as said, except an exemplification of the will itself, with the attesting clause, and the certificate of the register that he had compared the copy with the original on file and of record in his office, and found the same to be a true copy of and transcript of the original record. What is lacking is an exemplification of the record of the probate of the will in the proper court of Bradford county, Pa., if it was ever proved. The defendant insists that, for the will to be operative as a conveyance in plaintiff's chain of title, it was necessary for it to be proved; and that for the record introduced in evidence to establish this necessary link in his chain of title it was necessary to have an exemplification of the decree or judgment authenticated according to the act of Congress. This point must be granted. Our statutes provide that any person owning real or personal estate in this state may devise or bequeath such property by last will, executed and proved, if real estate be devised, according to the laws of this state, or, if personal estate be bequeathed, according to the laws of this state or of the country, state, or territory in which the will was made. They further provide that authenticated copies of such wills and the probate thereof shall be recorded in the same manner as wills executed and proved in this state, and shall be admitted in evidence in the same manner and with like effect. Rev. St. 1899, §§ 4634, 4635. For aught that appears, the will in question may have been on file in the office of the register of wills in Bradford county, Pa., but never have been proved in a court of competent jurisdiction to be the will of the testator, Armstrong; and no one will contend that a will can pass title to land until it is proved. The statutes just cited determine that proposition, which has, moreover, been the subject of adjudication. In *Keith v.*

Keith, 97 Mo. 223, 10 S. W. 597, it was said that a will, to be of any validity as a transfer of title to land, must be executed, attested, and proved in the manner prescribed by the laws of the state where the land is located. That remark was made in reference to a foreign will. In the same connection the opinion says, in effect, that, though the law of this state dispenses with proof here of a foreign will which has been proved in the foreign forum according to our law, our law must be complied with in order to give the foreign will the force and effect of a proved domestic will; citing *McCormick v. Sullivan*, 10 Wheat. 192, 6 L. Ed. 800; *Cabanne v. Skinker*, 56 Mo. 357. In *Lewis v. St. Louis*, 69 Mo. 595, an exemplification of a will executed in Wisconsin, and of its probate in Grant county, in that state, was admitted in evidence over the objection of the defendant that the will had not been recorded in this state. The precise point determined was that, if it had been duly executed and proved in Wisconsin, it could be received in evidence in this state, although not recorded here. The same thing was decided in *Drake v. Curtis*, 88 Mo. 644. In *Gaines v. Fender*, 82 Mo. 497, it was ruled that a foreign will need not be proved or recorded in this state to make it competent evidence, provided it was duly executed and proved in the state of its execution. The objection was made in that case to the record offered in evidence that there was no proof of the probate of the will in Kentucky, the state where the testator executed it. This was ruled against the appellant, not on the ground that such probate in Kentucky was unnecessary, but on the ground that the exemplification offered in evidence was a properly authenticated copy of the record of the judgment of the Kentucky court establishing the probate of the will. *Charlton v. Brown*, 49 Mo. 353, which the plaintiff invokes as an authority in favor of the propriety of receiving in evidence the record in question, is an authority against his position. The will offered in that case was executed in Missouri, and the objection to its admission was that the exemplified copy of the record of the probate which was offered did not embrace the testimony given by the witnesses to the will when it was proven. But the record showed the probate of the will, and this was held sufficient, and that it was unnecessary to insert in the exemplified copy of the judgment of probate the evidence on which the judgment was rendered. None of the decisions lends countenance to the proposition that an exemplified copy of a foreign will, though authenticated according to the act of Congress by the official custodian of wills in the foreign jurisdiction, is sufficient to prove a testamentary transfer of title to lands in this state without an exemplification of the judgment of some court admitting the will to probate. To so hold would be to disregard the express words of the statutes, which de-

clare that authenticated copies of foreign wills and the probate thereof shall be admitted in evidence, and that any person owning real estate in this state may devise it by will executed and proved according to the laws of this state. Error was committed in the reception of the record of the will offered by the plaintiff as sufficing to show a transfer of title, and the judgment must be reversed, and the cause remanded to allow the plaintiff to complete, if possible, his proof.

We will attend a moment to the plaintiff's argument that the certificate to the copy of the will shows it had been recorded, and that it could not be recorded until it was proven. This is a non sequitur. Certainly we cannot presume there was judicial action by the proper court in taking proof of this will, and dispense with evidence on the subject merely because the will happens to be recorded.

An objection was made against the admission of a deed executed by Chas. Mack, on the ground that the deed from Van Wormer, under which Mack claimed, was made to Charles Mock. As to this point, suffice to say that the evidence shows it was possible to read the name of the grantee in the deed Van Wormer made as either Mack or Mock, and, as the letter "a" is often carelessly formed in writing so as to resemble "o," we think it was for the trial court to say whether or not the grantee intended was Charles Mack.

The judgment is reversed, and the cause remanded.

BLAND, P. J., and REYBURN, J., concur.

HANHEIDE v. ST. LOUIS TRANSIT CO.
(Court of Appeals at St. Louis, Mo. Feb. 2, 1904.)

STREET RAILROADS—INJURIES AT CROSSINGS—
NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—
DEFINITION—PROXIMATE CAUSE—INSTRUCTIONS.

1. Where, in an action for injuries in a collision with a street car, the defense of contributory negligence is presented in the instructions taken as a whole, that one of the instructions ignored such issue was immaterial.

2. Plaintiff was injured in collision with a street car at a crossing. He testified that when his horses, which were hauling a heavy wagon, were about 5 feet from the track, he saw the car about 230 feet distant, when he whipped up his team to get across; that his horses' heads were about 24 feet from the wagon end, and the motorman approached in plain sight with unabated speed, and struck the rear of the wagon; that the car was going between 10 and 12 miles an hour, and other witnesses testified that it could have been stopped within 35 feet. Held that, plaintiff and the motorman being each bound to exercise due care to avoid the collision, it was for the jury to determine which party was at fault.

3. Where a street railway motorman discovers a vehicle negligently approaching a crossing, it is his duty to so regulate the speed of his car, if in his power, to avoid a collision;

¶ 3. See *Street Railroads*, vol. 44, Cent. Dig. § 219.

and the mere negligence of the plaintiff in approaching and crossing the track would not justify the infliction of an injury if it could be avoided by the exercise of reasonable care and caution.

4. An instruction on contributory negligence, requiring that such negligence, in order to be a defense, should be the sole and direct cause of the accident, was erroneous; since, if the accident was caused by the joint and concurring negligence of both plaintiff and defendant, and the negligence of neither without the concurring negligence of the other would have caused the injury, plaintiff was not entitled to recover.

Appeal from Circuit Court, Franklin County; Wm. A. Davidson, Judge.

Action by William Hanheide against the St. Louis Transit Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Boyle, Priest & Lehman, for appellant.
Ino. W. Booth and Scullin & Chopin, for respondent.

REYBURN, J. This, an action for damages for personal injuries sustained by plaintiff in collision between his wagon and an electric car of defendant on the 6th day of November, 1902, was begun in the circuit court of the city of St. Louis, and upon application of plaintiff for change of venue transferred to the circuit court of Franklin county. The petition contained averments that plaintiff was driving in a westerly direction on North Market street, and when he reached the point of its intersection with Fifteenth street, and while crossing defendant's tracks, his wagon was struck by a car traveling northward on Fifteenth street, and in consequent injuries were described. The assignments of negligence were negligent and careless management of defendant's car by its servants in failing to exercise ordinary care to keep watch for vehicles crossing said tracks, in failing to give any signal of the approach of the car, and to use ordinary care to stop the car after the danger to plaintiff became apparent, or by exercise of ordinary care would have become apparent, and by running at a high rate of speed. The defense coupled with a general denial the plea of contributory negligence in driving upon the track in front of a moving car at a time and place when and where, by looking and listening, he might have seen and heard the approaching car in time to have remained off and gotten off the track and avoided the accident, and that he failed to look or listen for the approach of such car, and to heed what he saw, if he did look or listen, and thereby caused his own injuries.

The evidence introduced consisted of the testimony offered on part of plaintiff, defendant tendering none. Plaintiff testified that at about half past 5 o'clock in the afternoon he was driving a team hauling a heavy wagon west on North Market street, and in crossing Fifteenth street was struck

by a car north-bound; that before starting across Fifteenth street he had looked for cars, and saw this car about three-quarters of a block, or 225 to 230 feet, distant, at which time his horses were about 5 feet from the track; that he saw the motorman was approaching with unabated speed, and he whipped up his team to get across; that the tips of his horses' heads were about 24 feet from the wagon end, and the wagon was struck in the rear before it was wholly across. He further deposed that he rode on street cars, but not very often; had frequently seen them, and could form an opinion of the speed of a car going between two points, and, while it was difficult to determine, the rate of this car was between 10 and 12 miles per hour; that the motorman made no effort to check the speed until about 10 or 15 feet from the wagon; and there was no obstruction, and he saw the car plainly when he drove on the track. Other witnesses differed but slightly from plaintiff in their description of the occurrence, the estimates of the distance separating the car from the wagon when the latter was started across the track varying, and two witnesses (former motormen) testified, one that on a level track a car could be stopped in 25 feet moving at rate of 12 miles per hour, and, if the track was slippery, 10 feet more would be required, and the other that at rate of 12 miles per hour, on a slippery track, 35 feet was the least distance in which a car could be stopped.

At close of plaintiff's testimony the court charged the jury by a series of instructions, and those as to the measure of damages, form of verdict, and definition of ordinary care appellant makes no complaint of. The court gave as its first instruction, and at instance of respondent, the following: "(1) The jury are instructed that if you believe from the evidence that plaintiff, driving a wagon and team of horses, drove on the track of the defendant in front of an electric car provided with brakes and appliances for stopping such car, then being run and operated on said tracks by defendant at a speed of twelve miles per hour, and that plaintiff and said wagon and team being so on said track were crossing the same at a slow walk, and were then and there in a place of great danger, and were then and there seen by defendant's motorman then and there operating said car to be so on said track and so crossing the same while the said car was at such a distance from plaintiff and from said wagon and team that by the ordinary use of the brakes and other appliances for stopping said car said car might have been stopped and the striking of said wagon by said car might have been avoided; and that said motorman, so seeing plaintiff, and being aware of his situation, continued to run said car toward plaintiff without attempting to stop said car until it was so close upon plaintiff and said wagon that

it could not be stopped in time to avoid striking said wagon and injuring plaintiff, and that by reason thereof said car struck said wagon and injured plaintiff as alleged in plaintiff's petition—then such failure to attempt to stop such car under such circumstances, and in the absence of explanation or excuse, would be negligence chargeable to the defendant, and if the jury find the facts to be as aforesaid they should find the issues for the plaintiff." After the argument the following was given of the court's own motion: "If the jury find from the evidence that the fact that plaintiff drove on the track of defendant in front of a moving car, if you find he did so drive on said track, and that was the sole and direct cause of the injury, you will find the issues for the defendant; but if you find that after plaintiff drove on said track defendant's motorman operating the car saw plaintiff on the track while the car was at such a distance from plaintiff that he could, by the use of the brakes on said car provided for stopping the same, have stopped the same in time to have avoided injuring plaintiff, and neglected to so stop the car, and run the car against plaintiff's wagon and injured plaintiff, then you cannot find that plaintiff's driving on the track was the sole and direct cause of plaintiff's injuries."

1. The first instruction above is assailed as wholly ignoring the issue of contributory negligence, and the Sullivan Case, 88 Mo. 169, is invoked in support of the contention. The true rule is, the instructions are to be taken as a whole, and, if the defense of contributory negligence had been presented to the jury, though disregarded in the first, but properly presented in a subsequent and separate instruction, this would have been sufficient; and such is the doctrine of *Owens v. Railway*, 95 Mo. 169, 8 S. W. 350, 6 Am. St. Rep. 39, wherein the contrary ruling of the above authority relied on by appellant is expressly repudiated. But this method was not pursued. Defendant had interposed the defense of contributory negligence, and plaintiff's denial in his reply presented such issue, and defendant had the right to have such question submitted to the jury, and in the form in which the jury were instructed the stricture of this instruction was well founded, and it is fatally defective. Much of the reasoning in the case of *Linder* against this defendant (No. 9,051, December 15, 1903) 77 S. W. 997, lately before this court, and cited by appellant, is applicable to this case. The rights of employment of public streets as highways by the public, whether on foot or in vehicles, and their use for the convenience of transportation of the public by cars propelled by electric power, are equal and concurrent, and to be taken advantage of and exercised to avoid injury, and with reasonable regard to the common safety. It devolved alike on the plaintiff and on the motorman of defendant to exercise due care to

avoid the impending collision, and it was for the jury, and not the court, under the facts and circumstances herein presented, to determine which party was at fault. The Supreme Court in a recent case, not adverted to in this argument, has again announced the legal principles governing where a collision has ensued between a private vehicle and an electric car; and while in many particulars the facts therein reviewed do not resemble those presented by this record, yet light is thrown on this case therefrom, and especially in two directions. It is therein held that at a crossing or intersection of public streets, no particular rate of speed can be deemed lawful regardless of the conditions and circumstances that confront the motorman at the time, and where a motorman discovers that a vehicle is negligently approaching a crossing it becomes his duty to regulate the speed of his car, if in his power, so as to avoid the infliction of any injury; and the familiar doctrine is therein reiterated that the mere negligence of a plaintiff in approaching and crossing a track would not justify the infliction of an injury if it could be avoided by the adoption and exercise of reasonable care and caution. *Holden v. Railroad* (Mo. Sup.) 76 S. W. 973. The same doctrine has been announced in this court in these words: "The settled rule in this state is that, though the plaintiff negligently placed himself in a perilous position by driving on or near the track, the motorman operating the car owed the plaintiff the duty of trying to avoid injuring him, and plaintiff's previous negligence did not bar a recovery if the injury resulted from the negligence of the motorman in not stopping or checking the car;" citing numerous decisions. *Septowsky v. Transit Co.* (Mo. App.) 76 S. W. 693.

2. The instruction, already quoted, given after the argument had proceeded, in no wise modified or injected into the first instruction for plaintiff a proper consideration of the contributory negligence, if any there was, on part of plaintiff. While purporting to give a legal definition of contributory negligence, this instruction demands that such negligence shall be found the sole and direct cause of the accident—an interpretation at war with the term "contributory" itself. This court has lately held in such cases that, if the accident be caused by the joint and concurring negligence of both plaintiff and defendant's agents, and the negligence of neither without the concurring negligence of the other would have caused the injury, the plaintiff is not entitled to a recovery. *Hornstein v. Railroad*, 97 Mo. App. 271, 70 S. W. 1105.

3. The appellant has made conspicuous the discussion participated in by the trial judge and opposing counsel prior to argument to the jury, as a result of which appellant's counsel declined to present any argument on its behalf. It will suffice to dispose of

this branch of the case by the expression by this court of the confident belief that such occurrence will not recur at any future trial. Judgment reversed, and cause remanded.

BLAND, P. J., and GOODE, J., concur.

DAWSON v. WOMBLES.

(Court of Appeals at St. Louis, Mo. Feb. 2, 1904.)

WITNESSES — COMPETENCY — TRANSACTION WITH DECEDENT—CLAIM AGAINST ESTATE—VERIFICATION—SUFFICIENCY OF AFFIDAVIT—AMENDMENT.

1. An agent for the payee of a note, in the transaction leading to its execution, is not incompetent to testify in favor of plaintiff in an action on the note against the maker's administrator, if he has no interest in the suit.

2. An affidavit by an agent in support of a claim against a decedent's estate is not defective for not stating that he had the management of the business out of which the demand grew, or had means of knowing the verified facts—matters which may be shown aliunde—but it is defective if it does not state, as required by Rev. St. 1899, § 196, the fact that it was made by an agent.

3. An affidavit by an agent in support of a claim against a decedent's estate, defective for failure to disclose that it was made by an agent, may be cured by amendment.

Appeal from Circuit Court, Audrain County; E. M. Hughes, Judge.

Action by Jennie L. Dawson against S. D. Wombles, administrator of Jas. R. Palmer, deceased. From a judgment for defendant, plaintiff appeals. Reversed.

Martin & Woolfold and Pearson & Pearson, for appellant. W. A. Dudley and O. H. Avery, for respondent.

GOODE, J. This case is on a note presented by the appellant, Jennie L. Dawson, against the estate of Jas. R. Palmer, deceased. The note was given July 2, 1897, to Nancy E. Palmer, the mother of the maker, for \$515.50, due one day after date, and drew interest at 8 per cent. It was indorsed by the payee to Jennie L. Palmer, December 10, 1888, and was credited with a payment of \$22 on the 5th day of September, 1893. Respondent's counsel contends it is not clear whether the credit was indorsed in 1891 or 1893, but we must look to the transcript for the facts, and the transcript shows it was indorsed in 1893. Shortly after the note was executed, although it had been previously assigned to Jennie L. Dawson (née Palmer), it was deposited with her father, Jno. W. M. Palmer, who was the brother of the deceased, Jas. R. Palmer, and both of them were sons of the payee. The purpose of the payee in depositing the note with Jno. W. M. Palmer was to prevent the maker from being

pressed for payment. No question is made about appellant's ownership. The note was given as the result of a settlement between Jas. R. Palmer and his mother. The credit on it grew out of an arrangement between Jno. W. M. Palmer and Jas. R. Palmer in regard to the funeral expenses of their mother, who died in 1890. It was agreed between the two sons that each should bear one-half of her funeral expenses, but that Jas. R. Palmer should have credit for the half he paid on the note. Jno. W. M. Palmer advanced the entire amount, and subsequently James R. Palmer reimbursed him for half of it, and at that time the credit was indorsed. The note was filed for allowance August 5, 1902. Notice of its presentation was given July 21, 1902. All the facts in regard to its execution, amount, indorsement to appellant, and the credit, were elicited from Jno. W. M. Palmer; but his testimony was afterwards excluded by the circuit court for the reason that he was the agent of his mother in the transaction with Jas. R. Palmer leading to the giving of the note, and the witness was deemed to be disqualified because his brother is dead. It might be questioned whether Jno. W. M. Palmer was the agent of his mother in the matter at all. He testified that he was no more her agent than his brother's, and he appears to have acted in a clerical capacity in adjusting the account. Be that as it may, it is certain, from the decisions on the point, that he was a competent witness if he had no interest in the suit, and we think he had none. The point was directly decided in *Clark v. Thias*, 173 Mo. 628, 78 S. W. 616, and that is the latest adjudication on it. It must control the decision of this case, and lead to a reversal of the judgment.

An objection was raised to the affidavit to the demand filed in the probate court on the score that it was made by R. L. Dawson, instead of the claimant herself, and contains no statement that Dawson was the agent of the claimant, or that he had had the management of the business out of which the demand originated, or had means of knowing personally the facts necessary to be stated in the affidavit. The statute requires an affidavit to a demand against an estate which is made by an agent to contain a statement of that fact. Rev. St. 1899, § 196. It does not require the affidavit to contain a statement that the agent had had the management of the business out of which the demand grew, or had means of knowing the verified facts. Those things, we apprehend, may be shown by evidence aliunde. The affidavit was defective in not disclosing that it was made by the agent of the claimant, but that defect may be cured by an amendment. *Woerner, Administration Law*, p. *808; *Walker v. Wigginton's Adm'r*, 50 Ala. 579; *Chadwell v. Chadwell*, 98 Ky. 643, 33 S. W. 1118.

As to when the payment was credited on

¶ 2. See *Executors and Administrators*, vol. 22, Cent. Dig. § 315.

the note was a question for the trier of the facts to determine.

The judgment is reversed, and the cause remanded.

BLAND, P. J., and REYBURN, J., concur.

PURDY v. PFAFF.*

(Court of Appeals at St. Louis, Mo. Feb. 2, 1904.)

PLEADINGS—AMENDMENT—CHANGE OF CAUSE OF ACTION.

1. Under Rev. St. 1890, § 657, providing for the amendment of pleadings which do not change substantially the claim or defense, an amended petition introducing a cause of action different from that stated in the original petition cannot be allowed, although the cause of action stated therein does not differ from that stated in a prior amended petition, which was not objected to as stating a new cause of action, but was overthrown on demurrer.

Appeal from Circuit Court, Lawrence County; Henry C. Pepper, Judge.

Action by Ida N. Purdy against Albert F. Pfaff. From a judgment for defendant, plaintiff appeals. Affirmed.

Washington Cloud, for appellant.

REYBURN, J. The sole question presented for the decision of this court necessitates the reproduction of the plaintiff's pleadings, although they are somewhat lengthy. Plaintiff brought this action to November term of the circuit court of Lawrence county, by filing the following petition: "Plaintiff states: That on June 1, 1900, and for a long time prior thereto, George A. Purdy was and had been postmaster at Peirce City, Missouri, under an appointment of the President of the United States for a term ending January 21, 1902. That as such he had executed bond to the United States in the sum of \$6,000, by which he had bound himself, his heirs and executors, to perform and to cause to be performed all the duties of said office during his said term and until his successor should be duly appointed and take charge of said office. That the defendant and others were his securities in said bond, and by its terms become liable to the penalties of the same if default was made, and the principal in said bond should not pay the same. That the duties of said office were, in part, that a suitable room and place should be maintained, with boxes, safes, and other furniture and fixtures to receive all mailable matter coming, see that it was properly stamped, cancel the stamp, and forward the same to its proper destination; to receive and distribute all such matter as might, through the regular channels of the mail, come to said office; to sell stamps and postal cards, issue money orders, and collect fees and commission therefor; to rent

the boxes and collect the rentals due on same; to pay off all legitimate expenses, including his own salary and commissions, and remit the balance to the United States treasury. That for his services he received about one hundred and fifty dollars, out of which he had to pay two clerks and all other expenses. That all the fixtures and furniture was furnished by the postmaster at his own cost, and was his own individual property. That the said Purdy was on said date employing two clerks, for which he paid them \$30 and \$15, respectively, and the said clerks were doing all the work required in said office. Plaintiff says that on the 1st day of June aforesaid the said George A. Purdy died, leaving the said office, with all its fixtures, furniture, and belongings, in charge of the plaintiff, as his widow and executrix, but more immediately in charge of the clerks aforesaid, who were there and continued thereafter to perform all the work in said office at the same salary, till the successor of said Purdy was appointed and took charge of said office on the 1st day of April, 1901. That, in order that the securities on his said bond and the estate of Purdy be fully protected, and the contract therein contained be fully executed till such time as the successor should be appointed, it was arranged between the plaintiff and the bondsmen for the defendant to be in personal charge of said office, and to act for them (pro tem.), and do such acts and duties as could only have been done by the said George A. Purdy personally, take charge of the receipts of said office, collect the compensation allowed to said Purdy, pay all the expenses, all of the same, and after receiving a reasonable compensation for his service, pay the remainder to plaintiff. That under said arrangement, agreement, and understanding the defendant collected each month the sum of one hundred and fifty dollars, paid to the clerks forty-five dollars, which was all the expenses for which the office was liable, appropriated the balance of one hundred and five dollars each month to his own use, and continued to do this for ten months, and has failed to account for the said sum of \$1,050 so received, or to pay the same, or any part thereof, to the plaintiff, although required so to do. That the said George A. Purdy left a will, by which he devised all his property and personal effects to this plaintiff, who was also appointed and named there as his executrix, which will was on the 4th day of June, 1900, duly probated in Lawrence county, and letters testamentary were granted to plaintiff. That on the 1st day of October, 1901, plaintiff demanded of defendant the amount sued for. Wherefore plaintiff prays judgment for one thousand and fifty dollars, with the interest thereon from the 1st day of October, 1901, at the rate of six per cent., and for costs."

Defendant's general demurrer was await-

*Rehearing denied February 16, 1904.

ing the action of the court, when, by leave of court, plaintiff substituted an amended petition, thus: "Plaintiff, for amended petition, states: That on the 1st day of June, 1900, her husband, George A. Purdy, was postmaster at Peirce City, Missouri, under an appointment of the President for a term ending January 21, 1902, and had at a large outlay furnished the office with the latest and most improved fixtures and furniture for conveniently operating the office, and had procured the assistance of clerks, whom he had trained until they were fully competent to carry on said office, for all of which he received about \$1,800 per year, out of which he paid his clerks \$45 per month. He had executed a bond to the government in the sum of \$8,000, conditioned that said office should be carried on during his term according to law, and the defendant, Albert Pfaff, and R. T. Brite, Frank Wicks, Barney Mullrenin, Chas. Hellweg, Fred Albert, were his bondsmen. That on the said 1st day of June, 1900, the said George A. Purdy died testate, giving to plaintiff all his personal effects, and appointing her executrix of his will, with full power of disposing of his property, and thereafter, on the 4th day of June, the said will was probated, when she took charge of the estate, including the post office, fixtures, and furniture aforesaid. Upon the death of George A. Purdy the bondsmen aforesaid took charge of the office, including the property, and deputed the defendant to carry on the business of said office until such time as other arrangement should be made. Soon after the plaintiff took charge of her late husband's affairs there was a movement made by her friends to give her the benefit of the office during the unexpired term of her late husband, of which the defendant was advised, and came to the home of the plaintiff to confer with her in regard to the matter, and informed her that he had intended to apply for the office, but he had heard of the movement of her friends to give her the benefit of the office, and, if she desired it, he would be glad to assist her, and would not put in an application until the expiration of said term; but that he would like to stay in the office, and qualify himself to become postmaster, and place her friends under obligations to assist him to get the appointment. That the assistant postmaster and clerks were competent and able to carry on the office without his assistance, but that for the reason mentioned he would like to be retained, and his compensation would be small, as the office was fully equipped, and the bond would continue, and he would have no additional responsibility. That he wanted her to have so much of the pay, inasmuch as it all rightfully belonged to her. That he would be glad to assist her in any way he could, and that he would go ahead and continue to act for the bondsmen, and, after paying the expenses of clerk hire, rental of

fixtures, and a reasonable compensation for such services as he should render, he would pay her the balance allowed said office, provided she would allow him the use of the fixtures and property in said office belonging to her, as heretofore agreed by them; to which she agreed. And she immediately advised her friends of this arrangement, which was satisfactory to them, and thereupon took such steps as that there was no appointment made for ten months, during all of which time the defendant was fully advised of what her friends were doing, and he was in frequent consultation with her attorney as well as herself, and professed to be assisting in carrying out the arrangement, and in furtherance thereof continued in the office, acquainting himself with the duties thereof, for such time as he could leave his mercantile business at Monett, until April 1, 1902. The same clerks who had been doing the business when he went into the office continued to run the office, as they were fully competent and able to do, for the same salary paid theretofore; all the fixtures and furniture remaining as before agreed upon, the use of which was of great value to him, to wit, \$25 a month, which he had theretofore agreed to pay plaintiff. Plaintiff states that the government paid to defendant on account of said post office \$1,500, out of which he paid to the help \$450, leaving in his hands a balance of \$1,050, which he agreed to pay plaintiff as aforesaid, after deducting a reasonable amount for his services and other expenses, which would not exceed \$300, which he has failed to pay plaintiff, although often demanded; wherefore she prays that by reason of the agreement, and by reason of the use of the property and fixtures aforesaid, she have judgment for the sum of \$750, with interest thereon from the time of demand, to wit, the 1st day of May, 1901, at the rate of six per cent., and costs."

A demurrer, based on the reasons that the amended petition did not state facts sufficient to constitute a cause of action against defendant, and that several causes of action were sought to be pleaded in the same count, was sustained, and a second amended petition filed by leave, in form following: "Plaintiff, for amended petition, states: that on the 1st day of June, 1900, her husband, George A. Purdy, was postmaster at Peirce City, Missouri, under the appointment of the President for a term ending January 21, 1902, and had at a large outlay furnished the office with fixtures and furniture for conveniently operating the same, which remained his property. He had executed a bond to the government, conditioned as required by law, with the defendant and others as his bondsmen. That on the 1st day of June, 1900, the said George A. Purdy died testate, leaving to the plaintiff all his effects, including the property aforesaid, appointing her, the plaintiff, executrix of his said will, with full power of

using and disposing of all of the personal property and effects belonging to said estate. That on the 4th day of June, 1900, said will was duly probated, and then she took charge of the said estate, including the property hereinbefore and hereinafter mentioned. That upon the death of said George A. Purdy the bondsmen took charge of the office, and deputed the defendant to carry on said office until such time as other arrangements should be made, which he then and there did. And the defendant desiring to hold and use the said fixtures and furniture in said office belonging to her as aforesaid, consisting of lock and call boxes and general delivery boxes and connections, safe, distributing boxes, table and boxes, racks, stoves, chairs, and all other furniture and fixtures used in the Peirce City post office at that time, for which he then and there agreed and undertook to pay plaintiff \$25 per month for the use thereof. That under said agreement he kept and used said property for ten months, by which he became indebted to plaintiff in the sum of \$250, which amount the defendant has failed to pay, although often requested so to do. Wherefore plaintiff prays judgment for \$250, the interest, and costs. Plaintiff, for another cause of action, alleges: That on the 4th day of June, 1900, she was the owner and entitled to the possession of the following personal property, to wit, all the furniture and fixtures of the Peirce City post office, consisting of lock and call boxes, general delivery, money and stamp departments, desks, iron safe, chairs, distributing table, racks, stove, and all other furniture and fixtures used in said office. And the defendant, desiring to use the same, was permitted to do so by the plaintiff, upon his request, for which he undertook to pay a reasonable sum for the use of same, which the plaintiff alleges was \$25 per month. That he continued to use the same for ten months. That he has failed to pay said sum or any other sum for the use thereof, though often requested so to do. Wherefore she prays judgment for two hundred and fifty dollars, interest, and costs."

A motion to strike out this second amended complaint, predicated on objection that it was a change, departure from, and abandonment of the cause of action attempted to be set up in plaintiff's original petition, was sustained. Plaintiff declined to plead further, and from judgment for defendant this appeal has been duly taken.

The appellant seeks to uphold the second amended petition upon the theory that there was no departure therein from the amended petition, the cause of action pleaded in the final complaint having been contained in a different form in the first amended pleading, which defendant, in lieu of assailing by motion to strike out as a departure from the original petition, elected to test the legal effect of by demurrer. Under the Code the office of a demurrer is the same as it was at

common law. It still is directed to the legal effect of the pleading for defects apparent on face of the pleading, but is confined in range to the statutory limits. *Bliss, Code Pleading, § 404; Beattie Mfg. Co. v. Gerardi, 166 Mo. 142, 85 S. W. 1035.* But the amended petition may have been vulnerable to objections by demurrer testing its legal sufficiency in setting forth a valid cause of action, and also to motion to strike out as constituting a departure from the cause of action pleaded in the petition; the resort to such motion being the proper method of raising the question of such variance. *Manufacturing Co. v. Gerardi, supra.* In *Scovill v. Glasner, 79 Mo. 449*, later approved in *Liese v. Meyer, 143 Mo. 547, 45 S. W. 282*, the tests by which to determine whether a second petition is an amendment or the substitution of a new cause of action is discussed at length, and declared to be, first, whether the same evidence will support both petitions, and, next, whether the same measure of damages will apply to both. If these questions are answerable in the affirmative, the modification is an amendment; if in the negative, a new cause of action is supplanted, and it is a substitution. The original petition, while abandoned by the plaintiff for purpose of presenting her right of action, remained the standard by which to determine whether subsequent petitions embraced the original cause of action upon which suit was brought, or were departures therefrom, and recovery on new causes of action sought. *Ross v. Land Co., 162 Mo. 317, 62 S. W. 984.* While the right of amendment under the Code is liberal and comprehensive, a limitation imposed thereon in this state is that an amendment of a petition shall not introduce new causes of action, and after instituting an action upon one state of facts plaintiff is not permitted by amendment of the complaint to substitute a different cause of action from that stated in the original petition, thus substantially changing his original claim. *Ross v. Land Co., supra; Liese v. Meyer, supra; Heman v. Glann, 129 Mo. 325, 31 S. W. 589; Rev. St. 1899, § 657.*

The judgment of the trial court was correct, and is affirmed.

BLAND, P. J., and GOODE, J., concur.

ORANE v. NOEL et al.*

(Court of Appeals at St. Louis, Mo. Dec. 1, 1903.)

SUBROGATION—VOLUNTARY PAYMENT OF DEBT BY STRANGER.

1. An agent gave a bond to his principal with defendants as his sureties, but before any liability accrued thereon plaintiff was appointed to succeed the agent, and as part of the consideration of his appointment agreed with the principal, without the knowledge of defendants, to pay over any sums which the first agent and

*Rehearing denied December 15, 1903.

¶ 1. See Subrogation, vol. 44, Cent. Dig. § 67.

defendants, as his sureties, failed to pay, but took no assignment of the bond. *Held* that, on paying a sum to his principal in pursuance of the agreement, he was not entitled to be subrogated to the rights of his principal against defendants on the bond.

Appeal from St. Louis Circuit Court; Warwick Hough, Judge.

Action by Charles L. Crane against Harry G. Noel and others. From a decree for plaintiff, defendants appeal. Reversed.

Lyon & Swarts and Thos. J. Hoolan, for appellants. F. M. Haskins, for respondent.

GOODE, J. The petition in this case is in the nature of a bill in equity, and the purpose of the action is to have the respondent subrogated to rights held by the Greenwich Insurance Company as the obligee of a bond made by Felix Levy, as principal, and Noel and Cohn, as sureties. Levy was appointed agent of the insurance company for the city of St. Louis, and gave bond for the faithful performance of his duties, among which was the payment to the company of the premiums collected on policies. The bond was given in 1896. Respondent, Crane, was appointed agent in succession to Levy in October, 1897, and as part of the consideration for his appointment agreed to become surety for Levy and the appellants, his sureties on said bond, and to pay any premiums to the company those parties might fail to pay. The cause below was tried on this agreed statement of facts:

"It is hereby stipulated by and between plaintiffs and defendants that the above-entitled cause may be submitted to the court for judgment on the following agreed statement of facts, to wit: That the Greenwich Insurance Company is a corporation, duly incorporated. That on or about the 29th day of December, 1896, it was mutually agreed between the Greenwich Insurance Company and Felix Levy that said Felix Levy should act as agent for the said Greenwich Insurance Company in the city of St. Louis, Mo., and as such agent should issue and sign and deliver policies of insurance in said Greenwich Insurance Company, collect the premium on the same, and properly account for and pay over to said Greenwich Insurance Company all premiums on policies of insurance issued by him and all moneys which might at any time come into his hands or pass under his control as such agent. That before entering upon his duties as such agent, to wit, on or about December 29, 1896, and as part of the agreement above referred to, Felix Levy made and delivered to said Greenwich Insurance Company a bond signed and sealed by said defendant Felix Levy as principal, and by defendants Harry G. Noel and M. A. Cohn as sureties, whereby said defendants bound themselves in the penal sum of one thousand dollars to the Greenwich Insurance Company; the condition of said bond being that, if the said Felix Levy should duly and

properly account for and pay over to said Greenwich Insurance Company all premiums on policies of insurance issued by him, and all moneys which might at any time come into his hands or pass under his control as such agent, then said bond should be void; otherwise to remain in full force and effect. Said bond being the same one attached to plaintiff's petition in this case. That thereafter defendant Felix Levy did as such agent issue policies in said Greenwich Insurance Company to various parties, the premiums on which policies amounted to the sum of two hundred and twenty-five and $\frac{77}{100}$ (\$225.77) dollars, and as such agent collected from the said policy holders the said sum of \$225.77, which sum defendant Felix Levy failed to account for to said Greenwich Insurance Company, or to pay over to them, and the same has not been paid the said Greenwich Insurance Company by his sureties aforesaid, H. G. Noel or M. A. Cohn. That before the said Felix Levy, Harry G. Noel, and M. A. Cohn became indebted as aforesaid, to wit, on or about October 20, 1897, plaintiff, Chas. L. Crane, was appointed by said Greenwich Insurance Company general agent for the state of Missouri, and as part of the consideration for the said appointment plaintiff, Chas. L. Crane, agreed and contracted with said Greenwich Insurance Company to become surety for the said Felix Levy, Harry G. Noel, and M. A. Cohn, and to pay to said Greenwich Insurance Company such premiums due on its policies of insurance issued by said Felix Levy which the said Felix Levy or his sureties, Harry G. Noel or M. A. Cohn, failed to pay. But the aforesaid agreement between Chas. L. Crane and Greenwich Insurance Company was made without the knowledge or request of either Harry G. Noel or M. A. Cohn. That by reason of the failure of said Felix Levy, Harry G. Noel, and M. A. Cohn to pay said Greenwich Insurance Company the sum of \$225.77 due as aforesaid, and by reason of and pursuant to the contract and agreement aforesaid between Chas. L. Crane and the Greenwich Insurance Company, plaintiff, Chas. L. Crane, did pay to said Greenwich Insurance Company the said sum of \$225.77, and said sum of \$225.77 has not been repaid to Chas. L. Crane by Felix Levy or his sureties, Harry G. Noel or M. A. Cohn, although the same has been demanded of them. But said payment of \$225.77 by Chas. L. Crane to Greenwich Insurance Company was made without the knowledge or request of either Harry G. Noel or M. A. Cohn. And it is further admitted by both parties that defendants Harry G. Noel and M. A. Cohn were not notified of the said defalcation of Felix Levy until June 1, 1901."

The action was originally brought against Levy as well as the appellants, but was subsequently dismissed as to him. Judgment went against Noel and Cohn, and they appealed.

The judgment in this case is assailed from the premise that the agreed facts show the respondent was a volunteer in becoming surety and in making good to the insurance company any defalcation that occurred during Levy's agency. The agreed statement of facts says respondent was appointed agent for the insurance company prior to the accrual of Levy's indebtedness; that he contracted to become surety for the latter and the appellants, and to pay whatever premiums they failed to pay; but that appellants Noel and Cohn had no knowledge of the arrangement. It is not stated whether Levy knew or was ignorant of it. Neither is it stated that the insurance company asked respondent to become surety, or made his appointment as agent dependent on his doing so. Choses in action are now assignable, and respondent could have purchased the demand of the insurance company against Levy and the appellants. That fact is pressed on us. But in appraising its force we must remember that choses have always been assignable in equity, and that the pale of the right of subrogation was fixed by chancery courts with their assignability and all the implications which flow from that equity rule in mind. No strength is lent to respondent's case by the change in the law rendering choses assignable and permitting assignees to sue on them. But the argument is persuasive that, as equity tolerates the assignment of a debt, it should also accord the full benefit of all securities held by a creditor to a party who, instead of buying the demand and taking an assignment of it, voluntarily binds himself as surety for the demand, and afterwards pays it. The barrier against the right of subrogation in such instances is technical, but firmly established. Subrogation is a remedy made use of by courts of equity as an efficient aid to justice, and, in the main, does not depend on a contractual obligation; though a man may acquire the right to a conventional subrogation by contract. This happens when one liquidates a demand secured by lien or guaranty, and takes an assignment of it, or agrees with the creditor that any security held by the latter shall continue available for the collection of the demand. No proof exists that an agreement was made between Crane and the insurance company which would entitle the former to sue Levy's bondsmen for reimbursement of the sum paid to the company on account of Levy's defalcation. Yet we can find none but a technical reason why Crane should not have the same right to sue on the bond that the company had before it was paid, and to decide in favor of Crane's right might advance the remedy along the path of justice. But the rule has ever been that a volunteer who pays a debt without being requested, and without any interest in the matter, or compulsion to pay in order to protect himself, acquires no right of subrogation by paying unless he contracts for it with the creditor; that is, be-

comes, in effect, an equitable assignee of the debt. *Bunn v. Lindsay*, 95 Mo. 250, 7 S. W. 473, 6 Am. St. Rep. 48; *Sheldon, Subrogation* (2d Ed.) § 8. One may think of a stranger paying the debt of some one else in circumstances that would constitute an officious intermeddling with the debtor's business, and afford the payer no good claim in equity to the securities held by the creditor. If the test of the right to be substituted was the purpose for which payment is made, as being a purpose laudable in itself, and including an intention to preserve the debt, and obligations collateral thereto, for the benefit of the payer, instead of extinguishing the debt, Crane's standing would be better. But the test is not the motive of the party who pays, but whether or not he acted as a volunteer. Whether he did or not is sometimes difficult to say. But according to the decisions in this state and the great weight of outside authority Crane's status, when he bound himself as surety for Levy and these appellants, was that of volunteer. That Noel and Cohn knew nothing of his act is certain. It does not appear that Levy knew of it, or that the insurance company required, or even requested, it. For aught that is disclosed, it was an unnecessary step, taken by him on his own motion. It was not a compulsory one we know. Hence, if he desired to stand in the shoes of the insurance company in the event he had to pay money on account of his self-imposed suretyship, he ought to have stipulated that Levy's bond should be assigned to him, or inure to his benefit. We find precedents in Missouri, and elsewhere, too, whose force we are unable to escape, as they look to be undistinguishable on principle from this case. *Bunn v. Lindsay*, supra; *Norton v. Highleyman*, 88 Mo. 621; *Price v. Courtney*, 87 Mo. 387, 56 Am. Rep. 453; *Evans v. Halleck*, 83 Mo. 376; *Francis Mill Co. v. Sugg*, Id. 476; *Wooldridge v. Scott*, 69 Mo. 669; *Anglade v. St. Avit*, 67 Mo. 434; *Wolff v. Walter*, 56 Mo. 293; *McPherson v. Meek*, 30 Mo. 345; *Kleimann v. Geiselmann*, 45 Mo. App. 497; Id., 114 Mo. 437, 21 S. W. 796, 35 Am. St. Rep. 761. See, also, *Ætna Life Ins. Co. v. Middleport*, 124 U. S. 534, 8 Sup. Ct. 625, 31 L. Ed. 537; *Excels. White v. White, Trustee*, 30 Vt. 338; *Carter v. Black*, 20 N. C. 561; *Shinn v. Budd*, 14 N. J. Eq. 234; *Sheldon, Subrogation* (2d Ed.) 240; 24 Am. & Eng. Ency. Law (1st Ed.) 281. Some of those cases presented a stronger equity in favor of the parties asking subrogation than this one shows for Crane, because those parties assumed and discharged liens under conditions requiring them to do so, or suffer loss by legal enforcement of the liens. We refer particularly to *Wooldridge v. Scott*, *Evans v. Halleck*, *Norton v. Highleyman*, and *Kleimann v. Geiselmann*. In the case last cited money had been loaned to a widow, and secured by a deed of trust on land devised to her by her deceased husband, to lift a prior deed of trust executed by the husband. The

loan was made on the supposition that the widow was the devisee of the fee, but she turned out to have only a life estate, subject to the homestead estate of minor children of the deceased. As the money went to discharge the first lien, and therefore for the benefit not only of the widow as life tenant, but of the children as owners of the fee, the assignee of the note given for the loan claimed to be entitled by subrogation to the lien of the discharged deed of trust. But the lender was held to be a mere volunteer, and relief was denied. The other cases are of the same tenor. In *Carter v. Black*, 20 N. C. 561, the facts were like we have here. A bond signed by a principal and surety was offered to the sheriff of a county in satisfaction of certain executions. The parties on the bond were nonresidents of the county, and the sheriff refused to accept it without resident security. Thereupon Carter, the plaintiff, bound himself as surety on the bond, in order to save the execution debtor. Carter had to pay, and afterwards sued the principal and original surety on the bond. He was ruled to be a mere volunteer, who had become surety at the instance of the holder of the bond, instead of the maker. But Crane does not occupy as favorable a position as Carter did, for the former became surety, so far as we know, on his own motion.

We have been cited by respondent's counsel to certain decisions supposed to have accorded the right of subrogation on facts similar to those before us. *Mathews v. Aikin*, 1 N. Y. 595; *Chapeze v. Young*, 87 Ky. 476, 9 S. W. 399; *Hough v. Ins. Co.*, 57 Ill. 318, 11 Am. Rep. 18. The last case does not aid the respondent's contention, for the party claiming subrogation was bound in the first instance to pay the debt. Some of the reasons given in *Mathews v. Aikin* support the position of the respondent; but it is to be noted that there were valid grounds, according to the settled principles of the law of subrogation, for granting relief to the plaintiff in that case. The opinion in *Chapeze v. Young* favors the respondent. Those cases, in so far as they go beyond the current of authority, seem to us to logically extend the equity of subrogation. But the decisions of the courts of this state, as well as the overshadowing weight of authority elsewhere, constrain us to deny the relief which the respondent prays.

The judgment is therefore reversed.

BLAND, P. J., and REYBURN, J., concur.

MARTIN v. WITTY et al.

(Court of Appeals at St. Louis, Mo. Feb. 2, 1904.)

EXECUTORY CONTRACT—DEPOSIT IN ESCROW—VARIANCE BY PAROL EVIDENCE.

1. An executory contract, complete in itself, providing merely that it shall be deposited in

a designated bank, shows on its face that it is not to be held in escrow; and it was error to admit, on the contrary assumption, parol evidence of a condition of its delivery varying its terms.

Goode, J., dissenting.

Appeal from Circuit Court, Scotland County; E. R. McKee, Judge.

Action by Andrew J. Martin against Lee T. Witty and others to recover for breach of contract. From a judgment for defendants, plaintiff appeals. Reversed and remanded, with directions to enter judgment for plaintiff.

Berkheimer & Dawson, for appellant. J. D. Smoot, for respondents.

BLAND, P. J. One Ward made his appearance in Monroe county, Mo., having in his possession fraudulent abstracts of titles to lands claimed to be situated in the state of Georgia, and designated as headright lands. Relying upon the abstracts, several gentlemen in Monroe county were induced to trade in these lands. J. M. Jayne acquired a deed to the lands, and conveyed them to T. R. Senter. Senter, for a valuable consideration, conveyed them to plaintiff, who, after receiving his deed, went to the state of Georgia to look up the lands and the title. He ascertained that the abstracts of title were fraudulent, and that the headright through which the pretended title was derived had been fraudulently surveyed, and the survey declared void and set aside more than 100 years before the making of the abstracts, as is shown by the following certificate in respect to the title to the lands:

"State of Georgia, Office of Secretary of State. I, Philip Cook, Secretary of State of Georgia, do hereby certify: That the grants of land to John Hanson in Franklin county, Georgia, one for two thousand acres and the other for five thousand acres, both grants in the year 1787, were based on fraudulent surveys and were declared null and void by an act of the General Assembly of Georgia, approved December 28, 1794, as shown by the records in this department. In Testimony Whereof, I have hereunto set my hand and the seal of my office, at the Capitol in the City of Atlanta, this twenty-second day of June, in the year of our Lord one thousand nine hundred and one and of the Independence of the United States of America the one hundred and twenty-fifth. Philip Cook, Secretary of State. [Seal of Georgia.]"

After learning that he had no title, plaintiff returned to Missouri, and made a demand on Jayne and the real estate agents who had figured in the sale of the lands, informing them of the swindle that had been perpetrated. These gentlemen, in compromise and settlement of the matter with plaintiff, entered into the following contract:

"This contract, made and entered into this twenty-seventh day of February, 1901, by and between A. J. Martin, of Clark county, Mis-

§ 1. See Evidence, vol. 20, Cent. Dig. § 1934.

souri, party of the first part and Lee T. Witly, P. G. Carder and T. J. Brumback, of the County of Scotland, State of Missouri, parties of the second part, witnesseth: That the party of the first part for and in consideration of the sum of five hundred dollars to be paid as hereinafter set forth, agrees to make his quitclaim deed to the south one hundred and eighty acres, the north one hundred and sixty acres of the east five hundred acres of a tract of land known as the John Hanson grant, being the lot known as the grant No. 86, and deeded to party of the first part by Thomas R. Senter and wife, said deed to be made to John M. Payne and wife. This five hundred dollars is to be paid by parties of the second part on or before the first day of May, A. D. one thousand nine hundred and one (1901). Party of the first part accepts said five hundred dollars in full of all demands of each and every kind by reason of any and all trades made by him through parties of the second part. This contract to be deposited with the Farmers' Exchange Bank of Memphis, Mo. A. J. Martin. Lee T. Witly. P. G. Carder. T. J. Brumback."

Plaintiff made the quitclaim deed as agreed, and forwarded it to the Farmers' Exchange Bank of Memphis, Mo. The cashier of the bank notified Jayne on several occasions that the deed was at the bank, but Jayne did not call for it. The contract was not deposited with the bank as was agreed, but was handed to Jayne, who retained it in his possession, and produced it at the trial. Carder, Jayne, and Witly, over the objections of the plaintiff, testified that one of the conditions of the contract was that plaintiff should furnish proof that there was no such land as described in the abstracts and in his deed in the state of Georgia, and that the contract was not to be delivered until this condition was complied with. The verdict was for the defendants. Plaintiff appealed.

Plaintiff assigns as error the admission of parol evidence to vary the terms of the contract. On the erroneous assumption that the contract was to be held in escrow by the bank, the defendants were permitted to offer parol evidence to show that all the terms agreed upon between the parties were not written in the contract. When a written undertaking is deposited with a third party, to be held by him until some act is done or some condition is performed, parol evidence is admissible to show the act and its performance, or to show performance of the condition, for the purpose of showing that the party suing is entitled to enforce the contract. But parol evidence is not admissible for the purpose of ingrafting upon the contract itself an essential condition thereof, or to vary its terms. Such evidence would violate the well-settled rule that parol evidence is not admissible for the purpose of varying, contradicting, adding to, or subtracting from the terms of a written contract that is complete in itself. The contract sued on shows on its face that it was

not to be deposited with the bank in escrow, but for the convenience of the parties, and for the purpose of making the bank the medium through which the deed to Jayne should be delivered, and the \$500 paid to plaintiff when he should make and deliver the deed to the bank. Plaintiff complied with the terms of the contract on his part by executing and delivering the deed to the bank, to be delivered by it to Jayne; and, having complied with the contract on his part, the defendants became legally bound to pay him the \$500. They have failed to perform this obligation, and the record shows they have interposed no legal or equitable defense to the plaintiff's demand.

The judgment is therefore reversed, and the cause remanded, with directions to the circuit court to enter judgment for plaintiff for \$500, with 6 per cent. interest thereon from the date of the commencement of the suit to the date when judgment shall be entered.

REYBURN, J., concurs.

GOODE, J. (dissenting). The decision of this case, in my opinion, turns principally on the fact that the contract sued on was not delivered to either of the obligees, but was deposited with the Farmers' Exchange Bank. If a contract is delivered to the obligee, it takes effect at once, as a complete contract, no matter what parol conditions were attached to it, and these cannot be shown. *Price v. Ins. Co.*, 54 Mo. App. 119; *Cocks v. Barker*, 49 N. Y. 107; *Braman v. Bingham*, 26 N. Y. 483; *Miller v. Fletcher*, 27 Grat. 403, 21 Am. Rep. 356. But if, instead of being delivered to the obligee, a contract is deposited with a third party, it is permissible to show by oral testimony that it was deposited as an escrow, and was not to take effect until a certain parol condition was complied with. *Shelton v. Durham*, 7 Mo. App. 585; *Barclay v. Walnwright*, 86 Pa. 191; *Beall v. Poole*, 27 Md. 645; *Murray v. Stair*, 2 Barn. & Cress., loc. cit. 85, 86. This is an entirely different matter from ingrafting a parol stipulation on a written instrument. The latter act would change a completed contract which the parties have put in writing. The former simply shows when and on what condition the contract was to become binding. The majority opinion concedes this may be done, but holds that the contract in question showed on its face that it was to be delivered as a complete obligation. I do not read it that way. All it says on the subject is that "this contract to be deposited with the Farmers' Bank of Memphis, Missouri." That bank was not a party to the contract, and a mere recital that the contract was to be deposited with it cannot be construed as conclusive that the contract was delivered to take effect immediately. It was competent to explain by oral testimony the condition on which it was deposited with the bank. As a specimen of the oral testimony

on the subject, I take this extract from the testimony of Lee Witty: "Q. I will ask you if that contract was ever delivered? A. Never. Q. I will ask you if that contract was ever delivered? A. No, sir. Q. Why not? You can state the reason. A. Because Mr. Martin did not fulfill his part of the contract. Q. What is it that he was to do before the delivery? A. It was to furnish Mr. Jayne the necessary proof that that was no land in existence. He had in his possession a satchel full of papers showing there was no land there of that description. Q. You say that was to be done before it was to be delivered? A. It was contingent upon it. Q. When was it to be? A. Right away. * * * Q. Mr. Witty, when did you have such a conversation with Mr. Martin? A. That was during the day or evening he was there, when this instrument was written." P. G. Carder testified as follows: "Q. Was that contract ever delivered, Mr. Carder? A. No, sir. Q. To Mr. Martin, or anybody for him? A. It was never delivered, to my knowledge. Q. I will ask you what was to be done before it was delivered? A. Why, Mr. Martin stated that he had information showing that that was no land in Georgia, and all that kind of stuff, and Mr. Jayne agreed to pay him \$250 of this money. Q. In which conversation Mr. Peter Jayne asked if Mr. Martin had furnished that evidence of the failure of the title? A. Yes, sir. Q. That is the reason it was made? A. Yes, sir. Mr. Jayne offered right then and there to make it good if he would furnish that information, that night; he would give him a check for \$100 right that minute; and that I will swear to on any witness stand on earth." Other witnesses swore to the same effect. Besides, Martin, the plaintiff, wrote a letter after the contract was signed which tends to show that it was not to take effect at once as a settlement of their dispute, as he declared in it that nothing was settled. The letter was as follows: "February 27th, 1901. Mr. E. R. Bartlett—Dear Sir: Please do not mention my name in any of your remarks as we are trying to unravel the mystery of the Georgia land deals. We propose to go to the bottom before we quit and you will please keep quiet on this subject. We have not settled any matter yet; we are trying to find the guilty parties, which I trust we will before we quit. It is late so I could not see you. A. J. Martin." I think the foregoing evidence was sufficient to send the case to the jury on the issue of whether the contract was finally delivered when it was deposited with the bank, or whether there was anything more to be done before it was delivered. It appears that Martin claimed he had a document which would show there was no such land in Georgia as he had bought—the same document he offered in evidence in this case. Perhaps, if he had produced that document, the defendants would have reimbursed him without a lawsuit. At all events, I think it

was competent to show by oral testimony that he was to do so before the contract was to take effect. The evidence, if believed, required him to make a reasonable showing that he had acquired no title to the land he had bought; and this was a reasonable requirement, when he was demanding repayment of the purchase money. The court adopted that theory, and gave several instructions to the jury, declaring it as the law of the case, of which the following is an example: "Gentlemen, although you find and believe from the evidence in the cause that the defendants signed the contract in question, and agreed to deliver the same to the Farmers' Exchange Bank, yet if you further believe that it was agreed between the parties, plaintiff and defendants, that said contract should not be binding and operative until the plaintiff furnished satisfactory evidence of the falsity of the title to the Georgia lands, and that he did not furnish such proof of said false title, then said contract is not binding upon said defendants; and in that event your verdict should be for the defendants and may be in the following form: 'We, the jury, find for the defendants.' And sign it by your foreman."

It seems to me this case was fairly tried, and for that reason I respectfully dissent from a reversal of the judgment.

DUFFY v. ST. LOUIS TRANSIT CO.*

(Court of Appeals at St. Louis, Mo. Feb. 2, 1904.)

STREET RAILWAYS—PERSONAL INJURIES—NEG-
LIGENCE—EVIDENCE—SUFFICIENCY—DAM-
AGES—IMPAIRMENT OF EARNING CAPACITY—
PLEADING—NONSUIT.

1. On the question as to whether or not there should be a compulsory nonsuit, the evidence should be considered in its most favorable aspect for the plaintiff.

2. In an action against a street railway company for personal injuries received by a passenger in alighting from a car, evidence examined, and held to tend to show the negligence alleged, and not to warrant a nonsuit.

3. A passenger on a street car whose ankle was broken, and remained weaker than the other ankle, was entitled to compensation for future pain and suffering and impairment of earning capacity, though he continued doing the same work and receiving the same wages as before the injury.

4. Where, in an action against a street railway company for injuries to a passenger, there was no plea of contributory negligence, there was no occasion for an instruction that issue of such negligence was not in the case.

Bland, P. J., dissenting in part.

Appeal from St. Louis Circuit Court; Daniel D. Fisher, Judge.

Action by James Duffy against the St. Louis Transit Company for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

Boyle, Priest & Lehman, for appellant. A. R. Taylor, for respondent.

*Rehearing denied February 10, 1904.

BLAND, P. J. After alleging that plaintiff was a passenger on one of defendant's street railway cars, and the contract to carry him to his place of destination (Clara and Easton avenues, in the city of St. Louis), and the duty to stop the car a reasonable length of time to let plaintiff off, the petition proceeds as follows: "Yet the plaintiff avers that the defendant, unmindful of its said undertaking and of its duty in the premises, did, by its servants in charge of its said car, carry the plaintiff past his said point of destination, and thereafter, to wit, as said car was approaching the intersection of Easton and Goodfellow avenues, at the request of the plaintiff, did slow down said car until it was stopped or moving very slowly at or near said Goodfellow avenue and Easton avenue, in the city of St. Louis, and invited the plaintiff to alight from said car whilst so stopped or slowed down. That the plaintiff, in obedience to such invitation to alight from said car whilst so stopped or slowed down, proceeded to the platform and step of said car to alight therefrom, and was proceeding to alight from said car, and whilst he was in the act of doing so, and before he had a reasonable time or opportunity to do so, defendant's servants in charge of its said car negligently caused and suffered said car to be started forward, whereby the plaintiff was thrown from said car to the street and dragged, and greatly and permanently injured upon his body and legs and internally, sustaining a fracture of the bones of his right foot and ankle, and bruises upon his body and arms and his leg and knee."

Plaintiff testified that he was a passenger on one of defendant's Easton avenue cars, and that his destination was Clara and Easton avenues. He further testified as follows: "Q. Why was it you did not get off at Clara that night? A. Through a mistake of mine. Q. Through a mistake of what? A. My own mistake. Q. Now, after you passed Clara, and ascertained that you had passed Clara, tell the jury what you did to indicate that you wanted to get off the car, and where. A. I got off the car at Goodfellow avenue—about 25 yards west of Goodfellow avenue—when we went by this side of Rinkle's Grove. That is how I seen I was too far ahead. Q. When you had found out you had passed your point of destination, tell the jury what you did. Tell the jury what you did to indicate to the motorman or conductor you wanted to get off the car. A. When I seen this I shoved down to ring the bell for the car to stop at Goodfellow avenue. He was in the front part of the car, standing sidewise, some transfers in his hand, counting them. He changed the transfers to one hand from the other; put up his left hand to the bell; as he did that I walked out, the car going below speed as it approached; I stepped out and fell. There was not out there any houses the south side until you get to Blackstone avenue, the near-

est building. A few houses on the north side. Q. When you walked out, what did the car do towards slowing down or stopping? A. She slowed down until about 25 yards, maybe 30, a little less or more, west of Goodfellow avenue. Q. Did it come to a full stop? A. No, sir; it did not. Q. How was it moving, how slow, at the time you got on the step as you were about to step off? A. About an ordinary walk would keep up with it. Q. An ordinary walk? A. About an ordinary walk. Q. When you stepped off the car, tell the jury what occurred; what did the car do? A. Well, in some way, I believe, the brake didn't work on the car; he started the car too sudden on me. I had my foot up as the car slowed up. I was preparing the other foot to get it up, ready to get off the car. The car started off in that position. I had hold of the hand rail with my left hand. I made a grab with my right hand to catch the rail, missed it, and it turned me out on the street, dragged four paces, maybe five paces. Q. When you say the car started up how did it start, fast, or how? A. Started with a jerk; started with a jerk, fast; started with a twist, turning on a twisting sensation. Q. What did the car do after it threw you off; did it go on? A. Went ahead. Q. Did it stop at all? A. No, sir; no, sir; it did not. Q. Now, how were you holding? Describe that to the jury. What was your position when this jerk of the car took place and the car went on? A. Standing up like this (indicating). I had my foot there ready to get off the car this way (indicating), hold of the left rail with my left hand. Q. When this jerk came, what effect did it have on you? Explain to the jury. Did you remain on the step or were you thrown off the step? A. I was forced off. Q. Did you fall a clean fall or were you dragged? A. I was dragged about four paces; the second time that it jerked the car jerked clean away from me; turned me over in the street." He admitted that the car passed Clara avenue without stopping, through his own mistake in failing to give a signal for it to stop. His testimony shows that he attempted to get off after the car had passed Goodfellow avenue from 25 to 30 yards, and that it was running at a speed of about an ordinary walk for a man; that the accident happened at night. He nowhere stated that the signal was given by him to stop the car at any other point than at Goodfellow avenue, and does not state, as a matter of fact, that any signal was given for the car to stop at Goodfellow avenue. However, it is inferable from his testimony that after he pressed the electric button the conductor gave the motorman the signal to stop before reaching Goodfellow avenue. There is no evidence that the bell was given for the motorman to go ahead after reaching Goodfellow avenue. The plaintiff said he believed the brake did not work, and that the car was started up too suddenly on him by the motor-

man. On this evidence it is insisted by defendant that plaintiff's own evidence shows that there was no negligence on the part of defendant's servants that contributed to plaintiff's injury, and that its instruction for a compulsory nonsuit should have been given. On the question of whether or not there should have been a compulsory nonsuit, the evidence should be considered in its most favorable aspect for the plaintiff. Considering all of it that bears upon the accident, about this state of facts is shown to exist: Plaintiff, without noticing, let the car pass Clara avenue, and then gave the usual warning of his desire to get off at the next street—Goodfellow avenue. The usual signal was given by the conductor to the motorman to stop at Goodfellow avenue, and in obedience to this signal the motorman tried to stop the car, and slowed it down, but it did not come to a full stop on account of the failure of the brakes to work properly, and when plaintiff reached the rear platform he discovered the car had passed the stopping place from 25 to 30 yards, but was still slowed down to a speed of an ordinary walk, and he undertook to get off, but before he could alight from the car its speed was suddenly accelerated, whereby he was thrown off and injured. The negligence shown by this evidence to have caused the injury was not that the car was caused to lurch forward on account of the defective brake, but that it was suddenly started forward by the motorman while the plaintiff was in the act of alighting from it, and tends to prove the negligence alleged in the petition.

The contention that plaintiff was bound to show that the defendant's servants knew of his position when the speed of the car was accelerated is answered by the evidence that plaintiff was a passenger, that he had given the usual signal of his wish to get off the car, and that the conductor, in recognition of that signal, had signaled the car to stop, and saw plaintiff leave his seat and go to the rear platform for the purpose of getting off. In these circumstances it was the duty of the conductor and motorman to hold the car still for a reasonable length of time to allow the plaintiff to get off in safety.

On the measure of damages, the court gave the following instruction: "If the jury find for the plaintiff, they should assess his damages at such sum as they may believe from the evidence will be a fair compensation to him: (1) For any pain of body or mind which the jury believe from the evidence he has suffered, and will suffer, by reason of said injuries, and directly caused thereby. (2) For any loss of the earnings of his labor which the jury believe from the evidence he has sustained, and will sustain, by reason of his injuries, and directly caused thereby. (3) For any expenses necessarily incurred for medical and surgical attention which the jury believe from the evidence he has sustained, directly caused by said injuries." Plain-

tiff's evidence shows that the injury to the ankle (broken bone) had healed; that the ankle would remain for some time weaker than the other one; but there is no evidence that it will cause any severe pain or mental suffering in the future. The evidence further shows that plaintiff, at the time of the trial, and for several months prior thereto, had done and was doing the same work and was receiving the same wages as before the injury. There is therefore no evidence that he will suffer future pain of body or mind, or future loss of his earnings, on account of the injury. He is entitled to compensation for any future or permanent impairment of the strength and use of his ankle, but not for any loss of future earnings, as the evidence shows he is earning the same wages he earned before the injury, and is doing exactly the same work.

The court gave the following instruction for plaintiff: "The court instructs the jury that there is no issue in this case that the injury, if any, sustained by the plaintiff, was caused by his own negligence in getting off a car of the defendant." There was no plea of contributory negligence, and hence no occasion for the giving of this instruction. *Voegeli v. Marble & Granite Co.*, 49 Mo. App. 643; *Taylor v. Railway*, 26 Mo. App. 336; *Hughes v. Railway*, 127 Mo. 447, 30 S. W. 127.

For error in giving these instructions, I think the judgment should be reversed and the cause remanded; but Judges REYBURN and GOODE are of the opinion that the evidence tends to prove that plaintiff will suffer future pain and mental anguish from the injury, and that his earning capacity has been permanently impaired, that the damages are moderate, and the judgment should be affirmed. The judgment is accordingly affirmed.

STATE ex rel. MILLS v. MAST et al.

(Court of Appeals at St. Louis, Mo. Feb. 2, 1903.)

PUBLIC ADMINISTRATORS—INFANTS—GUARDIANS—RIGHT OF SELECTION.

1. Rev. St. 1889, § 290, authorizing public administrators to take charge of the person and estates of minors under 14 years of age in certain contingencies, and section 301 (Rev. St. 1889, § 294), declaring that, when a public administrator had been appointed to take charge of an estate, he shall continue, unless he resigns, dies, is removed for cause, or is discharged, do not deprive a minor of the benefit of Rev. St. 1889, § 3483, entitling any minor having a guardian appointed by the court, on attaining the age of 14 years, to make choice of another, who shall then be appointed by the probate court, if suitable.

Appeal from Circuit Court, Butler County; J. L. Fort, Judge.

Proceedings by the state, on the relation of Lemuel Mills, against Aaron Mast and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Phillips & Phillips, for appellants. Jos. T. Davison, for respondent.

Statement.

REYBURN, J. This is an action upon the official bond of defendant Aaron Mast and his sureties, as public administrator of Butler county, Mo. The pleadings are not reproduced, but, from the statements of the respective parties, it is gathered that the petition contained averments that the relator was duly appointed, qualified, and acting as guardian of estate of Parazada Thorne, a minor; that Thomas M. Lane, former guardian and curator of the person and estate of such minor, died January 30, 1895, leaving her without legal or natural guardian of her person or estate, and defendant Mast was duly appointed, qualified, and commissioned, and entered upon the discharge of the duties of public administrator of Butler county for the unexpired term of above deceased, and gave bond as such, which is embodied; that on the 4th day of March succeeding, pursuant to an order of the probate court of Butler county, Mast took charge of the estate of the minor named, collected sundry sums of money belonging to her estate, and on the 21st day of February, 1899, owed, and still owes, her estate a balance of \$723.35; that on the 22d day of May thereafter, said minor, having attained the age of 14 years, appeared before the probate court of Butler county, and chose relator, then public administrator of Butler county, as guardian of her estate, and he was thereupon appointed such guardian by that court; that Mast, although ordered by such court to account to relator for the property in his hands, of the estate of Parazada Thorne, has failed so to do, and judgment was asked accordingly. For answer, defendants filed a joint general denial, united with the plea that Mast was the guardian of Parazada Thorne at time of institution of the suit, and that relator had no authority to institute the action. A nonjury trial was had December, 1901; the defendants interjecting objections that the petition did not state facts sufficient to constitute a cause of action against them; that respondent had no legal capacity to sue. The proof, embracing oral testimony, and the records of the probate court of Butler county, and tending to establish the facts alleged in the petition, was not controverted—defendants offering no testimony—but was objected to for the reason that, an estate of a minor having passed into the hands of a public administrator, the ward or minor was precluded from selecting another guardian until he died, resigned, or was removed. The defendants asked instructions appropriate to the theory of their defense, which the court refused, and from judgment against them they have appealed.

Opinion.

Until the amendment of sections of chapter 15, Rev. St. 1879, by the Thirty-Third

General Assembly (Laws 1885, p. 27), the duties and powers of a public administrator extended no farther than taking charge of and administering upon the estates of persons deceased, under the conditions therein classified. By the above act the authority of such officials was first broadened so as to make them public guardians and curators, as well as administrators, and imposing on them the further duties of taking charge of the persons of minors under the age of 14 years whose parents were dead, and who were without legal guardians, and the estates of all minors under that age whose parents, if surviving, refused or neglected to qualify as curators, or, having so qualified, had been removed, or were from any cause incompetent, or of those who had no one authorized by law to take charge of their estates. In the statutes of 1889 also appeared a new section, by which the public administrator was created ex officio public guardian as well, and to have charge of estates of minors ordered into his charge by the probate court. Rev. St. 1889, § 5336. Such was the law in force at the time defendant Mast took charge of the estate of the minor named. Rev. St. 1889, § 299. With amendments of the act of April 11, 1895 (Laws 1895, p. 35), further enlarging the scope of the duties and authority of such officers so as to include custody and care of persons and estates of parties insane, such are the statutory provisions now prevailing. Rev. St. 1899, §§ 292, 3536. The amending act of 1885 further added to section 307 the words "and guardians and curators," so that section provided that the public administrator should have the same powers conferred upon, and be subject to the same duties, penalties, provisions, and proceedings as enjoined upon or authorized against, executors and administrators, so far as the same might be applicable. Section 300, Rev. St. 1889. In the interpretation of this statute, especially as affecting administration of estate of deceased, but subsequent to amendment, this court has held that its purpose was to provide a bonded officer to take charge of estates liable to be wasted, and that it was auxiliary to the general law, and was intended to supply the deficiency in the particular named, but not designed to repeal or supplant any of the provisions of the existing general law. *Tittman v. Edwards*, 27 Mo. App. 492. At the time of the amendment above referred to, and ever since, the statutes have contained a section entitling any minor having a guardian appointed by the court, upon attaining the age of 14 years, to make his or her own choice of another guardian or curator, whose appointment as such is to be confirmed by the probate court, if a suitable and competent person for the trust. Section 529A, Rev. St. 1889 (section 3485, Rev. St. 1899). This section also received the attention of the Legislature of 1885, by authorizing the probate judge to act in such and other enumerated cases in vacation, as well as in term

time, but was not otherwise disturbed. Laws 1885, p. 175. Appellant relied upon the provisions of section 294, Rev. St. 1899 (section 301, Rev. St. 1899), which recites that, when a public administrator has been appointed to take charge of an estate, he shall continue, unless he resigns, dies, is removed for cause, or is discharged. Attention is directed to the language adopted in this section as resembling section 3485, Rev. St. 1899 (formerly section 5290, Rev. St. 1889), empowering a minor having a guardian or curator appointed by the court to exercise the right of election, and which wording, appellant insists, confines its operation to instances where estates of minors are in charge of such officials, not by virtue of their office, but by express and independent appointment of the probate court. In further construction of section 299, Rev. St. 1889 (section 292, Rev. St. 1899), except supplemental provision as to persons non compos mentis, as above, the Supreme Court has announced that, in the instances embraced in the several classifications therein mentioned, the public administrator takes charge of estates, and acts independently of any order of the probate court, but occupies the position of private administrator. *Leeper v. Taylor*, 111 Mo., loc. cit. 322, 19 S. W. 955. The above contention of appellant, however, lacks application herein, for the order of the probate court directing Mast to take charge of the estate of this minor is made part of the testimony introduced. It is worthy, also, of remark that the above legislative enactment enlarging the powers and duties of a public administrator to those of a public guardian as well, in terms, limits such additional authority to minors under the age of 14 years.

In conclusion, no statutory provision has been invoked, nor has any authority interpreting the statute been submitted, nor has any reason been advanced, why a minor, whose estate, up to the period of attaining the age of 14 years, has been in custody of the public administrator as public guardian, should be denied the right at that age, accorded by the statute, of selecting a guardian or curator to his or her liking, subject to the approval of the probate court. Especially does such deduction appear reasonable in view of the fact that after such age such minor would have enjoyed such privilege in absence of any guardian. Rev. St. 1899, §§ 3485, 3486.

The judgment is accordingly affirmed.

BLAND, P. J., and GOODE, J., concur.

GIBBS v. ST. LOUIS & S. F. R. CO.

(Court of Appeals at St. Louis, Mo. Feb. 2, 1904.)

RAILROADS—FIRES—DESTRUCTION OF BUILDINGS—NEGIGENCE—SPARKS—EMISSION—CUSTOM—EVIDENCE.

1. Decedent's frame house, located 50 feet from defendant's railroad, and used as an inn,

was destroyed by fire during the night. At a point opposite the building the track ran at a heavy grade, and there was evidence that three or four minutes before the fire was discovered on the front porch of the house, which faced the railroad, a train had passed, going up the grade. The fire immediately spread, and consumed the house and its contents before any of them could be removed. There were three fires in the house, which were replenished with wood before the family retired. No witness saw the train, and there was no evidence either that that engine, or defendant's engines generally, threw sparks, or, if they did, as to the size and extent thereof. *Held*, that since, in such a case, depending on circumstantial evidence, expert evidence that locomotives under such circumstances uniformly emitted sparks of a sufficient size to fire a building 50 feet away was admissible, in the absence of such proof the facts were insufficient to sustain a verdict against defendant.

Appeal from Circuit Court, Crawford County; L. B. Woodside, Judge.

Action by Mary A. Gibbs, as executrix of the estate of William A. Gibbs, deceased, against the St. Louis & San Francisco Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

L. F. Parker and J. T. Woodruff, for appellant. Harry Clymer, for respondent.

GOODE, J. Plaintiff's testator sued to recover damages for the burning of his house and furniture by a fire alleged to have been ignited by sparks emitted by one of defendant's locomotives. The cause stands now revived in the name of the plaintiff as executrix of her father's estate, he having died since it was instituted. The destroyed house was in the town of Leasburg, on the line of the defendant's railway, and stood about 50 feet from the railway track, which at that point runs northeast and southwest. The house faced the track, and was a story and a half structure, with a porch in front, and extending around the corner a short distance on the east side. The testator kept a hotel, and a sign announcing that fact had been fastened to the roof of the porch; but, according to one of the witnesses, who was contradicted by another one, it had blown over, and was lying on the roof the night of the fire. It is said the fire was started by a hot cinder from an engine catching against the sign. In the house that night were the deceased owner, Wm. A. Gibbs, his daughter, his son, and a wayfarer who had taken lodging with them. The fire was detected about 1 o'clock in the morning, and at that time was burning on the northeast corner of the porch roof, in a patch about 1½ feet wide, and from 2 to 3 feet long, close to, if not in contact with, the roof of the house itself. Plaintiff had judgment for \$900, and defendant appealed.

The proposition relied on for a reversal of the judgment is that the evidence was insufficient to carry the case to the jury; that is to say, on the facts proven, no inference was warranted that the fire was kindled by sparks from an engine of the train that is said to

have passed through Leasburg a few moments before it was noticed.

Some facts in evidence obtrude themselves on the attention as especially important. There were fires in the house early in the evening in three stoves, the cook stove in the kitchen, a heating stove in the room where Mary Gibbs slept, and a "King heater" in the room where the men slept. The latter was filled with wood when the family retired, at 9 o'clock, and left burning. The building had caught fire previously in some manner other than from engine sparks. Notwithstanding the small patch of the roof that was aflame when the destructive fire was discovered, and though Mary Gibbs at once aroused her brother, and the two tried to save the furniture, the building was so quickly enveloped in flames, both inside and outside, that practically nothing of its contents was saved. Two bureau drawers and a feather mattress were gotten out, but those articles were not rescued, for Mary Gibbs testified that, before they could be carried to a place of safety, they caught fire and were consumed. These facts argue that the house was on fire inside when flames were discovered on the roof. There was testimony that a mist had fallen during the preceding afternoon, and that the night was cold; that only three or four minutes elapsed, as the plaintiff swore, between the passage of the train and the discovery of the fire, and in that short interval the roof was blazing over a space three feet long and a foot and one-half wide.

Equally important is the lack of evidence to make the proof of defendant's responsibility at all satisfactory. There was no testimony that the train which passed immediately before the discovery of the fire threw out sparks, and no evidence tending to prove it did, except the statement of Mary Gibbs that it seemed to be a heavily loaded train, and the fact that the track runs through Leasburg on a rising grade. No witness saw the train. Neither was there testimony adduced to show that defendant's engines frequently or ever threw out sparks while on that grade, nor to what extent, if at all, they threw them, how large they were, or how far they flew. No testimony of a positive sort was adduced on that subject, nor opinions of experts as to whether locomotives emit sparks large enough to fly 50 feet, and fall still burning. As the want of such testimony is the point on which the decision must turn, it is unnecessary to give a fuller digest of the evidence, for respondent's counsel does not contend there was any proof, either expert or direct, as to the emission of fire by locomotives.

A plaintiff suing a railroad company for damages caused by a fire alleged to have been set by a locomotive can establish his case by circumstantial evidence that the fire was thus set, and is not to be defeated for lack of positive testimony on the issue if he proves facts

sufficing to authorize an inference that coals or sparks from an engine of the company were the source of his loss. *Otis v. R. R.*, 112 Mo. 622, 20 S. W. 676; *Kenney v. R. R.*, 70 Mo. 243, 252; *Redmond v. R. R.*, 76 Mo. 550; *Sappington v. R. R.*, 14 Mo. App. 86; *Alexander v. R. R.*, 37 Mo. App. 609; *Torrey v. R. R.*, 64 Mo. App. 382. In those cases, and in many others, the rule is declared as we have stated it. But the propriety of submitting to the jury the question of the railway company's responsibility has been affirmed in some instances, and denied in others, in obedience to another rule of evidence, namely, that where there is no direct testimony to prove the ultimate fact essential to a plaintiff's recovery, but proof of collateral circumstances is relied on, such circumstances must be of a kind to fairly point to the existence of the essential fact—to authorize the conclusion that it existed—or there is no case made for the jury to determine. A court must consider the proven facts as regards their tendency, according to common experience, to produce a belief in impartial minds that the unproven, but necessary, fact occurred. If the circumstances given in evidence have no tendency of that kind, they do not justify a submission of the cause to the jury, for the latter body's function is to weigh evidence which is relevant, material, and possessed of probative force. The law regulates the admission of evidence during trials with reference to its pertinency to the issue, as supporting one side of it or the other; excluding whatever has no bearing, and receiving all that has. This policy obtains because of the presumption that the force of pertinent testimony, unweakened by admixture with irrelevant matter, will impel the minds of jurors to a fair conclusion about the truth of the issue to be determined. But when the evidence adduced by a party has no tendency, according to the experience and observation of men, to prove the main fact in dispute, the jury should not consider it because its influence, if it exerts any, must be to stir surmises and conjectures as to the truth, instead of producing a sincere conviction. To say when, in the absence of direct evidence on an issue, collateral circumstances bear on it and become competent evidence to be weighed by a jury, is a delicate and often a difficult task, and perhaps nowhere more difficult than in cases like the present, when indirect proof is depended on to show that sparks from a railway engine kindled a destructive fire.

In this case we face not only a lack of direct evidence to show that sparks from the engine that was heard to go by after midnight set fire to the decedent's house, but a lack of direct evidence to show that sparks escaped from it. The precise question for decision, therefore, is, is it so generally known to persons of average intelligence that a locomotive drawing a heavy load on an ascending grade throws sparks or cinders

50 feet away, and hot enough to ignite the roof of a house if they happen to fall on one, that evidence on the subject may be dispensed with, and the jury assume, from their own knowledge, that this event can and does happen, and use the assumption as the basis for a finding that in the particular case before them it did happen? We regard that as the controlling question, though the appellant's counsel have laid more stress on there being several fires in the house, and a defective flue, which circumstances, they contend, render it more probable that the conflagration was started inside the building, than by coals from an engine. But, in our opinion, it was for the jury to determine whether the fire originated from some interior cause, or from coals from a locomotive, if the absence of proof that the locomotive which was heard to pass threw out fire can be supplied by an assumption, based on common knowledge, that locomotives do emit fire under similar conditions—in other words, if the action of locomotives in that respect belongs to the body of information about familiar and customary events which men generally possess. If it does, the information takes the place of proof, and the case stands as though testimony had been introduced directly proving that the locomotive in question threw burning matter as far as the decedent's house as it passed through Leasburg, or testimony that defendant's locomotives frequently did so. When a fact is so generally known as to obviate the need of evidence about it, the knowledge is equivalent to proof. *Lee v. Knapp*, 155 Mo. 610, 56 S. W. 458. Now, there was testimony adapted to induce a belief that the conflagration was of exterior, instead of interior, origin, and the further belief that, if it started outside, the burning matter which kindled it did not proceed from the flue of the house. The fire was first detected on the roof, about 18 feet from the flue, and in a direction from it contrary to the wind's movement. The latter circumstance is of slight weight, however, because on blustery nights the wind often swirls around a chimney, and blows sparks contrary to its main course. But these observations pertain to the province of the jury, and show that the jury might properly have concluded the fire originated independently of any source in the house. If their right to draw that conclusion is allowed, it follows that they had the right to draw the conclusion that the house was ignited by fire cast from the locomotive the plaintiff heard pass, if they might do so without evidence that a locomotive will cast fire that will ignite a house 50 feet away. The rule of law as to whether or not a jury may take notice of such a fact should be applied, if we can ascertain it accurately, as the rule for the decision of the present appeal. It ought to be further remarked that there was no testimony concerning the kind of engines in use by the defendant, and how thoroughly

they were equipped with spark arresters or appliances to prevent the escape of fire. We think it is generally known that all locomotives in use emit fire to some extent, and that inventors have not perfected any appliance which will entirely prevent the escape of sparks from them. *Torpey v. R. R.*, 64 Mo. App. 382. The *Torpey* decision is greatly relied on by the plaintiff's counsel as sustaining his contention that there is evidence enough to support the verdict in the present case. It is not stated in the opinion in that case that evidence was adduced of other fires in the vicinity of *Torpey's* house, set by the railway company's engines about the same time; but such evidence was given by an employé of the company who worked on that section of the track, as we found by procuring the record. We think, too, it is known, and may be taken for granted, that a locomotive drawing a heavy train on a rising track will throw out more fire than at other times. But that good engines will emit particles of burning fuel that will fly 50 feet, and fall still burning, is a fact, if it be one, which, in our opinion, is not generally known to men of common intelligence, and therefore must be established by testimony. If we are right about this, it devolved on the plaintiff to show either that the defendant's engines had thrown fire as far as the destroyed house, or expert testimony that well-equipped engines would do so. In every cognate decision that we have seen in which the evidence, though not directly establishing that an engine set the fire, was held sufficient for the jury, there was testimony of one kind or the other—testimony either that the engines of the railway company had been seen to cast sparks and coals to the alleged distance, or to set out fires that far away, or that this might happen, according to the way engines work. Railway companies have frequently raised the objection to such evidence that it has no tendency to prove that the fire which gave rise to the litigation was started by an engine; but the point was invariably, we believe, ruled against them. See cases first cited, *supra*; also *Grand Trunk R. R. v. Richardson*, 91 U. S. 454, 23 L. Ed. 356; *Chicago, etc., R. R. v. Gilbert*, 52 Fed. 711, 3 C. C. A. 264; *Dunning v. R. R.*, 91 Me. 87, 39 Atl. 352, 64 Am. St. Rep. 208; *Frisco R. R. v. Jones*, 59 Ark. 105, 26 S. W. 595; *Jamieson v. R. R. (Sup.)* 42 N. Y. Supp. 915; *Brush v. R. R. (Sup.)* 42 N. Y. Supp. 103; *Frace v. R. R. (Sup.)* 22 N. Y. Supp. 958. Such decisions certainly determine the competency of evidence of the character stated, if not its necessity; and, as evidence is incompetent, strictly speaking, when it relates to matters requiring no proof, the decisions go far toward determining that some evidence is necessary, in litigation like this, to show it was possible for the fire to have been started by sparks from an engine. Indeed, they would be conclusive on the point, but for the fact that the admission of testimony of the sort

mentioned, if it is not strictly competent, might nevertheless not constitute reversible error. This cause is unlike those wherein it appeared the fire started on the right of way, or very close to the track, as it is unlike, too, those wherein there was no fire in the consumed building from which it could have caught. As to the propriety of testimony to show how far sparks of fire may be dispersed by a locomotive, there is an adjudication by the Supreme Court of New York in *Jamleson v. Railroad*, supra, and decisions less pertinent, but enough so to be germane, in the *Brush and Frace Cases*, supra.

After we had advanced thus far with this opinion, we chanced to discover a decision on the very point of doubt by our Supreme Court, which, if we had found it sooner, would have relieved us of considerable labor. *Campbell v. R. R.*, 121 Mo. 341, 25 S. W. 936, 25 L. R. A. 175, 42 Am. St. Rep. 530. In discussing the competency of evidence that other fires than the one involved in that action were set out by engines of the company, the court, speaking by Judge Macfarlane, said: "The only issue involving the liability of defendant was whether the fire was communicated to plaintiff's property, directly or indirectly, by a locomotive engine in use upon its road. Was this evidence admissible as tending to prove that issue? The question was sharply contested on the trial whether the fire causing the damage did in fact originate from one of defendant's engines. The evidence was all circumstantial. It was important, then, to show that there was a possibility that sparks may have been thrown a distance sufficient to reach the building in which the fire originated, and that they contained heat enough to set it on fire. The facts that live sparks were thrown from engines, and did ignite grass and other combustible materials, would tend to prove the probability that the fire was communicated from an engine. It was not shown that the engine from which alone the fire could have been communicated was constructed or manned with more care than all others in use on the road. The admissibility of such evidence was affirmed in *Sheldon v. Railroad*, 14 N. Y. 223 [67 Am. Dec. 155], by a divided court. The court in that case says: 'The competency of this evidence has been directly decided in the English court of common pleas. *Piggott v. Railroad*, 10 Jur. 571; *Aldridge v. Railroad*, 3 M. & G. 515. These cases upon this point are well decided. The principle is essential in the administration of justice, inasmuch as circumstantial proof must, in the nature of things, be resorted to, and inasmuch as the jury cannot take judicial cognizance of the fact that locomotive engines do emit sparks and cinders which may be borne a given distance by the wind. The evidence was competent to establish certain facts which were necessary to be established in order to show a possible cause of the accident, and to prevent vague

and unsatisfactory surmises on the part of the jury.' This ruling was followed without division in *Field v. Railroad*, 32 N. Y. 339; *Webb v. Railroad*, 49 N. Y. 421 [10 Am. Rep. 389]."

The judgment in plaintiff's favor must be reversed for lack of evidence tending to show fire emitted by a locomotive would fly to the roof of the decedent's house while so hot as to ignite the roof.

The defendant's counsel insist the case should not be remanded, as the plaintiff failed to introduce proof enough to establish a cause of action. But we think justice requires us to send it back to the circuit court, and thus afford plaintiff an opportunity to supply, if possible, the omitted proof. There is a difference between an appeal taken by a plaintiff from a nonsuit ordered because he failed to make out his case, and one in which the plaintiff did make it out to the satisfaction of the trial court, but the latter court was in error in so ruling. In the first instance the judgment is right on the record, and cannot be reversed, while in the second it is wrong, and must be reversed, and in reversing it the appellate court may remark the cause for a second trial, if that course appears likely to promote a correct disposition of it finally.

The judgment is reversed, and the cause remanded.

BLAND, P. J., and REYBURN, J., concur

MAGUIRE v. ST. LOUIS TRANSIT CO.*

(Court of Appeals at St. Louis, Mo. Dec. 1, 1903.)

CARRIER-INJURY—STOPPING CAR AT CROSSING—CITY ORDINANCE—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE QUESTION FOR JURY—INSTRUCTIONS—PLEADING—ELECTION BETWEEN COUNTS—DAMAGES—MEASURE—EXCESSIVE.

1. Where one count of a petition alleges a city ordinance requiring street cars to stop at crossings on signal, and that on a signal from plaintiff a car came almost to a stop, and that on his attempt to board it was suddenly started, causing his injury, and another count omits the ordinance, alleges that the car stopped, and states the injury, both state the same cause of action, and plaintiff is not required to elect between them.

2. Where a city ordinance requires street cars to stop at crossings, a rule of the company as to the cars stopping for passengers when they are eight minutes late was inadmissible, in an action for injuries in attempting to board a car, from its sudden starting.

3. The failure of an instruction to direct on which count of the petition there might be a recovery was not error where both counts stated the same cause of action, though in different forms.

4. An instruction authorizing a recovery for injuries in attempting to board a street car, if the plaintiff believed the car was stopping for passengers, is not objectionable as allowing the right to board it irrespective of its speed, where the evidence showed that it was moving very slowly when he attempted to board it.

*Rehearing denied February 16, 1904.

5. Whether it was negligence to attempt to board a street car moving very slowly was a question for the jury, and was properly submitted by an instruction that, to authorize a recovery for injuries in making the attempt, the plaintiff must have exercised ordinary care.

6. Where a street car slowed down at the usual point for receiving passengers, so that plaintiff had reason to believe it was for that purpose on this occasion, the company is liable for the consequences of any mistake on his part in so believing, if he was not guilty of contributory negligence.

7. In an action for injuries in attempting to board a street car at a certain point, an instruction that cars should stop at that point was not objectionable as imposing the duty, whether there were any passengers there or not.

8. A street car should be brought to a full stop at a crossing when signaled, and should be kept stationary for a time reasonably sufficient to permit a passenger to reach some place of safety on the car.

9. An instruction declaring it negligence, after stopping a street car to let on a passenger, to start it before he had a reasonable time "to get upon said car and to a place of safety therein," was proper, and was not inconsistent with an instruction stating the duty to hold the cars stationary a reasonable time to enable persons "safely to board such cars."

10. An instruction that the burden of proving contributory negligence rests on the defendant is not erroneous as depriving the defendant of the benefit of plaintiff's own evidence, though contributory negligence, if shown at all, was shown by plaintiff's evidence alone.

11. Where an injury is permanent, and future physical pain and mental anguish are reasonably certain, and are the necessary and natural result of the act complained of, they are proper elements of damages.

12. Where the evidence shows that an injury caused very serious impairment of the use of a leg, continues to cause very severe pain, is likely to continue a long time, and ultimate recovery is doubtful, a verdict for \$3,500 is not excessive.

Appeal from St. Louis Circuit Court; Horatio Wood, Judge.

Action by Robert W. Maguire against the St. Louis Transit Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Boyle, Priest & Lehman, for respondent.

BLAND, P. J. The petition is in two counts. The first alleges, in substance, that on November 24, 1902, plaintiff, desiring to become a passenger on one of defendant's cars bound eastward on Maryland avenue, in the city of St. Louis, took his stand at the southeast corner of Euclid and Maryland avenues, the proper and usual place where defendant's cars stopped to take on passengers; that when the car approached Euclid avenue he signaled the motorman in charge of his desire to become a passenger, and the motorman, as he approached Euclid avenue and crossed the same, slowed down his car; that on reaching the south crossing, where the plaintiff was standing, the car was slowed down to a stopping point, leading plaintiff to believe that the car had stopped to receive him and others standing by, who wished to become passengers, when plaintiff took hold

of the handrail at the rear end of the car, and attempted to board the same, but while he was in the act of getting on the defendant negligently, carelessly, and recklessly failed to let the car remain standing a sufficient length of time to allow plaintiff to get on the car, but started it forward with great suddenness and speed, whereby plaintiff was thrown down and dragged some distance, by reason of which he sustained severe and permanent injuries. The first count of the petition also pleaded section 1761, of City Ordinance 19,919 of the city of St. Louis, regulating the stopping of street cars to let passengers on and off. The second count omitted the ordinance, and alleged the car came to a standstill. The other particulars are as in the first count. The section of the ordinance pleaded, among other things, provides that street cars operated in the streets of the city shall make stops at certain points for the purpose of letting passengers get on and off the cars. It requires the cars traveling eastward to stop on the east side of the streets intersecting the one on which the car is traveling for the purpose of letting persons get on and off the car. The answer was a general denial and a plea of contributory negligence. The plea of contributory negligence was put in issue by a reply. Before proceeding to trial the defendant moved the court to require the plaintiff to elect upon which count he would proceed to trial. This motion was denied, and the cause proceeded to trial on both counts. The evidence offered by the plaintiff tended to prove the allegations as made in both counts of his petition, especially as laid in the first count, that the car did not come to a standstill, but that, after plaintiff gave the motorman the usual signal to stop, he turned off the power, and twisted the brake, and when the rear end of the car came opposite to where plaintiff was standing the car was moving very slowly, and plaintiff took hold of the handrail with the intention of getting aboard, when the car was suddenly started forward, and plaintiff was jerked off his feet and dragged about 25 feet. He was then helped or pulled on the car by some one standing on the rear platform. Plaintiff testified that on the spur of the moment, after he was jerked off his feet, he thought came to him to hang on. He further testified that he was hurt in the groin of his left leg; that the pain became very severe, and he went home and went to bed, called a physician, who gave him an opiate to relieve the pain, and prescribed for treatment hot applications and the use of liniment; that the inside tendons and muscles of his leg were injured, and that he had suffered pain on account of the injury from the time of the accident down to the trial; that he was unable to cross his left leg over his right one, and was unable to walk as well as he could before the injury. His evidence and the evidence of the physicians who testified in his behalf tends to show that the

¶ 11. See Damages, vol. 15, Cent. Dig. § 236.

use of the left leg had been very much impaired by the injury, and that plaintiff continued to suffer pain from the injury, and it would require a very long time for the leg to recover, and it was questionable if it ever would become a sound leg. Section 1761 of City Ordinance 19,919 was read in evidence. At the close of plaintiff's evidence defendant again moved the court to require plaintiff to elect upon which count of the petition he would rest his case. This motion was also denied. The only witness offered by the defendant was the conductor, who, presumably, was on the car when the accident occurred; but he testified he knew nothing whatever of the occurrence. He said his car was eight minutes behind time, and that about two months afterwards, at the request of defendant, he made a report of the trip to the defendant. This report was offered in evidence, but was excluded by the court. The motorman was no longer in the employ of defendant, and could not be found by the defendant's claim agent, but the conductor testified that the motorman was in the city, and that he saw him almost daily.

The court gave the following instructions for the plaintiff:

"(1) The court instructs the jury that if you find and believe from the evidence that on or about the 25th day of November, 1902, the defendant was operating certain lines of street railroads in the city of St. Louis, Missouri, and particularly a double-track line of railroad running east and west on Maryland avenue, past the intersection of Maryland and Euclid avenues, in said city; and if you further find and believe from the evidence that the plaintiff attempted to board one of the defendant's east-bound cars on Maryland avenue, at the intersection of said Maryland and Euclid avenues, and on the east side of said Euclid avenue and south side of said Maryland avenue, at a place where defendant's cars were in the habit of stopping to receive passengers, and that plaintiff, at said time and place, had reason to believe, and did believe, that said car was stopping for passengers to board said car at said place; and if you further believe and find from the evidence that the plaintiff took hold of the handrail of said car at the rear end thereof for the purpose of becoming a passenger on said car; and if you find from the evidence that the defendant's servants in charge of said car knew, or by the exercise of ordinary care should have known, that plaintiff was attempting to board said car as a passenger; and if you further believe from the evidence that after the plaintiff had so taken hold of the handrail of said car at the rear end thereof for such purpose the said servants in charge of said car suddenly started the same before the plaintiff had a reasonable time to get upon said car and to a place of safety therein, and that the injury complained of was caused by the failure to stop the car and by such sudden starting of the car

under such circumstances; and if you further believe from the evidence that the plaintiff at the time exercised ordinary care in attempting to board the car in the manner shown by the evidence—then your verdict should be for the plaintiff.

"(2) The court instructs the jury that at the time said Robert W. Maguire was injured the city ordinance introduced in evidence imposed upon the servants, agents, and employes of the defendant, while running, conducting, or managing the street car in question, the following duties: That they should stop cars going eastward on Maryland avenue on the east side of Euclid avenue for taking on passengers; that they should bring cars going eastward to a full stop on the east side of Euclid avenue at the intersection of Euclid avenue and Maryland avenue whenever requested, signaled, or motioned by any person standing at the southeast corner of the intersection of said Maryland and Euclid avenues desiring to board such cars, and in every instance to keep such cars stationary for a reasonable length of time to enable such persons desiring to board such cars safely to board such cars. And if the jury believe from the evidence that the agents, servants, and employes of the defendant, while running, conducting, or managing said street car upon the occasion referred to, failed to perform any one or more of the duties specified in this instruction, such failure was negligence. And if you believe from the evidence that in consequence of such negligence in any one or more of the particulars hereinabove mentioned the said Robert W. Maguire received the injuries which are complained of in his petition herein, your finding should be for the plaintiff, unless you further believe from the evidence that the said Robert W. Maguire was guilty of negligence which contributed to the injury; and the burden of proving contributory negligence on the part of said Robert W. Maguire rests on the defendant, and, unless the defendant has proven such contributory negligence by a preponderance of the evidence, you cannot find for the defendant on that ground.

"(3) The court instructs you, gentlemen of the jury, that if you find for plaintiff you should, in estimating his damages, consider his physical condition before and since receiving the injuries for which he sues, as shown by the evidence, the physical pain and mental anguish, if any, suffered by him on account of his injuries at the time of and since such injuries, as shown by the evidence; and for such mental anguish and physical pain and injury, if any, as you may, from the evidence, find it is reasonably certain he will suffer in the future therefrom, and you will find a verdict for such sum as, in your judgment, will, under the evidence, reasonably compensate him for such injuries.

"(4) The court instructs the jury that the charge of negligence made against the defendant in the plaintiff's petition is that the

motorman of defendant's car slowed down the said car to a stopping point, inducing plaintiff to believe that said car had stopped to receive him as a passenger, and that while plaintiff was in the act of boarding said car the same was suddenly, and in violation of the ordinances of the city of St. Louis, started, throwing plaintiff to the ground and injuring him. With respect to the foregoing charge of negligence you are instructed that the burden is upon the plaintiff throughout the whole case of establishing to your satisfaction, by the preponderance or greater weight of testimony, that the defendant's car did slow down, either for the purpose of receiving plaintiff as a passenger, or to so slow a speed as to cause the plaintiff to believe that it was slowing down for the purpose of receiving him as a passenger, and that the same was so suddenly started while plaintiff was in the act of boarding the same as to cause him to be injured; and unless the plaintiff has so proven he is not entitled to recover, and your verdict must be for defendant."

The defendant asked and the court refused the following instructions:

"(1) The court instructs the jury that under the law and the evidence in this case the plaintiff cannot recover, and your verdict must be for the defendant.

"(2) The court instructs the jury that under the pleadings in this case they must find, in order for plaintiff to recover, that he attempted to board defendant's car while the same was at a standstill; and if they find at the time plaintiff attempted to board the car the same was moving, then he cannot recover, and your verdict must be for the defendant.

"(3) The court instructs the jury that if they find from the evidence that the defendant's car was behind time, and for that reason did not stop or slow down at the southeast corner of Maryland and Euclid avenue, in the city of St. Louis, Missouri, for the purpose of receiving passengers thereon, but simply slowed down for the purpose of crossing the tracks in said Euclid avenue, and that while passing said southeast corner plaintiff attempted to board defendant's car while it was in motion, and that such effort on the part of plaintiff was negligent under the circumstances, and caused or contributed to his injuries, then he is not entitled to recover, and your verdict must be for the defendant.

"(4) The court instructs the jury that if they find from the evidence that the defendant's car was behind time, and for that reason did not stop or slow down at the southeast corner of Euclid and Maryland avenues, in the city of St. Louis, Missouri, for the purpose of receiving passengers thereon, but simply slowed down for the purpose of crossing the tracks in said Euclid avenue, and that while passing said southeast corner plaintiff, without the knowledge of the agents of defendant in charge of its car, attempted

to board said car while it was in motion, and that such effort on the part of the plaintiff either caused or contributed to his injuries, then he is not entitled to recover, and your verdict must be for the defendant, even though you should also find that at the time plaintiff attempted to board said car its motion was accelerated or increased."

A verdict for \$3,500 in plaintiff's favor was returned, signed by nine of the jurors. A motion for new trial proving of no avail, defendant appealed.

1. It is contended that the court erred in refusing to compel the plaintiff to elect upon which count of the petition he would stand. Both counts of the petition state one and the same cause of action, but in a different form. That this may be done has been the settled rule since the adoption of the system of pleadings for the purpose of forming issues of fact for trial in courts having common-law jurisdiction, and it is admissible under our Code of Practice for the plaintiff, in his petition, to state the same cause of action in different form by separate counts for the purpose of meeting any possible state of the proof, and a general verdict will be a bar to any future suit upon any of the counts. *Clemens v. Collins*, 14 Mo. 604; *Brownell v. Railroad*, 47 Mo., loc. cit. 243; *Brady v. Connelly*, 52 Mo., loc. cit. 19; *City of St. Louis to Use, etc., v. Allen*, 53 Mo., loc. cit. 49; *Owens v. Railroad*, 58 Mo., loc. cit. 386. It follows that the plaintiff was not required at any stage of the proceeding to elect upon which count he would rely, and no error was committed by overruling either of the motions to require plaintiff to elect.

2. Defendant offered to prove the defendant company had a rule as to cars stopping for passengers when the car was eight minutes late. The court excluded this evidence. This ruling is assigned as error. City Ordinance, § 1761, pleaded by plaintiff, and offered in evidence, makes no exception in favor of a car that is eight minutes or any other number of minutes behind its running time, but requires all cars operated in the streets of the city of St. Louis for the purpose of carrying passengers to make the stops that are required to afford an opportunity for passengers to get on and off the cars, when to do so will not obstruct the operation of the line. The street railroad companies were not granted the use of the streets of the city solely for their own emolument and profit, but primarily for the carriage of passengers upon their cars. That they may make and enforce all needful rules and regulations in respect to the conduct of their business, including stops at street crossings, not inconsistent with the charter and ordinances of the city, is manifest; but they have no power to bind or affect the public by an unreasonable rule that is opposed to an ordinance of the city, as was the one offered in evidence, and excluded by the court. Nor was the rule admissible for the purpose of

showing or tending to show that the intention of the motorman in slowing down his car was not to stop or slow down for the purpose of letting the plaintiff board the car. The plaintiff could not be affected by the rule, unless he had knowledge of it, nor is he bound by the uncommunicated intentions of the motorman. He had a right to act upon appearances, and to attempt to board the car, if he gave the usual signal to the motorman to stop, and the motorman, in apparent response to the signal, slowed down the car to a speed so slow that it was not negligence on the part of plaintiff to attempt to board it.

3. Defendant contends that the first instruction given for plaintiff is erroneous for the reasons: First. It does not direct the jury upon which count of the petition it could find a verdict for plaintiff. This objection is answered by the first paragraph of this opinion. The second objection is that the instruction authorized the jury to find for plaintiff on the theory that, if plaintiff believed the car was stopping for passengers, he had a right to board the same, irrespective of the speed of the car. This is not a just criticism. Plaintiff's evidence in respect to the speed of the car is that the car stopped on the west side of Euclid avenue, then came on across the tracks in Euclid avenue, and while the car was crossing the tracks the motorman turned off the power and put on the brakes; that the car was then running very slowly, and when it was just abreast of plaintiff the motorman turned off the power and twisted the brake; that the car was moving very slowly. He could not say at what speed it was running, but he easily caught hold of the handrail, and, as he did so, the car gave a sudden lurch and went forward. There is no other evidence in the abstract in respect to the speed of the car. If the car was moving very slowly, it was not negligence per se for the plaintiff to attempt to board it, as is stated by defendant's counsel in their brief. Whether or not it was negligence was a question for the jury, and the instruction told the jury that, to authorize a verdict for the plaintiff, they should find that at the time he attempted to board the car he was exercising ordinary care; hence the instruction is not open to the objection made.

It is further contended that the plaintiff made a mistake in supposing the car had slowed down for the purpose of receiving him as a passenger, and should bear the consequences of his own mistake. If he did make a mistake, according to the evidence, the mistake was induced by the conduct of the motorman in turning off the power, twisting the brake, and slowing down the car at a time and place and under circumstances that would induce any one in plaintiff's place to believe as plaintiff believed—that is, that the motorman intended to stop the car to let him and the other eight or ten persons present and waiting for a car to get aboard; and

the defendant, not the plaintiff, is responsible for the consequences of the mistake, if plaintiff himself was not guilty of contributory negligence in attempting to board the car while in motion.

4. In addition to the alleged errors contained in the first instruction, it is contended that the second for plaintiff contains the following errors: "(1) That the car going eastward on Maryland avenue should have been stopped at the east side of Euclid avenue. This broad duty is imposed by this instruction without reference to whether there were any passengers there or not, or whether any signal had been given or not. (2) That defendant should have brought the car to a full stop at the east side of Euclid avenue when signaled. And (3) that defendant should have kept the car stationary for a reasonable length of time to enable persons, then desiring to board the car 'to board' the car." These objections are entirely fanciful, and a reading of the instruction will dispel each one of them.

5. The first instruction declared it negligence, after stopping the car to let on a passenger, to start it before he "had a reasonable time to get upon said car and to a place of safety therein." The second declared its duty to be to hold the "cars stationary for a reasonable length of time to enable such persons desiring to board such cars safely to board such cars." It is contended that these instructions are inconsistent, and that the first misstated the law; that the defendant is not required to hold a car stationary until a passenger can be seated. It is not the rule that the car must be held until a passenger who has just boarded it can be seated. If such a requirement was made of street cars, the carmen would, on account of the crowded condition of the cars, often find themselves in a dilemma. The rule is that the car must be stopped for a reasonable time; that is, time sufficient for a passenger to board the car. *Dougherty v. Railroad*, 81 Mo. 325, 51 Am. Rep. 239; *Id.*, 97 Mo. 647, 8 S. W. 900, 11 S. W. 251. We do not think the first instruction runs counter to this rule. The phrases "within the car" and "aboard the car," as used in the two instructions, are synonymous in their application to the situation indicated, and mean nothing more than that the car should be held for a time reasonably sufficient for passengers to reach some place of safety on the car, and we think the jury so understood both instructions.

6. It is contended that the last clause of the second instruction is erroneous for the reason, if contributory negligence was shown at all, it was shown by the plaintiff's own evidence, the defendant having offered none on this point. Notwithstanding this fact, the burden of showing such negligence was, by the instruction, cast on the defendant, and to show it by a preponderance of the evidence. The point made is that the instruction deprived the defendant of the benefit of

plaintiff's own evidence. In *Murray v. Railroad*, 101 Mo., loc. cit. 240, 13 S. W. 817, 20 Am. St. Rep. 601, it was held that an instruction substantially the same as No. 2, where the evidence tending to prove contributory negligence came from the plaintiff, the defendant was not deprived of the benefit of the plaintiff's evidence tending to prove contributory negligence, and that the instruction asserted a correct proposition of law. The other objections made to the first and second instructions seem to us to be hypercritical.

7. The instruction on the measure of damages is objected to for the reason that it authorized a recovery for future mental anguish. Mental anguish that is incident to bodily pain caused by an injury is a proper element of damages, and may be inferred from the nature of the injury. *Seawell v. Railway*, 119 Mo. 222, 24 S. W. 1002; *Brown v. Railroad*, 99 Mo., loc. cit. 319, 12 S. W. 655. Mental anguish can be recovered for coextensively with physical injury, and, so long as the injury continues to give intense pain, mental anguish will be inferred to co-exist. *Union Pacific Railway Co. v. Jones*, 49 Fed. 343, 1 O. C. A. 282; *Ball v. Mabry*, 91 Ga. 781, 18 S. E. 64. In this state the general rule is that pain of body and mind, when connected with physical injury, is a subject of damages. *Trigg v. Railroad*, 74 Mo. 147, 41 Am. Rep. 305. And when the injury is permanent, and future physical and mental pain are reasonably certain, and are the necessary and natural result of the act complained of, they are proper elements to be taken into consideration in estimating the damages. *State v. Goode*, 24 Mo. 361.

8. Such of the refused instructions as are supported by any evidence were comprehended in those given by the court, and there was no error committed in refusing them.

9. Complaint is made that the verdict is excessive. The evidence as to the character and extent of the injury is all one way, and shows a very serious impairment of the use of the left leg, and that the injury at times continues to cause severe pain; and, further, that the injury is likely to continue for a long period of time, and plaintiff's ultimate recovery is doubtful. In this state of the evidence we are not prepared to say that the damages assessed exceed a reasonable compensation for the injury.

The judgment is affirmed.

REYBURN and GOODE, JJ., concur.

JONES & OGLEBAY v. KANSAS CITY BOARD OF TRADE et al.

(Court of Appeals at Kansas City, Mo. April 6, 1903.)

LANDLORD AND TENANT—DURATION OF LEASE—ASSIGNABILITY—EFFECT OF PRIVILEGE OF RENEWAL.

1. A lease for one year, with an option to the lessee to renew from year to year for five years,

is, in effect, a lease for more than two years, so as to be assignable without the landlord's written consent, though Rev. St. 1899, § 4107, prohibits a tenant for a term not exceeding two years from assigning his term without such consent.

Appeal from Circuit Court, Jackson County; J. H. Slover, Judge.

Suit by George W. Jones and James H. Oglebay, constituting the firm of Jones & Oglebay, against the Kansas City Board of Trade and another. From the judgment, all parties appeal. Modified.

Robinson & Carkener, for plaintiffs. Trimble & Braley, for defendants.

BROADDUS, J. This suit was instituted on the 28th of June, 1898, against P. T. Hamm and others, officers of the Kansas City Board of Trade, at which time a temporary restraining order was made. On the 30th day of July of said year there was issued what was called a temporary injunction, which was modified on the 6th day of August following. The defendant trust company petitioned to be made a party to the proceedings, and filed its answer. On the 29th day of November a final decree was entered in the case, making the temporary injunction in part perpetual, from which all parties appealed.

As all the pertinent facts were before the Supreme Court in the case (173 Mo. 218, 73 S. W. 143) wherein John W. Moore et al. were plaintiffs and the Guardian Trust Company (formerly Missouri, Kansas & Texas Trust Company) and George W. Jones and James H. Oglebay were interpleaders, as a matter of convenience we have adopted the statement to be found in said opinion, as follows:

The controversy is this: Prior to May 31, 1898, the board of trade occupied a part of the Exchange Building, on Eighth and Wyandotte streets, of which Richard Gentry was the owner. Their relations became unpleasant, and the board of trade, and its members, as individuals, who had offices in the building, determined to move. The plaintiffs, Jones & Oglebay, owned a building on Missouri avenue and Walnut street, called "Temple Block," and the board of trade, on May 31, 1898, leased the building from Jones & Oglebay for one year from July 1, 1898, for a rental of \$16,000, with a privilege of renewal for five years. The lessors were to furnish free heat, water, light, and elevator and janitor service, and to retain the offices then occupied by them. The lessors were to change "the four storerooms on the first floor into one room in complete order for a trading room for the board of trade, to the satisfaction of the building committee of the second party, the portion of the ceiling over the trading hall corresponding with the open space above, the main entrance from the hall to the trading room to be between the two elevators." It was further stipulated: "The second parties shall have the privilege of underletting any portion of said premises during said term,

and at its own expense causing such changes, by way of partition, or otherwise, as it may deem proper, under the supervision of one of the first parties." The lease expressed to be "upon condition, however, that no personal liability of any kind is assumed or created upon the part of any officer, director or individual member of the said board of trade." Pursuant to the lease the lessors notified all the tenants then in Temple Block to vacate on July 1, 1898, and made the changes on the first floor above provided for. The board of trade appointed a committee to fix the rental of the rooms in the building (Temple Block) other than those intended to be used by it, and they were all assigned by lot to the members. The trust company, in June, 1898, acquired title to the Exchange Building from its former owner, Gentry, and at once set about the prevention of the board of trade and its members from leaving the Exchange Building, and accordingly, on June 22, 1898, the trust company made a written proposition to the board of trade that, if it would remain in the Exchange Building for a term of five years, the trust company would assume the Jones & Oglebay lease, and, in addition, would not only charge no rent for the use of the trading hall, or for the rooms used by the secretary of the board of trade, but would pay the board of trade a bonus of \$500 a month. Later, on the same day, the trust company further, in order to make sure that the trust company would meet the assumption of the \$16,000 rental of the Temple Block, proposed to allow the board of trade to collect the monthly rentals from the tenants in the Temple Block, and keep them until the end of the month, and, if the trust company did not pay the rent on the Temple Block within 24 hours after it was due, to allow the board of trade to apply the rents so collected to the payment of the rent due for said Temple Block. Afterwards, on June 23, 1898, the trust company further wrote to the board of trade, saying the proposition did not contemplate that all the members then occupying rooms in the Exchange Building should sign leases for five years, and further saying that the lease contemplated was to be without personal liability of the officers or members of the board of trade, and agreeing to rely upon the honor of the board of trade to keep its promises, "as Messrs. Jones & Oglebay relied upon to get their \$16,000 for a year, which will most certainly be paid by us, and thus relieve the board of trade and all its members from any obligation of honor or otherwise to the owners of the Temple Block." This proposition was submitted to the members of the board of trade on June 23, 1898, and was accepted by a majority vote of the members. Thereupon, on June 24, 1898, the trust company wrote Jones & Oglebay as follows: "Gentlemen: The undersigned having purchased the Exchange Building recently made a proposition to the Board of Trade for rental of portions of said building, and in said proposition agreed

to assume the lease which you had made to the Board of Trade for the Temple Block for one year from July 1, 1898. We would like to meet you with a view of ascertaining for what sum we can secure a cancellation of this lease, releasing the lessees from any liability to pay rent thereon. Or in the event that you would not care to negotiate or consider such a proposition, we will, of course, under our promise to the Board of Trade, be obliged to pay the rent and sublet the Temple Block and get whatever we can out of it. If you will kindly indicate a place and time where and when we can meet you and talk over this matter, we would very much like to have you do so. Missouri, Kansas & Texas Trust Company, by A. E. Stillwell, President." To this letter Jones & Oglebay never made any reply. The attorney of the board of trade then prepared a lease from the trust company to the board of trade, which was executed by the trust company, but while said attorney was reading it to the officers of the board of trade, and before it was executed by them, Jones & Oglebay, on June 28, 1898, got out an injunction against the board of trade, restraining it from assigning or transferring or subletting Temple Block, or any portion thereof, except the basement, to the trust company, or to any person other than a member of the board of trade, or to one engaged in the grain or like business, and also restraining the board from "making any order, passing any resolution, or making any contract which would prevent or tend to prevent the said association (or members thereof) from locating its trading hall and officers in and otherwise using and occupying plaintiff's said building (Temple Block)." The lease which said board of trade was restrained from executing contained the provisions covered by the propositions of the trust company. Those that related to and bound the trust company to assume the lease of Temple Block, and which gave the trust company any rights under that lease, were as follows:

"(4) First party assumes the contract made by the second party on the 31st day of May, 1898, with George W. Jones and James H. Oglebay for lease of Temple Block, and expressly agrees to pay to said Jones & Oglebay the rent therein provided said first party expressly waiving any and all questions as to the said contract to pay rent not being binding at law. First party further agrees to indemnify and hold harmless said board, and each and every officer and member thereof, from any loss, damage, costs, attorney's fees and expenses by reason of any failure to comply with said contract as to said Temple Block, and by reason of not moving to Temple Block or by reason of any litigation arising out of or in any wise connected with either of said matters. Provided, however, that in any suit or suits instituted by said Jones & Oglebay against the board, its officers or members, the first party shall be in due time advised thereof, and through its

attorneys shall be permitted to have the management and defense of said suits. The said first party shall pay the monthly rental on the Temple Block two days prior to its becoming due, and in default thereof the secretary of the board may collect sufficient of the rents of the Exchange Building to pay the same, and after making such payment the balance shall be turned over to the first party.

"(5) The second party further agrees either to assign to first party its said lease for the Temple Block, or to sublet to the first party, or to whomsoever it may designate, portions of said Temple Block as from time to time requested by the first party, and if sublet to assign all rent to the first party, provided, however, that the board of directors of the second party, or its secretary, shall first approve the desirability of the tenant and provided, further, that all persons now in said Temple Block shall be accepted as tenants if the first party so desires, it being understood that the first party shall agree and the first party does hereby agree to save the second party, its officers and members harmless from any and all liability or damages for making of any of said subleases. The first party further agrees to pay the secretary of the second party the sum of twenty-five dollars per month for looking into the question of the desirability of tenants so long as the lease for the Temple Block shall not be canceled by an agreement between Messrs. Jones & Oglebay and the Missouri, Kansas & Texas Trust Company, not exceeding, however, one year."

On the 1st of July, 1898, Jones & Oglebay wrote to the board of trade, saying that they had made the changes required by their lease in Temple Block, and that said building "is now vacant, and ready for occupancy by your association, and the full possession of the same and every part thereof except such rooms as were expressly excepted and reserved to us by the terms of said lease is hereby tendered to your association to be used and occupied by them for the purpose of such business as is usually carried on and transacted by your association and the members thereof. And we hereby demand that you take immediate possession of said building for said purposes in accordance with said contract." On the same day the board of trade replied to said letter as follows: "Your letter of July 1, 1898, received. The Board of Trade of Kansas City, Missouri, demands of you the possession and keys of the building known as the Temple Block, to be delivered to it pursuant to the terms of the written contract of date of May 31, 1898. The Board of Trade denies your right to make any conditional tender, or to change or alter the contract, or to limit any right of use given by it. Any failure on your part to comply with the terms of the contract will operate as a forfeiture thereof." On the same day Jones & Oglebay wrote to the board of

trade as follows: "Gentlemen: Replying to your letter of this date, will say that, inasmuch as under the terms of the contract between you and us, we are required to operate the elevator and furnish heat, light, janitor service, etc., and are also entitled to retain our offices in the building, we do not very well see how we could deliver to you the keys of the building, and, at the same time, comply with the terms of our contract. However, the keys to and possession of such portions of the building as you are entitled to the possession of, are ready for you at the building, and you can have the same by calling therefor; but the fact of our delivering to you the keys and possession of such portions of said building as you are entitled to under the terms of our contract must not be construed as a waiver, on our part, of our right to have your association occupy our building or of our rights in regard to any assignment or subletting of said building, or any portions thereof. Those are matters which, if we could not be able to agree in regard to them, must be settled by the courts. It is our intention to fully and fairly comply with the contract on our part, and if at any time you should be of the opinion that we are not thus complying with our contract, we would be very glad to have you call our attention to the matter and specify wherein our failure consists." Nothing more was done by either Jones & Oglebay or the board of trade looking towards the latter moving into Temple Block. On the 6th of August, 1898, the temporary injunction was amended so as to restrain the board of trade from making any assignment of the lease, and from making any subletting of any portion of Temple Block, excepting the basement, to any person not connected with the board of trade. On the 5th of November, 1898, the injunction was made perpetual, and the board of trade was enjoined from assigning or transferring the lease of Temple Block or the rights and privileges of the board of trade under the lease to the trust company, either directly or indirectly. But the court found the issues for the defendant "so far as they relate to the removal to and occupancy of said Temple Block by said board of trade." The board of trade appealed from this judgment, and it is represented to this court that the appeal is now pending in the Kansas City Court of Appeals.

This is the injunction proceeding alluded to in said opinion. The plaintiffs herein appealed from that part of said final decree which was for the defendant so far as it was sought to compel said board of trade to remove to and occupy said Temple Block. As the Supreme Court in said opinion holds that said board of trade, under the terms of the lease from plaintiffs, was not compelled to remove to and occupy said building, the question on plaintiff's appeal from said final decree has already been decided. And as the parties here are the same in fact as they

were in said other case, the question raised is res adjudicata. That part of the said decree is affirmed.

The defendant board of trade appealed from that part of said final decree enjoining it from assigning or transferring the lease to the Temple Block, or any of its rights or privileges under said lease, to the trust company, either directly or indirectly. As to whether the board of trade had the right to transfer its lease, the court expresses no opinion; but intimates that it was a doubtful question, because of the option given for five years, in addition to the one year specified. Under section 4107, Rev. St. 1899, a tenant for a term not exceeding two years is prohibited from assigning his term without the written consent of his landlord. The language of the lease, as to its duration, reads: "For a term of one year to begin on the first day of July, 1898, and to end on the 30th of June, 1899," and "the second party is to have the option of renewing the lease from year to year, which option may be exercised from year to year for five years from July 1, 1898." Upon principle this question falls within the rule applied in *Donovan v. Brewing Co.*, 92 Mo. App. 341, where it was held: "An option in the lessee of a lease for one year to extend the term to a greater length than one year transforms the contract into a lease for more than a year." Such being the law, it follows that the plaintiff was not entitled to the injunction restraining the board of trade from transferring its lease to the defendant trust company.

It therefore follows that the cause as to the defendant be reversed, and affirmed as to the plaintiff. All concur.

SHAREMAN v. ST. LOUIS TRANSIT CO.*

(Court of Appeals at St. Louis, Mo. Dec. 15, 1903.)

CARRIERS OF PASSENGERS—STREET RAILWAYS—PERSONAL INJURIES—COMPLAINT—SUFFICIENCY—AMENDMENT—CONTRIBUTORY NEGLIGENCE.

1. Where a complaint against a street railway company alleged that plaintiff's wife was injured in alighting from a street car "while said car was stopped, or slowed down so that its motion was imperceptible," the court properly permitted an amendment stating that the motion was "imperceptible to her," on an objection that it did not state a cause of action because the conductor was not negligent if the motion was imperceptible.

2. The complaint, having alleged that the car "stopped," was sufficient to permit evidence that the car stopped and suddenly started, thereby injuring plaintiff's wife, and therefore stated a cause of action, though it was uncertain as to whether plaintiff intended to count on an accident due to the starting of the car from a motionless state, or one due to the car reducing its speed instead of stopping.

3. Evidence that the car had stopped and then started again as plaintiff's wife was stepping off, but before she reached the street, was

not a variance as that was one form in which the matter was pleaded.

4. Plaintiff claimed that his wife was injured while alighting from defendant's street car by the negligent starting of the car, and defendant claimed that, after the car had stopped a reasonable time for passengers to alight, and had started forward, plaintiff's wife attempted to alight while the car was moving. Held, that a city ordinance that street car conductors should not permit ladies to leave a car while it was in motion did not justify an instruction that if, after plaintiff's wife so attempted to alight, the conductor could, by the exercise of reasonable care, have prevented her from alighting, and failed to do so, plaintiff might recover.

Appeal from St. Louis Circuit Court; Franklin Ferriss, Judge.

Action by Edward Shareman against the St. Louis Transit Company for injuries to plaintiff's wife while alighting from one of defendant's street cars. Judgment for plaintiff, and defendant appeals. Reversed.

Boyle, Priest & Lehman, for appellant. A. R. Taylor, for respondent.

Statement.

GOODE, J. While alighting from one of appellant's trolley cars, Hermina Shareman fell on the paved street, and was hurt. That accident is the foundation of this lawsuit. In which the plaintiff, as the husband of said Hermina Shareman, seeks to recover damages sustained by reason of the loss of his wife's services and society on account of the injuries she received and the expense of her medical treatment. According to the petition the wife boarded a car west of Grand avenue in St. Louis, intending to get off at the intersection of Broadway and Washington avenue. Instead of stopping at the east crossing of those streets, it is averred the car passed on and stopped or slowed down for her to alight at a point east of the crossing. The petition then proceeds: "That she, in obedience to said invitation, whilst said car was stopped or slowed down so that its motion was imperceptible, was proceeding to alight from said car when she was caused to be thrown from said car by its motion whilst she was in the act of stepping therefrom, and was thereby greatly and permanently injured upon her head, chest, body, and spine, and she also sustained a great and permanent shock to her nervous system, and was injured internally, and the bone of her forehead was crushed, and her sight injured. And the plaintiff avers that the defendant's servants in charge of said car were negligent in causing and suffering said car to be so in motion whilst his wife was so alighting from said car, which negligence directly contributed to cause said injuries to his said wife. And for another and further assignment of negligence the plaintiff avers that at the time of his wife's said injuries there was in force within the city of St. Louis an ordinance of said city by which it was provided that conductors of street cars should not permit women and children to leave street cars whilst the same

*Rehearing denied February 16, 1904.

were in motion. Yet the plaintiff avers that the conductor of said car was present at the time his wife was about to leave said car, and invited her to leave said car, and permitted her to do so whilst said car was in motion, which violation of said ordinance directly contributed to cause said injuries to his wife."

In an opening statement to the jury plaintiff's counsel said: "The evidence will be that she was a passenger on the car; that the car ran past its destination at Broadway and Washington avenue, and stopped about the east side of Nugent's—the building in which Nugent's place is. And it will also probably appear that they had a post there, and that that was one of their usual places to stop to discharge east-bound passengers from that car. Now, the evidence will show this: If we are precluded from introducing the wife, the evidence will show that the car did stop at this post; that while the car was stopped at that post the lady got up in her seat, and started to get off of the car. The car was one of that description in which there is both a side entrance and a rear entrance. She was leaving the car, as the evidence will be, by the side entrance. A gentleman who saw it and picked her up (rescued her from her position of peril and injury) was standing within a few feet of where this accident occurred, and saw it. The accident occurred about 9 o'clock at night. By him we will prove that the car stopped; that he saw the lady on the step; that he saw the conductor at or near her side; that while the lady was there on the step in the act of stepping off that the car started and threw her; that he went to her rescue."

Only one witness introduced by plaintiff testified concerning the facts of the accident. He swore that when the car stopped at the place where cars usually stop Mrs. Shareman started to alight; that she got as far as the lower step of the car; it started, and she fell on the street; that she attempted to alight from the middle exit, and the conductor was standing near the steps; that the starting of the car threw her. Over the objection of the defendant, plaintiff read and put in evidence this ordinance of the city of St. Louis: "Conductors shall not allow ladies or children to enter or leave cars while in motion." Several witnesses for the defendant swore the car stopped at the stopping post long enough for all passengers to get off who desired to do so, and then started; whereupon Mrs. Shareman arose from her seat, walked to the middle exit of the car, down the steps, and attempted to alight while the car was moving, and before she could be checked, though the conductor tried to check her, and called to her to wait until the car stopped, at the same time ringing the bell for a stop. The car was one with an entrance and steps in the center as well as at the ends.

For the plaintiff the court gave the follow-

ing instructions, besides one in regard to the measure of damages: "(1) If the jury find from the evidence that the car in question stopped east of Broadway for the purpose of allowing passengers to alight, and that while the car was so stopped the plaintiff's wife attempted to alight therefrom, and while she was in the act of alighting the servants of defendant negligently suffered said car to start forward, and thereby caused her to fall or be thrown to the ground and injured; or if you find from the evidence that plaintiff's wife was in the act of alighting from the car while it was in motion, and that the conductor, by a high degree of care, might have seen her in such act, and might have prevented her from alighting, and failed to do so, and that because of his failure to do so she fell or was thrown from the car; and if you find from the evidence that plaintiff's wife was injured by her fall, and that plaintiff thereby lost her services and companionship and incurred expense for medicine and medical attention and nursing—then the plaintiff is entitled to recover. (2) The court instructs the jury that under the ordinance read in evidence it was the duty of the conductor of defendant's car on which plaintiff's wife was a passenger to exercise ordinary care to prevent said car from being in motion while plaintiff's wife was alighting, and such care not to permit her to alight from said car while it was in motion. (3) There is no evidence in this case to the effect that when plaintiff's wife proceeded to alight from the car it was moving so slowly as to be imperceptible to her."

The defendant asked the following instruction: "If the jury find from the evidence that defendant's car stopped to let off passengers in front of Nugent's store or place of business on Washington avenue, and then started forward, and that after said car had so started forward and was moving away from said point, plaintiff's wife attempted to alight from said car while it was so moving away, and was thereby thrown and injured, then plaintiff cannot recover in this action, and your verdict will be for the defendant." The court refused to give it in that form, and instead gave it with this modifying paragraph appended: "Unless you find from the evidence that after she so attempted to alight the conductor could, by the exercise of a high degree of care, have prevented her from alighting or leaving said car, and failed to do so."

Defendant asked four instructions which the court refused: "(1) The jury are instructed that there is no evidence in this case from which they can find that plaintiff's wife fell or was thrown from defendant's car while the motion of the car was so slow as to be imperceptible to her, and that plaintiff cannot recover in this action upon the ground that plaintiff's wife was injured while attempting to alight from the car while it was so moving. If defendant's car had come to a

stop, and then started forward, and plaintiff's wife thereafter, and while said car was so moving, stepped or fell from the same, and was thereby injured, then plaintiff cannot recover in this action, and your verdict will be for defendant. (2) The jury are instructed that plaintiff cannot recover in this action because of any violation by defendant's servants of the ordinance read in evidence, if you find they did so violate said ordinance in permitting plaintiff's wife to alight from a moving car. (3) Plaintiff must recover, if at all, in this case, upon proof of the following facts, to wit: First. That defendant's car had come to a stop, and that while said car was so standing still plaintiff's wife attempted to alight therefrom. Second. And that while she was in the act of alighting the car started forward, and that the movement of the car in so starting forward threw or caused plaintiff's wife to fall from said car. And unless plaintiff has proven these facts by the greater weight of all the credible evidence in the case, your verdict must be for the defendant. (4) If the jury find from the evidence that defendant's car came to a stop in front of or near to Nugent's store, and there remained standing a sufficient length of time to permit passengers then and there desiring and offering to alight from said car to do so, and then started forward, and that thereafter, and while said car was so moving forward plaintiff's wife arose from her seat, and started to leave said car, and that defendant's servants in charge of said car then stopped the same in the shortest time and space possible with the means and appliances then at hand, then plaintiff cannot recover in this action and your verdict will be for the defendant."

Opinion.

1. An objection was made to the introduction of any evidence on the ground that the petition did not state facts sufficient to constitute a cause of action. The argument advanced by appellant's counsel in support of the objection is that, as the petition alleged the motion of the car was imperceptible when Mrs. Shareman started to get off, and alleged that she was thrown or fell from the car on account of its imperceptible motion, the conductor, if the motion was imperceptible, could not be aware of it, and therefore was not negligent. When this objection was preferred, plaintiff's counsel asked leave to amend so that the averment would read "imperceptible to her"—that is, to plaintiff's wife; and the amendment was allowed over the defendant's objection. As will be seen from the statement of the case given above, this averment of the imperceptible motion of the car was abandoned by plaintiff's counsel during the trial. In his opening statement to the jury said counsel informed them that the evidence would prove the car stopped, and that while Mrs. Shareman was on its steps, and in the act of stepping off, it start-

ed, and threw her. This theory was adopted in the instructions, and submitted, and at plaintiff's request one instruction was given which told the jury there was no evidence in the case that when plaintiff's wife was proceeding to alight from the car it was moving, but so slowly that its motion was imperceptible to her. The court properly permitted the amendment, which, however, from the course the evidence took, proved to be immaterial. There were certainly sufficient facts stated in the petition to let in evidence. There was an averment that the car stopped, or slowed down until its motion was imperceptible to Mrs. Shareman, and when she was in the act of stepping off its motion threw her, and hurt her. Of course, if the car stopped still, as the petition alleged, it must have started again while she was alighting, for its motion to throw her down; and, as stated, the case was tried for the plaintiff on that theory alone. The averment was good enough to permit the introduction of evidence to prove the car stopped and then suddenly started. We think, therefore, the petition stated a cause of action, without reference to specifications of negligence based on the city ordinance which forbids conductors to allow women and children to get on and off cars while they are in motion. But such a pleading is to be condemned; and this one would be if it had been attacked by motion for a more definite and specific averment in regard to the movement of the car and the cause of the fall. The averment, as it stands, leaves one in doubt whether the pleader intended to count on a fall due to the starting of the car from a motionless state while plaintiff's wife was alighting, or one due to the car crew simply reducing speed for her to alight, instead of stopping. Defendants in these tort cases are entitled to be clearly apprised by the petition of the negligent acts relied on as a cause of action. *Wills v. R. R.*, 44 Mo. App. 51; *Waldhier v. R. R.*, 71 Mo. 519; *Current v. R. R.*, 86 Mo. 62. But the defendant took no step to have the petition made definite.

2. It is contended there was a variance between the petition and the proof in that the petition counts on an accident arising from the plaintiff's wife leaving the car while it was in motion, and before it stopped, whereas the proof showed it had stopped and started again as she was stepping off, but before she reached the street. What is said above answers this argument, for the petition pleaded the matter in two ways, though the case was tried exclusively on the assumption that the car had come to a full stop, and threw Mrs. Shareman down by starting suddenly as she was getting off. No affidavit of surprise was filed in order to take advantage of the supposed variance, and certainly, in view of the statement of the petition that the car had stopped, and the testimony tending to prove that statement, it cannot be held there was a total failure of proof. The flaw

we find is not a variance between the pleading and the proof, but an indefinite petition.

3. In our opinion, this cause was submitted to the jury on mistaken and inconsistent theories of the law. The second instruction given for the plaintiff laid down the proposition that under the ordinance read in evidence it was the conductor's duty to exercise ordinary care to prevent the car from being in motion while the plaintiff's wife was alighting, and the same degree of care not to permit her to alight while it was in motion, whereas the appendix attached to the first instruction given for plaintiff and to one asked by the defendant required the conductor to exercise high care to prevent her from leaving the car while it was moving, and, in effect, charges that, unless he did, plaintiff ought to have a verdict. Those two instructions are in conflict as to the care required of the conductor. There is no proof that Mrs. Shareman started to leave the car while it was in slow motion, and was thrown off by an acceleration of its speed. The evidence countenances only two theories of the casualty. One arises on the testimony of the plaintiff, and is that, after the car had stopped, and while Mrs. Shareman was in the act of getting off, it was suddenly and carelessly started, she being thereby thrown on the street and hurt. That makes a clear case of liability against the defendant if she herself was exercising due care, and there was nothing in the testimony of the witness to attach fault to her if those were the facts. It was the duty of the car men not only to stop the car, but to hold it quiet long enough for her to alight safely by using ordinary activity and caution. *Straus v. R. R.*, 75 Mo. 185; *Hurt v. R. R.*, 94 Mo. 255, 7 S. W. 1, 4 Am. St. Rep. 374.

The other theory of the case arises on the testimony for the defendant. It is that after the car had stopped a sufficient interval for all passengers to alight who desired to do so, and had then started again, plaintiff's wife suddenly arose from her seat, walked to the middle door of the car, and without ringing for a stop stepped off, and was thrown down; but not by a sudden increase of speed. If she did that, she, and nobody else, was to blame for the accident. For aught the evidence shows to the contrary, she was a woman of full physical and mental capacity, and therefore of full legal responsibility. If the defendant's servants owed her a high care to prevent injury to her, she owed herself ordinary care to avoid injury. If she deliberately left the car while it was moving fast enough to make the act dangerous, her conduct was negligent, and bars recovery. In that event the case differs essentially from one where a passenger is hurried in his exit by the failure of a car either to stop, or stop long enough, at his destination, for him to get off safely by reasonable diligence. He is then, in a manner, forced to take a risk, and, if hurt, will not

be denied redress unless the risk taken is one which a man of common prudence would shun. *Kelly v. R. R.*, 70 Mo. 604. This car had already made a customary and reasonable pause to discharge passengers, and had started onward, if the testimony for the defendant is true—as, for the purpose of this hypothesis, we assume it to be. There was therefore no invitation, express or implied, to Mrs. Shareman to alight, nor any constraint on her to do so. If she attempted to alight while the car was moving away from its usual stopping place, the act was purely voluntary, and she must abide the consequences. In *Neville v. R. R.*, 158 Mo. 293, 59 S. W. 123, it was said that, if the plaintiff's son was killed while getting off a moving train, without direction or invitation of the defendant railway company or its servants, plaintiff had no case, as the deceased took the risk incident to such an act. In *Mason v. Railway*, 75 Mo. App. 1, which was an action for damages based on the ground that a railway train was not held long enough at a station to permit the plaintiff to alight safely, the plaintiff testified that he stepped on the station platform while the train was moving. Concerning this testimony it was said that, if he selected the time when and the place where to alight, he would be held to a greater degree of care, and to have assumed more of the responsibility of the situation, than if the conductor was present, and gave him a direction to alight; that, having selected his own time, the law will hold him to the exercise of due care in making the choice in view of the environment and other circumstances which induced him to jump from the moving train. In *Jackson v. Railroad*, 118 Mo. 199, 24 S. W. 192, plaintiff, a woman, had been injured in leaving a street car, and sued for damages. Her testimony, like that for the present plaintiff, was that while she was stepping from a still car it was started, and threw her off. The testimony for the company was that she stepped from the car while it was moving, and after it had left its stopping place. This instruction was given in behalf of the defendant: "If the plaintiff undertook to alight from the defendant's car while it was moving, then defendant could not have been guilty of any negligence charged, and your verdict must be for the defendant." The negligence charged in the petition was that the car started while she was in the act of getting off. Said instruction was attacked as erroneous, but was approved by the Supreme Court. That case throws much light on the true issues of the present case, and should be carefully studied. The instructions given by the trial court were held to embody the only theories which properly arose on the evidence therein, namely, whether the car stopped, and was suddenly started while Mrs. Jackson was alighting, or whether she attempted to alight while it was in motion. It will be seen by reading the opinion that the Supreme Court

insisted on holding the plaintiff fully accountable for her voluntary acts, instead of attaching blame to the conductor if he failed to intercept her, though he could have done so, which the instructions submitted by the plaintiff insisted was so far his duty that the railway company was liable if he neglected to intercept her. Defendant's counsel in the present case contended for doctrines approved in the Jackson Case, and submitted instructions which enunciated them; but the trial court refused those instructions. It is not necessarily a negligent act to leave a moving car; but a question of fact arises for the jury as to whether the act was negligent, and, if it was and proximately contributed to an injury received by the passenger, he had no case for damages.

The facts shown by the record did not call for an application of the last-chance rule, but the court applied it by the clause attached to an instruction requested by the defendant. Said instruction, as requested, was that, if the car stopped to let off passengers, and started forward, and after it had started and was moving away plaintiff's wife attempted to alight, and was thrown down and injured, he could not recover. That charge was precisely like one approved in the Jackson Case, *supra*. The qualification added by the court was, in effect, that plaintiff could not recover unless the jury found from the evidence the conductor, by the exercise of a high degree of care, could have prevented plaintiff's wife from leaving the car. The last-chance rule, so far as we know, has never been held to make a defendant liable unless he could have avoided injuring a negligent plaintiff after he knew, or might have known, the plaintiff was in danger from what he (the defendant) was doing—has never been applied to make a passive defendant liable because he could have prevented a plaintiff of full capacity from injuring himself. But this was what the instructions in this case did. Granting that the conductor could have hindered her from getting off (and the evidence to maintain that premise is weak), she herself, by the hypothesis of the requested instruction, and by the testimony for the defendant, was a voluntary and active agent in bringing on the accident until the very instant of her fall. She stepped from the moving car with her eyes open, with every means to know the risk she took, with nothing done by the defendant's servants to distract her attention or mislead her, and with no sudden peril to confuse her. Therefore her own conduct was the proximate and sole cause of the harmful

consequence. This case is, as to the point in hand, identical with *Weber v. R. R.*, 100 Mo. 194, 12 S. W. 804, 13 S. W. 587, 7 L. R. A. 819, 18 Am. St. Rep. 541, in which the law was declared as we have stated it. *Carroll v. Transit Co.*, 107 Mo. 653, 17 S. W. 889, is also apposite, as are sections 185, 186, and citations in 1 Thompson, *Negligence*. A person who is as conscious of the danger to which he is exposed as is the person whose conduct endangers him is at least as much bound to try to shun the danger, instead of going forward to meet it, as the other party is to try to avert it; otherwise defendants only are liable for negligent acts. *Moore v. R. R.* (Mo. Sup.) 75 S. W. 672; *Cooley, Torts* (2d Ed.) 812.

Whatever force may be allowed to the city ordinance in question, it cannot abrogate the rule of law that, when the negligence of a party proximately and directly causes or contributed to causing injury to him, he has no just claim for damages from another individual whose negligence also played some part in the affair. *Moore v. R. R.* (Mo. Sup.) 75 S. W. 672; *Hudson v. R. R.*, 101 Mo. 13, 14 S. W. 15; *Corcoran v. R. R.*, 105 Mo. 398, 16 S. W. 411, 24 Am. St. Rep. 394; *Weller v. R. R.*, 120 Mo. 635, 23 S. W. 1061, 25 S. W. 532; *Duncan v. R. R.*, 46 Mo. App. 198. The scope of the last-chance doctrine is to be found in the adjudicated precedents, which have already encroached on the doctrine of contributory negligence to the extent of constituting an exception to that doctrine as applied in some cases.

The judgment is reversed, and the cause remanded.

BLAND, P. J., and REYBURN, J., concur.

MONUMENTAL BRONZE CO. v. DOTY.

(Court of Appeals at St. Louis, Mo. March 3, 1903.)

Separate opinion. For majority opinion, see 73 S. W. 234.

REYBURN, J. As a general proposition, it seems to me that under the authority of *Gannon v. Gas Co.*, 145 Mo. 516, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505, we should be obliged to recognize the rule therein laid down that a peremptory instruction should not be given; but, under the peculiar facts in this case, I think the peremptory instruction may be warranted, and therefore agree to this opinion.

SMITH v. M. J. LAWLER & SON.

(Court of Appeals of Kentucky. Feb. 19, 1904.)

LIMITATIONS—STREET IMPROVEMENT—PROPORTION OF COST—ACTION BY CONTRACTOR.

1. Under Ky. St. 1903, § 2515, providing that an action on a statutory liability must be commenced within five years from the accrual of the cause of action, limitations commence to run against an action by a contractor on a street improvement apportionment warrant on its delivery to him.

Appeal from Circuit Court, Common Pleas Division, Jefferson County.

"Not to be officially reported."

Action by M. J. Lawler & Son against Rebecca Smith. From a judgment for plaintiffs, defendant appeals. Reversed.

Chatterson & Blitz, for appellant. Crawford & Krieger, for appellees.

BURNAM, C. J. On the 21st day of August, 1897, the board of public works of the city of Louisville made an order that William T. Smith should pay to M. J. Lawler & Son, contractors, \$36.10, as his proportion of the cost for improving Lucia avenue from the southwesterly line of the Bardstown Road to the northwesterly line of Vonbories avenue. On the 21st day of August, 1902, Lawler & Son instituted this action in the Jefferson circuit court against Rebecca and James Smith, in which they alleged that Wm. Smith was the owner and in possession of a lot of land fronting Lucia avenue, 60 feet, at the date of the apportionment warrant issued to them for improving the carriageway of Lucia avenue; that, subsequent to the issue of the apportionment warrant, W. T. Smith died intestate, leaving the defendant Rebecca Smith, his widow, and James Smith, his brother, his only surviving heirs at law—and asked that they be adjudged a lien upon the lot to secure the payment of the apportionment warrant, and for an enforcement of their lien. The defendant, Rebecca Smith, answered, denying that William T. Smith was ever the owner or in possession of the lot of land described in the petition, or that James Smith was his brother or heir at law, or that he ever had a brother by the name of James Smith, and alleged that the lot sought to be subjected to plaintiffs' claim belonged to her at the time mentioned in the petition, and was her property. On the 8th of November thereafter, the plaintiffs filed an amended petition, in which they alleged that the lot sought to be subjected to the payment of their claim had been assessed as the property of Wm. Smith, and the apportionment warrant issued against Wm. Smith, but that, as a matter of fact, they had discovered that it was at the time mentioned in the petition, and was then, the property of the defendant, Rebecca Smith, and prayed as in their original petition. The defendant, for answer to the amended petition, pleaded that more than five years had elapsed between the issue of the alleged warrant filed with the petition and the institution of this action for its col-

lection, and pleaded the lapse of time and statute of limitations in bar of recovery. Plaintiffs thereupon demurred to the plea of limitations, which was sustained; and, defendant declining to plead further, judgment was entered subjecting the property, and the defendant has appealed.

Section 2515 of the Kentucky Statutes of 1903 provides: "An action upon a liability created by statute, when no other time is fixed by the statute creating the liability, * * * should be commenced within five years next after the cause of action accrued." The first question, therefore, to be determined, is when appellees' cause of action accrued upon the apportionment warrant issued by the board of public works. In *Chiles v. Smith's Heirs*, 52 Ky. 460, it was held by this court that the rule in regard to the computation of time is that, "when the computation is to be made from an act done, the day on which the act was done must be included, because, since there is no fraction in a day, the act relates to the first moment of the day on which it was done. But when the computation is to be made from the day itself, and not from the act done, the day in which the act was done must be excluded." The rule announced in this case has since been adhered to in numerous decisions. See *Irwin v. Irwin*, 105 Ky. 632, 49 S. W. 432, and authorities there cited. Plaintiffs could have instituted suit for the collection of this warrant immediately upon its issue and delivery to them. It therefore follows that the five years from the accrual of his cause of action expired on the 20th day of August, 1902, the day preceding the institution of this suit. We are therefore of the opinion that the plea of the statute of limitations was an effectual bar against recovery in this proceeding. In view of our conclusion on this question, it is unnecessary to consider the other questions relied on by appellant to escape liability.

For reasons indicated, the judgment is reversed, and the cause remanded, with instruction to dismiss the petition.

BARDSTOWN & L. TURNPIKE CO. v. NELSON COUNTY.

(Court of Appeals of Kentucky. Feb. 19, 1904.)

TURNPIKE—PURCHASE BY COUNTY—CONSIDERATION FOR CONTRACT—BURDEN OF PROOF—PAYMENT OF INDEBTEDNESS—BOND ISSUE—EFFECT OF VOTE—ABANDONMENT—JUDGMENT—JURISDICTION OF FISCAL COURT—VALUATION OF PROPERTY—ADMISSIBILITY OF EVIDENCE—INSTRUCTIONS.

1. Where a turnpike company, suing a county on a contract for the purchase of its road, alleges as the consideration of the agreement the transfer of the road to the county, a plea of no consideration merely raises an issue as to the validity of the vote under which the county contracted. But does not inject an issue of fact, or shift from the plaintiff the burden of proving a consideration.

2. Const. § 157, prohibits a county from incurring a liability beyond the revenue of the cur-

rent year, unless by two-thirds of the votes cast at an election on that question. Ky. St. 1903, § 4748b, subsec. 9, relative to the purchase of turnpikes by counties, requires that a bond issue to pay therefor shall receive a two-thirds majority at an election on the question. A proposition to buy such a road received 1,370 affirmative votes, 563 being cast against it. A proposition for a bond issue submitted at the same time received only 828 votes, 612 being cast against it. *Held*, that the county had authority to incur an indebtedness for the purchase of the road beyond the revenue of the current year, but was not authorized to issue and sell bonds therefor.

3. Where the fiscal court of a county submitted a written proposition to a turnpike company to purchase its road, which the company accepted conditionally, but the county rejected the conditions, whereupon the company turned over the road to the county under the original proposition, there was an acceptance of such proposition, binding on the county.

4. Ky. St. 1903, § 4732, makes it the duty of the fiscal court of a county to take charge of a turnpike which the turnpike company has abandoned for four months; the failure to charge toll to be deemed an abandonment. A county contracted with a turnpike company for the purchase of its road, and the road was turned over to the county, and commissioners appointed in condemnation proceedings, pursuant to contract, to fix its value. Thereafter the county dismissed the proceedings, it having been more than four months since the road was turned over to it. *Held* not to constitute an abandonment, within section 4732.

5. Ky. St. 1903, § 1840, gives county fiscal courts jurisdiction to appropriate county funds, erect and repair public buildings, bridges, etc., regulate and control the fiscal affairs and property of the county, provide for the poor, provide a hospital, take care of the highways, and have jurisdiction of matters relating to taxes, etc. *Held*, that such a court had no jurisdiction to try a litigated question as to whether a turnpike company had abandoned its road, and its judgment that the company had done so was void.

6. Ky. St. 1903, § 4748b, subsec. 13, relative to the purchase of turnpikes by counties, makes it the duty of commissioners appointed under the act to view the road, and require the owners to produce books or other evidence showing receipts and expenditures on the portion sold, and the amount of net earnings of the owners for each year for six years, and to hear any other evidence conducing to show the value of the property to be taken, and to award the "actual value" of the property. A county contracted with a turnpike company to purchase its road, the value to be fixed in condemnation proceedings instituted by the county. Afterwards the county abandoned such proceedings, and the company sued for the value of the road. *Held* that, as the company could not sell to any person except the county, evidence as to the market value of the road was inadmissible, as was also evidence of the market value of the company's stock, and evidence that the marketable character of the road had been destroyed by marauders.

7. The market value of a turnpike is not a criterion of the actual value, which is the measure of the company's recovery in an action against a county under its contract for the purchase thereof.

8. In an action against a county on its contract to purchase a turnpike, an instruction that a vote in the county only authorized it to obtain the road by gift, lease, purchase, or contract, for the purpose of making the road free, is irrelevant.

9. In an action by a turnpike company against a county on its agreement to purchase the company's road, it appeared that for at least six years the company had paid 6 per cent. divi-

dends on its stock; that the right of way was 60 feet wide; the grade, 20 or 22 feet wide; metal, about 20 feet wide. The road was macadam, built of limestone rock so as to make a paving, and covered with broken rock and gravel from 4 to 6 inches. The road was built in 1832, and connected the largest city in the state with an enterprising county town; passing through a number of villages and a rich agricultural community. There were two expensive wooden bridges, with substantial stone abutments. The road cost over \$200,000. *Held*, that instructions permitting the jury to find that the road had no value were erroneous.

Appeal from Circuit Court, Nelson County.
"To be officially reported."

Action by the Bardstown & Louisville Turnpike Company against Nelson county. From a judgment granting insufficient relief, plaintiff appeals. Reversed.

Jno. A. Fulton, Fulton & Fulton, J. S. Kelley, and J. S. Barlow, for appellant. Nat W. Halstead, W. S. Pryor, C. O. McChord, Morgan Yewell, Eli H. Brown, Jr., and Robt L. Greene, for appellee.

O'REAR, J. Nelson county by vote in 1897 adopted the provisions of the statute known as the "Free Turnpike Act" (section 4748b, Ky. St. 1903). In the following March the owners of the Bardstown & Louisville Turnpike Road and Nelson county (the latter acting through its fiscal court) entered into a contract by which the county was to acquire that part of appellant's road in Nelson county (about 13 miles), and fixing the compensation to be paid by the county for the use of the road pending the fixing of its value by commissioners or a jury according to the provisions of the statute. The county was permitted to, and did, take charge of the road under that contract, and has continuously since used and maintained it as a public road by virtue of that agreement. On a former appeal (109 Ky. 800, 60 S. W. 862) it was held that the contract in question amounted to an agreement by the turnpike company to sell, and by the fiscal court to buy, the road; that the price was left to be determined in the condemnation proceedings which had been instituted by the county; and that for the use of the road until the price was thus fixed the county was to pay the turnpike company a sum equal to 6 per cent. per annum on the amount finally fixed as the value and price of the road. Instead of prosecuting the condemnation proceeding already instituted under the statute, and which, as was held on the last appeal, was the one the parties had in contemplation in entering into the contract, the county abandoned it. The commissioners had by their report fixed the value of the road at \$18,356. The condemnation proceeding was dismissed before the commissioners' report was acted on. The county claimed that the statute (subsection 15 of section 4748b) expressly provided that the county might, by paying the expenses incurred, abandon the condemnation proceedings begun by it. While that is true, it does not

at all follow that the county could abandon the contract made by it with the road owner. On the former appeal it was held that under the statute the county could acquire the turnpike road by contract, lease, purchase, or by condemnation, and that the paper exhibited in that suit was both a contract for purchase and lease. By it the county agreed—so it was held—to pay for the road, as purchase price, the sum to be fixed in the pending condemnation proceeding; and, as the county had wrongfully abandoned and dismissed that condemnation proceeding, an action would lie to recover the value of the road at the time it was taken under the contract; that such was the implied undertaking of that agreement. All the foregoing matters were settled on the former appeal between these two litigants. In this action to recover the value of the road, the county has attempted to relitigate those questions. But that cannot be done. They are *res adjudicata*. In addition, the county pleads as a defense that the contract attempted to be made between it and the road company was void because *ultra vires*. There was also a plea that the road had been abandoned by the company for more than six months, and had been taken charge of by the county on that account. There was also a plea of no consideration made by the county. A trial before a jury in the circuit court resulted in a verdict fixing the value of the road, as of the date when taken by the county, at \$5,000. This appeal by the road company raises the correctness of the jury's verdict, and of the instructions given the jury by the trial court, as well as its rulings in admitting and rejecting evidence.

Inasmuch as appellant's petition sets out the consideration of the agreement sued on, to wit, the transfer of the 18 miles of road to the county by the company, the plea of no consideration simply raises the validity of the vote under which the contract was entered into. As those matters were fully set forth in the petition, their sufficiency was as well presented by the demurrer to the petition as by the plea of no consideration. Under the pleadings as formed, this plea was really only the pleader's conclusion of the legal effect of the contract, under appellee's version of the vote by which it was authorized. It neither shifted the burden of proof, nor presented an issue of fact in the case. *Chaplin & Bloomfield T. P. Road Co. v. Nelson Co. (Ky.)* 77 S. W. 377.

Every writing evidencing an indebtedness imports a consideration, under our statute (section 470, Ky. St. 1903). *Andrews v. Hayden's Adm'r*, 88 Ky. 455, 11 S. W. 428. A petition upon such writing, where the consideration is not named in it, need not aver the consideration. If the defendant plead no consideration, he would have the burden of proof. But where the writing states its consideration, and the petition also declares upon it, if denied, the burden of proving it is

upon the plaintiff. And that is so whether the form of the denial is a traverse or an affirmative denial. The trial court should have awarded the burden in this case to appellant.

When the proposition was submitted to the voters of Nelson county whether they would adopt free turnpike and gravel roads, there was also submitted the question whether they were in favor of issuing bonds to pay for the roads. The first proposition received 1,370 votes in the affirmative, and 563 against it. But on the second proposition there were cast only 826 votes in favor of it, and 612 against it. From this it is argued that no authority was given to incur an indebtedness to be paid out of the revenues of future years; that section 157 of the Constitution prohibits the incurring of a liability by a county beyond the revenues of the year in which it is incurred, unless the proposition is submitted to a vote of the people of the county, and receives in its favor two-thirds of the votes cast on that question. When the voters of Nelson county, by 1,370 votes to 563, voted to acquire the turnpike roads, that necessarily involved the incurring of such indebtedness as might be required to pay for them. Merely voting for free turnpikes could not make them free. The voters must have known that they would have to pay for the roads, and their value was such that that could not possibly be done out of the revenues of any one year. The vote in favor of free turnpikes would be meaningless unless it was construed to mean that, if it prevailed by the constitutional majority, the necessary indebtedness was also provided for, in order to carry the vote into effect. That is the precise point decided in *Whaley v. Commonwealth*, for the Use, etc., 110 Ky. 154, 61 S. W. 35. But in this case there is this additional fact, not in the *Whaley* case: The bond question was also submitted at the same time, and failed of the two-thirds majority required by subsection 9 of section 4748b, Ky. St. 1903. This cannot mean, though, that 612 votes could annul 1,370 votes in favor of acquiring all the roads at once. Assuming that these voters knew the effect of their action, and intended it, the situation is this: By more than the constitutional majority the voters of the county decided to acquire all the turnpike roads in the county, and to make them free to all travel; and they, by virtue of that majority, invested the fiscal court with the power to incur an indebtedness beyond the revenues of the current year, in order to carry the will of the voters into effect. But at the same time the voters refused to issue and sell bonds on the public market to meet the indebtedness. They seemed to prefer that the county should arrange to carry this debt by its notes or contracts, and not by bonds. A vote to incur an indebtedness, and a vote to issue and sell bonds to meet it, are not necessarily the same thing. We are of opinion that the county was authorized by the vote to incur

the indebtedness, but it could not issue and sell bonds on the market, as provided in subsection 9 of the statute (section 4748b). Counsel for appellee cite the case of *Maysville & Lexington, etc., Co. v. Wiggins* (Ky.) 47 S. W. 434, as sustaining a contrary doctrine. But the fact is overlooked that that case is discredited on that point, and declared not to be authority, in *Whaley v. Commonwealth*, supra.

The proposition submitted to the turnpike company by the fiscal court, which was in writing, was accepted by the company, but it added certain conditions to its acceptance. The county, by a written order, rejected the conditions. It is now argued that a proposition cannot be accepted conditionally, so as to impose them upon the other party, and that such an acceptance is no acceptance. Admitting this to be so, yet, in this matter, when the county rejected the conditions imposed by the company, the latter turned over to the county the possession of the road under the original proposition, which was an abandonment of the condition which it had sought to impose, and left the original proposition accepted, without other conditions than were contained in it.

Section 4732, Ky. St. 1903, provides: "When any turnpike company abandons its road and ceases to charge toll thereon, it shall be the duty of the fiscal court in the county in which any such road lies to take charge and control of same, and keep it in a safe and proper condition for public travel, and alter or discontinue same as other public roads. The failure on the part of any turnpike company for the period of four months to keep its road in a condition safe for public travel, and their failure to charge toll thereon for such length of time, shall be deemed and held to be an abandonment within the meaning of this section." After the execution of the contract first named, and after the commissioners appointed in the proceeding to condemn appellant's road as a free turnpike had reported, but before the report was acted on, the fiscal court decided to abandon the proceeding under section 15 of the act (section 4748b). It therefore dismissed the condemnation proceedings in the county court. It had been more than four months since the turnpike company had turned over the road to the county, and had failed to collect tolls on it, and had likewise during that time failed to keep the road in repair. Assuming that the county's contract with the road company was not binding, and, indeed, had not been accepted, for the reasons above stated, the fiscal court caused a notice to be served upon the road company to show cause before that court on a day named why the fiscal court should not take charge of the turnpike in question as an abandoned turnpike, under section 4732 of the Statutes, above quoted. The company resisted the motion, but the fiscal court adjudged its defense insufficient, and declared and adjudged the

road an abandoned road, and ordered it to be taken in charge and kept up as a county road. The turnpike company prayed and was granted an appeal to the circuit court from that judgment, but never prosecuted it. Now the county pleads that proceeding in bar of this action as an estoppel by judgment. This seems to be the principal contention made in the brief for appellee. We are of opinion that the matter is not a good estoppel. In the first place, there was no abandonment by the turnpike company, in any sense of the word; and, in the next place, if there was a question about that, the fiscal court was utterly without jurisdiction to try the title to the property, or to adjudge an abandonment or forfeiture. The Constitution does not define the jurisdiction of the fiscal courts. But section 1840 of the Statutes does. In no event is it authorized to try any litigated question, or to adjudge the rights to property. Its attempted proceeding was a nullity. Its judgment was void.

On the trial of the case a number of witnesses introduced by the county testified that, in their opinion, the road was valueless. On cross-examination they gave as their reason for this that tollgate raiders—a species of felons who in the nighttime went armed and in bands, destroying the tollgates and terrorizing the gate keepers—had by their action made the property so undesirable as a marketable property that it could not be sold. Therefore they thought it had no market value. Again, some thought, as the people of the county had voted for free turnpikes, that meant that all toll roads must be relinquished, and that destroyed their future value. Others yet suggested that the effect of these matters, and of the free-turnpike sentiment, took away all market value from the stock of the turnpike companies; that investors would no longer buy it. The only value of that class of evidence was to show that the witnesses giving it were utterly incompetent to judge of the matter about which they were attempting to testify—the actual value of the turnpike road. It was the duty of the county to have protected the gates and property of the road company from the depredations of the marauders. If it failed to do it, and if their strength overcame that of the owners temporarily, that fact should not, and in law does not, detract in the least from the actual value of the properties, in the condemnation proceedings by the county. Nor has the market value of the road anything to do with the question. There was no market value, and, from the very nature of things, could not be. Under the law, the road company could not sell its road at all, except to the county. There was but one purchaser in existence. Manifestly, then, the criterion of a market value could have no application. Where a commodity or species of property can be sold, and there is a market for it, with opportunity for any number of bidders, and where such sales are made, it

is thought that condition affords the best test of value, because, by reason of the competitive bidding in a free and open market, the value so established is most likely to be the actual value of the thing.

Nor did the market value of the stock enter into the question. The stock was not being condemned. The company may have been overcapitalized, or may have paid unnecessarily large salaries to useless officers, all of which would have affected the market value of this stock, and yet have had no just effect whatever upon the value of its road. While the value of the road would likely have affected the value of the stock, the market value of the stock could not possibly have affected the actual value of the road, except to show its dividend-paying capacity.

The statute governing condemnation proceedings in the county court, as to how the value of the road was to be ascertained, should have been applied in the circuit court. Section 13 of the act regulates that. These are declared to be probative evidence: (1) A view of the road; (2) the books and other evidence showing receipts and expenditures on the part of the road to be sold, and showing net earnings for past six years; and (3) "any other evidence conducing to show the value of the property sought to be taken." The commissioners are then required, from all that evidence, to "award to the owner or owners thereof, the actual value of the property taken." This provision of the statutes speaks of proceedings before the commissioners appointed to find the value of the property to be taken. It must be remembered that in this case, because appellee, Nelson county, wrongfully dismissed its proceedings in the county court, the circuit court, as the only court of general original jurisdiction, is undertaking to carry into effect the original contract between these parties. Besides, that section and provision is the legislative test of value. In the trial of a similar case before a chancellor, without a jury, it was said that it applied. *Richmond, etc., T. P. R. Co. v. Madison County Fiscal Court (Ky.)* 70 S. W. 1044.

In this connection it is well to notice the instructions of the court guiding the jury to a verdict upon the value of this property. The instructions given were as follows:

Instruction "r": "The court instructs the jury that they should find for the plaintiff the actual value, from the evidence, of its road in controversy—being that portion of plaintiff's road between Bardstown and the Spencer county line, including bridges, in the condition in which it was on March 7, 1898—unless they shall believe from the evidence said property was of no value on said date."

Instruction "s": "By 'actual value' is meant such price or value as could have been obtained at a fair, voluntary sale."

Instruction "t": "If they believe from the evidence that the property in controversy

was of no value March 7, 1898, they should find for defendant."

Instruction "u": "The vote in Nelson county November 7, 1897, only authorized said county to obtain the turnpike road in said county, by gift, lease, purchase or contract, for the purpose of making said road free."

Instruction "M": "The court instructs the jury that they are not authorized to consider any failure or cessation of plaintiff to collect tolls at its gates, which they may believe from the evidence was caused by the acts of mobs and tollgate raiders, prior to March 7, 1898, as an abandonment of its road or franchise privileges."

Instruction "N": "The court instructs the jury that the plaintiff was not required to expend any other portion of its tolls and revenues in the repair and maintenance of its road than was required to keep its road and bridges in a fit condition for public travel, and, if the receipts of the road were more than sufficient to so keep it, it was the duty of plaintiff company to declare dividends, and pay the surplus earnings and profits each year to the stockholders."

There should have been omitted from the first instruction the last sentence—"unless they shall believe from the evidence said property was of no value on said date."

Instruction "s" and instruction "t" should have been omitted; nor do we see any occasion for instruction "u."

It is true, certain witnesses, basing their opinions upon erroneous bases, as has been shown, stated that the road was valueless. But that could not have been so in this case. It was a manifest fact from the record, and one of which the court was bound to take notice, that property of this character and quantity had some value. It had for many years—certainly for the six years previous to its being taken—paid dividends to its stockholders on a basis of 6 per cent. per annum on the valuation of about \$23,000 for the 13 miles of road in suit. The right of way was 60 feet wide. The road was built about 1832. The grade was 20 or 22 feet wide; metal, about 20 feet wide. The road was a macadam. The base was built of limestone rock set on edge, 6 inches deep, making what is known as paving. This was covered or napped with small, broken rock and gravel, 4 to 6 inches deep. The section of country traversed by the road was a rich agricultural community. The road connected the largest city in the state—only about 80 miles distant—with an enterprising and thrifty county town, passing through a number of villages. Two expensive covered wooden bridges, with substantial stone abutments—the bridges about 180 feet long—were a part of the road in this county. The road is a historic one. It was one of the first attempts of the commonwealth at internal improvements. It was projected and built before the introduction of steam railroads, and was

expected to be an interstate thoroughfare. It cost over \$200,000 to build it, of which the state of Kentucky took in stock \$100,000. See Collins' History of Kentucky, vol. 1, p. 541. The road was in good condition when taken by the county—a dividend-paying investment to its stockholders. The country it traversed, and the cities it afforded a highway between, had grown considerably, and are yet growing, in population and commercial importance; and the use of the road in the future as a highway must necessarily have been increased, and therefore been more profitable to its owners. To say, or to submit whether, such property was without value, is utterly unjustifiable. The error of the trial court must have been based upon the theory of market value referred to in instruction "a." But even if it had no market value, yet it had a very substantial value to its owner. It is not material, under the Constitution, whether the citizens' property had a market value or not—whether there is such general demand for it as to create a market—if the state or public need it and proposes to take it for public use, they must pay for it; must make the owner whole; must give him in money an equivalent of that value to him, which has been taken for the public. If the thing taken has a market value, then that value is the thing to be restored, for he can go into the market and get the equivalent of what he has been compelled to yield to the public. But if it has not a market value, nevertheless he must be compensated for its actual value to him—in this case to be ascertained in the manner pointed out by the statute. The finding of the jury of \$5,000 as the value of this 13 miles of road was flagrantly against the evidence. The court erred in placing the burden of proof. The instructions were erroneous, as indicated. The admission of evidence may be regulated by what has been said.

The judgment is reversed, and cause remanded for a new trial consistent herewith. The judgment of the circuit court should add 6 per cent. per annum from March 7, 1898, to whatever sum is found and adjudged to be the value of the road, for the use of the road under the contract since that date.

NELSON COUNTY v. BARDSTOWN & L. TURNPIKE CO.

(Court of Appeals of Kentucky. Feb. 19, 1904.)
APPEAL—FINAL ORDER—REFUSAL OF JUDGMENT NON OBSTANTE VEREDICTO.

1. An order refusing to enter a judgment for defendant on the pleadings notwithstanding a verdict for plaintiff is not such a final order as will sustain an appeal.

Appeal from Circuit Court, Nelson County.
"Not to be officially reported."

Action by the Bardstown & Louisville Turnpike Company against Nelson county. Judgment for plaintiff, and defendant appeals. Dismissed.

Nat W. Halstead, C. C. McChord, W. S. Pryor, Morgan Yewell, Eli H. Brown, Jr., and Robt. L. Greene, for appellant. Jno. A. Fulton, J. S. Kelly, and G. S. & J. A. Fulton, for appellee.

O'REAR, J. We have this day decided the appeal of Bardstown & Louisville Turnpike Co. v. Nelson County, 78 S. W. 851. In that case, after the verdict for the turnpike company, the appellant here moved the court for a judgment non obstante veredicto. The motion was overruled, and from that action this appeal is prosecuted. The motion seems to be based upon the theory that the pleadings showed that the county had not the power, under the vote for free turnpikes, to enter into the contract for the purchase of the road; also that the plea of estoppel by judgment discussed in the other opinion was a bar to this action. Those matters are disposed of adversely to appellant's contention. The order refusing to enter a judgment for the defendant upon the pleadings notwithstanding a verdict for the plaintiff is not such a final order as will sustain an appeal.

This appeal by Nelson county is therefore dismissed.

BISHOP v. MATNEY.

(Court of Appeals of Kentucky. Feb. 19, 1904.)

COURT OF APPEALS—JURISDICTION—ACTION INVOLVING TITLE TO LAND—PERSONAL PROPERTY—TITLE OF INTESTATE—NOTES—CANCELLATION—VOID CONSIDERATION.

1. An action to enforce a lien on real estate is an action involving the title to real estate, and the Court of Appeals has jurisdiction of an appeal therein, irrespective of value of the matter in controversy.

2. The title to personal property, including choses in action, of an intestate, passes to the administrator, and the heir at law has no right to collect or dispose of the same.

3. An agreement by which a note is transferred to the payor, to be canceled, in consideration of the compounding of a felony, is void.

Appeal from Circuit Court, Pike County.

"Not to be officially reported."

Action by W. E. Bishop, administrator, etc., against Nelson Matney. From a judgment for defendant, plaintiff appeals. Reversed.

Roscoe Vanover, for appellant. J. M. Roberson, for appellee.

O'REAR, J. In this suit, to enforce a purchase-money lien of less than \$200 upon a tract of land, the judgment denied the plaintiff any relief; upholding the defendant's plea of payment.

It is first contended on this appeal that this court has not jurisdiction of the case, because the amount in controversy, exclusive of interest and costs, is less than \$200. Where the action seeks to enforce a lien upon real estate, this court uniformly holds that it is

¶ 2. See Descent and Distribution, vol. 14, Cent. Dig. §§ 252, 253.

an action involving the title to real estate, and therefore this court has jurisdiction of the appeal, without regard to the amount or value of the matter in controversy.

The plea of payment was supported only by this proof: The note sued on was executed to William Bishop, who is now dead. Before an administrator had been appointed for his estate, he having died intestate, one of his sons (Andy Bishop) attempted to transfer the note to the payor (appellee) in consideration of the compounding of a felony. The plea of payment was not sustained. In the first place, the title to personal property, including choses in action, of one dying intestate, passes to the administrator. The heir at law has not the right to collect the chose or dispose of it. In the second place, the consideration shown for the attempted cancellation of the note was vicious. The agreement was void.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent herewith.

DOWELL et al. v. WORKMAN et al.

(Court of Appeals of Kentucky. Feb. 18, 1904.)

WILLS—CONSTRUCTION—AMOUNT OF WIDOW'S INTEREST.

1. By item 3 of a will, the testator, after giving to his wife certain items of personal property, some of which were to be charged to her at specified prices, declared that he intended their antenuptial contract to remain in full force, and to be supplemented by the amount she would receive under the will. By item 12 he bequeathed to his seven children each one-eighth of his estate, and to his wife the other eighth. He then designated the amount of advancements to the children, and in the same connection provided that his wife should be charged with \$1,608, as the total amount of his estimate, at the date of the will, of the value of the antenuptial contract, added to the sums charged to her in item 3. Concluding, he said that, to produce equality in dividing his estate, the amounts charged to his children and his wife should be treated as advancements, under Ky. St. 1903, § 1407, and, explaining further, said that the amount each devisee received must be regarded as part of the one-eighth each was to receive, and that each was to receive one-eighth of his estate, including the advancements theretofore mentioned. *Held*, that he intended to supplement the antenuptial contract by giving his wife one-eighth of his estate, less the amount due on such contract, which would be more than she would be entitled to thereunder, and not to give her one-eighth regardless of the amount due her under the contract.

Appeal from Circuit Court, Green County.
"Not to be officially reported."

Action between Annie Workman and others and Luella A. Dowell and others, involving the construction of a will. From a judgment construing the same, the latter appeal. Reversed.

Noggle & Graham and Eugene Hubbard, for appellants. B. W. Penick, for appellee Annie Workman.

PAYNTER, J. This appeal involves the interpretation of the will of A. K. Workman,

deceased. The controversy is as to the meaning of items 3 and 12, which read as follows:

Item 3. "To my beloved wife, Annie Workman, I will and bequeath my buggy horse, which I call Celam, which is to be charged to her for the purpose hereinafter mentioned at the price of ninety dollars; also my buggy and buggy harness which are to be charged to her at the price of twenty-five dollars; also my jersey cow named 'Patsey' which is to be charged to her at the price of thirty-five dollars; also my white-faced cow named 'Bally' which is to be charged to her at the price of thirty-five dollars; also one share in the capital stock of the Greensburg Deposit Bank, which is to be charged to her at the price of one hundred dollars; also one twenty-dollar gold coin, which coin has engraved on the eagle side the words: 'United States of America Twenty Dollars;' on the reverse side of said coin is the head of 'Liberty,' and the date '1861,' which coin is to be charged to her at the price of twenty dollars; also one large arm cushion chair with rollers and adjustable back, being the chair which I purchased of W. E. Ward which is to be charged to her at the price of three dollars; also thirty barrels of corn which is not to be charged to her at all; I also will and desire that my beloved wife and her three infant children, Delia L. Workman, Mary F. Workman and Ruth Workman, live with my two sons Demmon K. Workman and William Robert Workman on my Home Place on Big Russell Creek in Green county, Kentucky, until the 25th day of December, 1906; and it is my desire that my said wife, her three infant children and my said two sons, Demmon K. Workman and William Robert Workman, live together on said farm and enjoy all the rights and privileges incident to said farm and necessary to render their home life on said farm pleasant and comfortable; that my said wife and two sons jointly run and cultivate said farm for their mutual benefit as aforesaid and that at the end of each year, my said wife shall receive one-third of the net proceeds of said farm and my two sons one-third each of said net proceeds: but in the event my said wife does not desire to reside with my said sons on said farm, I still desire her to have one-third of the net rents and profits of said farm. In making this will, it is not my intention to change, cancel, modify or annul in any way whatever the antenuptial contract, entered into between me and Annie Moss, now Annie Workman, on October 30th, 1893, but the same shall remain in full force and effect; it is simply my intention to reward her kindness and devotion to me by supplementing the amount secured to her by said antenuptial contract with the additional amount she will receive under the provisions of this will; but in the event, she renounces the provisions of the will, I desire that said contract shall regu-

late and control the marital rights existing between her and me and my estate."

Item 12. "It is my desire and I so will and bequeath that each of my children, to wit: Luella A. Dowell, Effie E. Buckner, Demmon K. Workman, William Robert Workman, Della L. Workman, Mary F. Workman and Ruth Workman, have and receive each one-eighth part of my estate, and that my wife receive the other eighth part of my estate; but that Luella A. Dowell be charged with nine hundred and forty dollars; that Effie E. Buckner be charged with two hundred and fifteen dollars; that Demmon K. Workman be charged with two thousand and sixty-eight dollars; that William Robert Workman be charged with two thousand one hundred and thirty-nine dollars; that Della L. Workman be charged with one hundred dollars; that Mary F. Workman be charged with one hundred dollars, and that Ruth Workman be charged with two hundred dollars; and that my said wife be charged with one thousand six hundred and eight dollars; these amounts thus charged to my children being the value of the property heretofore devised and the advancements heretofore mentioned in the various items of this will; and the amount charged to my wife being the actual value of her interest in the two thousand dollars as secured to her by the antenuptial contract entered into by and between my wife and me on the 30th day of October, 1893, which actual value of her interest in said contract being estimated by me at the date of this will at thirteen hundred dollars and the value of property bequeathed to my said wife in Item 3rd of this will being three hundred and eight dollars; the two amounts added together making sixteen hundred and eight dollars; that in order to produce equality in the division of my estate, the above amounts shall be treated in the same manner as advancements are treated under section 1407 of Kentucky Statutes [1903]; that is, the amount that each of the devisees receives as above stated, must be regarded as a part of the one-eighth that such devisee is to receive under this will; and that each devisee is to receive one-eighth of my entire estate including the property, bank stock, money and advancements heretofore mentioned."

The testator, in item 8, said that it was his intention to supplement "the amount secured to her by said antenuptial contract with the additional amounts she will receive under the provisions of this will." By item 12 he bequeathed to his seven children each one-eighth of his estate, and to his wife, Annie Workman, the other eighth part of it. After doing this, he designated the amount with which each child is to be charged as an advancement. And in the same connection he provides that his wife is to be charged with \$1,608, "actual value of her interest in the two thousand dollars as secured to her by the antenuptial contract * * * being estimated by me at the date of this will at

thirteen hundred dollars, and the value of the property bequeathed to my said wife in Item 3rd being three hundred dollars; the amounts added together making sixteen hundred and eight dollars." The testator says, to produce equality in the division of his estate, the amounts which he charges to his children and his wife shall be treated as advancements as under section 1407, Ky. St. 1903. The testator, fearing that his will might be misunderstood, further explains his meaning by saying that the amount that each of the devisees receives "must be regarded as part of the one-eighth that such devisee is to receive under this will; and that each devisee is to receive one-eighth of my entire estate, including the property, bank stock, money and advancements heretofore mentioned." It seems to us that we cannot employ language which would make the intention of the testator plainer than was done by the language used by him. His evident purpose was to respect the antenuptial contract, and to supplement it with one-eighth of his estate, less the amount due on such contract. He did not intend to give his wife one-eighth of his estate, regardless of the amount due her under the antenuptial contract. He wanted to give her a child's part, but thought proper, in giving her the one-eighth of his estate, that the amount which she was to receive under the antenuptial contract should be estimated as part of his estate, the same as should be the advancements with which he charged his children. While he gave her one-eighth of his estate, he prescribed the rule by which the amount of his estate should be ascertained, and which required the amount due his wife under the antenuptial contract to be estimated as part of it. If he had not so intended, there was no occasion for making any reference in item 12 to the amount due her under the antenuptial contract. The explanation which he makes in that item of his will shows what part of his estate was given as a supplement to the amount due under the antenuptial contract. The amount which the widow receives under the will is much greater than that she would have received under the antenuptial contract, and that excess is the supplementary amount referred to in the third item of the will.

The judgment is reversed for proceedings consistent with this opinion.

CORNETT et al. v. COMMONWEALTH.
(Court of Appeals of Kentucky. Feb. 18, 1904.)
LIQUOR LAW—BOND NOT TO VIOLATE—
VALIDITY.

1. A bond required of one by the court, conditioned that he shall not sell liquor contrary to the prohibitory law is void; there being no statute authorizing the court to put one under bond, except Cr. Code Prac. §§ 382, 391, authorizing it to put one under bond not to commit offenses amounting to a breach of the peace or a felony.

Appeal from Circuit Court, Leslie County.
"Not to be officially reported."

Action by the commonwealth against James H. Cornett and others. Judgment for plaintiff. Defendants appeal. Reversed.

Cook & Jones, for appellants.

HOBSON, J. On March 26, 1902, James H. Cornett being in custody, and required by the Leslie circuit court to give bond in the sum of \$500 to keep the peace and be of good behavior to all the citizens of the commonwealth for the period of one year from that date, H. H. Hensley and A. B. Asher appeared in open court and entered into a bond to the commonwealth of Kentucky, conditioned that, for the period of twelve months, Cornett would keep the peace, and be of good behavior to all persons of the commonwealth, and that during this period he would not be guilty of any offense involving a breach of the peace, or of any felony, nor engage in the unlawful sale of spirituous, vinous, or malt liquors, directly or indirectly, nor aid any one thus offending, nor permit same to be sold on his premises, and, if he failed to perform any of these conditions, they would pay to the commonwealth \$500. At the June term, 1902, Cornett was indicted for selling spirituous, vinous, and malt liquors to Hiram Begley and A. B. Couch in June of that year, contrary to the local prohibitory law in force in the counties of Bell, Harlan, Perry, and Leslie, approved February 9, 1884 (1 Acts 1883-84, p. 214, c. 136). He was tried on this indictment at the March term, 1903, and convicted. Thereupon this proceeding was instituted on the bond referred to against his sureties. They demurred to the petition. Their demurrer was overruled. They then filed an answer denying that Cornett had sold any whisky in Leslie county to Begley or Couch. The court sustained a demurrer to their answer, and gave judgment against them. From this judgment they appeal.

By section 382 of the Criminal Code of Practice, if the defendant has threatened to commit an offense against the person or property of another, and there are reasonable grounds to fear the commission of the offense threatened, or if he is about to commit violence endangering human life, or is about to commit an offense amounting to a felony, and there are reasonable grounds for apprehending such violence or felony, the defendant may be required to give surety to keep the peace or for his good behavior. By section 391, a judicial conviction of the defendant for an offense involving a breach of the peace or for a felony within the time specified in the bond is a breach of the bond. Under these provisions, it has been held that a conviction of the defendant of an offense not amounting to felony, and not involving a breach of the peace, is not a breach of the bond. *Rankin v. Commonwealth*, 72 Ky. 553; *Commonwealth v. Mahoney*, 2 Ky. Law Rep. 314. The conviction, therefore, for selling spirituous, vinous, and malt liquors in violation of the local prohibitory law, was not a breach of the bond.

There is nothing in the Criminal Code of Practice authorizing the court to put the defendant under bond, except the provisions of sections 382 and 391, above referred to, and these do not refer to offenses not amounting to a breach of the peace or to a felony. We have examined the local prohibitory act above referred to (see 1 Acts 1883-84, p. 214, c. 136), and the act amendatory thereof (see 3 Acts 1887-88, p. 374, c. 1183), and find nothing in them authorizing such a bond to be taken. We have been referred to no statute giving the court power to require the execution of a bond of this character. The act of March, 1902, had not taken effect when this proceeding was had. In the absence of some statutory authority, the court was without power to take the bond, in so far as it provided as to the sale of spirituous, vinous, and malt liquors, and the bond was, to this extent, without consideration and void.

The judgment appealed from is therefore reversed, and the cause remanded, with directions to dismiss the proceeding.

CINCINNATI, N. O. & T. P. R. CO. v.
VAUGHT.

(Court of Appeals of Kentucky. March 1,
1904.)

RAILROADS—OPERATION—INJURY TO PERSON
UNLOADING CAR—NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS—EVIDENCE—QUESTION FOR JURY.

1. Plaintiff was engaged in unloading a car, and, just before he left it, it was coupled to an engine, which started to haul it away; and when he went to see, as he testified, where he was being carried, the door, which swung outwardly, struck a platform, and slammed to, striking him, and causing the injury complained of. He testified that he was not notified that the car was about to be moved, and did not know it until it was started, and that he went to the only place where he could look out. Defendant's brakeman, however, testified that he notified plaintiff before attaching the engine, and that he answered, "All right," and he supposed that he left the car. Instructions made it the duty of defendant to exercise ordinary care in handling its cars, and made it liable for plaintiff's injuries, if due to its negligence, which, the jury were, in effect, told, consisted of a failure to use reasonable care to ascertain his presence and warn him of the danger, and in carelessly moving the car without warning, and allowing the door to remain open, so as to strike the platform, but otherwise relieved it from liability if the injury would not have occurred but for plaintiff's negligence, which was said to consist in a failure to leave the car after he was notified in time to have done so in safety, or in unnecessarily placing himself where the door could strike him after it started. Held to correctly state the law applicable to the case in defendant's favor.

2. Plaintiff was not bound to jump from the car after it started, though he might have thought it safe to do so; and, if it was being hauled off without his knowing where he was being taken, he had a right to go to the door, as affording the only means of finding out, though he might have known there was danger.

3. Whether or not he unnecessarily placed himself in peril was a question for the jury.

Appeal from Circuit Court, Pulaski County.
"Not to be officially reported."

Action by D. F. Vaught against the Cincinnati, New Orleans & Texas Pacific Rail-

road Company for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

O. H. Waddle and John Galvin, for appellant. Denton & Robinson, for appellee.

BARKER, J. The appellant, Cincinnati, New Orleans & Texas Pacific Railroad Company, is a corporation operating a railroad through the state of Kentucky; a part of its line being in Pulaski county. The appellee, D. F. Vaught, was, at the time of the occurrence which produced this litigation, in the employment of the Somerset Ice Company. The appellant had hauled a refrigerator car loaded with ice to the place of business of the Somerset Ice Company, and left it there to be unloaded. Appellee, by order of his employer, had unloaded the ice from the car, and was engaged in cleaning out the straw from the floor, and gathering up the ice hooks, for the purpose of turning over the car, unloaded and cleaned, to appellant; but, just before he left it, an engine in the custody and control of appellant's employes backed down, coupled onto the empty car, and hauled it away. The door of the car, which was large and heavy, opened out on hinges, and was swinging open when it started. After the car started, appellee went to the door, in order to look out, and, as he says, to see where he was being carried, at which time the heavy door, which was swinging outwardly, struck against a platform, which constituted a part of appellant's station, with such violence that it was slammed to, striking him on the head, shoulder, and abdomen, knocking him senseless, and severely injuring him. Appellee's evidence was to the effect that he was not notified of the fact that appellant's servants were about to move the car, and knew nothing of their purpose so to do, until it was started on its journey away from the place where it had been standing; that, being a refrigerator car, there was no place from which he could look out, except the open door; and that he went to this door to look out and see where he was being carried. For the appellant, John Starkie testified that he was one of the brakemen in charge of the train which moved the car upon which appellee was engaged in working; that, before the engine was attached to it, he saw appellee, and told him he must get out, as they were going to take it away; that appellee answered, "All right," and at once threw out some of his implements, whereupon he, supposing appellee had left the car, gave the signal which started it on to its destination. The jury returned a verdict of \$500 in favor of appellee, of which appellant is now complaining.

The court instructed the jury as follows:

"(a) The court instructs the jury that if they believe from the evidence that the plaintiff, Vaught, received injuries on the breast, abdomen, and legs by being struck by a car door while plaintiff was in a car on the side track of the defendant, and said injuries

were caused by the negligence and carelessness of the defendant, its agents, servants, and employes, in pulling or pushing said car without warning to the plaintiff, and by allowing the car door to remain open, and by pulling or pushing said car door against the platform, you will find for the plaintiff such sum as will reasonably compensate him for his suffering and physical agony, if any, and loss of time, by reason thereof, and, if you believe he is permanently disabled, you will find such damages as will reasonably compensate him therefor—your whole finding, however, not to exceed \$1,999.

"(b) It was the duty of the defendant, in handling its cars, to do so in such a manner as not to inflict injury upon any person who had a right to be upon or in any of said cars of the defendant; and, if the defendant's agents failed to use reasonable care or diligence to ascertain his presence and warn him of danger, they were guilty of negligence.

"No. 1. Unless you believe from the evidence that the employes of the defendant railroad engaged in moving the car causing the injury to plaintiff complained of failed to exercise such care in the movement of said car as an ordinarily prudent person would have exercised under the same or similar circumstances, you will find for the defendant.

"No. 2. If you believe from the evidence that the plaintiff was notified that the car in which he was located was about to be moved, and he was requested to leave the same, and he had sufficient time to have left the same in safety before the collision of the car door with the platform of the depot, and failed to do so, such conduct would be contributory neglect on his part; and, if the injury complained of would not have occurred but for such contributory neglect, you will find for defendant.

"No. 3. If you shall believe from the evidence that plaintiff knew of the condition of the car, and of the door thereto, and, after knowing said car was being moved, he placed himself and remained where said door could strike him, when it was unnecessary for him to have remained in said car or to have occupied such position, this would be negligence on his part; and, if such negligence so contributed to the injury received by him as that he would not have been injured but for such negligence, you will find for defendant.

"No. 4. Negligence, as used in these instructions, is the want of ordinary care. Ordinary care is such care as would be exercised by an ordinary prudent man under the same or similar circumstances as those under investigation."

These instructions constitute, as we think, the correct rule of law applicable to the case at bar. Certainly, taken as a whole, they are not unfavorable to appellant.

Appellee was not bound to jump from the car after it started, as is contended for by appellant, although he might think that could

be done with safety; and if the car was being hauled off, with him in it, without his knowing where he was being taken, it was but natural for him, and he had the right, to go to the door, which afforded the only means of obtaining the information he desired of the situation, although he might have known there was danger attending his so doing; but he was not entitled to unnecessarily place himself in peril, and the question whether he did or did not do so, under all the circumstances of this case, was a question for the jury. His perturbation of mind would necessarily be increased or diminished by the fact as to whether he was being carried far from home, or merely shifted around in appellant's yards, with the opportunity, after a few minutes, of being allowed to leave the car in safety.

For the reason indicated, the judgment is affirmed.

INDIANA ROAD MACH. CO. v. LEBANON CARRIAGE & IMPLEMENT CO.

(Court of Appeals of Kentucky. Feb. 18, 1904.)

PRINCIPAL AND AGENT—EXCLUSIVE AGENCY—CONTRACT—CONSTRUCTION—COMPENSATION—COMMISSIONS.

1. Defendant authorized plaintiff as agent to sell the I. Road Machine, the I. Stone Crusher, the I. Road Roller, etc., in certain territory, "said sale privilege to become exclusive on the I. Road Machines only, for 1899, as soon as said party shall have sold one machine therein, from the date of this contract until date of final settlement mentioned below." The contract was dated April 29, 1899, and final settlement was to be made December 1, 1899. *Held*, that the sale privilege was to become exclusive on the I. Road Machine only, and that this exclusive privilege on the road machine was only to begin as soon as the second party had sold one machine.

2. Where plaintiff was granted right to sell machines for defendant in certain territory for a remuneration of all that the sale price exceeded the net list price at the factory, but the privilege was not exclusive, and defendant entered the territory, and sold to a customer secured by plaintiff, at a price beneath the net list price, plaintiff was not entitled to commissions on such sale.

Appeal from Circuit Court Marion County.
"Not to be officially reported."

Action by the Lebanon Carriage & Implement Company against the Indiana Road Machine Company. From a judgment for plaintiff, defendant appeals. Reversed.

C. S. Hill, for appellant.

HOBSON, J. Appellees were agents of appellant for the year 1899 for the sale of certain machinery, including its stone crushers, in the counties of Marion, Washington, and Nelson. They learned that Nelson county was contemplating the purchase of two rock crushers, and so notified appellant, requesting it by telegram to send expert with model machine to meet one of them at the Bardstown fair grounds the next day, it being stipulated in the contract that appellant would do this if requested. The parties met at the

fair grounds, and the committee made an order for two rock crushers complete at \$1,750, but reserved the right to countermand the order at any time within three days. On the same day the agent of the Champion Crushers offered the committee two machines for \$1,300, and the committee then countermanded the order for appellant's machines. After this appellees made an arrangement for another meeting with the committee, and notified appellant to send the man there again to meet them on a certain day. Before this day arrived, however, appellant's man went to Bardstown the second time, and, finding that he could not sell his machines to the county for more than \$1,300, finally, rather than be underbid by the Champion Company, sold the crushers to the county for \$1,300, appellees not being present or consulted. By the contract of agency appellees were to have for their commission all amounts that machinery sold for over and above the net list prices at the factory. The net price got for the two machines by the agent was not as much as the list price referred to. Appellees then sued appellant for their commission on the sale, and recovered judgment for \$428.70, which would have been their commissions if the sale had stood at \$1,750. The proof on the trial shows that the machines could not have been sold to the county except at the price of \$1,300, and that the agent did his best to get more, but failed, simply because of the bid of the Champion Company. Whether the appellees are entitled to recover commission on the sale depends on whether or not their contract created an exclusive agency for the sale of the machinery in the territory named.

So far as material to this question, the written contract is as follows: "Indiana Road Machine Company of Fort Wayne, Indiana, of the first part, and Lebanon Carriage & Implement Company, of Lebanon, county of Marion and state of Kentucky, of the second part: Witnesseth: Said party of the first part, in consideration of the agreement by the party of the second part, hereinafter mentioned, hereby agrees: First. To authorize said party of the second part to sell under the stipulations and conditions of this contract, the Indiana Reversible Road Machine, Indiana Stone Crusher, Indiana Reversible Road Roller, Drag and Wheel Scrapers, and Plows, in and for the following named territory, only: Marion and Washington and Nelson counties in Kentucky, said sale privilege to become exclusive on Indiana Reversible Road Machines only, for 1899, as soon as said party shall have sold one machine therein, from the date of this contract until date of final settlement mentioned below."

In *Aultman & Taylor Company v. Joplin*, etc., 8 Ky. Law Rep. 62, it was held as follows: "Under a contract whereby appellant agreed to furnish appellee with machines, and to allow them certain commissions on each sale within a certain territory, appellant

was not precluded from making sales within that territory, and appellees are not entitled to commissions on sales made by appellant, there being nothing in the contract which conferred on appellees the exclusive right to sell within the designated territory."

The contract before us authorizes the appellees to sell the road machines, the stone crushers, the road rollers, the drag and wheel scrapers, and plows, in the counties named. So far there is nothing in the contract from which an exclusive agency can be inferred. Then these words are added: "Said sale privilege to become exclusive on Indiana Reversible Machines only, for 1899, as soon as said party shall have sold one machine therein, from the date of this contract until date of final settlement mentioned below." The contract is dated April 29, 1899, and the final settlement was to be made December 1, 1899. The natural meaning of the words quoted is that the sale privilege is to become exclusive on the Indiana Reversible Road Machine only, and that this exclusive privilege on the road machine is only to begin as soon as the second party has sold one machine. Otherwise we do not see what effect would be given the word "only." If the parties had meant to say that the sale privilege should become exclusive on all the machinery, and not on the road machines only, from the time that the second parties sold one road machine, it cannot be presumed that they would not have used words indicative that the sale privilege was to be exclusive as to the other machines, but only exclusive on the Indiana Reversible Road Machine from the time the second party sold one road machine. An exclusive agency will not be created by implication where the words of the contract do not naturally import this meaning. Appellees had not sold a road machine.

As the contract does not create an exclusive agency, appellant might lawfully sell the machinery in the territory named. Still, if it sold to a customer gotten by appellees, it would be responsible to appellees for their commissions on the sale where appellees would have been entitled to commission had they gone on and completed the sale themselves. But in this case, if appellees had made the sale themselves, they would have been entitled to no commission for the reason that the price got for the two crushers was less than the net list prices therefor, and they were only to have for commissions the excess over and above the list prices. While the result is a hardship on appellees, as they are out the time and money spent by them in the negotiation, still they took the risk of this on the chance of getting the full commission if the sale at \$1,750 had gone through. As it is, appellant is about \$200 worse off than it would have been if that sale had stood, and it cannot, in addition, be made liable to appellees for commission.

Judgment reversed, and cause remanded, with directions to dismiss the petition.

JAHN'S ADM'R v. WM. H. McKNIGHT & CO.

(Court of Appeals of Kentucky. Feb. 17, 1904.)
MASTER AND SERVANT—TORTS OF SERVANT—INDEPENDENT CONTRACTOR.

1. When the proprietor of a store gave a certain sum per week to one who, in consideration therefor, delivered the goods sold by said proprietor, and such person used his own horse and wagon in making the delivery, and employed a driver, over whom the proprietor had no control, and no right to discharge, the driver was not the servant of the proprietor, and he was not liable for the negligent act of the driver, causing the death of plaintiff's decedent.

Appeal from Circuit Court, Jefferson County, Common Pleas Division.

"To be officially reported."

Action by Albert Jahn's administrator against William H. McKnight & Co. for damages for the death of plaintiff's decedent. From a judgment for defendants, plaintiff appeals. Affirmed.

O'Neal & O'Neal, for appellant. Kohn, Baird & Spindle and Stanley E. Sloss, for appellees.

BURNAM, C. J. Albert Jahn, a messenger boy for the Western Union Telegraph Company, 15 years old, while riding his bicycle on Main street, between Third and Fourth in Louisville, Ky., was struck and instantly killed by a delivery wagon drawn by a runaway horse that had become frightened at a passing drove of hogs during the absence of his driver, who had gone inside of a store for the purpose of delivering certain packages, leaving the horse unhitched and unattended. The petition alleges that the horse and wagon which caused the death of plaintiff's intestate was in the employ of W. H. McKnight & Co. at the time of the accident, and that the death of the boy was caused by the gross negligence of John Thomas Hooper, the driver, in leaving the horse unhitched and unattended, who, it is alleged, was a servant of appellee. In the second paragraph of the answer the defendants deny that John Thomas Hooper was in their employ at the time of the runaway, or that either the horse or wagon was their property or under their dominion or control, and allege that the delivery wagon and horse belonged to Granville Hooper, who carried on an independent hauling and delivery business in the city of Louisville; that for some time prior to the accident Granville Hooper, by contract with them, delivered packages of goods to their customers in the city of Louisville at an agreed price per week; that they had no interest in or control over the manner or means by which this was accomplished; that Hooper had full power and authority to select such means to accomplish this end as he saw fit, and was an independent contractor, and not a servant. At the

¶ 1. See Master and Servant, vol. 34, Cent. Dig. § 1248.

conclusion of plaintiff's testimony the trial court directed a verdict for the defendants, to which plaintiff excepted, and has appealed. The only question for decision is whether there was any evidence that John Thomas Hooper was defendants' servant at the time of the accident.

Upon the trial Granville Hooper⁶ was called as a witness by the plaintiff, and testified that at the time of the accident he carried on a hauling and delivery business in the city of Louisville; that he also ran a stone quarry and delivered stone for building foundations for houses, and operated two wagons and teams in this business; that he also had a contract with defendants to deliver packages to their customers in a one-horse delivery wagon at the price of \$18 per week; that if they had more work in this line than the one-horse delivery wagon could perform that he furnished extra teams and received extra pay for it, or they would call in other wagons to do it; that if defendants did not need the services of his wagon and driver at any time he was at liberty to haul for any one else; that usually his delivery wagon would call at the store of defendants some time in the morning from 7 to 9 o'clock to see if they had any packages to deliver; that if there were any he always found them piled up in the front part of the store, addressed to the person for whom they were intended; that the wagon and horse were his property; that he hired the driver and paid all necessary expenses for running the wagon; that the defendants under their contract with him had no right to employ or discharge the driver, or to direct how or in what manner his work should be done; that the driver of the wagon was in his service, and not in that of the defendants.

Thompson on Negligence says:

"Sec. 621. It is a general rule that one who has contracted with a competent and fit person, exercising an independent employment, to do a piece of work, not in itself unlawful, or of such a nature that it is likely to become a nuisance, or to subject third persons to unusual danger, according to the contractor's methods, and without being subject to control except as to the result of his work, and subject to other qualifications hereafter stated, will not be answerable for the wrongs of such contractor, his subcontractors, or his servants, committed in the prosecution of such work.

"Sec. 622. An independent contractor, within the meaning of this rule, is one who renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. The contractor must answer for his own wrongs and the wrongs committed in the course of the work by his servants."

"Sec. 638. One who, under a public license, exercises a certain employment on behalf of any member of the public who may hire

him, such as a licensed public drayman, does not stand in the relation of servant of one who may hire him to do a particular job, such as he is licensed to do, but he is deemed an independent contractor, within the meaning of subdivision 11."

Shearman and Redfield on Negligence, § 164, defines an independent contractor as follows: "Although in a general sense every person who enters into a contract may be called a contractor, yet that word, for want of a better one, has come to be used with special reference to a person who, in the pursuit of an independent business, undertakes to do a specific piece of work for other persons, using his own means and methods, without submitting himself to their control in respect to all its details. The true test of a contractor would seem to be that he renders service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as the means by which it is accomplished."

In Robinson, etc., v. Webb, 74 Ky. 404, it was decided that, in order that the relation of master and servant should exist, the parties sought to be charged as master must have the right to control the person with whose negligence it is sought to charge him.

"He is deemed to be the master who has the supreme choice, control, and direction of the servant, and whose will the servant represents, not merely in the ultimate results of the work, but in all the details."

In Driscoll v. Towle, decided by the Supreme Court of Massachusetts (63 N. E. 922), the court had before it the same question involved upon this appeal. In that case the defendant was engaged in a general teaming business, owned the horse and wagon driven by K., employed K., and paid him his wages. The defendant contracted with another company to do its hauling, and K. reported each morning with the horse and wagon at the office of the company, and was thereafter engaged in carrying out the orders of that company's foreman. K. had exclusive control of the management of the horse and wagon, chose his own route, harnessed and unharnessed the horse, and at night returned it to the defendant's stable. It was held, in an action for injuries to a person in the street by being struck by such horse and wagon while driven by K. in performing the orders of such company, that the evidence was sufficient to authorize a finding that K. was the servant of the defendant, and not of the company. In discussing the case, Chief Justice Holmes said: "In cases like the present there is a general consensus of authority that although a driver may be ordered by those who have dealt with his master to go to this place or to that, to take this or that burden, to hurry or to take his time, nevertheless, in respect to the manner of his driving and the control of his horse, he remains subject to no orders but those of the man who owns

him. Therefore he can make no one else liable, if he negligently runs a person down in the street." In this case appellee exercised no control over the driver of this wagon. They did not employ or pay him, had no right to discharge or to direct in any manner how his work should be done, further than that the packages should be promptly delivered to the addressee. Under this state of fact the driver of the wagon was not the servant of appellee, and consequently there could be no liability on their part for his negligence. We therefore conclude that the instruction of the trial court to find for the defendant was not error. This conclusion is not in conflict with the opinion in *Adams Express Co. v. Schofield* (Ky.) 64 S. W. 903. In that case the alleged independent contractor was the sole representative of the defendant at Shelbyville, and in complete charge of all its business at that point, and subject to its orders.

Judgment affirmed.

MARKS & STIX v. HARDY'S ADM'R.*

(Court of Appeals of Kentucky. Feb. 18, 1904.)

PLEADING—PETITION—AMENDMENT—PARTNERSHIP—COMPROMISE—EVIDENCE—WRITTEN CONTRACT—ALTERATION OR MODIFICATION BY ORAL TESTIMONY.

1. The court did not abuse its discretion in refusing permission to amend the petition after the issues had been made up for fully a year, and in the meantime defendant had died, and the conduct of his case was in the hands of his administrator.

2. On an issue as to whether a defendant was a member of a firm, mercantile reports were not admissible, where it was not shown that they were based on information given by him or by his authority, or that he knew the existence thereof, or of the general reputation that he was a member.

3. Evidence of a compromise offered by plaintiffs was properly rejected, where it did not appear that defendant himself made an offer of compromise, or authorized it, or that he knew that an offer was made.

4. Where, to establish the existence of a firm, articles of dissolution are introduced in evidence by plaintiffs, evidence of declarations, made at the time of their execution, by the party sought to be bound, denying the existence of the firm, and asserting that he only signed the same on assurance of counsel that it was right to do so, and that they would not bind him, was thereafter properly admitted as a part of a transaction which plaintiffs themselves had undertaken to introduce in evidence.

5. The evidence was not a violation of the rule against oral testimony to alter or modify a written contract, in the absence of an allegation of fraud or mistake; the controversy not being between the parties to the instrument, but between strangers and a party thereto.

6. Declarations made by one sought to be bound as a partner, to the effect that he was not a member of the firm in question, are inadmissible.

Appeal from Circuit Court, Lewis County.
"To be officially reported."

Action by Marks & Stix against William A. T. Hardy. Pending the action, defend-

ant William Hardy died, and it was revived in the name of his administrator, Andrew T. Hardy; and, from a judgment in favor of the latter, plaintiffs appeal. Reversed.

W. B. Pugh, S. J. Pugh, and Robt. D. Wilson, for appellants. W. C. Halbert and T. R. Phister, for appellee.

BARKER, J. The appellants, Marks & Stix, are boot and shoe merchants of Cincinnati, Ohio. At the time this action was instituted, William Hardy resided in Vanceburg, Lewis county, Ky. A. T. Hardy, who is his son, lived at Willard, Carter county, Ky., where he carried on a general store under the firm name of William Hardy & Son. The firm of William Hardy & Son in June, 1900, purchased of the appellants \$450 worth of shoes on credit. The bill not having been paid when it fell due, this action was instituted against William Hardy and A. T. Hardy, as composing the firm of William Hardy & Son. A. T. Hardy made no defense. William Hardy filed an answer putting in issue the fact that he was a member of the firm in question. After the issues were made up, William Hardy died, and the action was, by consent, revived in the name of his administrator, Andrew T. Hardy. About a year after the completion of the issues, the action coming on for trial, appellants offered to file an amended petition, setting up certain matters alleged in the way of estoppel as against William Hardy. The motion to file this amendment, upon objection, was overruled by the court. Upon the trial the jury returned a verdict in favor of appellee, of which the appellants are now complaining.

The uncontradicted facts show that William Hardy was a man about 71 years of age, and that he lived in Vanceburg, Lewis county, Ky., from 50 to 75 miles from Willard, Carter county, Ky.; that for many years prior to the events constituting the subject-matter of this litigation he had been engaged in the business of buying and selling staves for wine casks, and had built up quite a reputation in this business, and accumulated some money; that his son A. T. Hardy was not of age, and that his father sent him over to Willard for the purpose of buying wine-cask staves for cash; that, after he was settled there, he opened up a general merchandise store under the firm name and style of William Hardy & Son, which was the name of the firm engaged in the business of buying and selling wine-cask staves; that he advertised the store under the firm name of William Hardy & Son, and all of his billheads and letters were so marked, but that there was no sign over the store.

The first error complained of is the refusal of the court to permit the amended petition to be filed after the case was called for trial. The issues had been made up for fully a year theretofore. William Hardy had

* 6. See *Partnership*, vol. 23, Cent. Dig. § 71.

*For extension of opinion, see 78 S. W. 1105.

in the meantime died, and the conduct of the defense to the action was in the hands of his administrator. We do not think, under these circumstances, that the court abused the large discretion conferred upon it in the matter of permitting amendments to be filed, by refusing the one in question. *Elizabeth-town, Lexington & Big Sandy R. Co. v. Catlettsburg Water Co. (Ky.)* 61 S. W. 47.

The second error complained of by appellants is the refusal of the court to permit them to prove by mercantile agents' reports who composed the firm of William Hardy & Son, or the general report in and around Willard that the partnership was composed of William Hardy and A. T. Hardy. It was not shown that the mercantile agents' reports were based upon any information given by William Hardy, or by any one authorized by him, or that he knew that such reports were being gotten up, or that he knew of the existence of what is called the "general reputation" that he was a member of the firm. The great weight of authority, as well as sound reason, is against the admissibility of this evidence. *Am. & Eng. Encycl. of Law*, vol. 22 (2d Ed.) p. 50, thus states the rule as to general reputation: "The existence or non-existence of a partnership between certain persons cannot be proved by evidence of general reputation or understanding that such persons were or were not partners, and such evidence is inadequate, even in aid of other testimony to the same effect. But evidence of general reputation in the community is admissible to show that plaintiff gave credit in reliance upon the supposed partnership, and this evidence has been admitted where it appeared that such common report was known to the partners sought to be charged." The learned author also lays down the rule that reports from a mercantile agency are inadmissible. The inadmissibility of general reputation to establish a partnership is sustained by the following cases: *Cook v. Slate Co.*, 38 Am. Rep. 568; *Hunt v. Jucks*, 1 Am. Dec. 555; *Grafton Bank v. Moore*, 38 Am. Dec. 478; *Smith v. Griffith*, 38 Am. Dec. 639; *Macy v. Combs*, 77 Am. Dec. 103; *Adams v. Morrison*, 113 N. Y. 152, 20 N. E. 829; *Brown v. Crandall*, 11 Conn. 92; *Tanner, etc., v. Hall, etc.*, 86 Ala. 305, 5 South. 584; *Stewell v. Borman*, 63 Ark. 30, 37 S. W. 404; *Bowen v. Rutherford*, 14 Am. Rep. 25; *Earl v. Hurd*, 5 Blackf. 248; *Bryden v. Taylor*, 3 Am. Dec. 554; *Goddard v. Pratt*, 16 Pick. 412, 28 Am. Dec. 259; *Sager v. Tupper*, 38 Mich. 258; *Taylor v. Webster*, 39 N. J. Law, 102; *Halliday v. McDougall*, 20 Wend. 81. William Hardy was an old man, and lived from 50 to 75 miles from Willard. There is no evidence in the record to show that he knew his son was carrying on a general merchandise store under his name, or that he ever heard any of the rumors that he was a member of the firm. To hold one responsible as a partner under such evidence would be to place him wholly in the power

of designing persons who had it in mind to ruin him. As was well said by Judge Cowen in the case of *Halliday v. McDougall*: "There is scarcely a question upon which common reputation is more fallible. A contract of partnership is, in its nature, incapable of being defined by laymen; and whether an apparent partnership be really so, or a contract of some other character, is often a most embarrassing legal question with the ablest lawyers. General reputation of the ordinary contracts, the legal nature and effect of which are understood by men of business in general, would be much more proper subject of proof by general report. This the law rejects, yet I am not aware that there is a necessity for resort to such proof in the one case more than the other." In *Brown v. Crandall*, 11 Conn. 92, the court said: "A person of doubtful credit might cause a report to be circulated that another person was in partnership with him for the very purpose of maintaining his credit. His creditors might also aid in circulating the report for the purpose of furnishing evidence to enable them to collect their debts."

The court also properly rejected the evidence of the compromise sought to be introduced by appellants. It did not appear that William Hardy made any offer of compromise himself, or authorized any one to do so for him, or that he knew that such an offer was made. Neither his assignee, nor the attorney of the assignee, was his agent for this purpose.

It is also complained that the court erred in permitting A. H. Parker to testify to declarations of William Hardy as to the existence of the firm of William Hardy & Son at the time the articles of dissolution between himself and his son were signed. It seems, when William Hardy finally heard that his son was engaged in the business of general merchandise at Willard in his name, that he went with his lawyer, A. H. Parker, to Willard, and then and there severed all business connection with him, in pursuance of which formal articles of dissolution were drawn up and signed by the parties. Appellants introduced A. H. Parker as their witness, to show the contents of this paper (having given notice to the appellee requiring its production at the trial), for the purpose of establishing the fact that the existence of the firm was recognized by William Hardy in the articles of dissolution. This evidence having been introduced by appellants, appellee undertook to show by Parker that, although William Hardy finally signed the articles of dissolution, he at the time denied the existence of the firm, and only signed the paper upon the assurance of his counsel that it was right so to do, and would not obligate or bind him as a partner. The court very properly admitted this evidence. It constituted a part of the transaction which appellants had themselves undertaken to introduce. The rule is elementary that, where a transac-

tion is placed in evidence, all that took place at the same time, and which was a part of it, may also be shown. One cannot introduce a part of a conversation or transaction which he deems to his interest, and exclude the remainder. What was said by William Hardy at the time the articles of dissolution between his son and himself were drawn up and signed was a part of the transaction itself, and he had the right to introduce his declarations on the subject, in order to show his construction of his position in the matter. Nor was this in violation of the rule against introducing oral testimony to alter or modify a written contract, in the absence of an allegation of fraud or mistake. That rule might apply as between the father and son, but it has no place in the controversy between William Hardy and appellants. In speaking upon this subject in the case of *Strader v. Lambeth, etc.*, 7 B. Mon. 589, it was said: "Between the parties to the instrument, such evidence, if true, is only admissible when the party offering it first shows that the writing, either by fraud or mistake, was drawn differently from what the parties intended, or was executed under circumstances tending to prove that the contract was usurious. But when the parties themselves do not rely upon the writing as drawn, but admit the contract to be other than that which it exhibits, this rule has no application. Nor are strangers to the instrument concluded by its terms, or estopped to show by parol evidence that the contract of the parties is different from what it purports to be on the face of the writing; and as estoppels, where they exist, must be mutual, it follows that, in a controversy with strangers to the instrument, the parties to it are not themselves estopped to explain or contradict it by parol evidence." See, also, *Greenleaf on Evidence* (16th Ed.) vol. 1, § 279.

But the court erred in permitting appellee to prove by various witnesses declarations made by William Hardy in his own interest, to the effect that he was not a partner with his son in the general merchandise venture which the latter was conducting at Willard under the style of William Hardy & Son. These declarations were essentially hearsay, and contrary to the rule that one may not make evidence in his own behalf by his declarations, and were highly prejudicial to the interests of appellants. It is said in section 110, vol. 1, *Greenleaf's Evidence* (16th Ed.): "It is to be observed that, where declarations offered in evidence are merely narrative of a past occurrence, they cannot be received as proof of the existence of such occurrence. They must be concomitant with the principal act, and so connected with it as to be regarded as the mere result and consequence of the coexisting motives, in order to form a proper criterion for directing the judgment which is to be formed upon the whole conduct. It is a necessary consequence of the principle as above explained that dec-

larations made after the equivocal act has ended cannot be regarded as forming a part of it, complementing and interpreting the physical part of the act; and they therefore come as ordinary assertions of a past fact, obnoxious to the hearsay rule, and not admissible under the present principle." The *American & English Encycl. of Law*, vol. 9. (2d Ed.) p. 50, thus states the rule: "An extrajudicial, self-serving declaration of a party is generally hearsay evidence, and is no evidence in his behalf, unless it constitutes a part of the *res gestæ*, or is made in the presence of the opposite party, and is acquiesced in by him." See, also, *Terrell v. Commonwealth*, 13 Bush, 246, and *Penn v. Fightmaster* (Ky.) 17 S. W. 334.

For the reasons indicated, the judgment is reversed for proceedings consistent with this opinion.

CONTINENTAL INS. CO. v. DANIEL
(Court of Appeals of Kentucky. Feb. 17, 1904.)
FIRE INSURANCE — POLICY — CONSTRUCTION — CANCELLATION.

1. Where an insurance company denied liability from the date of the fire to the time of the trial, it was not incumbent on the holder of the policy to make proofs of loss.

2. Where a policy of fire insurance is ambiguous, it will be construed most strongly against the insurance company.

3. A fire insurance policy contained the provision that "it shall be canceled at any time by the company giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void, or cease, the premium actually paid, the unearned portion shall be returned on the surrender of this policy or last renewal, this company retaining the customary short rate, except when this policy is canceled by this company by giving notice it shall retain only the pro-rata premiums." *Held* that, as it was ambiguous as to whether notice and tender must be given five days preceding cancellation, which should take effect immediately, or that cancellation should take place and notice and tender be made, and five days after this the cancellation should take effect, it would be given the latter construction, as being most strongly against the company.

Appeal from Circuit Court, Christian County.

"Not to be officially reported."

Action by Elijah Daniel against the Continental Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Breathett & Fowler, for appellant. L. Yonts and J. T. Hanberry, for appellee.

NUNN, J. This is an appeal from a judgment of \$250 in favor of appellee on an insurance policy which covered household property which was destroyed by fire. Appellant's contention is that it is not liable, because the appellee failed to make and present proof of his loss within 60 days from the destruction of his property, as required by the policy; and also that it was not li-

¶ 2. See *Insurance*, vol. 28, Cent. Dig. § 295.

ble under this policy for any amount, as it had been canceled before the date of the fire, and denied all liability thereon.

As to the contention that appellee failed to make the proof of loss, it is sufficient to say that the pleading of appellant and the proof, as it appears in the record, show that it denied all liability on this policy from the date of the fire to the time of trial, and under such circumstances the proof required by the policy would have been vain and useless. See the case of *Penn. Fire Ins. Co. v. C. D. Young & Co.* (decided by this court January 8, 1904) 78 S. W. 127; also the cases of *Home Ins. Co. v. Gaddis*, 3 Ky. Law Rep. 161, and *Lancashire Ins. Co. v. Monroe, Jefferson & Co.*, 101 Ky. 16, 39 S. W. 434.

The other question raised by appellant, as to the cancellation of this policy, is a more serious one. The facts with reference thereto, as they appear of record, are, in substance, as follows: Some weeks prior to the fire, appellant's agent at Hopkinsville met appellee upon the streets on one or two occasions and informed him that appellant desired to cancel his policy, and asked him to bring it to the agent's office and get his premium that he had paid. At first appellee appeared inclined to accede to the proposition, but on the last occasion he declined. Two witnesses for appellant, Garner Dalton, an agent of the company, and James Russell, testify that after that, and on the 29th of July, Dalton called appellee across the street, and in the presence of Russell tendered him \$4.50 in money, and informed him that his policy No. 488 was canceled from that date; that appellee refused to accept the money; that at the same time and place the following notice was read to him by Dalton:

"Hopkinsville, Ky., July 29th, 1901.

"Elijah Daniel, City—Dear Sir: You are hereby notified in accordance with the conditions of policy #488 that the Continental Insurance Co. of the City of New York, desires to cancel policy #488, issued to you at Hopkinsville, Ky., by agents of said company, dated May 20th, 1901, insuring dwelling house, situated on the North side of Clarks-ville pike. You are therefore demanded to return said policy to G. E. Dalton & Co. agents at Hopkinsville, Ky., and receive by them the sum of \$4.50, the amount paid by you on said policy.

"[Signed] Continental Insurance Co.,
"By G. E. Dalton, Agent."

It was also proven by this agent, Dalton, that he went immediately from this place to his office and entered upon the books of the company the word "cancelled" opposite or on the margin of the record of this policy. It was also proven by Dalton that on the 10th of August, 1901, he, as the agent of the appellant, prepared another notice, and addressed it to "Elijah Daniel, City," in the same words and figures as the above-copied notice, except the difference in date, and the following words in addition: "This be-

ing the third notice served on you, your policy is hereby cancelled, premium being at your demand at G. E. Dalton & Company's office in the city of Hopkinsville." This notice was signed in the same way as the other one. That he placed this notice in an envelope with \$4.50 in cash, sealed it, registered it, and placed it in the post office at Hopkinsville, Ky. It was proven by the postmistress that appellee was notified of the fact that a registered letter was there for him; that he came to the office, and the letter was tendered to him; and that he refused to accept it. Appellee's property which was covered by the policy was destroyed on the morning of August 14, 1901, about 2 o'clock a. m.

Appellee testified, admitting the conversations related by appellant's agent, Mrs. Wash, with reference to the company's desire to cancel the policy, and also admitted that he had the conversation with Dalton in the presence of Russell, but denied in positive terms that he was tendered \$4.50 or any sum in money at that time or at any time, or that Dalton at that time or at any time informed him that his policy was canceled, but admitted that Dalton at that time read to him the notice first copied herein, and also admitted that the postmistress tendered him the registered letter, which he refused, but stated that he did not know at the time that it was from Dalton & Co., but that he refused to accept it because he was afraid it would get him into a scrape.

Upon this evidence the court gave to the jury one instruction, which was as follows: "The court says to the jury that they will find for the plaintiff the sum of \$250, unless they shall believe from the evidence that, five days or more before plaintiff's house was burned, defendant, by its agent, Mrs. Wash or Garner Dalton, had given the plaintiff written or verbal notice that said policy No. 488 had been canceled; and shall further believe that, five days or more before the loss complained of, the premium paid for said policy had been paid or tendered back to plaintiff; in that event they will find for the defendant."

The provision of the policy with reference to cancellation is as follows: "This policy shall be cancelled at any time at the request of the insured; or by the company giving five days notice of such cancellation. If this policy shall be cancelled as hereinbefore provided, or become void, or cease, the premium actually paid, the un-earned portion shall be returned on the surrender of this policy or last renewal, this company retaining the customary short rate, except when this policy is cancelled by this company by giving notice it shall retain only the pro-rata premiums."

The difference between the contentions of appellant and appellee is this: The appellant contends that the notice and tender must be given and made five days preceding the cancellation, which takes effect immediately.

The appellee contends that the act of cancellation should take place and notice and tender be given and made, and five days after this the cancellation takes effect, and the policy is then no longer in force. The lower court took appellee's view of the matter, and we are not prepared to say that the court erred. This provision of the policy is somewhat ambiguous. This court has repeatedly decided in such cases that the policy should be construed most strongly against the company, as it prepared it. This language of the policy seems to support the construction contended for by appellee, to wit: "This policy shall be cancelled at any time * * * by the company giving five days notice of such cancellation. * * *" This seems to imply that the act of cancellation precedes the notice, but the cancellation is not to take effect until five days after the giving of the notice of the cancellation and the tender of the premium. The purpose of allowing the assured five days' notice, and to have his premium five days before the cancellation takes place, is to permit or give him the opportunity to reinsure in some other company if he so desires. Under the instruction of the court, if the jury had believed from the evidence that the tender of this premium was made on July 29th, and that he was then informed that the policy was canceled and would be no longer in force from that date, the jury must have found for appellant; but it seems that the jury believed the statement of appellee, corroborated by the notice and tender of August 10th, in which it was stated that the policy was canceled on "that" date, which was less than five days prior to the burning of the house.

It was the province of the jury to weigh and determine the effect of the evidence, and we do not feel disposed to disturb its finding. Wherefore the judgment of the lower court is affirmed.

STEELE v. FARIS.

(Court of Appeals of Kentucky. Feb. 17, 1904.)
ADMISSION OF EVIDENCE—HARMLESS ERROR.

1. Any error in admitting evidence is harmless, the fact being proved without objection by other evidence.

Appeal from Circuit Court, Laurel County.
"Not to be officially reported."

Action by Charles B. Faris against S. Y. Steele. Judgment for plaintiff. Defendant appeals. Affirmed.

C. R. Brock, J. A. Craft, and J. W. Alcorn, for appellant. W. R. Ramsey, Hazelwood & Parker, and H. C. Hazelwood, for appellee.

O'REAR, J. The fact to be established in this case was whether A. K. Cook and S. G. Steele had been partners in the bidding for, and operation of, certain mail route contracts. See statements of petition, Faris v. Cook, 110 Ky. 867, 62 S. W. 1043, 63 S. W. 600.

Certain evidence was offered by the surety who had signed the contracts, and who was attempting to hold Steele as a partner of the principal, Cook, that it was the custom at the time these contracts were made for partners who bid on such contracts to enter the bid in the name of only one of the firm. It is not quite clear from the bill of exceptions and evidence what the ruling of the court was intended to be on the admission of this evidence, for we find that in a number of instances it was excluded, in two instances it was admitted over objections, in several others it was admitted without objection from appellant. So that, if it was error to have admitted it to be proved by the witnesses when the objection was made, it was not reversible error to have admitted it where the objection was not made. If the same fact be proved without objection, it cannot be reversible error if evidence of the fact has also been admitted over objection, for if the court had excluded the evidence to which the objection was interposed, notwithstanding that, the fact would have been established by other evidence not objected to.

We doubt if the matter sought to be proved as a custom and above discussed was relevant as evidence tending to show that Steele and Cook were in fact partners in these transactions. The witnesses who testified as to the supposed custom only knew of two firms who transacted that character of business under that practice. How long they had so conducted it was not shown, nor was it shown that appellant, Steele, knew of the custom, or that it was general enough for him to have known of it.

We are of opinion that the instructions fairly submitted the question to the jury whether in fact Steele and Cook were partners in the transactions, and the evidence, even aside from that complained of, is sufficient to have sustained the verdict of the jury finding the partnership to have existed.

Perceiving no prejudicial error, the judgment is affirmed.

A. BOOTH & CO. v. BETHEL.

(Court of Appeals of Kentucky. Feb. 16, 1904.)
PRINCIPAL AND AGENT—AUTHORITY OF AGENT—CONTRACTS—EVIDENCE—APPEAL.

1. The opinion on appeal is the law of the case on subsequent appeals.

2. That a contract was apparently within the scope of an agent's authority, and that the alleged principal received the benefit of it, was sufficient evidence to go to the jury on the question of agency.

Appeal from Circuit Court, Kenton County.
"Not to be officially reported."

Action by William E. Bethel against A. Booth & Co. Judgment for plaintiff, and defendants appeal. Affirmed.

H. D. Gregory and W. W. Symmes, for appellants. Myers & Howard, for appellee.

HOBSON, J. The facts of this case are fully stated in the opinion rendered on the

former appeal. See *Bethel v. Booth*, 72 S. W. 903. It was there held that there was an implied contract that Booth & Co. would pay Bethel the difference between the amount paid for the assets of the store and its actual value on the day the purchase was made, and, in addition, would compensate Bethel for the loss which he sustained of the good will of the business. On the return of the case to the circuit court, it was tried in strict conformity to the rule thus laid down, and, the plaintiff having recovered judgment for something over \$800, the defendants appeal.

The evidence on the last trial is much the same as when the case was here before. The opinion on the former appeal is the law of the case. There was sufficient evidence to go to the jury as to the authority of the general manager of Booth & Co. to make the contract. It was apparently within the scope of his general authority, and the defendants had received the benefits of the contract. The action does not proceed upon the idea that the contract was a valid one, which could be enforced against them, but that they could not be allowed to retain the benefits of the contract after they repudiated it, and that, as Bethel had given up to them his business, as well as the personal property, they must account for what they had received.

The proof as to the amount of business done, and what Bethel was making, was sufficient to go to the jury on the value of the good will of the business; and we do not see that the defendants were in any way misled by the rulings of the court. On the contrary, they seem to have presented fully their evidence on the subject.

While the verdict is large, as there have been three trials in the case, and the evidence was conflicting, we deem it improper to disturb the verdict. The credibility of the witnesses was for the jury, and their verdict shows that they believed the plaintiff and his witnesses.

Judgment affirmed.

BARBOUR v. HUBER'S EX'R.

(Court of Appeals of Kentucky. Feb. 10, 1904.)

VENDOR AND PURCHASER—VENDOR'S LIEN—
RELEASE—PAYMENT OF PURCHASE
MONEY—EVIDENCE.

1. In a suit to obtain the release of a lien retained by the vendor in a deed to land, evidence *held* to show that the purchase money for the land had been paid.

Appeal from Circuit Court, Bullitt County.
"Not to be officially reported."

Action by Clara M. Barbour against Henrietta D. Huber's executor. From a judgment for defendant, plaintiff appeals. Reversed.

Fairleigh, Straus & Fairleigh, for appellant.
J. F. Combs, for appellee.

PAYNTER, J. The relief sought by this action is to obtain a release of the lien retained in the deed which appellee's intestate, Henrietta D. Huber, executed and delivered to the appellant for 10½ acres of land. The appellee resisted the relief sought upon the ground that the purchase money had not been paid. There was a sharp conflict between the testimony of Mary J. Hagan, a devisee under the will of testatrix, and John R. T. Barbour. Much of this conflict relates to issues between these witnesses, not the issue here for consideration. The deed was acknowledged in the city of Louisville. Mrs. Hagan claims that her mother did not start to the city with the deed which she made to appellant for the land or the notes which the appellant and her husband executed for the balance of the purchase money. John R. T. Barbour testifies that the notes had been delivered through Mrs. Hagan to the testatrix before the deed was acknowledged. This Mrs. Hagan denies. The notary who took the acknowledgment to the deed testifies that the testatrix produced to him at the depot in Louisville (Barbour not being present) the deed to the appellant, and acknowledged it, and that she left it with him for the appellant. He also testifies that she had the two notes executed by appellant and her husband for the purchase money, indorsed them on the back, and left them with him to be delivered to John R. T. Barbour. Mrs. Huber's name is indorsed on the back of the notes. The notes were for \$155 each. The weight of the testimony establishes the fact that the notes had been actually received by Mrs. Huber, and, after indorsement by her, were returned to appellant's husband. This statement becomes important in view of the fact that the notes were delivered to Mrs. B. M. Tucker for value. John R. T. Barbour testifies that the reason the notes were returned to him was that Mrs. Huber was starting to Texas, and she wanted him to use the proceeds to pay several debts for which she was liable. In this he is sustained by Mrs. Hagan, because she said the notes were to be discounted. So far as this record shows, there could be no purpose in discounting the notes, unless it was for that stated by Barbour, because it is not claimed that the proceeds of the notes were to be sent to Mrs. Huber. She certainly did not want to discount them, and thus deprive herself of the interest, simply to turn over the proceeds to the husband of appellant without any purpose. John R. T. Barbour and Mrs. Hagan lived near each other. In June following the execution of the notes Barbour sent Mrs. Huber a statement, and the record shows that she never made any complaint to him that he had applied the proceeds of the notes to the payment of any debts, or to any purpose not intended by her. We think the circumstances sustain the claim of Barbour. It is admitted that the notes were paid to Mrs. Tucker either by the appellant or her husband. It is immate-

rial which paid them, as the proceeds were applied as directed by the testatrix.

It is claimed that the contract price of the land was \$635. There were 10¼ acres in the boundary, and the plaintiff claims that it was sold to her at \$40 an acre, and the amount recited in the deed in excess of that (except \$30) was so stated to apparently keep up the price of land in the neighborhood. It was shown that Mrs. Huber did the same thing in a deed to other lands which she sold a short time before. It is recited in the deed that \$325 is cash in hand paid, and for the balance of the purchase money the two notes for \$155 were executed. The evidence shows that the land was not worth \$40 an acre. Mrs. Hagan testifies that the contract price was \$40 an acre, but that the improvements on the place were estimated at \$225. Mrs. Hagan and Barbour contradict each other on this issue, but there is another witness whose testimony tends to support Barbour. In view of the recitation in the deed and the statement in the notes that they are for the balance of the purchase money, and the other evidence in the record, we conclude that all the purchase money, except that evidenced by the notes, had been paid before the delivery of the deed and the execution of the notes.

The judgment is reversed for proceedings consistent with this opinion.

ADKINS v. WILLIAMS et al.

(Court of Appeals of Kentucky. Feb. 18, 1904.)

APPELLATE JURISDICTION—AMOUNT IN CONTROVERSY.

1. In an action for damages for an alleged fraudulent concealment by a grantor of prior conveyances of minerals under the land conveyed, wherein damages in the sum of \$75 only were sued for and recovered, no appeal lies from the judgment under Ky. St. 1903, § 950, prohibiting appeals to the Court of Appeals from a judgment for the recovery of money if the value in controversy is less than \$200, exclusive of interest and costs.

Appeal from Circuit Court, Pike County.

"Not to be officially reported."

Action by M. K. Williams and others against Wright Adkins. From a judgment for plaintiffs, defendant appeals. Appeal dismissed.

Roscoe Vanover, for appellant.

HOBSON, J. Appellees filed this action alleging in their petition that on April 30, 1894, appellant, in consideration of \$315 in hand paid, conveyed to appellee Sanders a tract of land in fee simple with general warranty, fraudulently concealing from her that he had previously conveyed away the minerals, coal, etc., under the land. They alleged that the minerals under the land were of the value of \$75, and prayed judgment against him for \$75 in damages. The defendant answered, denying the fraud, and pleading five years' limitation, but admitted the conveyance of

the land with warranty, and that he had previously sold the coal and mineral privileges. The court sustained a demurrer to his answer, and gave judgment against the defendant for \$75. From this judgment he appeals.

By section 950, Ky. St. 1903, no appeal shall be taken to the Court of Appeals from a judgment for the recovery of money or personal property if the value in controversy is less than \$200, exclusive of interest and costs. The judgment appealed from is simply a personal judgment for \$75. The matter in controversy is therefore not within the jurisdiction of this court.

The fact that the cause of action grew out of a conveyance of land does not affect the rule. The judgment is simply for the recovery of money, and for an amount less than \$200. No question of title to land is involved. The only thing in contest is the matter of damages. The amount of the judgment determines the jurisdiction of this court in such cases.

The appeal is therefore dismissed.

PATTERSON v. MAYSVILLE & B. S. R. CO. et al.

(Court of Appeals of Kentucky. Feb. 16, 1904.)

FALSE IMPRISONMENT—CARRIERS—ARREST OF PASSENGERS—PROSECUTION FOR CRIME—ACTS OF CONDUCTOR.

1. The fact that plaintiff in an action against a railroad for damages was, through a prosecution set on foot by a conductor in its employ, arrested on the charge of rape, for which the grand jury failed to indict plaintiff, does not constitute an actionable wrong against plaintiff on the part of the railroad company; such act not being within the scope of the conductor's employment.

2. The fact that plaintiff in an action against a carrier for damages was, through a prosecution set on foot by a conductor in its employ, arrested on the charge of rape, and carried handcuffed by the arresting officer through several counties on defendants' train, on which charge the grand jury failed to indict plaintiff, does not constitute an actionable wrong against plaintiff on the part of the carrier.

Appeal from Circuit Court, Lewis County.

"Not to be officially reported."

Action by William Patterson against the Maysville & Big Sandy Railroad Company and others. From a judgment for defendants, plaintiff appeals. Affirmed.

A. E. Cole & Son and Allan D. Cole, for appellant. W. H. Wadsworth and E. L. Worthington, for appellees.

BURNAM, C. J. The appellant, William Patterson, brought this suit against the Maysville & Big Sandy Railroad Company, the Chesapeake & Ohio Railway Company, and C. R. Morarity. The defendant Morarity was not brought before the court by service of summons, and the defendant corporations filed a general demurrer to each paragraph of the petition, which was in three paragraphs, which was sustained by the trial court, and plaintiff's petition dismissed, and he has appealed.

In the first paragraph of his petition, appellant attempts to state a cause of action for assault and battery; in the second, for false imprisonment; and in the third, for malicious prosecution. At common law these separate grounds of complaint could not be joined in the same action, but in the code states, where each cause of action is founded upon and grows out of the same facts, it is generally held that they may be all relied upon in the same action, when stated in separate paragraphs. Good pleading, however, requires that the petition should state the facts relied on for recovery in plain, direct, and positive language. Neither of these simple and necessary requirements has been complied with in this case, and we have found some difficulty in determining the exact facts attempted to be relied on in this action. Going upon the theory that the alleged cause of action grows out of the same transaction, and considering each paragraph with reference to this fact, the first paragraph appears to allege that the defendant Morarity was a conductor in charge of a train operated by the Chesapeake & Ohio Railway Company, and that, while plaintiff was traveling as a passenger upon this train near Ashland, he was forcibly seized, handcuffed, and carried by the agents and servants of the company to Vanceburg, and that the defendant's agent in charge of the train could have prevented all these injuries upon him. The second paragraph alleges that Morarity, while in the employ of the defendant as a conductor, caused and permitted him to be assaulted and arrested and carried along the streets of the city of Ashland to a certain office, and to the county jail, and suffered him to be imprisoned therein, and publicly carried, handcuffed as a prisoner, through the counties of Boyd, Greenup, and Lewis, to the city of Vanceburg. In the third paragraph it is alleged that Morarity, while in the employment of the defendant, made an affidavit before the county judge of Boyd county charging him with the crime of rape on the person of Jennie Bell Murray, whereupon the county judge issued a warrant for his arrest, and that by authority of this warrant he was arrested by the sheriff of Lewis county and confined in the Lewis county jail; that the grand jury of Lewis county refused to indict him for the offense, and he was subsequently discharged. These paragraphs, taken together, appear to allege that the plaintiff was arrested at Ashland, Ky., under a warrant sworn out by R. C. Morarity while he was conductor in the employ of the Chesapeake & Ohio Railway Company, charging him with the crime of rape, committed in Lewis county; that he was arrested under the warrant, and taken on the train of appellee from Ashland to Vanceburg, and confined in jail until after the investigation by the grand jury, who failed to indict him. Neither of these paragraphs charges that the prosecution or proceedings against appellant were instigated,

instituted, or continued by the direction or procurement of defendants. The only connection between appellees and the alleged injuries to appellant attempted to be set out by the petition is that one of their conductors set the prosecution on foot by swearing out a warrant for his arrest. There has been great diversity of opinion as to whether a corporation was liable for damages for the unauthorized malicious acts of its agents, committed in the course of their employment. But in this state the law is well settled that if the act of the servant was committed in the course of his employment, and while acting within the scope of his authority as agent of the corporation, they may be so held; but, so far as we are advised, they have never been held liable for the malicious acts of one of their employes, which was not committed in the scope of their employment, or while acting within the line of their duty to the employer. See *Lexington Railway Co. v. Cozine* (Ky.) 64 S. W. 848; *Williams v. Southern Railway in Kentucky* (Ky.) 78 S. W. 779; *Tryon v. Pingree* (Mich.) 70 N. W. 905, 37 L. R. A. 222, 67 Am. St. Rep. 428; *Richmond, etc., Railway Co. v. Jefferson* (Ga.) 16 S. E. 69, 17 L. R. A. 571, 32 Am. St. Rep. 100. It cannot for a moment be contended that there was anything in the employment of Morarity as conductor of one of appellees' trains which imposed upon him the duty to swear out warrants for the arrest of persons charged with committing rape; nor was it the duty of such conductor, or the employes of the company, after the arrest of such person upon warrant based upon the affidavit of the conductor, to interfere with the arresting officer in taking his person from the point of arrest in Ashland to Vanceburg. We think it necessarily follows that the trial court properly sustained a demurrer to each paragraph of the petition.

Judgment affirmed.

STRATER BROS. TOBACCO CO. v. COMMONWEALTH.

(Court of Appeals of Kentucky. Feb. 10, 1904.)

TAXATION—LICENSE TAXES—UNIFORMITY.

1. Acts 1902, p. 355, c. 128, art. 10, subd. 3, § 32, provides that a tobacco factory shall pay a license tax of \$1 on the marketable value of each \$1,000 of product up to \$100,000, and at the rate of 50 cents thereafter. Const. § 174, provides that all property shall be taxed in proportion to its value, but that there may be taxation based on income or license, and section 181 authorizes the payment of license fees on various occupations or a special or excise tax. *Held*, that the tax imposed by the act of 1902 is not a property tax, but a license tax.

2. The statute does not violate Const. § 171, declaring that taxes shall be uniform.

Appeal from Circuit Court, Franklin County.

"To be officially reported."

¶ 2. See Licenses, vol. 32, Cent. Dig. § 10

Action by the commonwealth against Strater Bros. Tobacco Company. From a judgment for plaintiff, defendant appeals. Affirmed.

O'Neal & O'Neal and D. W. Sanders, for appellant. C. J. Whittemore and Hazelrigg & Chenault, for the Commonwealth.

PAYNTER, J. This action arises from an effort to enforce section 32, subd. 3, art. 10, c. 128, p. 355, Acts 1902, which reads as follows: "That all corporations, associations, copartnerships or other persons, owning or operating a tobacco factory in this state, whereby the natural leaf is converted by process of manufacture into manufactured product, including cigars and cigarettes, shall pay a license tax therefor. On the manufactured product (except cigarettes) for each factory, one dollar on the marketable value of each one thousand dollars of such product, up to one hundred thousand dollars of such product; and fifty cents on each one thousand dollars of the marketable value on all in excess of the first one hundred thousand dollars."

The appellant owns and operates a tobacco factory wherein the natural leaf is converted by process of manufacture into a manufactured product. For the appellant it is insisted (1) that it is a tax upon the manufactured product of the tobacco factory, not on the manufacturer's right or privilege to conduct a tobacco manufacturing business; (2) that it is a tax imposed under section 171 of the Constitution, and is in violation thereof, because it is not uniform.

For the commonwealth it is insisted that it is a license or occupation tax, and is not a tax upon the product of the tobacco manufacturer. Section 171 of the Constitution provides that taxes shall be levied and collected for public purposes only, and that they shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax. Section 174 provides that all property shall be taxed in proportion to its value, unless exempted by the Constitution, and it contains the further provision which reads as follows: "* * * Nothing in this Constitution shall be construed to prevent the General Assembly from providing for taxation based on income, license or franchises."

The taxes provided for by the sections of the Constitution to which we have referred are ad valorem taxes. Section 181 of the Constitution reads as follows: "* * * The General Assembly may, by general law only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations, and professions, or a special or excise tax. * * * The tax imposed is not levied upon property. It is simply a license tax as declared by the General Assembly in the act. The Constitution not only does not prohibit the imposition

of such a tax, but it expressly recognizes the right of the Legislature to impose it. It not only does so, but authorizes it to be done in addition to an ad valorem tax. If the Constitution had been silent upon the question, it would have been competent for the Legislature to have enacted the law.

It is said in Cooley on Taxation (2d Ed. p. 570): "It has been seen that the sovereignty may, in the discretion of its Legislature, levy a tax upon every species of property within its jurisdiction, or, on the other hand, that it may select any particular species of property, and tax that only, if in the opinion of the Legislature that course will be wise. And what is true of property is true of privileges and occupations also; the state may tax all, or it may select for taxation certain classes and leave the others untaxed. Considerations of general policy determine what the selection shall be in such cases, and there is no restriction on the power of choice unless one is imposed by the Constitution."

* * * Constitutional provisions requiring the taxation of property by value have no application to the taxation of other subjects, and do not, therefore, by implication, forbid the taxation now under consideration. Again it is said by the same author (p. 580): "This is a class of dealers commonly selected for exceptional taxation. Their occupation is sometimes taxed for federal, state, and municipal purposes, though their stocks are taxed as property, and whatever has been imported has paid a heavy duty. The right to levy these several taxes has almost ceased to be contested."

We do not think the tax is lacking in the quality of uniformity. It is the same on each person or corporation which manufactures the same quantity of tobacco. The Legislature had the right to impose a graduated license tax. The larger manufacturer is required to pay more than the smaller one, based upon the value of the product manufactured. If all manufacturers of tobacco, regardless of the manufactured product produced by each, had been made to pay the same license tax, then a more potential argument could be made against the validity of the law for lack of uniformity and inequality of burden than has been made against the law here sought to be enforced. While this is true, we would not hold it sound. If we did, then it would logically follow that a license tax on retail liquor dealers would be invalid, because the one who sold a small quantity of liquor paid the same as the one who sold many times as much. This court has upheld ordinances imposing a license or occupation tax on liverymen based upon the number of vehicles employed in their business. Such taxes are not based upon the value of the vehicles or the profit derived from their use, but upon the number employed.

The judgment is affirmed.

GORMAN et al. v. GLENN.

(Court of Appeals of Kentucky. Feb. 16, 1904.)

EXECUTION—LEVY ON LAND—SUBSEQUENT INCUMBRANCE—BILL TO SET ASIDE—JURISDICTION—RELIEF—LOCATION OF LAND—RECORD OF EXECUTION—MOTION TO QUASH—PRESUMPTION—PLEADING.

1. While ordinarily an execution plaintiff must enforce his execution lien by a sale as provided by the statute, he may file a petition in equity under Ky. St. 1903, § 1907a, to set aside a fraudulent conveyance or mortgage, and, as the chancellor has jurisdiction of the parties, he may grant complete relief while they are before him, by enforcing the execution.

2. Under Ky. St. 1903, § 1656, authorizing the issuing of an execution to a county other than that in which the judgment is rendered, or in which the defendant resides, before an execution has been returned therein "No property found," when the plaintiff, his agent or attorney, shall file with the clerk an affidavit stating that the defendant in the judgment has not sufficient property in either of these counties to satisfy the same subject to execution, it must be presumed that the clerk did his duty, and that the proper affidavit was filed before the executions to such other counties, and, on a bill to set aside a conveyance by the debtor of the land levied on, an allegation in the answer that no execution had issued to the county in which judgment was rendered is insufficient to overcome the presumption.

3. The county in which the judgment was rendered was the proper forum for quashing the execution issued to another county for failure to comply with the statute.

4. Where an execution creditor filed a bill to set aside a subsequent mortgage by the debtor, an answer by the mortgagee denying that the mortgage was without consideration, or made to hinder or delay the creditor, and that no record of the execution liens was made in the county where the land was situated, but not averring that he had parted with value without notice, did not bring him within Ky. St. 1903, § 2358a, subsec. 2, providing that no execution shall affect a subsequent purchaser without notice unless a memorandum, showing the execution, has been filed in the office of the clerk of court of the county where the land lies.

5. Where an execution was levied on two lots, and the court ordered only so much sold as would satisfy the execution, it is to be presumed that the property was divisible.

Appeal from Circuit Court, Kenton County.
"Not to be officially reported."

Bill by D. A. Glenn against Eliza Gorman and another to set aside a mortgage executed subsequent to the levy of plaintiff's execution on the land. From a decree for plaintiff, defendants appeal. Affirmed.

Hall & McLean, and W. C. Hall, for appellants.

HOBSON, J. D. A. Glenn on January 14, 1897, had an execution issued from the office of the clerk of the Boone circuit court in his favor against Eliza Gorman for \$67, with interest from September 3, 1877, and \$11.90 costs, directed to the sheriff of Kenton county, who levied it on January 3, 1897, on two lots in Covington, Ky., as her property, subject to a mortgage held by the Erlanger Building & Loan Association. She thereupon filed suit in the Boone quarterly court in which the judgment against her had been rendered enjoining the collection of the execution, but she did not execute the bond to

discharge the levy under section 278 of the Civil Code. That case was tried out, and, judgment having been given against her dissolving the injunction, she appealed to this court, but her appeal was dismissed for want of jurisdiction. *Gorman v. Glenn* (Ky.) 58 S. W. 776. On January 3, 1898, the mortgage held by the building association was released, and on May 6, 1898, Glenn had another execution in his favor issued and levied on the same two lots. On May 26th, Eliza Gorman executed to Anna Sullivan a mortgage on the two lots to secure, as recited therein, the payment of \$1,400. On December 21, 1900, the injunction suit having been finally settled, Glenn filed this action against Eliza Gorman and Anna Sullivan, alleging the facts above stated, also that he had a superior lien on the land; that the mortgage from Gorman to Sullivan was executed without consideration, and was given to hinder and delay him in the collection of his debt. He prayed judgment subjecting the property to his claim. Eliza Gorman filed a general demurrer to the petition, and also filed an answer in which she set up again the same matters that had been litigated in the injunction suit. She also denied that the mortgage to Anna Sullivan was without consideration, or made to delay or hinder the plaintiff in the collection of his debt, and alleged that the executions had been issued to the sheriff of Kenton county before there had been any execution issued to the sheriff of Boone county. Anna Sullivan filed an answer, in which she denied that the mortgage to her was without consideration, or made to hinder or delay the plaintiff in the collection of his claim, and she alleged that there was no record of the execution liens relied on in Kenton county—no lien of record in the Kenton county clerk's office or circuit clerk's office of either execution—at the date the mortgage was given to her, and that she had no notice of the execution levy; but she does not allege that she in fact paid Eliza Gorman any money or parted with any consideration on the faith of the mortgage.

The case being submitted to the court on the pleadings, he entered a judgment directing the land or so much of it as might be necessary to satisfy the plaintiff's debt and costs to be sold. The sale was made, and on the motion of Anna Sullivan was set aside. She then filed an amended answer, asserting a lien on the property under her mortgage. The court ordered a resale, and at this sale she bought the property for \$725, it being appraised at \$600. This sale was confirmed without objection. Within two years from the entry of the original judgment Eliza Gorman and Anna Sullivan have sued out from the clerk of this court an appeal therefrom.

While ordinarily an execution plaintiff must enforce his execution lien by a sale as provided by the statute, he may file a petition in equity under section 1907a, Ky. St.

1903, to set aside a fraudulent transfer, conveyance, or mortgage, and, as the chancellor has jurisdiction of the parties, he may grant complete relief while they are before him. The general demurrer to the petition was therefore properly overruled. The second execution created a lien on the land without regard to what had been done under the first.

Section 1656, Ky. St. 1903, authorizes the issuing of an execution to a county other than that in which the judgment is rendered, or in which the defendant resides, before an execution has been returned therein "No property found," when the plaintiff, his agent or attorney, shall file with the clerk an affidavit stating that the defendant in the judgment has not sufficient property in either of these counties to satisfy the same subject to execution. It must be presumed that the clerk did his duty, and that the proper affidavit was filed before the executions in controversy were issued. The allegation of the answer is insufficient to overthrow the presumption, the allegation being merely that no execution had issued to Boone county. Besides the proper forum for quashing the execution, if this question was desired to be raised, would be the Boone circuit court, from whose clerk's office the execution issued.

Anna Sullivan does not state facts sufficient to bring her within subsection 2, § 2358a, Ky. St. 1903. The execution levy was older in date than her mortgage, and was superior to her, unless she was a bona fide purchaser without notice. She does not plead any facts sufficient to show that she was a bona fide purchaser. The statute only protects those who have parted with value without notice of the execution lien, where the required memorandum has not been filed in the county clerk's office.

The court ordered only so much of the property sold as was necessary to pay Glenn's debt and costs. This was proper. We must presume that the property was divisible, as it consisted of two separate lots. No appeal is taken from the order confirming the second sale, and in fact no exception was filed thereto.

Judgment affirmed.

DODSON v. COMMONWEALTH.

(Court of Appeals of Kentucky. Feb. 18, 1904.)

CRIMINAL LAW—BILL OF EXCEPTIONS—VERITY AS SHOWN BY JUDGE'S CERTIFICATE.

1. The verity of the bill of exceptions, as made by the judge's certificate of his rulings and exceptions thereto in a criminal case, cannot be assailed by bystanders or the affidavits of interested parties.

Appeal from Circuit Court, Jefferson County; Criminal Division.

"Not to be officially reported."

Charles Dodson was convicted of manslaughter, and he appeals. Affirmed.

E. E. McKay and Edwards & Ogden, for appellant. N. B. Hays and Loraine Mix, for the Commonwealth.

PAYNTER, J. The indictment under which the appellant was tried charges him with the murder of Henry Warner, and the jury found him guilty of manslaughter. The principal ground relied upon for reversal is alleged objectionable statements made by the commonwealth's attorney to the jury in closing the argument in the case. The bill of exceptions signed by the judge does not show that the commonwealth's attorney made any statement in argument to which the defendant objected, or that he excepted to the ruling of the court on any question as to the propriety of the argument of the commonwealth's attorney. The defendant seeks to supplement the bill of exceptions or to impeach its correctness by affidavits which were filed on the motion for a new trial. These affidavits purport to give the alleged objectionable remarks of the commonwealth's attorney. The judge certified to his own rulings and exceptions taken during the progress of the trial, and the verity of the bill of exceptions as thus made cannot be assailed by bystanders, or the affidavits of the parties interested in the litigation. *Garrott v. Ratliff*, 83 Ky. 389; *Patterson v. Commonwealth of Kentucky*, 86 Ky. 325, 5 S. W. 387.

The judgment is affirmed.

GRANT COUNTY BUILDING, LOAN & SAVINGS ASS'N v. LEMMON et al.

(Court of Appeals of Kentucky. Feb. 12, 1904.)

PAYMENT—ACCEPTANCE BY CREDITOR—APPLICATION OF FUND—LIMITATIONS—SURETIES—COMMENCEMENT OF PERIOD.

1. Where the secretary of an association for a period of some years misappropriated the association's money, and during the last year of the period surreptitiously redeposited a part thereof, such redeposit did not become a payment until accepted as such by the association, and, when it accepted it, it had the right, by agreement with the debtor, to apply it to the last defalcation, and such application was conclusive of the rights of the sureties for the former years.

2. Limitation begins to run against the sureties on a fidelity bond the instant a fraudulent misappropriation of funds is made by the principal, and not at the end of the year for which the principal was elected to the position of trust.

Appeal from Circuit Court, Grant County. "Not to be officially reported."

Action by the Grant County Building, Loan & Savings Association against J. R. Lemmon and others. From a judgment for defendants, plaintiff appeals. Reversed.

Clore, Dickerson & Clayton and R. L. Webb, for appellant. A. G. De Jarnette, for appellees.

¶ 2. See Limitation of Actions, vol. 33, Cent. Dig. § 257.

BARKER, J. John R. Westover was elected secretary and treasurer of the Grant County Building, Loan & Savings Association in July, 1895, and was annually thereafter re-elected until 1902, inclusive. For each of the years he was so elected and acted as secretary he gave a separate bond with sureties. During the year elapsing from July 8, 1895, to July 8, 1896, he fraudulently misappropriated and withheld the sum of \$101.94 of the association's money, in the year elapsing from July 8, 1896, to July 8, 1897, he fraudulently misappropriated and withheld the sum of \$100, and in 1901 and 1902 he fraudulently misappropriated and withheld the sum of \$2,500. During the latter period he surreptitiously, and without the knowledge of the association, commenced to pay back in sums of \$20 per month, by secretly depositing in the bank where its funds were kept, until he had covered back into the treasury the sum of \$520. About this time the association employed an expert bookkeeper to examine his accounts, who discovered the various defalcations herein set forth, and the various monthly deposits. When this fraud was discovered, the secretary agreed with the association that the monthly deposits, amounting in the aggregate to \$520, should be credited upon the defalcations occurring during the years 1901 and 1902. Having made this settlement, the association instituted this action on the bonds of the secretary for the years 1895-96 and 1896-97 for the purpose of recovering judgment against the sureties therein. The petition is in two paragraphs—the first setting up the bond for the year 1895-96 and the breach, and praying judgment against the sureties for the sum of \$101.94; the second paragraph setting out the bond for 1896-97 and the breach, and praying judgment for the sum of \$100 against the sureties. To the action set up in the first paragraph of the petition the sureties pleaded the seven-years statute of limitation, contained in section 2551 of the Kentucky Statutes of 1903, and to the first and second paragraphs they pleaded the monthly payments made during the years 1901 and 1902, which aggregated, as before said, the sum of \$520, claiming that, as neither the defaulting secretary nor the association had made application of these sums, the law applied them to the oldest indebtedness existing at the time, to wit, the defalcations occurring during the years 1895-96 and 1896-97.

There is no contrariety in the evidence in this case, and the issues arising, therefore, are of law. The case was submitted to the court without the intervention of a jury, upon an agreed statement of the facts. The court held that the \$520 paid during the years 1901 and 1902 were to be applied upon the oldest indebtedness for the following reasons: After stating the facts, as agreed by the parties, it is said in the opinion: "Upon the foregoing finding of facts the court is

of opinion that the agreement between plaintiff and J. R. Westover to apply the \$520 to the payment of the \$2,500 default made in 1901 and 1902 was void as to the defendants, because it was not applied at the time of payment, but several months after, and that the law, in the absence of an agreement to apply at the time of payment, made the application to the oldest items of default, and therefore should be applied to discharge the default for which the defendants had become liable."

To this conclusion of the court we cannot agree. Assuming it to be true, as a proposition of law, that, where a debtor owes several different sums, and makes payments, in the absence of any application of these payments to any special debt by either the debtor or creditor the law applies them to the oldest debt, we think the court erred in concluding that there had been such a payment by the debtor as put the creditor upon its election as to which of its several debts it would make the application. The debtor has the first right of applying the payment. If he fails to make application, then the creditor may apply it as he sees fit. This is a valuable right to a creditor, and one of which he cannot be deprived without his consent, or without laches on his part. No payment can be made without the acceptance of the creditor. This rule is well stated in the Am. & Eng. Encycl. of Law, 2d Edition, 22d volume, page 577, in the following language: "In order that a transaction may operate as a payment it is essential that the money or property delivered to the creditor be accepted as a discharge of the debt. If it is accepted for some other purpose, it does not operate as a payment. And a fortiori a mere tender by the debtor, without acceptance by the creditor, has no effect as a payment. The payment is complete as soon as the money or property is delivered to and accepted by the creditor as payment."

Applying the principle thus announced, it would follow that the secret deposits of money by the secretary to the credit of the association were not payments until the latter accepted them as such; and the agreed facts show, that, as soon as the association became aware of the defalcation and various deposits, with the consent of the debtor it applied them to the last defalcation. If these monthly deposits can be considered as payments within the meaning of the law, so as to put the creditor upon its election, then it would follow that one can do secretly and surreptitiously what he cannot do openly and above board. One who owes a debt cannot make a lawful tender of a part of the sum due by him. In order to make a legal tender of an indebtedness, the debtor must tender the full sum due in lawful money. The conclusion reached by the learned trial judge makes a surreptitious deposit of \$20 per month, without the consent of the creditor, a payment, when no one will dispute

that, if he had come to his creditor with the \$20 in his hand, and tendered it, it would not have constituted a payment, pro tanto, without the creditor's consent. The application of the money deposited to the last indebtedness was made, both by the debtor and the creditor, as soon as the latter knew of or accepted it as payment, and this, we think, was conclusive of the rights of the sureties.

The conclusion thus reached makes it necessary for us to pass upon the validity of the plea of the statute of limitations as to the cause of action set up in the first paragraph of the petition. Appellant contends that, inasmuch as the bond of the secretary was executed annually, the statute of limitations did not begin to run until the end of the year in which the defalcation occurred. If this be so, then the statute did not bar the cause of action in question; but, if the statute began to run from the time of the defalcation, then the seven years had elapsed, and the bar was complete. We know of no basis for the contention of appellant on this question. The cause of action of the association arose against the secretary and his sureties the instant the fraudulent misappropriation of its funds took place, and not from the end of the year for which the secretary was elected; and it follows, as a consequence, that the cause of action set up in the first paragraph of the petition was barred on the 17th day of January, 1903, at which time this action was instituted.

In the case of *Schwearman v. Commonwealth*, 90 Ky. 296, 38 S. W. 146, which was an action against sureties on an official bond, it was contended that the cause of action did not commence to run against the sureties until the fraud of the principal was discovered. This court held that this contention was not sound, but that the cause of action arose upon the perpetration of the fraud, and said, "In our opinion, the only conditions or acts which do stop the running of the statute of limitations in favor of sureties are prescribed in section 2552;" and these have no application to the case at bar.

For these reasons, the judgment is reversed for proceedings consistent with this opinion.

ILLINOIS CENT. R. CO. v. BROUGHTON.
(Court of Appeals of Kentucky. Feb. 16, 1904.)
RAILROAD—NEGLIGENCE—DUTY TO TRESPASSER—CONTRIBUTORY NEGLIGENCE.

1. Where one wishing to cross a railway track on which cars were standing climbed on one and started to walk across on a projecting plank, the company, having no knowledge of his presence there, was not liable for his injury resulting from the backing of other cars against the one he was on.

2. Where one in crossing a railway track, having heard the whistle of a train at a distance, but not knowing of its immediate proximity, climbed on a car, and, standing erect, carrying articles in each hand, started to walk

across on a plank projecting about 18 inches, he was guilty of such gross negligence as to preclude his recovery for his injury from other cars backing against the one he was on, even if the company was negligent in failing to give warning, by bell or whistle, of the approach of the additional cars.

Appeal from Circuit Court, Ohio County.
"Not to be officially reported."

Action by William Broughton against the Illinois Central Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

H. P. Taylor, for appellant. C. E. Smith, M. L. Heavrin and E. M. Woodward, for appellee.

BARKER, J. The appellee, at the time of his injury, was in the employ of the Taylor Coal Company, at its mines in Ohio county, Ky. His usual business was working under the tippie, loading cars, and dressing off the tops of those loaded, so as to prevent the coal from jostling off during the moving of the train; being what is technically called a "trimmer." After the regular working hours, it was his duty to clean up the fallen coal around the tippie, and remove sulphur lumps out of the way, and to lock up such tools as he and his assistants had been using during the day. Appellee received the injuries of which he complains at or near 5 o'clock p. m. The regular work for the outside employes of the company was over at 4 o'clock p. m., but appellee and his assistant, Jim Miller, were required to do the extra work of cleaning up sulphur lumps and locking up the tools after the regular day's work was over. This required some 20 or 30 minutes. Appellee testifies that after he and Jim Miller had cleaned up around the tippie he carried about half of the tools over to the toolhouse and placed them therein; that, instead of going back at once for the remainder, he left them where they were, and went up to the company's store for the purpose of obtaining checks with which to purchase his landlady a lamp and chimney; that, after making these purchases, he came back with them in his hand and his dinner bucket on his arm, and, thus laden, he undertook to go back to the place where he had left the tools, in order to bring them over to the toolhouse. There were standing upon the switch which led to the company's tippie six empty coal cars, which were standing directly between him and the tools on the far side. Instead of going around these empty cars, he undertook to cross over them by climbing up upon one of them, and walking along a projecting plank about 18 inches wide. While he was thus standing erect upon this plank, an engine and nine additional empties were backed in on the switch by the employes of appellant, bumping against those over which appellee was crossing, and throwing him to the ground by the jostle, dragging him some distance, and injuring his leg and heel so severely as

to make him permanently a cripple. Appellee did not know of the immediate proximity of the train, although he had heard it whistle some distance off, but did not hear it whistle at a crossing about 200 yards from the empties, at which point it was their duty and custom to sound the whistle, upon which appellee and other employes of the mine had come to rely. No bell was sounded, and he did not know of any immediate danger until the train was backed against the empties over which he was crossing. Upon the trial of the case below, the jury awarded a verdict of \$1,300 in favor of the appellee, from which judgment this appeal is prosecuted.

The first question which arises for decision is whether or not appellant was entitled to a peremptory instruction. According to his own testimony, appellee had no duty to perform which required him to climb upon the empty cars after 4 o'clock; his boarding the empty car, for the purpose of crossing over, was for his own convenience entirely, and not in the discharge of any duty which he owed the mining company; he had no right to use appellant's cars as a passway; having no duty that called him thereon, but using them for his own convenience, he was a mere trespasser, and appellant owed him no duty other than to refrain from injuring him after his perilous position was discovered—of which latter fact there is no evidence in the record. The fact that he had to go back for his tools did not authorize him to cross over appellant's empty cars; its employes were not bound to anticipate his presence where he had neither duty nor right to be, and, owing him no duty, could not be guilty of negligence with regard to him until after his peril was discovered.

This case comes both within the letter and the reasoning of the opinion in the case of the Louisville & Nashville R. R. Co. v. Hocker (Ky.) 64 S. W. 638. Hocker was in the employ of the Louisville & Nashville Railroad Company as telegraph operator at its station at Latonia, Ky. Having occasion to go to a water-closet placed in the yard for the convenience of the employes, he left his post, walked across the company's tracks, and, instead of going to the closet, went between some cars, which were standing on one of the tracks, for his own private purpose. While there, an engine was backed against the cars between which he was standing, seriously injuring him. No whistle was blown, and no bell was rung, to warn him that the engine was about to be backed against the cars. After reviewing the authorities, the court said: "The cars between which he was standing were coupled, and there was no reason to expect his presence at that place, and there is no testimony which tends in the slightest degree to show that any servant of the company knew he was there. He knew from long experience that the switch opening from this track to the lead track could be opened, as he testifies, in

a second, and was likely to be so opened at any moment. Both ordinary prudence and the rules of the company required that he should look after and be responsible for his own safety. It seems to us, from the undisputed facts of this case, that, as appellee was not in his place of business, or in the discharge of any duty imposed upon him by his employment, the appellant company owed him no duty except to avoid injuring him after it had discovered his perilous position. Even if it be admitted that there was negligence on the part of the employes of the company in running cars upon the switch, the contributory negligence of appellee was so great as to preclude a recovery." In response to the petition for rehearing (85 S. W. 119) it was said: "It was gross negligence in appellee to stand between the cars for this purpose, and, there being no proof that his danger was perceived by those in charge of the train, before the injury or in time to avoid it, a peremptory instruction should have been given to the jury to find for the defendant. A railway yard is necessarily a dangerous place, and one who goes between standing cars in such a yard for purposes of his own takes the chances of injury." See, also, *McDermott v. The Ky. Cent. R. R. Co.* (Ky.) 20 S. W. 330; *Kentucky Cent. R. R. Co. v. Gastineau's Adm'r*, 83 Ky. 119; and *Brown's Adm'r v. L. & N. R. R. Co.* (Ky.) 30 S. W. 639.

Appellant was injured on the 5th day of February, at or near 5 o'clock p. m.; it was then dark; he knew that it was about time for the train to come in, and he knew that when it did come in on the switch it was liable to back against the empties over which he was crossing; he heard the train far down the track, but did not know of its immediate proximity; and, as said in the *Hocker Case*, even if it be considered negligence for appellant's employes to back against the empties without warning, appellee's undertaking to cross in the manner in which he did, by walking upon a narrow plank 18 inches wide, standing perfectly erect, with his hands occupied in holding a lamp and chimney and his dinner bucket, so as to prevent the possibility of his saving himself in case of an accident, was such gross negligence as warranted the granting of appellant's motion for a peremptory instruction. We are of opinion that, upon appellee's own testimony, the court should have awarded the peremptory instruction asked for in favor of appellant.

Judgment reversed, for proceedings consistent herewith.

EVANS v. MOTLEY.

(Court of Appeals of Kentucky. Feb. 18, 1904.)

PRIVATE ROAD—PRESCRIPTIVE RIGHT—FORFEITURE OF RIGHT TO ROAD—STIPULATIONS—RIGHT TO MAKE.

1. Proof that an owner established a passway over his land to a public road, solely for his

own convenience, and which was rarely used by others, does not establish a prescriptive right to the passway in a devisee of a part of the premises excluded from the public road except by means of the passway.

2. A devisee of land, bordering on a public highway, charged with the burden of providing a suitable passway to the devisees of land excluded from the highway, has no right to stipulate that the passway shall be forfeited by the failure on the part of the devisees to keep the gates over the passway closed.

Appeal from Circuit Court, Allen County.

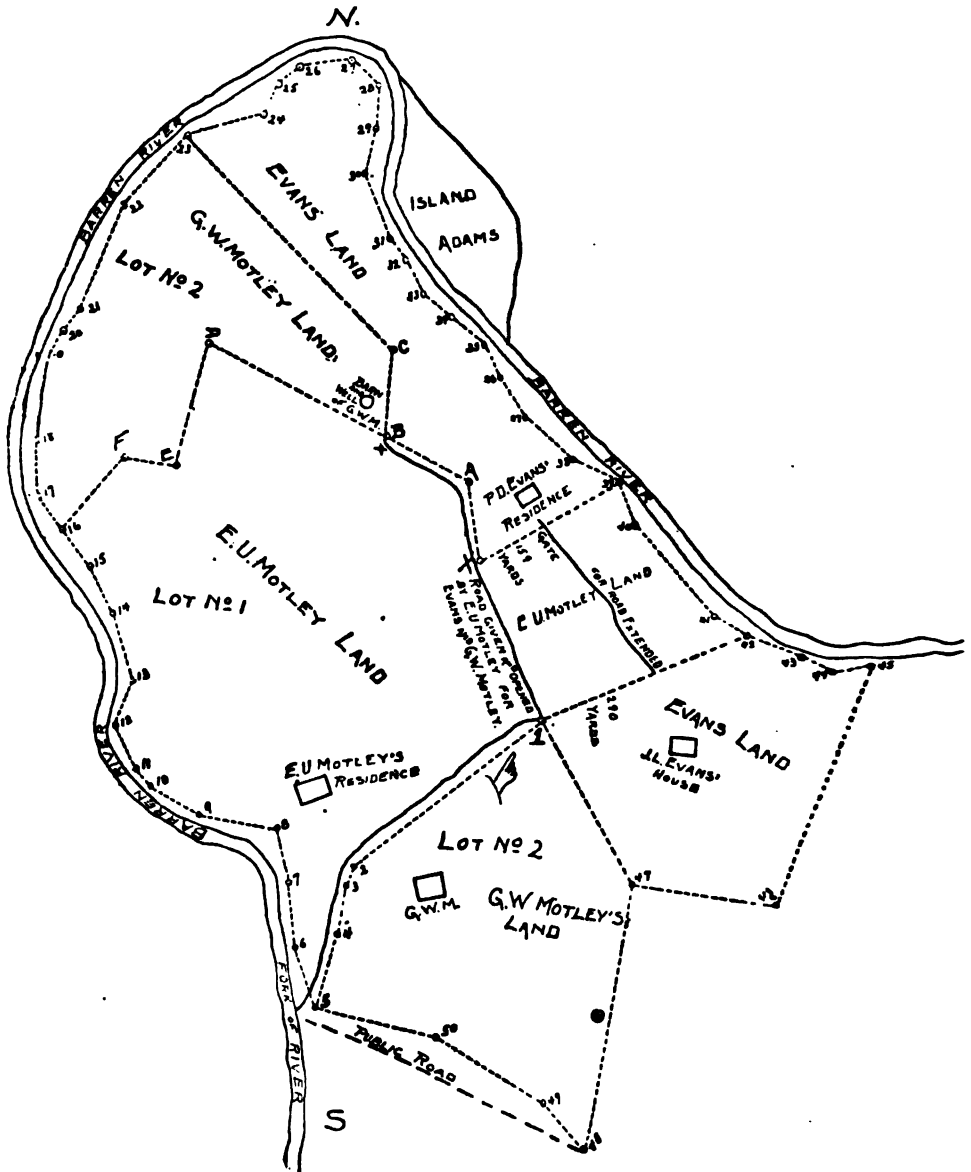
"Not to be officially reported."

Action by P. D. Evans against E. U. Motley. From a judgment dismissing the petition, plaintiff appeals. Reversed.

The following is the map referred to:

R. W. Bradburn and Goad & Carpenter, for appellant. John M. Wilkins, for appellee.

BURNAM, C. J. John A. Motley died a resident of Allen county in the year 1888, the owner of a large boundary of land in what was known as "Motley's Bend," on Barren river. Shortly before his death, he divided this tract of land into three parts, and by his will, which was duly proven and recorded after his death, devised these respective pieces to his two sons, George W. and E. U. Motley, and to the children of his dead daughter, Mrs. John L. Evans. The location and division lines of these respective



tracts of land are shown in a map made by L. Bowcher, filed with this opinion. The lot which he gave to his son E. U. Motley embraced the homestead, and ran from the river on the west to the river on the east, and separated the parts devised to G. W. Motley and to the Evans children from the public road. During the life of J. A. Motley he made use of a passway which ran along the eastern side of his boundary of land, in order to get from the front of his farm back to the land lying in the bend. This passway, after the division of the entire tract of land, crossed the land devised to E. U. Motley, and connected the lands devised to the Evans children, but did not touch either piece devised to G. W. Motley. It followed a zigzag course through a boundary of heavily timbered land, and did not connect any particular pieces, but was simply used by John A. Motley as a matter of convenience. In making the division of his land among his children, testator made no provision for a passway from the back land devised to G. W. Motley and the Evans children to the public road. It appears from the map that the only public road which this boundary of land bordered on was the one from Scottville, in Allen county, to Bowling Green, in Warren county. At the time of the division of his lands, John A. Motley told both his son G. W. Motley and his son-in-law, Evans, that he intended to provide a passway from the back land to the public road. With the view of carrying out the purpose of his father in this respect, E. U. Motley opened a road beginning at the letter B on the plat, along the line between the land of E. U. Motley and the Evans children, but wholly upon his own land, to the letter x, and thence across his land to the figure 1, which is the division corner of the southern boundaries of the land between G. W. Motley and the Evans children, from this point out to the public road at figure 5; and at the same time executed a deed to the passway 20 feet wide to G. W. Motley and the Evans children, in which the true location of the passway is described by courses and distances. In this deed E. U. Motley reserved the right to put gates across the passway, and stipulated that the second parties were to keep them closed, and, in the event of their failure to do so, that the deed to the passway should become null and void. The appellant, P. D. Evans, one of the children of J. L. Evans, refused to accept this passway, and instituted this suit against E. U. Motley, asking that he be perpetually enjoined from in any wise obstructing the old passway which ran parallel to the new road, some 250 or 300 feet distant, upon the ground that the new passway was not suitably located for a road, and claiming the old passway by prescription. The issues were made up in this proceeding, proof taken, and, upon final submission, the circuit judge dismissed plaintiff's petition, and he has appealed.

We think the evidence in this case entirely fails to establish any prescriptive right in appellant to the use of the old passway. It was established by John A. Motley over his own land, and solely for his own convenience, and was rarely used by any one else.

The evidence also fails to support the contention that the new passway dedicated by appellee is not a convenient or suitable one. In fact, it is quite apparent, from an inspection of the plat, that it affords a much more convenient outlet to the public road from the back land of G. W. Motley and the appellant than the old road, and that the trial court properly refused the injunction sought. However, appellee took the land devised to him by his father charged with the burden of providing a suitable and convenient passway, having regard to the pecuniary rights of all the parties, from the back land of appellant to the public road; and he had no right to stipulate that this passway should be forfeited by a failure on the part of appellant or G. W. Motley to keep gates, that he might erect thereon, closed. For any violation of his rights in this respect, the law affords an adequate remedy. For this reason alone, the judgment is reversed, and cause remanded, with instructions that the trial court enter a judgment establishing the passway for the back lands of the Evans children and G. W. Motley along the line indicated in the deed from E. U. Motley and wife to G. W. Motley, reserving to E. U. Motley the right to establish gates thereon at convenient places, and for other proceedings consistent with this opinion.

PAGE et al. v. SOUTHERN CONST. CO.
et al.

(Court of Appeals of Kentucky. Feb. 4, 1904.)
PROCEDURE—WAIVER OF OBJECTION—
JUDGMENT.

1. Parties who are summoned to answer a cross-petition, or who enter their appearance thereto, may not, after judgment, for the first time, question the right of those filing the petition to have the issues raised by it determined by such procedure.
2. Where a party entitled to the judgment in effect waives its right thereto, and lets it go in favor of others, those against whom it is rendered cannot complain.

Appeal from Circuit Court, Webster County.

"Not to be officially reported."

Action between Thomas S. Page and others and the Southern Construction Company and others. From a judgment, Page and others appeal. **Affirmed.**

M. C. & G. D. Givens, for appellants. W. E. Bourland, Lockett & Lockett, J. M. Dickinson, and Pirtle & Trabue, for appellees.

PAYNTER, J. Several actions were pending—some by the property owners against the Kentucky Western Railway Company to recover damages for the appropriation of land

for the right of way, and some by that company against certain property owners to condemn property for the right of way. These actions were consolidated without objection. The railway company filed an answer making an issue upon some of the averments in the petitions. Subsequently it and its co-defendant the Southern Construction Company filed an amended answer, and made it a cross-petition against more than 50 persons who had guaranteed the right of way for a railroad between Dixon and some point on the Illinois Central Railroad, and sought to make them pay the balance due, growing out of the acquisition of the right of way. Some of the defendants were served, and others entered their appearance. None of them objected to the answer as a cross-petition before the judgment was rendered, or questioned the right of appellees to have the issue raised by it determined. It is too late for those who had been summoned to answer it, or those who entered their appearance thereto to question the correctness of the form of procedure.

The answer of the Kentucky Western Railway Company contains averments showing it was duly incorporated under the laws of this state, and that it had the right to acquire a right of way for a railroad. The answer, as amended, constituted the cross-petition. So the necessary averments were made to show the railway company had the right to maintain the action on the contract. *Curry v. Kentucky Western Railway Co.* (opinion delivered Feb. 3, 1904) 78 S. W. 435.

It is insisted that the judgment is erroneous because it is in favor of certain persons who are not parties to the action. Some of them were parties to the record. It is true, the appellee the Kentucky Western Railway Company was entitled to the judgment; but it, in effect, waived its right to it, and let it go in favor of the parties to whom the amount recovered was due. In effect, it was a judgment in favor of that company for the use of the parties named therein. It is bound by it, and now asks to have it affirmed. Certainly the judgment for that reason is not prejudicial to appellants.

The reasons we have given for affirming the judgment were sufficient for the refusal of the lower court to deny appellants a new trial. Both judgments are affirmed.

McADAMS & MORFORD v. NORTON'S ASSIGNEE.

(Court of Appeals of Kentucky. Feb. 12, 1904.)
WILLS—CONSTRUCTION—ESTATES CREATED—JUDICIAL SALES—PARTIES.

1. Under Ky. St. 1903, § 2342, providing that, unless a different purpose appear, every estate in land created by deed or will without words of inheritance shall be deemed a fee simple, or such estate as the grantor or testator has power to dispose of, a will devising certain property to testator's son, and then directing the executors to keep the same under rent until

testator's debts were paid, at which time the son was to have full control thereof, and also providing that the issue of deceased children should receive their parent's portion of the estate, vested in the son a defeasible fee, contingent on his dying without issue before testator's debts were paid; and, surviving that event, his title became absolute.

2. On exceptions to a judicial sale of property of an assignor for creditors, the purchaser could not bring in the daughter of the assignor, so as to bind her by the judgment, where, under the proper construction of the instrument which vested title in the assignor, the daughter had no interest in the property.

Appeal from Circuit Court, Fayette County.

"Not to be officially reported."

Action by F. H. Norton's assignee to sell the assignor's real property, in which McAdams & Morford, purchasers at judicial sale, filed exceptions to the sale, and appeal from a judgment overruling the same. Affirmed.

H. E. Ross and Breckinridge & Shelby, for appellants. Morton, Webb & Wilson, Forman & Forman, and Robt. L. Greene, for appellee.

BARKER, J. This action involves the title of F. H. Norton to a storehouse and lot in Lexington, Ky. He having made a general assignment for the benefit of all his creditors, in an action in the Fayette circuit court, for the purpose of selling his real property to pay his debts, the storehouse and lot in question were sold at judicial sale, and purchased by appellants. The purchasers, being apprehensive that the title of the assignor was not indefeasible, filed exceptions to the sale, which being overruled by the court, they have appealed.

The property was devised to F. H. Norton by his father, George W. Norton. So much of the will as we deem pertinent to the issues involved is as follows: "I desire, first, that all my debts be paid off as rapidly as possible from rents not otherwise provided for. * * * To my son Frank, the storehouse No. 39, southwest corner of Main and Upper, includes half the wall next to No. 37 running back to No. 39 Upper street, including the whole wall [property in question]." In addition to the devise to his son Frank, herein set out, the testator devised quite a large estate to his wife and daughters. "I direct my executors to keep under rent all the above storehouse bequeathed to my children, together with Nos. 9 and 11 on the north side of Upper street, also Nos. 6, 8, 10, and 12 on the south side of Upper street, until all my debts are fully paid. My children are then to have full control of the property bequeathed to them, unless the remainder of the property and stock will not produce enough income to carry out my bequests; then, it must be deducted pro rata from their income. * * * In the case of the death of any of my children leaving issue, such children shall receive their parents' portion of my estate. * * * I appoint my beloved wife and my son-in-law John R. Sharp the executors of this, my last will."

The question raised by the exceptions is

the title which Frank Norton took, under the will of his father, to the property in question. The purchasers are willing to comply with the terms of sale, provided they obtain a fee-simple title by their purchase.

Section 2342 of the Kentucky Statutes of 1903 provides as follows: "Unless a different purpose appear from the express words or necessary inference, every estate in land created by deed or will, without words of inheritance, shall be deemed a fee simple, or such estate as the grantor or testator has power to dispose of." This section of the statute is declaratory of that rule of testamentary construction in favor of absolute estates which is thus stated in the *Am. & Eng. Encycl. of Law* (1st Ed.) vol. 29, p. 468: "In doubtful cases, an interest, whether vested or contingent, ought, if possible, to be construed as absolute or indefeasible, in the first instance, rather than as defeasible; but, if it cannot be construed to be an absolute interest in the first instance, at all events, such a construction ought to be put upon the conditions expressed, which render it defeasible, as to confine their operation to as short a period as possible, so that it may become an absolute interest as soon as it can fairly be so considered." And in the note in support of the text: "The law favors the free, uncontrolled use and enjoyment of property, and the power of alienation, whereas defeasible qualification of an interest tends most materially to abridge both." Bearing this principle in mind, from an examination of the will constituting the muniment of title in question it appears reasonably certain that the father of the assignor intended that his son should take a defeasible fee in the property, contingent upon his dying without issue either before the death of the testator, or, at all events, before the time when the debts of the testator had been fully paid. It will be observed that the will required the executors to keep under rent all the storehouses bequeathed by the testator to his children (which included the property under discussion) until all of his debts were fully paid, at which time they were to have full control of the property bequeathed to them, "unless the remainder of the property and stock will not produce enough income to carry out my bequests"—a contingency which seems not to have arisen. The assignor survived his father, and also the time when all his debts were fully paid, so that, if the construction be admissible that he took a defeasible fee, predicated upon the contingency of his death without issue before the happening of either of these events, then his defeasible title has ripened into a fee-simple estate by the non-happening of the contingency within the periods named. There is nothing in the testator's will, taking a survey of the whole, which militates against this construction, or which would indicate an intention on his part to postpone indefinitely the time upon which his son's title would become indefeasible.

This case seems to come within the letter and the reasoning of the opinion in the case of *Wilson v. Bryan*, 90 Ky. 482, 14 S. W. 533. In that case the will provided as follows: "It is my will that my estate be kept together, and jointly used and enjoyed by my children until the youngest comes of age, and then the land to be equally divided in value amongst my sons that may then be living. If any of my sons should die without any bodily heirs, his portion of my estate to be divided amongst his brother and sister that then may be living. * * *" In construing this provision, the court said: "It seems to us, if each portion of the claim quoted be considered in relation to and dependence upon all other parts, as manifestly should, and was intended by the testator to, be done, there is not much difficulty in determining the nature and object of the scheme devised for disposal of his real estate among his five sons. That scheme was, we think, to have his estate, in his own language, 'kept together and jointly used and enjoyed by all his children' until the arrival of his youngest son to the age of twenty-one, and then for a division to take place among those of his sons living, which, according to the natural import of the language used, involved an absolute title of each of the sons to the particular tract of land falling to him in that division. As we think, it is equally clear the event, and the only one contemplated by the testator, or correct grammatical construction permits, upon which that scheme was to be modified or altered, was to be the death of a son or sons before the time arrived for the division to take place. The close connection of the sentence in which the condition or contingency is mentioned with that providing for division, for one immediately follows the other, shows that the condition, and only one, intended, upon which the devise of an absolute estate should be defeated, was occurrence of the death of one or more of his sons before his youngest became of age."

In the case of *Duncan v. Kennedy*, 9 Bush, 580, a testator provided that his estate should be kept intact until the 1st day of January, 1872, when it was to be divided among his five devisees, with the provision that, should any of the five die without issue, then in that case the estate was to be divided among the survivors. The court held that the conditional devise over to the survivors of the devisee in the contingency of the dying of any of them without issue had reference to the 1st of January, 1872, the time contemplated by the testator for a division of the real estate, and could not thereafter take effect. *Hughes v. Hughes*, 12 B. Mon. 115; *Wren v. Hynes' Adm'r*, 2 Metc. 129.

In the will under discussion, it is provided that the estate of the testator should be kept under rent by the executors until all of his debts were fully paid, at which time his children were to have full control of the property bequeathed to them. We are of opinion that

the contingency under which the defeasance of the assignor's title to the property in question depended was his dying childless before the debts of the testator were paid. That event happening in his lifetime, his title became absolute.

There is nothing in the case of *Trimble v. Shawhan*, 101 Ky. 403, 41 S. W. 546, or *Varble, Jr., v. Phillips* (Ky.) 20 S. W. 306, which militates against this view. The first involved the construction of a deed, and it is specifically stated in the opinion that it has no application to a will, and was not opposed to the rule of construction laid down in the case of *Wills v. Wills* (Ky.) 3 S. W. 900, which is in harmony with the opinions in the cases of *Wilson v. Bryan* and *Duncan v. Kennedy*. In the second, it is declared that the intention of the testator was gathered from the entire will, and the opinion was not predicated upon any specific rule of construction, other than the cardinal rule of enforcing the intention of the testator, as gathered from the whole instrument.

The assignor has one child, an infant daughter, who was sought to be made a party defendant by the purchasers, in what was called an "amended and supplemental answer as cross-petition," in order to bind her by the judgment rendered on the exceptions to the sale. This, we think, could not be done, for, the court having properly reached the conclusion that her father owned the absolute title, she had no interest, and was not either a necessary or proper party. The demurrer to the pleading was properly sustained.

Judgment affirmed.

SOUTHERN PLANING MILL & LUMBER CO. v. DOERHOEFER'S EX'R et al.

(Court of Appeals of Kentucky. Feb. 25, 1904.)

RES JUDICATA—MECHANICS' LIENS—BUILDING CONTRACT—BANKRUPTCY PROCEEDINGS—LIABILITY OF OWNER.

1. On bankruptcy of a building contractor before completion of the building, it was finished by the trustee by order of court, and, the owner being made a party to the bankruptcy proceedings, the amount due on the contract was ordered paid into court. A materialman became a party, asserted its lien, the amount of which was determined by the court, but received only a portion thereof from the fund in the trustee's hands. Ky. St. 1894, § 2463, as amended by Acts 1896, pp. 47-49, c. 29, provides that the mechanic's lien allowed thereby shall not exceed the agreed price, and, if so, there shall be a pro rata distribution. *Held*, that the judgment in the bankruptcy proceeding was a bar to an action against the owner for the unpaid portion of the materialman's claim.

Appeal from Circuit Court, Jefferson County, First Division.

"Not to be officially reported."

Action by the Southern Planing Mill & Lumber Company against John Doerhoefer and Andrew Peklink. Defendant John Doerhoefer died pending the action, which was revived against his executors. From a judg-

ment for defendants, plaintiff appeals. Affirmed.

Forcht & Field, for appellant. O'Neal & O'Neal, for appellees.

SETTLE, J. Appellant, Southern Planing Mill & Lumber Company, instituted this action in the lower court to recover of John Doerhoefer and Andrew Peklink \$429.24 alleged to be due it upon account for materials sold to Peklink and used by him in erecting a dwelling for Doerhoefer under contract with the latter, who was alleged to be indebted to Peklink in the amount of appellant's debt. Appellant also set forth in its petition that it had in the statutory mode obtained a mechanic's lien on Doerhoefer's house and lot to secure the payment of its debt, which lien it sought to enforce. The answer filed by Doerhoefer traversed the averment of the petition, and in addition alleged, in substance, that though he had employed Peklink to do certain work on the house in question, and to furnish the material for its erection, the latter had, without performing the full work or furnishing all the material, and after being almost fully paid for what he had done and furnished, abandoned the contract, and filed his petition in bankruptcy. That one Mueller, trustee in bankruptcy of Peklink, by order of the bankrupt court completed the work upon Doerhoefer's house left unfinished by Peklink, furnishing the material necessary for that purpose; and upon the further order of the bankrupt court and proof heard it was ascertained that Doerhoefer, upon the completion of his house, was indebted for work done and material used on his house by Peklink, and his trustee in bankruptcy, in the sum of \$1,400, which sum Doerhoefer, by order of the bankrupt court, paid into that court and to the trustee of the bankrupt. It is also averred in the answer that appellant had in the meantime become a party to the bankruptcy proceedings, filed its claim in that court against Peklink, asserted its mechanic's lien as against Doerhoefer, and insisted upon its payment out of the fund of \$1,400 paid to the trustee by Doerhoefer in settlement of the balance he was owing Peklink. And, further, that the rights and liens of the parties were thereupon adjudicated and determined by the bankrupt court upon the issues and proof, with the result that appellant's lien debt was fixed at \$866.60, of which it received out of the fund in the hands of the trustee, paid him by Doerhoefer, \$426.76, leaving \$429.24 of its lien debt unpaid. The answer of Doerhoefer pleads the foregoing judgment in bar of appellant's claim against him, and, this plea of res judicata having been sustained by the lower court, appellant's petition was dismissed. Doerhoefer died during the pendency of the action in the lower court, or after its decision by that court, and it was

thereupon revived against the executors of his will.

The record before us sustains the averments of the answer to the effect that Doerhoefer had paid Peklink, before he became a bankrupt, several thousand dollars of the contract price as the work on the house progressed, and that, after its completion by Peklink's trustee as directed by the bankrupt court, there was found to be due the estate of the bankrupt only \$1,400. This sum Doerhoefer, by order of the court, paid to the trustee of the bankrupt, which payment operated as an acquittance and release to him. It will not be denied that the bankrupt court had the jurisdiction to determine what amount, if anything, Doerhoefer owed the bankrupt, Peklink, and to require the payment of that sum to his trustee; nor will it be denied that that court had like jurisdiction in the matter of applying the estate of the bankrupt to the payment of his debts; also to determine liens and priorities among creditors, and to that end to require all parties in interest to be made parties to the proceedings in bankruptcy. This being true, it will further be borne in mind that the bankrupt court, after the appellant and other creditors of the bankrupt asserting mechanics' liens, together with Doerhoefer, his debtor, had become parties to the bankruptcy proceedings, directed the trustee of the bankrupt to complete Doerhoefer's house as the bankrupt had contracted to do; otherwise there would have been nothing due the latter's estate from Doerhoefer, and consequently nothing to be paid creditors holding mechanics' liens. After the completion of the house by the trustee, the bankrupt court took the necessary steps to ascertain Doerhoefer's indebtedness to the estate of the bankrupt, and after the taking of the necessary proof it was judicially determined that the indebtedness was \$1,400, and that this amount was the whole of it.

It was next adjudged that Doerhoefer pay the above sum to the trustee in bankruptcy, which he at once did. It was then adjudged that appellant's lien debt amounted to \$856, but, as there were doubtless other lien debts of equal dignity entitled to share pro rata with that of appellant in the \$1,400 paid the trustee by Doerhoefer, appellant was further adjudged to recover only its share of the \$1,400, which was \$426.76, leaving \$429.24 of its debt unpaid. But as between appellant, the other lien creditors, and Doerhoefer, under section 2463, Ky. St. 1894, as amended March 21, 1896 (Acts 1896, pp. 47-49, c. 29), Doerhoefer was discharged from liability by the payment to the trustee in bankruptcy, for the benefit of the lienholders, of the \$1,400, especially as the payment was made in obedience to a judgment of court, in a proceeding in which all persons having an interest in the fund to be distributed were made parties. If Doerhoefer did not truly account to the estate of the

bankrupt for the full amount of his indebtedness on the building contract, appellant should have advised the bankrupt court of that fact, and itself taken such steps, by further litigation or appeal, as would have compelled a full disclosure from and an accounting by Doerhoefer. But having failed to prosecute the matter further in the bankrupt court, and accepted the benefits of the judgment there rendered, it is too late for appellant, by another action and in a different forum, to reopen questions that were settled by the former judgment. In other words, the plea of *res judicata* interposed by the answer constitutes a good defense to the appellant's action. The cases relied on as authority by counsel for appellant can have no application to a case in which, as in the one at bar, the question of the indebtedness of the owner of the property sought to be subjected to the payment of a mechanic's lien created by contract with the builder has been litigated and determined by a court of competent jurisdiction in a previous action between the same parties, especially where the judgment in the former action found such owner indebted to the contractor in a named sum, which, upon being paid by him, was applied by the court to the payment of mechanics' liens against his property.

Judgment affirmed.

RHODES et al. v. LOWRY & GOEBEL.

(Court of Appeals of Kentucky. Feb. 25, 1904.)

"Not to be officially reported."

Extension of opinion.

For former opinion, see 78 S. W. 459.

NUNN, J. The appellees ask the court to extend its opinion to cover the points made by them on their cross-appeal. At the time this case was under consideration, it was not noted on the record that a cross-appeal had been granted appellees; but it appears that such an appeal had been granted. It appears that the lower court allowed appellants two credits, one of about \$25, the other about \$50, in addition to credits admitted. Of this action appellees complain. Under the evidence, as appears of record, and giving some weight to the opinion of the chancellor, we do not feel authorized to disturb his finding. For these reasons, the judgment of the lower court on the cross-appeal is also affirmed.

MAYER v. MAYER.

(Court of Appeals of Kentucky. Feb. 25, 1904.)

WILLS — CONSTRUCTION — WIDOW'S USE OF DWELLING HOUSE — ABANDONMENT — RIGHT TO RENT.

1. Where testator's will provided that he desired that his widow "may, if she chooses," use and occupy a certain dwelling house, or such other homestead as he might own at the time of his decease, the widow's abandonment of the

house specified as a residence, did not cause it to become a part of the general estate, and she was entitled to the rents thereof.

Appeal from Circuit Court, Henderson County.

"Not to be officially reported."

Suit by Harry Mayer against Mrs. M. W. Mayer for the construction of the will of Jacob F. Mayer, deceased. From a decree in favor of complainant, defendant appeals. Reversed.

Montgomery Merritt, for appellant. Clay & Clay, for appellee.

BURNAM, C. J. The last will and testament of Jacob F. Mayer, deceased, was duly probated in the Henderson county court on the 24th day of June, 1890. He had been twice married. He left surviving him a widow and three children, the issue of his last marriage, and three children by a former wife. After making certain provisions for his wife, he directed that all the residue of his estate should be held in trust by his executor for the use and benefit of all of his children. For several years after the death of testator, his surviving widow and her infant children occupied the family residence, but more than five years before the institution of this suit she moved with her children to the state of New Jersey, where she has since resided. This suit was instituted by appellee, Harry Mayer, who belonged to the older set of children, against the widow, asking a construction of the fourth clause of the will of his father, which is as follows: "It is my desire that my wife, while a widow, may, if she chooses, use and occupy the dwelling house on the corner of Green and Clay Streets in the City of Henderson, Kentucky, or such other homestead as I may own at the time of my decease."

It is insisted that, by the permanent abandonment of the dwelling house as a residence, the widow had forfeited all right to use it, and that, under the terms of the will, it became a part of the general estate, which his executors were directed to hold in trust for the benefit of all the children, and asked that it might be so adjudged, and that appellant, Martha W. Mayer, be required to pay over to the executor the reasonable rents thereof since the date of her abandonment of the premises as a residence. The circuit judge so held, and the widow has appealed.

In Jarman on Wills (5th Ed.) § 798, the author says: "A devise of the 'free use,' or 'use and occupation,' of land, passes an estate in the land, and consequently a right to let or assign it, and is not confined to the personal use and occupation of the property unless the context clearly calls for a more limited construction." This rule is approved in 29 A. & E. En. of Law (1st Ed.) 403, and the editor has collated in the note quite a number of decisions from the courts of various states who have also adopted and approved the rule.

But it is the contention of appellee that the entire context of the fourth clause in this case clearly indicates a purpose on the part of testator to make the devise of the use of the dwelling house to his wife conditional upon its occupancy by her as a home, and that the words "may, if she chooses, use and occupy the dwelling house," have an entirely distinct meaning from the words "use and occupation." In our opinion, the distinction attempted to be made is too finessed. It is perfectly clear that testator had no particular affection for the house on the corner of Green and Clay streets, for he provides that if, at the time of his death, he was occupying another homestead, she should have the use and occupancy of that dwelling house. The predominant idea in the devise was evidently to provide a home for the use and occupation of his wife during her widowhood. There is no intimation in the will which contemplates a forfeiture of this provision for her. We therefore conclude that appellant may, if she chooses, actually occupy the dwelling house at the corner of Green and Clay streets, or she may, if she sees fit, rent it out, and appropriate the rents for her own use.

For reasons indicated, the judgment is reversed, and cause remanded for proceedings consistent herewith.

SMITH v. SMITH.

(Court of Appeals of Kentucky. Feb. 23, 1904.)
PRESCRIPTION — RIGHT OF WAY — USE BY DONEE OF LAND UNDER PAROL GIFT—SUBSEQUENT ACCEPTANCE OF DEED—EFFECT.

1. One who took and remained in possession of a farm under a parol gift from his father, and who also used, as a matter of right, contemporaneously with his possession and use of the land, a passway over other land of his father, acquired a prescriptive right to the passway at the end of 15 years from the time the use of it began, and the subsequent acceptance of a deed to the land and appurtenances could not affect such right.

Appeal from Circuit Court, Adair County.
"Not to be officially reported."

Action by J. Garrett Smith against Waller Smith. From a judgment for plaintiff, defendant appeals. Affirmed.

J. F. Montgomery, for appellant.

O'REAR, J. Joel Smith owned a farm of 610 acres in Adair county, lying between the Columbia and Greensburg road and the Columbia and Campbellsville pike. About 30 years ago he gave to his son, appellee, J. Garrett Smith, a tract of 76 acres of this farm lying immediately on the Columbia and Greensburg road. Appellee took possession of the farm, and continued to use it and claim it as his own from that time until the bringing of this suit. During the same time he also used as a matter of right a passway from his tract to the Columbia and Campbellsville pike. This was his way out to his post office, school, and stores where he did the most of his trading, as well as to the church

attended by his family. Joel Smith did not make Garrett Smith a deed for the land until 1885. That deed recites that the grantor and his wife "have given to our son Jeremiah Smith a certain piece or parcel of land, with all the appurtenances thereto belonging," etc. No express reference was made in the deed to the passway. Garrett Smith continued to use this passway until his father's death, some years afterward, and since the partition of the remaining lands among his brothers and sisters. A disagreement having arisen between appellee and his brother, appellant, over other matters originally not connected with the passway, appellant closed the passway through his part of the tract that had been allotted to him, and this suit was brought to compel the removal of the obstruction.

The evidence clearly shows that appellee has used this passway as an appurtenant to this tract of land for more than 80 years. Ordinarily, this would be sufficient to constitute a complete right by prescription. But it is insisted by appellant that, as appellee had not title to the land to which the easement is claimed as an appurtenant, and did not get the title until 1885, his use of the passway as a matter of right then began; that his occupancy of the 76 acres of land up until that time was without title, and by the permission of his father, the title holder, and that the use of the passway over the remainder of the father's land was permissive, and not adverse. It is not denied that title to land may be acquired by adverse possession where the possession is taken under a parol gift. Appellee's title to his 76 acres of land seems to have been perfected by his adverse claim and user before his father made him a deed for it. By using the passway contemporaneously with his possession and use of the land, the prescriptive right to use the passway as such was created and perfected at the end of the 15 years from the time it began. The fact that appellee accepted a deed subsequently from his father cannot affect his adverse claim and use of the passway, inasmuch as there is nothing contained in the deed inconsistent with such claim. Indeed, the grant of such appurtenances as belonged to the tract conveyed might well be held to include the easement in question.

Such having been the judgment of the circuit court, it is affirmed.

SNELL v. PAYNE et al.

(Court of Appeals of Kentucky. Feb. 25, 1904.)
TRUSTS—PROPERTY OF MARRIED WOMEN—EXCHANGE—CONVEYANCE TO CESTUI QUE TRUST.

1. Since 1804 the estate of a married woman in lands has been a separate one. A will executed subsequent to that date devised lands in trust for testator's married daughter, giving the trustee power to sell and invest in other security, but no other powers or duties, and a portion of the land was exchanged for other

lands. The trustee resigned, and the deed to the land received in exchange ran to the daughter. Held, that the lands received in exchange were not burdened with any trust.

Appeal from Circuit Court, Fayette County.

"Not to be officially reported."

Suit between W. B. Snell and Nannie J. Payne and others. From the judgment, W. B. Snell appeals. Affirmed.

J. D. & G. R. Hunt, for appellant. Morton, Webb & Wilson, for appellees.

O'REAR, J. The question presented for decision by this appeal is as to the nature of the title taken by Mary Powell to a tract of land in Fayette county, Ky., which had been conveyed to her in exchange for another tract of land in Nelson county, Ky., which was devised to her by her father by the sixth clause of his will. That clause reads as follows:

"I will and devise to my friend, Nathaniel Muir, in trust for my daughter Mary Powell, two hundred acres of land where William Hampton now lives, including the one hundred and forty-nine and one-half acres I sold to the Hamptons and John Wallingford, and took back, and enough land from the field directly west and Foster field to make two hundred acres, and enough land continuing west to make at forty-five dollars per acre, nine hundred and fifty-five dollars. Said trust is for the use and benefit of my daughter, Mary Powell, all the proceeds or income arising therefrom for the use and benefit of my daughter, Mary Powell, and should my friend Nathaniel Muir, at any time conclude that it is to her benefit and interest, he is authorized to sell the same and invest in some good securities, the interest of which to be used for the benefit of my said daughter, Mary Powell, she to be made equal out of my estate with all my other children."

In the proceeding in the Nelson circuit court, to which Mrs. Powell and her husband and her trustee, Nathaniel Muir, were parties, it was alleged and shown that it was to the advantage of the said cestui que trust, Mary Powell, that an exchange be made by the sale of the land obtained under the sixth clause above named, for a certain property designated and described, which lay in Fayette county, Ky. The court decreed that the exchange should be made, and it was made. Thereupon Nathaniel Muir, the trustee, was permitted to, and did, resign as trustee, and deed was taken to Mrs. Powell and her children by the consent of herself and her husband, without the trustee, Muir, or any trustee, being named as the grantee in the deed.

It is the contention of appellant that the Fayette county land conveyed to Mrs. Powell is in some way affected by the trust created under the will of James R. Hughes, father of Mary Powell—the trust created by the sixth clause of that will. Aside from the discretion vested in the trustee to sell the

Nelson county land devised by that clause of the will, if, in his judgment, it was deemed desirable to do so, and to invest the proceeds in other securities for the benefit of Mary Powell, it appears that the will created only a dry trust. At the time the will of James R. Hughes was written, the estates of married women to land in this state were either general or separate. Under the statute, as it now is and has been since 1894, and as it was at the time Mrs. Powell acquired the title to the Fayette county land, all of the estate of married women to lands in this state is a separate estate. It is now not necessary to have a trustee to hold the title of the married woman's separate estate. Therefore it was not material that Mrs. Powell had not a trustee in whom could be vested the title to the Fayette county land, to be held by him for her use under the will of her father. The sole discretion of the trustee, Muir, seems to have been limited to his selling the Nelson county land, and investing it in other securities, without the consent of the beneficiary of the trust. After that land had been otherwise sold with the consent of the trustee and of the beneficiary and her husband, and had been invested in other land, which was not held under the will at all, there was no occasion for the appointment of a trustee in the matter, as he had neither duty to perform, nor discretion to exercise.

We concur in the judgment of the circuit court that neither the fact that the conveyance to Mrs. Powell of the Fayette county land was not made to her trustee, Nathaniel Muir, nor the fact that said trustee was by the judgment of the Nelson circuit court discharged as trustee under the will of Hughes, in any way affects prejudicially the title to the 75 acres of Fayette county land conveyed to Mary Powell and her children by R. M. Powell, as aforesaid, and that judgment is therefore affirmed.

WM. DEERING & CO. v. VEAL.

(Court of Appeals of Kentucky. Feb. 24, 1904.)

NOTE—CONSIDERATION—SURETY—NOTICE TO PAYEE—LIMITATIONS.

1. Where a wife executed a note, which was accepted as settlement of notes of her husband, there was sufficient consideration for her note, though the old notes were not returned.

2. Where a wife signs a note, which she expects her husband, also, to sign as principal, but he does not, and the note is accepted in settlement of notes previously executed by him for a binder, she is a principal, and not a surety, within Ky. St. 1903, § 2514, providing that an action on a written obligation must be commenced within 15 years, and section 2551, providing that a surety in such an obligation shall be discharged from liability in 7 years.

3. Where a wife signed a note, at her husband's request, as his surety, and gave it to him, she made him her agent to deliver it, and is bound by his representation that she signed it as principal, so that she is liable, though the time has passed in which limitations run as to a surety.

4. That a wife signed a note on the second line for signatures was not sufficient to give no-

tice to the payee, who accepted it in settlement of notes previously given by her husband, that she signed it as surety, and not as principal.

Appeal from Circuit Court, Bell County.

"Not to be officially reported."

Action on a note by Wm. Deering & Co. against Elenora Veal. Judgment for defendant. Plaintiff appeals. Reversed.

N. B. Hays, for appellant.

HOBSON, J. Appellant brought this suit against appellee on the following note:

"\$326.14.

October 3, 1888.

"On or before the 1st day of March, 1889, for value received, I, the undersigned, of section ——— Township ———, State of Kentucky, promise to pay William Deering & Company, or order, three hundred and twenty-six ¹⁴/₁₀₀ dollars with interest at six per cent. per annum from date until paid.

"The endorsers, signers, sureties and guarantors severally waive presentment for payment, protest and notice of protest and notice of non-payment of this note and diligence in bringing suit against any party to this note, and agree that time of payment may be extended without notice or other consent and without affecting their liability.

"Elenora Veal.

"—————."

In the first paragraph of her answer she pleaded that the note was executed without any consideration. The second paragraph of her answer is in these words:

"Defendant alleges that, about two years prior to the date and time when said note is alleged to have been executed by this defendant, the plaintiffs did enter into a contract with and sell to one James Veal a self-binder reaper, for the amount as stated in said note and plaintiff's petition; that it was for the price of said reaper which was sold and credited to said James Veal for which said note was executed by this defendant; that this defendant never bought said reaper or anything else from plaintiffs, and never had any other transaction with or received any consideration from plaintiffs, but that at the time she signed and executed said note it was understood and agreed by the plaintiffs and this defendant that defendant was only to be surety for said James Veal on said note for the purchase price of a reaper which the said Veal had bought from said plaintiffs and owed them for; that said note became due and payable March 1, 1889; that the defendant is surety to James Veal in the said note sued on and that the cause of action set forth in plaintiff's petition did not accrue within seven years before the commencement of this action."

The plaintiff demurred to the answer, and the demurrer being overruled, filed a reply controverting its allegations. The proof for the plaintiff on the trial showed that on September 1, 1888, Elenora Veal and James

Veal, who were then residing near Lexington, Ky., executed to William Deering & Co. two notes, each for \$100, due September 1, 1887, and December 1, 1887, respectively; that on September 19, 1887, James Veal and Elenora Veal executed to it another note for \$90, due in one year, and on November 4, 1887, executed a fourth note for \$50, due October 1, 1888; that, after the four notes fell due, certain sums were paid on them, and on October 3, 1888, the balance due on them aggregated, in all, \$326.14; that she then executed her individual note sued on for the amount, which was accepted by William Deering & Co. in satisfaction of the four old notes, she claiming to be on the point of selling some land, and agreeing to turn over as security for the note a \$900 purchase money note for the land which she expected to sell, but that this she afterwards failed to do.

The defendant stated on her own behalf on the trial as follows: "Two gentlemen came down to our place one morning to have me sign a note with Mr. Veal, as surety. Mr. Veal did not sign it, for some reason. He told me that he wanted me to sign it as surety. Q. Where was it that you signed this note? A. I signed it in my own home. Q. Where were you living then? A. In Fayette county, Kentucky. Q. This note was executed for a self-binder? A. Yes, sir. Q. Did you sign any other notes prior to this note? A. No, sir; I had not myself. Q. Had you ever signed any other notes that were made to them? A. No, sir. Q. Did Mr. Veal, when he brought you this note, tell you for what it was executed? A. Yes, sir; self-binder. Q. You remember the circumstances of your husband having bought a self-binder from William Deering & Co.? A. Yes, sir. Q. How long prior to the execution of this note? A. In the summer of that year. Q. You had not bought any machinery from them yourself? A. No, sir. Q. Any other property? A. No, sir. Q. Ever obtain anything of value from either of this firm? A. No, sir. Q. Ever have any business transaction with them, other than the one you have just stated? A. None at all. Never was in their office." On cross-examination her attention was called to the form of the note, and she said: "A. The note was drawn up for Mr. Veal. He was to be the undersigner. Q. Mr. Veal did not sign it? A. I suppose that is his neglect. Q. There is no one's name but your own? A. I signed it where it should be—in the proper place. Q. Any one sign it but yourself? A. I supposed my husband would sign it when he took it back to the men." She denied that the four old notes were surrendered when the note in suit was given, or that she agreed to give as collateral the purchase-money note of \$900 for the land, but said her husband purchased a self-binder, and that the note in suit was given for it, and was the only note she signed.

On this evidence the court refused to instruct the jury peremptorily to find for the plaintiffs, and instructed them as follows:

"(1) Gentlemen of the jury, if you believe from the evidence the note described and mentioned in plaintiff's petition as having been executed and delivered by the defendant to the plaintiff was executed without consideration, you will find for the defendant.

"(2) If, however, you believe from the evidence in this case that the defendant signed this note as surety and with the understanding that that was the proper place to sign on the first line above, as it appears, and that she did sign the same as surety only, and not as her personal obligation; that more than seven years have elapsed since the maturity of this note before the institution of this action—you will find for the defendant.

"(3) Unless you so believe, you will find, as stated in instruction No. 1, for the plaintiff the amount of note sued on."

To constitute a sufficient consideration for a contract, it is not necessary that the promisor receive a benefit from it. A consideration may be something beneficial to the promisor, or disadvantageous to the promisee. A release of a legal right by the promisee is a sufficient consideration to support a contract. Bishop on Contracts, §§ 61-63. If the four old notes were settled by the note in suit, or if no notes had been given for the binder, and the note in suit was executed therefor, it is not without consideration. For if, the next day, Deering & Co. had sued James Veal for the price of the binder, he could have answered that the plaintiff had accepted the note of Elenora Veal, due the following March, for the debt, and this would have defeated the action. The relinquishment of the cause of action against James Veal was a sufficient consideration to support the defendant's promise. On the undisputed facts, therefore, the note was not without consideration.

By section 2514, Ky. St. 1903, an action on a written obligation for the payment of money must be commenced within 15 years after the cause of action accrues. By section 2551, a surety in such an obligation shall be discharged from all liability thereon when 7 years have elapsed without suit after the cause of action accrues. A surety is one who contracts for the payment of a debt in case of the failure of another person who is himself principally responsible for it, or, as it has otherwise been expressed, a surety is a person who, being liable to pay a debt, is entitled, if it is enforced against him, to be indemnified by some other person, who ought himself to have paid it before the surety was himself compelled to do so. Brandt on Sureties, § 1; Addison on Contracts (8th Ed.) 648; Wendlandt v. Sohre, 37 Minn. 162, 33 N. W. 700. Appellee was not surety for any one on the debt sued for. It was her debt. In Short v. Bryant, 49 Ky. 10, Short executed

a note with Withers, who was an infant. When they were sued on the note, Withers pleaded infancy. Judgment was rendered for him on that plea, and a judgment for the debt was rendered against Short alone. After the lapse of more than seven years, execution was issued on the judgment, and Short relied on limitation. The plea was held bad. The court said: "Short's liability on the judgment was not as surety in the judgment, nor in the original note, but as the only person ever bound by the note. He therefore does not come within the fair interpretation of the terms of the statute, and, as he had no right against the original co-party which might be affected by the conduct of the creditor in the enforcement of the judgment, he does not come within the reason or principle on which the statute makes the delay of execution a discharge of the surety." In *Gaines v. Poor*, 60 Ky. 504, 79 Am. Dec. 559, Poor bound himself by a writing to save Gaines, his heirs and representatives, free from any claim of Mrs. Gaines for dower in his estate, and suit was not brought on the contract until seven years after the cause of action accrued. Mrs. Gaines did not sign the contract, but it was held that if she had signed it as principal, and Poor as her surety, the contract would have been void as to her, as she was a married woman, and Poor would not have been her surety, within the meaning of the statute. These cases control here, for no one else was bound to William Deering & Co. for the debt, except appellee, after the note in suit was accepted.

By the statute now in force, a married woman cannot bind her estate for the debt of another unless it has been set apart for that purpose by a mortgage or conveyance. Ky. St. 1903, § 2127. But the note in suit was given before this statute was passed. The defendant did not plead her coverture.

If a surety signs a note, and places it in the possession of the principal under his promise to procure another to sign it before its delivery, and he, in violation of his promise, delivers the note to the payee, who is ignorant of the arrangement, the surety is bound, notwithstanding the fraud of the principal. *Smith v. Moberly*, 49 Ky. 268, 52 Am. Dec. 543; *Whitaker v. Crutcher*, 68 Ky. 622. But the surety so signing is not bound if the agreement between the principal and surety is known to the payee when he accepts the note. *Coffman v. Wilson*, 59 Ky. 542; *Bivins v. Helsley*, 61 Ky. 78. When appellee signed the note at the request of her husband, and gave it to him, she made him her agent to deliver the note, and she is bound by the representations which he made as her agent. *Tompkins v. Triplett* (Ky.) 62 S. W. 1021. The fact that her name appeared on the second line and not on the first line for signatures to the note was not sufficient to put appellant on notice of any infirmity in the paper, for notes and contracts are often signed in this way. But this defense also was

not pleaded. The court therefore erred in refusing to instruct the jury peremptorily to find for the plaintiff.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

PRICE v. PRICE.

(Court of Appeals of Kentucky. Feb. 24, 1904.)

HUSBAND AND WIFE—PROPERTY RIGHTS—RELEASE.

1. A contract between husband and wife after separation and before a contemplated divorce, by which the wife, for a valuable consideration, relinquished to the husband all rights of dower, homestead, and other interest in all property of which the husband was possessed or might acquire, did not release the husband from liability on a note which he had previously given the wife for borrowed money.

Appeal from Circuit Court, Webster County.

"Not to be officially reported."

Action by Una Price against C. S. Price. From a judgment for plaintiff, defendant appeals. Affirmed.

J. F. Gordon and C. J. Waddill, for appellant. Baker & Baker and Lockett & Lockett, for appellee.

PAYNTER, J. The appellant, C. S. Price, was formerly the husband of the appellee, but the bonds of matrimony have been dissolved. After the separation took place, but before they were divorced, they entered into a contract which reads as follows: " * * * Now, we, for the purpose of settling our respective property rights and in order to effect a fair and equal division of the property of whatsoever possessed by the party of the second part, do hereby covenant and agree as follows: The party of the first part agrees to accept in lieu of all rights to and interest in all real estate, personal property and cash possessed by the party of the second part all rights of maintenance and alimony, the sum of \$1500.00 and one-half of the household and kitchen furniture now on hand, said sum of Fifteen Hundred Dollars and one-half interest of said household and kitchen furniture has this day been paid, and receipt of same is hereby acknowledged by the party of the first part, in full of all rights above mentioned, and the party of the first part does hereby relinquish to the party of the second part all rights of dower, homestead and other rights to, and interest in, all property of which party of the second part is now possessed or that he may hereafter acquire. * * * " At the time this contract was executed the appellee held the appellant's note for \$574.83, which had been previously executed for money which she derived from her father's estate. After the divorce was granted, the appellee instituted this action on the note against the appellant, and recovered a judgment therefor, with interest. This action of the court is here for review.

The writing, in clear and explicit terms,

shows the parties were contracting with reference to the wife's interest in the husband's estate, and that they were dividing the property possessed by him. The relinquishment which she made was "to right of dower, homestead, and other rights to and interest in all property of which the party of the second part is possessed or that he may hereafter acquire." The contract does not purport to have reference to any other property save that of the appellant. There is no ambiguity in the writing, and neither fraud nor mistake has been shown in its execution. The record shows that the appellant was indebted to the appellee in the sum evidenced by the note. He so became indebted since the act of 1894 (Acts 1894, p. 176, c. 76). Under that act a husband can become indebted to a wife and execute to her an enforceable obligation.

The judgment is affirmed.

CUMBERLAND VALLEY BANK'S ASSIGNEE v. CITIZENS' NAT. BANK.

(Court of Appeals of Kentucky. Feb. 24, 1904.)

ASSIGNMENT TO CREDITORS—CONSIDERATION—ASSIGNMENT BY SOLVENT DEBTOR—PREFERENCE—SUBSEQUENT ATTACHMENT—EFFECT.

1. An agreement between a debtor and some of his creditors, whereby the debtor agreed to sell certain property and turn over the proceeds for pro rata distribution among the creditors, is supported by a sufficient consideration.

2. An agreement between a solvent debtor and some of his creditors for the sale of certain property belonging to the debtor and for a pro rata distribution of the proceeds among the creditors is not invalid as an act to prefer such creditors.

3. The levy of an attachment by a creditor on property of his debtor after an agreement has been entered into whereby the debtor agreed to sell the property and distribute the proceeds pro rata among certain creditors, including the attaching creditor, does not release the other creditors from the agreement where the attachment was known to the other creditors, and was for their benefit, and they co-operated in the prosecution thereof.

Appeal from Circuit Court, Boyle County.
"Not to be officially reported."

Action between the Cumberland Valley Bank's assignee and the Citizens' National Bank. From a judgment for the latter, the former appeals. Reversed.

Hazelrigg & Chenault and S. B. Disham, for appellant. Robt. T. Quisenberry, for appellee.

PAYNTER, J. The petition, as amended, to which a demurrer was sustained, contains averments to the effect as follows: The Stone-Heines Lumber Company of Cincinnati, Ohio, executed to John W. Faulkner its several notes aggregating over \$33,000, which he indorsed and sold to various banks. One of the notes, for \$7,937.40, was indorsed and sold to the Cumberland Valley Bank, and one to the appellee for \$2,150. In July, 1890, the

Stone-Heines Lumber Company made an assignment to Granger for the benefit of its creditors. On August 2, 1890, Faulkner, the banks to which he had indorsed and sold the notes (including the Cumberland Valley Bank and appellee), and Granger, as assignee, entered into a writing, by which all the parties to the contract agreed that Faulkner should sell certain lumber which he owned, and, after deducting the expense of making the sales and delivery of the lumber, turn over the proceeds to the Cumberland Valley Bank, who was to distribute it pro rata to the banks on the notes which they held. Faulkner shipped some car loads of lumber to Cincinnati, Ohio, for sale, and on March 6, 1891, the appellee sued out an attachment in a court in that city, and had it levied on the lumber which had been sent there by Faulkner, and was sold in satisfaction of its debt, but only realized \$1,920. Just before the appellee instituted the action in Ohio, the Cumberland Valley Bank instituted one in Kentucky, and attached the lumber which was the subject in part of the agreement referred to. It was averred in the petition as amended that the action was for the benefit of all the banks which entered into the agreement.

To sustain the judgment of the court below it is urged (1) that the instrument was a nudum pactum; (2) that it was a preferential act, and operated as an assignment of Faulkner's property for the benefit of his creditors; (3) that the Cumberland Valley Bank violated the agreement by bringing the suit, thereby releasing all other parties from its terms.

We are unable to see that it was a nudum pactum. The parties were capable of making the agreement. The lumber could be the subject of such an agreement. The owner placed it in trust, so that the net proceeds might be applied to the payment of his debts.

The petition does not disclose that Faulkner was insolvent when he entered into the contract, and that he entered into it with the design to prefer the contracting creditors to his other creditors.

It is averred in the petition that the Cumberland Valley Bank prosecuted the action in which it obtained an attachment against the property for the benefit of all the banks; that this fact was known to the appellee, and its attorney co-operated in the prosecution of the action. The facts averred do not raise the question discussed by counsel that the Cumberland Valley Bank violated the agreement in bringing the action.

Counsel for appellee argues the case as if the petition contained an averment that the Cumberland Valley Bank instituted the action for its own benefit, and in disregard of the terms of the agreement. When this state of facts is shown by the record, the question will arise whether or not the institution of the action by the Cumberland Valley Bank for its own benefit had the effect of releas-

ing all the parties from the terms of the contract.

The judgment is reversed for proceedings consistent with this opinion.

HILTON et al. v. COLVIN.

(Court of Appeals of Kentucky. Feb. 24, 1904.)

TRESPASS TO LAND—TITLE TO LAND—EVIDENCE—SUFFICIENCY—ESTOPPEL—PLEADING—NECESSITY.

1. In an action for damages for the cutting and removing of trees, a verdict in favor of plaintiff *held* sustained by the evidence.

2. Where defendant, in an action for damages for the cutting and removing of trees on the land of plaintiff, did not specifically plead estoppel based on the claim that plaintiff had represented to defendant that the title to the land was in defendant's grantor and had advised defendant to purchase it, evidence showing such representations was incompetent.

Appeal from Circuit Court, Magoffin County.

"Not to be officially reported."

Action by John W. Colvin against John Hilton and others. From a judgment for plaintiff, defendants appeal. **Affirmed.**

D. D. Sublett, for appellants. John W. Rodman, for appellee.

BURNAM, C. J. The appellee brought this action against the appellants for damages for having entered upon his boundary of land and cut and converted to his own use certain valuable timber trees growing thereon. Appellants answered, denying that plaintiff was the owner or in possession of the land from which the trees were taken, and alleged that they were the owners and in possession of the tract. A trial before a jury resulted in a verdict and judgment for plaintiff for \$50. Defendants' motion for a new trial having been overruled, they have appealed, and ask a reversal on two grounds: First, because the verdict is palpably against the weight of the evidence; and, second, because the plaintiff was estopped by admissions and representations, made by him to them previous to their alleged purchase of the land in dispute from one S. W. Brown, from the prosecution of this suit.

Upon the trial the plaintiff introduced record evidence tracing his title back to the commonwealth to the land from which the trees were taken, and proved actual possession thereof by a number of witnesses. And we are inclined to the opinion that the verdict of the jury is sustained by the weight of the evidence. Both of the defendants testified that a short time previous to their purchase of the land in controversy from S. W. Brown they had a conversation with plaintiff about the title thereto, and that the plaintiff represented to them that the title was all right, and advised them to go ahead and buy the land. Their testimony on this point is also corroborated by several other witness-

es, but denied by plaintiff. Whilst this testimony was admitted without objection—fact, the record fails to show that a single exception was reserved by either party during the course of the trial—it is a well-settled rule of pleading that estoppels must be specifically pleaded, with great particularity and precision, leaving nothing to intendment. This rule proceeds upon the theory that an estoppel precludes a party from asserting the truth, and all things essential to give the right to shut out the truth should be affirmatively pleaded. Bliss on Code Pleading, § 364; 8 En. of Pl. & Pr. 7; *Faris and Wife v. Dunn*, etc., 70 Ky. 276. As the defendants did not plead the representations and admissions of the plaintiff with regard to the title to the land in controversy as an estoppel in pais, the testimony on this point was competent, and could not have been made the basis of a judgment. Besides, no instruction on this point was asked or given by the trial court.

For reasons indicated, the judgment is affirmed.

SIMMONS v. REINHARDT et al.

(Court of Appeals of Kentucky. Feb. 24, 1904.)

MORTGAGE—ESTOPPEL—FRAUD.

1. A wife, having joined with her husband in the execution of a mortgage by which they conveyed "all their interest" in a lot, is estopped to assert after his death that they intended only to convey his life estate, and not the life estate which she held.

2. Evidence *held* to show that a mortgage from a tax collector to the sureties on his official bond was not procured by fraud.

Appeal from Circuit Court, Daviess County.

"Not to be officially reported."

Action by Louis H. Reinhardt and others against Lucy H. Simmons and another. From a judgment in favor of plaintiffs, defendant Lucy H. Simmons appeals. **Affirmed.**

Sweeney, Ellis & Sweeney and W. S. Pryor, for appellant. Miller & Todd and L. P. Little, for appellees.

BARKER, J. The appellees were the sureties on the official bond of A. M. C. Simmons, tax collector of the city of Owensboro. This officer having become short in his accounts to the extent of \$2,220, which he was unable to pay, this sum was paid by his sureties, whereupon, in order to indemnify them against loss, he and his wife, the appellant, executed and delivered to the appellees the following mortgage:

"This indenture witnesseth:

"That in consideration of two thousand two hundred and twenty dollars, A. M. C. Simmons and Lucy M. Simmons hereby convey to John G. Delker, Louis H. Reinhardt and L. P. Little, all their interest in the house and lot in Owensboro, Kentucky, on the west side of Frederica street, bounded on

¶ 2. See Estoppel, vol. 19, Cent. Dig. § 200.

the north by the lot of R. J. Frayser; on the south by the lot of J. D. Brashear, and on the west by the lot of W. H. Clark. Also the one-half interest in the vacant lot north of Seventh and Center streets owned jointly by A. M. C. Simmons and John Wandling, and being the same property conveyed to them by T. L. Hall.

"The purpose of this conveyance is to secure said Delker, Reinhardt and Little in the said two thousand two hundred and twenty dollars four months from this date; should the said Simmons pay, or cause to be paid, the above-mentioned indenture, then, in that event, this mortgage shall be null and void; otherwise it remains in full force and effect.

"This May 1st, 1896.

"A. M. C. Simmons.

"Lucy M. Simmons."

After the execution of this mortgage, A. M. C. Simmons died, and W. E. Aud was appointed administrator of his estate. The debt which the mortgage was executed to secure not having been paid, this action was instituted by the appellees for personal judgment against the administrator, and an enforcement of their lien against the land described.

To this action Lucy M. Simmons was made a defendant. To the petition of appellees, she filed an answer pleading, first, that she joined in the mortgage only for the purpose of giving a lien upon the interest of her husband, A. M. C. Simmons; that he only had a life estate therein, and after his death she had a life estate, which was not embraced, and not intended to be embraced, in the mortgage in question; second, that at the time of the execution of the mortgage her husband was mentally unsound to a degree which incapacitated him from contracting; that therefore his act was void, and, he not having joined with her, her act was void; and, third, that the execution of the mortgage was procured by fraud.

The affirmative allegations of this answer were placed in issue, and, the case coming on for trial on the merits, the chancellor rendered a judgment in favor of appellees, enforcing their lien upon the life estate of the appellant, Lucy M. Simmons, from which judgment she has appealed.

Although the appellees, at the time they took the mortgage to secure their debt, believed that the whole title of the property was in A. M. C. Simmons, the undisputed fact is that he had only a life estate therein, and that at his death, his wife surviving him, she had a life estate; and the first question that arises is whether or not Mrs. Simmons mortgaged her life estate by the instrument which she signed. On this question we do not think there can be two opinions. The language of the mortgage precludes the existence of any estate in the land owned by A. M. C. Simmons or Lucy M. Simmons which was not mortgaged to appellees. The expression "all their interest" conveys every-

thing, and the fact that the word "interest" is singular, instead of plural, in no wise militates against this conclusion. The imperative language of the mortgage must control, and appellant, having signed it, cannot now be heard to say that she did not intend it should have accomplished what the language of the instrument clearly embraces. While the appellees did not know the exact condition of the title, as between Simmons and his wife, they did understand that they were getting all the title that they had; and this, we think, they are entitled to.

The allegation of the unsoundness of mind of the husband is not sustained by a preponderance of the evidence. We doubt if the evidence of appellant alone on this subject would sustain her position, but, when taken in connection with all the evidence, we think that the soundness of mind of the husband at the time he executed the instrument in controversy is clearly established.

The issue of fraud or overreaching was not even pretended to be established, and the uncontroverted testimony shows that, so far from appellees' attempting to defraud or overreach A. M. C. Simmons, they had not even asked him to execute the mortgage in question. On the contrary, however, he approached J. G. Delker, and told him that he desired to secure his sureties, asking him to come to his (Simmons') house that night for the purpose of receiving the mortgage; the other sureties not knowing, until after the instrument was executed, anything of the transaction. Delker and appellant alone testify as to what took place when the mortgage was executed and delivered, and, while she makes a feeble attempt to show that he represented to her that she was only conveying her husband's interest, he testifies that he made no representation to her whatever, and the burden is on her.

We fully appreciate the hardship of this case upon appellant; and the pathos of her position, in being left aged, penniless, and widowed, deeply affects us. As to this aspect of the case, we can make no better answer than is contained in the opinion of the learned chancellor below: "I have gone over the whole case—the pleading, evidence, and suggestions of counsel—two or three times, and reflected over it, with unusual care and deliberation, because of the fact that the defendant is an old woman, and the property involved is her last bit of earthly estate, and, when deprived of it, she will be left houseless. These are considerations that have compelled me to anxiously consider every fact and interpret every doubtful fact more favorably toward the defendant, and this much a chancellor is warranted in doing; but he is not warranted by such considerations in disregarding well-established rules, and giving to language an interpretation contrary to its plain grammatical import. Nor may he, in considering the right and credibility of testimony, discard the logical effect of over-

whelming preponderance of the evidence on the one side or the other, if it exists."

Judgment affirmed.

REED v. TAYLOR et al.

(Court of Appeals of Kentucky. Feb. 23, 1904.)

POLICE JUDGE—JURISDICTION—PROTECTION FOR JUDICIAL ACT.

1. In an action of forcible detainer before a police judge in a town of the sixth class by the owner of a hotel against an occupant, after judgment against the owner and the execution of a traverse bond by him, the judge was without jurisdiction to proceed further than to return the papers to the circuit court, and in no event could he appoint a receiver of the hotel property.

2. While a judicial officer will be protected against suits for damages resulting from erroneous judgment, yet where he acts maliciously, or beyond his jurisdiction, his office is no protection.

Appeal from Circuit Court, Hardin County.
"Not to be officially reported."

Action by T. E. Reed against G. O. Taylor and another for false imprisonment and malicious prosecution. From a judgment in favor of defendants, plaintiff appeals. Reversed.

W. T. Burch and S. H. Bush, for appellant.

O'REAR, J. Appellant was the owner and in the possession of a certain hotel property at West Point, Ky. He contracted with appellee Taylor for the latter's services as assistant in the management of the hotel for one year from March 1, 1901. Under the contract Taylor and wife were to occupy one of the rooms of the hotel. The net proceeds of the venture were to be divided between the two parties, Taylor and appellant. Appellant was to receive and disburse all money. Before the expiration of the year, for some reason not shown in this record, appellant instituted a forcible detainer proceeding before appellee J. L. Shipley, judge of the police court of West Point (which is a town of the sixth class), seeking to oust Taylor from the premises. The judgment of the police court was adverse to appellant, but within three days he traversed the judgment, and executed a bond before the police judge, which was approved by him. Thereafter, at the instance of appellee Taylor, Shipley, the police judge, issued warrants of arrest against appellant, and caused him to be arrested thereunder, charged with contempt of the police court, and held until he had executed bond for his appearance. Other warrants were issued against him of a similar nature thereafter, but which were not executed, because he fled. The police judge also issued an order putting the hotel property in the hands of a receiver, and directing the books and papers, etc., belonging to appellant to be turned over to Taylor. The police judge also issued an order directed to and served upon certain customers of ap-

pellant, proclaiming that the hotel was open for business under the contract with Taylor, and forbidding them ignoring Taylor's rights in the premises as adjudged by the said police court, and not to pay any money in violation thereof to appellant.

Appellant brought this suit against Taylor and against the police judge, Shipley, to recover the damages alleged to have been sustained by him because of the false imprisonment under the warrants above named, and because of the annoyance and worry, loss of business, and expenses incurred in defending the other proceedings which were sued for as results of malicious prosecution. It was charged in the petition that there was a conspiracy between Taylor and Shipley by which it was agreed that appellant was to be harassed and annoyed so as to abandon his property and yield it to Taylor during the balance of the term. At the close of the evidence in appellant's case the court peremptorily instructed the jury to find for the defendants. This was error. There was evidence deducible from the circumstances proven to the jury to sustain the charge of the conspiracy. Furthermore, after the execution of the traverse bond the police judge was utterly without jurisdiction to proceed further in that action other than to return the papers to the circuit court, and in no event did he have authority to appoint a receiver for the hotel property. It is well settled that, while a judicial officer will be protected against suits for damages resulting from an erroneous exercise of judgment or power, yet where he acts corruptly, maliciously, or beyond his jurisdiction, his office is no protection. *Blincoe v. Head*, 103 Ky. 106, 44 S. W. 374; *Stephens v. Wilson* (Ky.) 72 S. W. 836.

Judgment reversed, and cause remanded for a new trial under proceedings not inconsistent herewith.

BENNETT v. RYAN.

(Court of Appeals of Kentucky. Feb. 19, 1904.)

CONTRACTS—PAYMENT OF ANOTHER'S DEBT—REIMBURSEMENT—DELIVERY OF TIMBER—ACCOUNTING.

1. Where plaintiff paid defendant's debt on an understanding that he should be reimbursed with timber from defendant's land, and, in an action to recover the difference between the amount paid and the value of the timber cut, it appeared that some of the timber had not been cut, but that it was of greater value than that at which it had been placed by the terms of the contract, and that defendant had requested that it should not be removed, defendant was not entitled to a credit for such timber.

Appeal from Circuit Court, Muhlenberg County.

"Not to be officially reported."

Action by A. L. Bennett against J. B. Ryan. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Wilfred Carico and J. C. Johnson, for appellant. W. L. Reeves, for appellee.

¶ 2. See *Judges*, vol. 29, Cent. Dig. § 165.

NUNN, J. In the year 1897 the land of the appellee, J. B. Ryan, was sold under four executions, and was bought by the plaintiffs in the executions for less than two-thirds of its value. There were also some taxes against the land. These execution claims and taxes made an indebtedness of \$2,000, which it was necessary for appellee to raise to redeem the land. For the purpose of raising this sum, the appellee entered into an agreement with appellant in which it was stipulated that appellant should cut the white oak and poplar timber of specified sizes from this land, and the appellee was to receive a credit, on the indebtedness of \$2,000, of 30 cents per hundred feet for the amount so cut, and, if the amount of timber purchased under this contract at that price exceeded the \$2,000, then appellant was to pay to appellee the excess, but, if the timber did not amount to as much as \$2,000, then the appellee was to pay the appellant the difference. Appellant was to have three years in which to remove the timber from the land. Appellant ceased to cut and remove timber from the land about July, 1898, and at that time rendered a statement to appellee of the amount of timber so received under this contract, amounting to \$788.18. Thus matters stood until July 24, 1900, when appellant brought this action, seeking to recover the difference between the \$788.18 and the amount he had paid for appellee in redeeming the land, to wit, \$2,000. Appellee answered, admitting the amount and value of the timber received by appellant from the land, but alleged that there was other timber upon the land, which had not been cut and removed, and which had been purchased by appellant under his contract, amounting to more than the amount sued for by the appellant—in other words, that, if appellant had cut all the timber called for under the contract, appellee would not be owing appellant anything, but, on the contrary, the appellant would be owing the appellee. Afterwards appellee filed an amended answer in which he stated that appellant not only cut and removed \$788.18 worth of timber from this land, but that he cut and removed over \$1,000 worth. Appellant replied, denying these allegations, and alleged that a portion of this land on which much of the timber was situated was covered by a dower interest or claim of one Mrs. Blaine, who objected to the cutting and removal of the timber therefrom, and appellee directed the appellant not to cut this timber; that upon the remaining portion of the land there were only a few trees left uncut within the size and specifications of the contract, and these were not cut by the request of appellee. The proof was heard by the lower court, and it adjudged that the appellee was entitled to a credit of \$896.22, as the value of the timber actually cut and received by appellant under his contract, and also adjudged that appellee was entitled to a further credit of \$812.69, the value of the trees uncut, and which were

then standing upon the land, that were within the size and specifications of the contract.

As to the amount credited to the appellee for the timber actually received, we are not disposed to disturb the finding of the court thereon. But we cannot agree with the action of the court in allowing a further credit of \$812.69 for the timber not taken and received by the appellant under his contract, for the reason that the preponderance of the evidence shows that the timber failed to be cut by appellant was not cut by the direction, consent, and approbation of appellee. In addition to this, it is also shown by the evidence that the timber was left standing on the land uninjured, owned by and in the possession of appellee, and was of much greater value than the price agreed to be paid by appellant in his contract, and, instead of appellee being damaged by the failure of appellant to comply with his contract and remove the timber, he was benefited thereby. It would be unconscionable to make appellant pay and account for timber which he did not receive under his contract, which was left in the possession of appellee and growing upon his land, especially when the same was not received by appellant, and left standing and growing upon his land with the approval and consent of appellee.

For these reasons, the judgment of the lower court is reversed, and the cause remanded for further proceedings consistent herewith

PEACOCK DISTILLERY CO. v. COMMONWEALTH.

(Court of Appeals of Kentucky. Feb. 19, 1904.)

NUISANCE—SLOP FROM DISTILLERY—LIABILITY—INDICTMENT—DUPLICITY—CREDIBILITY OF TESTIMONY—QUESTION FOR JURY—IMPOSITION OF PENALTY—EXCESSIVENESS OF VERDICT—REVIEW.

1. An indictment for suffering and committing a common nuisance was not duplex as also charging the statutory offense of poisoning or polluting a stream, where these acts were alleged only as incidents and parts of the main offense, which was the creation of unhealthful and noisome odors.

2. Where a distillery company furnished the slop from its distillery to a cattleman, to be fed on its premises, which it rented to him, liability for a nuisance created thereby is not avoided by the duty which it put upon feeders to prevent the same, and by an agreement that the tenant should be liable if any was created, where the means which the company provided to avoid the nuisance were inadequate.

3. Whether the jury should believe evidence in defense corroborating the prosecution, or other evidence in defense, was a matter which they had the sole right to determine.

4. Conceding that the judgment in a penal prosecution may be reversed because the verdict imposing the penalty is excessive, the instance must be rare, and the abuse of its power by the jury be flagrant, to warrant interference with their action.

Appeal from Circuit Court, Bourbon County.

"Not to be officially reported."

The Peacock Distillery Company was convicted of suffering and committing a nuisance, and it appeals. Affirmed.

Emmet M. Dickson, for appellant. Denis Dundon and N. B. Hays, for the Commonwealth.

O'REAR, J. Appellant was indicted, convicted, and fined \$1,500 for suffering and committing a common nuisance. The indictment describing the offense charges that the defendant corporation, being in the possession and control of a certain distillery in Bourbon county, which was located on Stoner creek, and near a public highway, "did unlawfully suffer and permit the still slops and refuse from said distillery to accumulate at and around said distillery, and did suffer and permit same to flow into the waters of said Stoner creek, whereby the said stream of water was rendered foul, noisome, and unfit for use for man or beast, and caused the fish in said stream to die, whereby there did arise from said distillery, still slops and refuse, stream of water, and dead fish, foul, unhealthy, and disagreeable odors, and did render the atmosphere foul, noisome, disagreeable, and dangerous to the health, comfort, and happiness, and to the common nuisance and annoyance of all citizens of the commonwealth of Kentucky, and especially to those living in the neighborhood of said stream and distillery, and passing along said highway," etc.

Appellant complains that the indictment charges two offenses—one the common-law offense of maintaining a nuisance, and the other the statutory offense of poisoning or polluting a stream of water whereby fish are sickened and killed—and that therefore it was demurrable for multifariousness. It not infrequently occurs that the same act may constitute, in whole or in part, two or more offenses. In that event it is the accusative part of the indictment that determines the offense charged by the commonwealth. This indictment does not go upon the idea that the statute has been violated. It is not a prosecution for a violation of that or any statute. But it is drawn to charge the common-law offense of maintaining and suffering a nuisance. The description of the acts constituting the offense states not only the suffering of the filth and slop to accumulate so as to create unhealthful and offensive odors, but that by letting the slops and filth escape into the stream it killed the fish, which decomposing, added to the offensiveness of the other odors. The gravamen is the creation of unhealthful, noisome odors. That fish were killed and waters polluted by the slop were only incidents and parts of the main offense. The indictment was not duplex, and the demurrer was properly overruled. *Commonwealth v. T. J. Megibben Co.* (Ky.) 40 S. W. 694; *Greenbaum v. Commonwealth*, 10 Ky. Law Rep. 723.

Appellant showed that it had sold all of its slop for the season to Lair & Houston, and let to them its cattle stables and pens, under an agreement that Lair & Houston were to feed all the slop to their cattle there, and to hold the distillers harmless from any prosecution for suffering the slops to escape into the stream, and to so use the premises as not to create a nuisance. It is claimed for appellant that as the only nuisance shown was such as was created by the conditions in and about the cattle pens, and the escape of refuse therefrom into Stoner creek, while Lair & Houston were in possession under their contract, the court should have instructed the jury to find the defendant distillery company not guilty.

To fully understand the applicability of the principle invoked by appellant, we must state the facts showing the situation: The distillery is situated on the side of Stoner creek, and on the Paris and Peacock turnpike road, north of the city of Paris. The capacity of the distillery—at least its operating capacity at that time—was to mash 300 bushels of grain each day. The slop produced from this was forced through an overhead main across the creek into a number of large tubs or vats, whence it was drawn off into the cattle stables and there fed to the cattle and hogs. Three hundred and seventy cattle and about seventy hogs were provided to consume this slop. The distillery began running about the 1st of March, and continued till about the 10th of June. The cattle and hogs were confined in pens and stables. The excrement from this live stock, the filth, mud, spilled slop, and any surplus slop, all were run into a large pool in the lot, probably 100 by 200 feet. The effect of the hot, dry weather on this mass of refuse was to decompose it. The odor for miles around, especially on damp days and of evenings, was so strong as to necessitate citizens closing their doors and windows while serving meals, and to escape its discomforts. Stock would not drink the water from the creek. Fish in great quantities were killed. Crawfish, and even snakes and turtles, were killed and driven from the water to the banks, where their decomposition attracted great flocks of buzzards and carrion crows. Persons traveling the road were assailed by the stench. Although there was some evidence that the sink was allowed to run off into the creek, it may be that this occurred only after a heavy rain, when the pool was filled to overflowing by surface water. It is not shown that Lair & Houston neglected to do anything that they could have done to prevent the conditions complained of. On the contrary, they seem to have used the means provided by the distillery company for caring for this refuse matter. The result was such that it must have been inevitable in the use of the means at hand. Hot weather will decompose damp animal and vegetable matter. The decomposition is essentially offen-

sive to smell, and poisonous. We are asked to say that the distiller who produces these conditions can escape the consequences by contracting with a tenant that the latter will stand for the prosecutions, and agree to prevent a nuisance. It may be doubted whether one can contract to shift the consequences of his violation of the law to protect health upon another. It would seem to be contrary to a sound public policy to permit it.

Wood on Nuisance (volume 1, p. 100, 8d Ed.), cited by appellant, says: "A landlord who lets premises for a particular purpose, which may or may not become a nuisance, according to the manner in which the tenant conducts the business, is not liable either to an action or to an indictment therefor, unless he had reasonable grounds to believe that the nuisance would be created from such use. Neither is the landlord liable for a nuisance created by the tenant, when the nuisance arises from a use of the premises which was not contemplated by the lease."

The soundness of the text is not called in question by the court. But if it applies to this case, it sustains the argument that the landlord is liable. In this case the so-called landlord, the distiller, furnishes the slop, the pens in which it is to be fed, and the cesspool for the collection and care of the offal and refuse matter. The distiller itself creates the primary conditions. If let alone, those things would inevitably become a nuisance. Their decomposition, overflow into the creek, especially in time of rains, and their chemical effect in hot weather, were actually known, and the consequences must have been in the thought of the distiller. It undertakes to rid itself of them, and thereby discharge itself from liability to the community. It sells the slop to cattle men to feed on the premises, and puts upon the feeders the duty to keep the premises from becoming a nuisance. Manifestly the means provided by the distiller were inadequate. The result shows it. The distiller claims, and the feeders, Lair & Houston, declare, there was no negligence in their manner of managing the business of taking care of the slop, so far as failure to use the means at hand was concerned. Nor does the evidence show that there was. The question then comes back to this: The distiller, having created the conditions, has failed to provide sufficient means to care for them so as to prevent their becoming a nuisance. For this the distiller ought to be liable. It has no right to set in motion causes reasonably sure to injure other people, and then fail to provide against such injury. Every person must use his own property and conduct his business with regard to certain rights of his neighbors. He can no more neglect to provide against known consequences of certain uses of his property, where it would become deleterious to the health and comfort of others rightfully in the neighborhood, than he could purposely injure them in that respect, without answering in dam-

ages. We think the instructions asked for by appellant were properly refused.

The evidence for the commonwealth clearly and beyond question established appellant's guilt. Much of the evidence in defense corroborated it. Whether they should believe that, or the other evidence in defense, was a matter which the jury had the sole right to determine.

It is complained that the verdict is excessive. Conceding that we are at liberty to reverse a judgment in a penal prosecution on that account, the instance must be rare, and the abuse of its power by the jury be flagrant indeed, to warrant such interference by this court. Trial juries are peculiarly fitted for the imposition of such penalties as will not only adequately punish the offender in hand, but serve to deter others from a repetition of the breach. They are the people who must execute the criminal and penal laws of the state as directly affecting their community. We decline to interfere with their judgment in this case.

Affirmed, with damages.

STOVALL v. HAYNES.

(Court of Appeals of Kentucky. Feb. 23, 1904.)

ADVERSE POSSESSION MORTGAGE BY ANCESTOR—FORECLOSURE—WIDOW OF HEIR—EXCEPTION OF CERTAIN TRACT—ADMISSIBILITY OF EVIDENCE—LAND IN POSSESSION OF THIRD PERSON—CHAMPERTOUS CONVEYANCE.

1. Where one claiming under a foreclosure sale under which no writ of possession has been issued, sues for the land within 15 years from the order for the deed, the widow of the mortgagor's heir, who has remained in possession, cannot successfully plead adverse possession, the heir having been a party to the foreclosure suit.

2. In a suit for possession of land by the vendee of the purchaser at a foreclosure sale, evidence that the purchaser, who was a sister of the mortgagor's heir in possession of a portion of the property, had agreed with him that he could hold his tract, and that it was not to be affected by the purchase, in consideration of which he did not appear to defend the foreclosure suit, is admissible in behalf of his widow.

3. A conveyance of land by a purchaser thereof at a foreclosure sale, who has not been put into possession and while the land is in possession of the mortgagor's heir, is champertous and void.

Appeal from Circuit Court, Ballard County.
"Not to be officially reported."

Action by T. J. Haynes against Matilda Stovall. Judgment for plaintiff, and defendant appeals. Reversed.

Geo. W. Reeves and Reeves & Thorp, for appellant.

O'REAR, J. Appellant's husband, J. C. Stovall, occupied a tract of 28 acres of land, which was part of a larger tract of 113 acres. The larger tract was sold under a judgment foreclosing a mortgage on it, executed by J. C. Stovall's father in his lifetime. The suit was brought after the mortgagor's death, J. C. Stovall being made a party defendant. The judgment was ren-

dered without defense. The sale was made and confirmed in 1889, and the deed executed in 1891. There was no writ of possession, so far as this record shows. J. C. Stovall continued to live on the 28 acres, and died shortly after the sale by the commissioner. His widow has continued to live there and claim the land adversely, she says, for more than 15 years before this suit was brought by the vendee of the purchaser at the commissioner's sale aforesaid. The purchaser claimed that the widow of J. C. Stovall continued to occupy the premises by permission. But this was denied. Upon that evidence the court peremptorily instructed the jury to find for the plaintiff, which was error. If appellant for 15 years claimed and adversely held the land, the owner's title and right of entry was barred, although appellant's husband had been a party to the suit in which the title was sold to appellee's vendor. But the record shows that the judgment confirming the sale of the land in the foreclosure suit and the order making the deed thereunder were within 15 years from the time of the bringing of this suit. As appellant claims under her husband's title, and as he, if living, could not claim back of the judgment making the deed to which he was a party, she cannot do so. Manifestly, her claim did not begin until after his death.

It was attempted to be shown that appellant's husband and the purchaser at the decretal sale, who was his sister, had an agreement at that time by which J. C. Stovall was to continue to hold the land in dispute, and that it was not to be affected by the purchase, and that in consideration thereof he did not make defense to the proceeding. The trial court should have allowed this evidence. A deed executed by the purchaser after the death of J. C. Stovall conveyed all the 113 acres, except the 28, and in the deed one of the boundary lines is named as being the boundary of the land owned by J. C. Stovall's heirs. This seems to confirm the claim that there was some adjustment between J. C. Stovall and his sister, the purchaser. Furthermore, if appellant was in the actual, adverse possession of the land when the deed was made to appellee by his vendor, the transaction was champertous, and void. The case should have been submitted to the jury under appropriate instructions covering these two points.

Reversed, and remanded for proceedings not inconsistent herewith.

FIDELITY TRUST CO. et al. v. LLOYD et al.
(Court of Appeals of Kentucky. Feb. 24, 1904.)

WILLS—CONSTRUCTION—PERPETUITIES—
STATUTE.

1. A will providing that testator's real estate shall not be sold or incumbered for 40 years after his death, and then shall be divided among those who shall then be the heirs of the tes-

tator's body, though the restriction is to be removed in the event the land shall be taken into the limits of a certain city, is void as in violation of Ky. St. 1903, § 2360, providing that the power of alienation shall not be suspended for a longer period than during the continuance of a life or lives in being at the creation of the estate and 21 years and 10 months thereafter.

Appeal from Circuit Court, Jefferson County, Chancery Division.

"Not to be officially reported."

Action by Isabella Lloyd and others against the Fidelity Trust Company and others. From a decree for plaintiffs, defendants appeal. Affirmed.

Joy & Jarvis, for appellants. Humphrey, Burnett & Humphrey, R. C. Kincaid, H. H. Nettleroth, and Bodley, Baskin & Floxner, for appellees.

BURNAM, C. J. The will of Edwin V. Thompson, Sr., was probated without objection in the Jefferson county court on the 10th of June, 1893. He left eight children and numerous grandchildren, some of whom were alive and some have been born since the probate of the will. The will disposed of a large estate, consisting of land in Jefferson county, Ky., outside of the city of Louisville, real estate in the city, and lands and personalty in Iowa and Kansas. On the 1st of July, 1902, four of testator's daughters, the husbands of two of them uniting, brought this action against the other children of testator, his grandchildren, the Fidelity Trust Company as trustee under the will and statutory guardian of some of the infant grandchildren, and the National Trust Company, receiver, asking a construction of each clause of the will, and that the 1st, 3d, 4th, 7th, and 8th clauses be declared void as contrary to and in violation of section 2360 of the Kentucky Statutes of 1903, prohibiting restraint upon the power of alienation for a longer period than during the continuance of a life or lives in being at the creation of the estate and 21 years and 10 months thereafter. In an exhaustive opinion the chancellor upheld the contention of plaintiffs, and adjudged that E. V. Thompson, Sr., died intestate as to all the real estate owned by him, or in which he had any interest at the time of his death, and that it descended in equal shares to his eight children; that none of the grandchildren of testator, nor any of the proposed beneficiaries, living at the expiration of 40 years from testator's death, took any interest in any of the real estate which E. V. Thompson owned at the time of his death or in which he had any interest. Defendants have appealed, and ask a reversal.

The clauses of the will involved upon the appeal are as follows:

"(1) I will that the house I now live in with four acres of ground attached, together with the outbuildings and appurtenances to said home and all the personal property

¶ 1. See Perpetuities, vol. 39, Cent. Dig. § 50.

pertaining to said home, including animals, vehicles, implements, furniture, etc., shall be kept as a home by my wife, Jane L. Thompson, so long as she lives, or so desires. And after her death or otherwise giving it up as a home, it shall be so kept as long as any of my unmarried daughters may choose to occupy said place as a home. When the said place shall cease to be so used as a home, the realty and personalty is to be disposed of according to other portions of this will.

"(2) My executors shall place the entire amount of my stocks and bonds and other securities for money, which are in the State of Kentucky, in charge of the Fidelity Trust and Safety Vault Company, to be by it held as follows: Said company shall make collections of debts, interest, dividends, etc., and make investment and reinvestments, and pay of the entire amount of the net income so derived to my wife, Jane L. Thompson, so long as she lives. After her death said net income is to be paid over to my children and grand-children as follows, said income shall be paid to my children who are then living in equal shares, and if any one of said children should not be living, his or her share shall go to his or her children, with this provision, however, that in making said division all of my grand-children shall take shares equal with one another. This trust is to continue for twenty years after my death. At the end of said twenty years the said personalty so held by said company, or its successor, shall be divided among my children and grand-children in the same manner as the income aforesaid is to be divided among them. If, however, at the end of said twenty years any one of said grand-children is less than thirty years of age, his or her share shall continue to be held by the said Fidelity Trust & Safety Vault Co., or its successor, until such grand-child attains the age of thirty years, and then be paid over. If my executors should at any time during the above trust all agree that it would be advisable to substitute some other custodian in the place of said Fidelity Trust & Safety Vault Co., they are hereby empowered to do so. Neither said company nor such substitute shall sell for reinvestment any of my stocks, bonds, or other securities it may hold, except with the consent of my executors.

"(3) It is my will that all the real estate I own in the State of Kentucky, outside the city limits of the city of Louisville, shall not be sold or mortgaged or otherwise encumbered for the period of forty years after my death, excepting that such of my lands now lying outside the said city limits which may be taken into the said city limits may be sold by my executors as directed in the next clause of this will. My lands remaining unsold as aforesaid, shall be held by my executors and their successors and managed by them for the period mentioned for the benefit of those who may be the heirs of my body, the revenue derived therefrom during said period

is to be divided among my children and grand-children in the same manner as the net income from my personalty is directed to be divided in clause two. And at the expiration of said forty years said real estate shall be divided among those who shall then be the heirs of my body.

"(4) My real estate which is now in the city of Louisville, Ky., and which may hereafter come within its limits, and also my real estate in Iowa, Kansas, and Texas shall be managed by my executors, and the revenues derived therefrom appropriated as directed in clause three, as long as they remain unsold, when my executors so desire they may sell the same, and they are hereby invested with full power to sell and convey the same. If sold, the proceeds shall be invested in good interest paying securities, or real estate yielding income, and the same shall be held for the same uses and purposes as is directed in clauses 2 and 3."

"(7) All the lands owned by me at the time of my death in the state of Iowa jointly with my son, Edwin, shall be managed by him as at present, for the uses and purposes mentioned in clause three, if the same is agreeable to my said son. If not, then they are to be managed by those named and in the manner directed in clause four."

"Codicil: Upon consideration I have determined to make this addition to my will and make this codicil: at any time after the expiration of ten years from my death, if all my children then living shall agree that it would be desirable to sell any part of my real estate, they by uniting with my executors are hereby invested with full power to sell and convey the same, the proceeds of said sales to be invested in securities or other real estate as directed in clause four."

By these clauses in the will of testator his executors were given full power to manage and control the real estate owned by him in the states of Kentucky, Iowa, Kansas, and Texas, for a period of 40 years after his death, for the benefit of those who might be the heirs of his body; the power to sell, mortgage, or otherwise incumber for that period being expressly prohibited except as to such lands as might be taken into the city limits during the period, in which contingency he provided that they might be sold and the proceeds invested in good interest-bearing securities or other real estate, to be held upon the same trust as provided in the second and third clauses of his will. During this period of 40 years the executors are directed to pay over the net income of the property to his wife during her life, and after her death to his children and grandchildren in equal shares. In our opinion, the trust attempted to be created by this will is obnoxious to the rule against perpetuities and to section 2360 of the Kentucky Statutes of 1908, for the reason that it unlawfully suspends the power of alienation for a longer period than during the continuance of a life

or lives in being at the creation of the estate and 21 years and 10 months thereafter. Testator plainly provides that his real estate shall remain in the hands of his executors for the gross period of 40 years, without reference to any life or lives in being. The law permits the vesting of an estate and the power of alienation to be postponed for a life or lives in being and 21 years and 10 months thereafter; but if the vesting of the estate or interest is postponed or the power of alienation suspended for a longer period it is unlawful, and the devise or grant is void. The estate must necessarily vest within the prescribed period. If by any possibility the vesting may be postponed beyond this period, the limitation over will be void. The statute concerns itself with the vesting of estates, and not with their termination. These principles have been repeatedly announced in numerous decisions of this court. See *Coleman v. Coleman*, 65 S. W. 832; *Stevens v. Stevens*, 54 S. W. 835; *Ludwig v. Combs*, 58 Ky. 132; *Armstrong v. Armstrong*, 53 Ky. 345; *Birney v. Richardson and Ford*, 35 Ky. 427; *Luke v. Marshall*, 28 Ky. 355; *Brashear v. Macey*, 26 Ky. 91.

While the restriction upon the power of alienation imposed by clause 3 upon the real estate is removed in the event these lands are taken into the city limits, this contingency may not happen during the 40 years; and it is also uncertain who may take at the end of 40 years, as it is utterly impossible to know who may be alive at that time. We therefore hold that the attempted trust created by the 1st, 3d, 4th, and 7th clauses of the will postpones the vesting of the estate beyond the statutory period of limitation, and therefore the whole trust is void, and the estate devised by these clauses must be treated and administered as intestate property.

Judgment affirmed.

BINION et al. v. WOOLERY et al.

(Court of Appeals of Kentucky. Feb. 24, 1904.)
JUDGMENT—RELIEF GRANTED—INADVERTENCE—REMEDY.

1. Where a judgment grants relief not sought in the pleadings or claimed in any way, and it is patent that it was only so entered by inadvertence, it is a clerical misprision, which may be corrected on motion.

Appeal from Circuit Court, Carter County.
"Not to be officially reported."

Action by E. H. Woolery and others against William Binion and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

J. R. Botts and Hazelrigg & Chenault, for appellants. R. D. Davis, for appellees.

HOBSON, J. John Nemezowski owned a tract of land in Carter county. He failed to pay the taxes for the year 1882, and in January, 1883, the land was sold for the taxes, amounting to \$8.37, and was bought

by John Rice. Nemezowski did not redeem the land, and the sheriff made Rice a deed. Rice, after this, paid the taxes on the land as his own. In the year 1894, Nemezowski claimed the land, and Rice agreed to give it up to him if he would pay him back his money. They had a conference as to how much was coming to Rice, and finally agreed on \$100 as the amount, but Nemezowski failed to pay the money. After this Rice sold the land to Daniel H. Woolery. Previous to this, however, Nemezowski had filed suit for the land. Rice died, and Woolery defended the suit. Judgment was entered in that case in favor of the plaintiff for thirteen-fifteenths of the land, and Woolery was adjudged lien on it for the amount of the taxes paid. Jones and Davis, who were attorneys for the plaintiff, asserted a lien on the recovery for their reasonable attorney's fee of \$300. On June 29, 1897, Woolery brought this action, alleging these facts, and that the taxes paid on the land amounted to \$178.98. He prayed judgment enforcing the lien adjudged him in the former case. Jones and Davis, on their petition, were made defendants, and asserted their lien for \$300. On final hearing the court adjudged Woolery \$100, with interest; also adjudged Jones and Davis \$300, subject to Woolery's lien, and ordered a sale of the land, which was had. Woolery bought the land for the amount of his debt, interest, and costs, and the sale was confirmed without objection.

The tax lien was on the entire tract, and the court therefore properly ordered the whole tract sold on Woolery's claim. The proof is very indefinite as to the amount of the taxes paid by Rice, owing to the fact that he is dead, and that all the tax receipts cannot be found. From those that are produced, however, it would appear that the taxes on the land were about \$6.60 per year, and nobody but Rice seems to have paid any taxes after the year 1882. Rice and Nemezowski agreed on \$100 as the proper amount coming to Rice on account of the taxes which had been paid, and this agreement of the parties is the best evidence in the record on the subject. After so many years, the death of Rice, and the loss of the tax receipts, the court properly followed the agreement, and gave judgment in favor of Woolery for the amount so agreed on.

Appellants cannot raise the question that the land did not belong to Rice when he sold it to Woolery, on the ground that it had been forfeited to the commonwealth for the non-payment of taxes by Rice. Woolery was adjudged a lien on the land in the former suit, and that judgment is conclusive. Besides, the forfeiture took place after Rice's death, and there is nothing here to show the irregularity of those proceedings.

It is true, Jones and Davis had only a lien on thirteen-fifteenths of the land, and that a sale should have been ordered of only what they had a lien on, for the payment of

their debt. But this was, perhaps, a clerical misprision in entering the judgment. They only asserted a lien on the land they recovered, and in so far as the judgment grants relief not sought in the pleading or claimed in any way, and for which no foundation is laid, it is perhaps a clerical misprision which may be corrected on motion (*Martin v. McKinney*, 4 Ky. Law Rep. 452; *Emlison v. Walker* [Ky.] 31 S. W. 461; *Tong v. Elfort*, 80 Ky. 152); it being patent that it was only so entered by inadvertence. But in any event the land, when sold, brought only Woolery's debt; Jones and Davis getting nothing. Appellants have not, therefore, been prejudiced.

. Judgment affirmed.

HAGAN et al. v. CLEMONS et al.

(Court of Appeals of Kentucky. Feb. 19, 1904.)

DESCENT OF LAND—INFANT ANCESTOR—GIFT FROM PARENT—WHAT CONSTITUTES.

1. Ky. St. 1903, § 1393, provides that the land of an intestate shall descend in parcenary, first, to his children, and, if none, then to his parents, a moiety to each, and, if either parent be dead, then the whole to the other. Section 1401 provides that if an infant dies without issue, having title to realty derived by gift, devise, or descent from one parent, the whole shall descend to such parent and his or her kindred. A mother purchased realty with her own means, the deed reciting that the property conveyed was to be for her and her two minor children, and that at the death of either one or two the property was to survive to the longest liver of the three. One of the minors proved the survivor, but died in infancy and without issue. *Held*, that the descent of the property was covered by section 1393, so as to vest entirely in the surviving father, and not by section 1401, so as to vest in heirs of the mother; as the title of the surviving infant was not derived from the mother, but from the vendor.

Appeal from Circuit Court, Nelson County.
"Not to be officially reported."

Action by Alfred Hagan and others against Charles Clemons and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

John D. Wickliffe, for appellants. Geo. S. & Jno. A. Fulton, for appellees.

O'REAR, J. Ellen Lewis was a negress and a slave. Before the emancipation of slaves, she and John Brown, who was also a slave, had contracted a slave marriage. There were born to them two children, Eddy Brown and Rebecca Brown. On the 3d of January, 1868, they made and entered of record in the proper county clerk's office the statutory declaration of their intention to live together as husband and wife. In 1870 Ellen Lewis purchased from J. W. Muir a house and lot in Bardstown, this state, and paid for it with her own means. Muir's deed conveying the property contained this clause: "The house and lot conveyed by this deed to be for Ellen Lewis, and Eddy Brown, and Rebecca Brown,

and at the death of either one or two the property to survive to the longest liver of the three." Eddy Brown and Rebecca Brown named were infant children of John Brown and Ellen Lewis. Eddy Brown died in infancy in the lifetime of her mother, and without issue. The mother, Ellen Lewis, then died, leaving Rebecca Brown, and her husband, John Brown. Afterward Rebecca Brown died without issue and an infant. John Brown continued to live upon the property, and to claim it as his own for a long while. He then sold and conveyed it to appellees.

This suit by appellants, who are brothers of the half-blood of Eddy Brown and Rebecca Brown, being sons of Ellen Lewis but not of John Brown, seeks to recover the property, appellants claiming that they inherited as heirs at law of their half-sister Rebecca Brown. Under section 1393 of the Kentucky Statutes of 1903, when a person having title to real estate of inheritance dies intestate as to such estate, it descends in parcenary to his kindred in the order, first, to his children and their descendants; if none, then to his father and mother, if both are living, a moiety each, but, if either parent be dead, then the whole estate shall pass to the other. Section 1401 provides that if an infant dies without issue having title to real estate derived by gift, devise, or descent from one of the parents, the whole shall descend to that parent and his or her kindred in the manner provided by the statute.

It is the contention of appellants that, upon the death of Rebecca Brown in infancy and without issue, she, being the survivor of the three beneficiaries named in the deed, and having succeeded to the entire estate under the deed, that the title thus acquired was by gift from her mother. In the recent case of *Guier, etc., v. Bridges* (Ky.) 70 S. W. 288, the question was involved whether an inheritance passing from an infant dying without issue, leaving a mother and father surviving, and the conceded purchase of the land and payment therefor by the father, descended to the father, or under the statute (section 1393) to both father and mother in equal portions. In that case the father claimed the entire estate in consequence of his having paid for same when it was conveyed to the infant. This court denied the father's claim, and in speaking of section 1401 observed: "It has always been most strictly construed, and the statute has been held to apply only to those cases where the title to the real estate owned by the infant came to him by gift, devise, or descent from one of his parents. * * * The infant's title to the real estate did not come from the father, but from his vendor."

That decision controls this case. Therefore the judgment is affirmed.

SPRIGGS et al. v. SIMPKINS et al.

(Court of Appeals of Kentucky. Feb. 23, 1904.)

TITLE TO LAND—CONFLICTING PATENTS.

1. A patentee conveyed a portion of his land to one who entered thereon, and also began the cultivation of a small tract of the adjoining land of the grantor, and who later secured a patent embracing in its boundaries the land of the grantor, but by its terms excluding a certain number of acres. Subsequently a tenant of the grantee's heirs extended this cultivated portion, and purchasers from the grantor sued to recover the land thus cultivated. *Held*, that except as to the tract first cultivated by the grantee, as to which adverse possession was shown, his heirs had no title.

Appeal from Circuit Court, Martin County.

"Not to be officially reported."

Action by N. S. Simpkins, as administrator, and others, against W. M. Spriggs and others. From a judgment for plaintiffs, defendants appeal. *Affirmed*.

W. H. Vaughn and C. B. Wheeler, for appellants. Alexander & Lackey, for appellees.

NUNN, J. This case involves the location of patents to land, as well as questions of possession and trespass. In the year 1854 one W. G. Wells obtained four patents, three of them containing 200 acres each, the other 100 acres. This last patent boundary, or a part of it, he sold and conveyed to one Shaddick Ward, who erected a cabin on it near the line of one of the 200-acre patents. After this, and in the year 1865, Ward obtained a patent, the boundary of which included 1,055 acres, but by the terms of the patent 855 acres were excluded therefrom. The boundary of this Ward patent covered the most of the land patented to Wells in 1854, and it is fair to presume that the exclusion of 855 acres from this patent boundary was meant to exclude the lands covered by the Wells patents. Appellant Spriggs claimed to be a tenant of the Ward heirs, and occupied the house or cabin near the line of one of the 200-acre patents of Wells. Ward, when he occupied this cabin, inclosed and cleared 15 or 20 acres of land across the line, and on the Wells patent. When Spriggs entered as tenant to appellants, the Ward heirs, he began to clear and inclose 30 or more acres to this Wells patent, and appellees, as the owners by purchase of the boundaries covered by the Wells patent, brought this action against appellants to recover this land, and damages for the trespass and destruction of timber, and to enjoin their further trespass. Appellants answered, denying the ownership of this land by appellees, and claimed the whole of it by virtue of the Ward 1,055-acre patent and also by adverse possession. The issues were completed, proof was heard, and the lower court sustains appellees' claim, except to the extent of the 15 or 20 acres of land first cleared and inclosed by Ward. This small piece was adjudged to appellants. Of this judgment appellants complain.

The appellants have not filed a brief, but we have examined the record, and are at a loss to understand upon what claim or theory they expect a reversal. It is clear that appellees own this land covered by the Wells patents, and they are prior in date to the Ward patent. They have failed to sustain by the proof their claim of 15 years continuous, actual, adverse possession of this land or any part thereof, except the 15 or 20 acres adjudged them by the court. For these reasons the judgment of the lower court is affirmed.

WADE v. KEOWN et al.

(Court of Appeals of Kentucky. Feb. 23, 1904.)

ENTRY ON LAND OF ANOTHER—COMPENSATION FOR IMPROVEMENTS.

1. One entering on land without any color of right thereto, and with knowledge that it belongs to another, is not entitled to a lien on the land for improvements made by him.

Appeal from Circuit Court, Ohio County.

"Not to be officially reported."

Action by George T. Wade against C. P. Keown and others. From a judgment for defendants, plaintiff appeals. *Affirmed*.

Ira Julian and C. W. Massie, for appellant. R. D. Walker, J. E. Fogle, and W. S. Pryor, for appellees.

NUNN, J. In the year 1888 E. D. Walker sold to one E. H. Basham a tract of 92 acres of land, situated in Ohio county, and took his note for the sum of \$450, the purchase price. When it became due, in 1891, Walker sued him on this note, and enforced his lien on the land. The land was sold by the commissioner under this judgment, and E. D. Walker became the purchaser, and the court granted him a writ of possession for the land. When Sheriff Stephens undertook to execute this writ, he found one E. F. Basham, a son of E. H. Basham, in the possession of the land. E. F. Basham then sued the sheriff and E. D. Walker, and obtained a temporary injunction, restraining them from the execution of this writ and putting him off of this land. Basham in his petition alleged that he was the owner of this land, but did not state how or when he became the owner thereof. The issues were formed and the case remained on the docket until 1902, when the plaintiff, Basham, dismissed his action without prejudice. In the meantime E. D. Walker died, and the action was revived in the names of his devisees, and they obtained another writ of possession and placed it in the hands of appellee C. P. Keown, then the sheriff of the county, to execute. When he undertook to execute it, he found the appellant, George T. Wade, in possession of the land, and he brought this action to enjoin the sheriff and the devisees from ejecting him, claiming that he was the owner thereof, but he also failed to state how or when he became the owner. The issues were com-

pleted, and the proof, by depositions, was taken, a trial had, and the court adjudged the land to the devisees of Walker, and dismissed appellant's action, of which he complains.

The preponderance of the evidence shows that E. F. Basham obtained the possession of this land from his father under the promise that he should own it provided he paid Walker the \$450 note; but after he obtained the possession he changed his mind, and concluded that he would and did set up claim to the land, and, while he was in possession, appellant, Wade, made an arrangement with one Coppage to trade E. F. Basham out of his right of possession, which he did by giving him a wagon and gear, and then appellant at once moved on this land in the nighttime. Appellant does not claim that he obtained the possession from Basham, but says he found the place vacant and moved on it, concluding that he would set up claim to it in his own right. The proof shows that E. F. Basham and appellant both recognized the claim and right of Walker to this land, and they knew the pendency of the action referred to, and appellant, prior to his entry on the land, wrote letters to Walker, giving him information of facts and witnesses to enable him to defeat Basham in his suit, and also offered to buy the land of Walker.

It is evident that when Basham and appellant entered on this land they knew of the pendency of the actions mentioned above, and that the land belonged to Walker, and it was their purpose to hold and have the use of this land as long as they could, and, if possible, beat Walker out of it. Appellant asked that he be allowed pay and a lien on the land for improvements made by him. Under the circumstances he is not entitled thereto. He entered without any color or pretense of right or title, and at the time knew the land belonged to another.

The judgment of the lower court is affirmed.

BEATTYVILLE BANK v. ROBERTS et al.
(Court of Appeals of Kentucky. Feb. 23, 1904.)

NOTE — FAILURE OF CONSIDERATION — BONA FIDE HOLDER — RENEWAL — EVIDENCE — PAROL AGREEMENT.

1. Under Ky. St. 1903, § 483, placing a note made payable at a bank, and which had been discounted at a bank, on the same footing with foreign bills of exchange, failure of consideration is not available as a defense to a note, if purchased in good faith by a bank without notice of the infirmity.

2. In an action by an indorsee on a note given for whisky, evidence of a contemporaneous parol agreement that the whisky should be paid for only as delivered is inadmissible.

3. Notice to a bona fide holder of a note that it was without consideration does not affect his right to recover on a renewal note afterwards given by the maker for a balance due the payee.

Appeal from Circuit Court, Lee County.

"To be officially reported."

Action by the Beattyville Bank against T. T. Roberts and others. From a judgment in

favor of defendants, plaintiff appeals. Reversed.

Gourley & Roberts, Jno. J. McHenry, and T. B. Blakey, for appellant. S. P. Stamper and O. H. Pollard, for appellees.

BURNAM, C. J. This action was instituted by the Beattyville Bank, of Beattyville, Ky., against T. T. Roberts, Ibbey Roberts, and the J. W. Slack Company, on a promissory note dated March 25, 1902, payable four months after date, for \$546, the note being signed by T. T. and Ibbey Roberts, and indorsed by the J. W. Slack Company. The defendants T. T. and Ibbey Roberts in their answer plead that the note was executed by them to their codefendants, the J. W. Slack Company, without consideration, and that the plaintiff was apprised of this fact before it purchased the note. Plaintiff, for reply, denied that the note was executed without consideration, or that they were apprised of this fact before its purchase by them, or that there was no consideration to support it. A jury trial resulted in a verdict and judgment for the defendants, and plaintiff has appealed.

The facts developed by the testimony are as follows: On the 22d of November, 1901, T. T. Roberts and Ibbey Roberts executed and delivered to the J. W. Slack Company, of Louisville, Ky., the following promissory note: "686.00. Beattyville, Ky., Nov. 22, 1901. Four months after date we promise to pay to the order of the John W. Slack Co., distillers, of Louisville, Ky., \$686.00, without defalcation, value received, negotiable and payable at the Beattyville Bank, Beattyville, Ky. [Signed] T. T. Roberts, Ibbey Roberts." Simultaneously with the execution of this note, the J. W. Slack Company executed and delivered to T. T. Roberts the following written agreement: "We have this day sold to T. T. Roberts fifteen barrels of ninety-eight whiskey, and twenty barrels new, for which he gives me his four months note, dated November 22, 1901, for \$686.00. If Mr. Roberts should die, we agree to take back the whiskey at what it was sold to him. J. W. Slack Company, By J. W. Slack, President." Before the maturity of this note, the J. W. Slack Company, by J. W. Slack, indorsed and delivered it for value to the appellant, the Beattyville Bank, of Beattyville, Ky. At the maturity of the note the bank gave notice thereof, and demanded its payment both from appellees and the J. W. Slack Company.

Upon the trial T. T. Roberts testified that he did not know that the bank held the note until he received this notice, and that he immediately went to the bank and notified R. N. Goodloe, its cashier, that he had a contemporaneous parol agreement with the J. W. Slack Company that he was only to pay for the whisky as it was delivered to him, and that he had already paid to them \$140 for whisky delivered, which should be credited upon the obligation; and that he direct-

ed him to return the note to the J. W. Slack Company, and not to purchase any more of his notes executed to the company, and at the same time explained to him the conditions of the written agreement of the Slack Company to him; that a few days after his conversation with Goodloe he received a letter from the Slack Company, inclosing the \$686 note, dated November 22, 1901, and the note sued on for \$546, which he executed in renewal of the balance due upon his original obligation, which reads as follows: "546.00. Beattyville, Ky., March 25, 1902. Four months after date we promise to pay to the order of John W. Slack Co., inc. distillers, of Louisville, Ky., \$546.00, without defalcation, value received, negotiable and payable at the Beattyville Bank, Beattyville, Ky. T. T. Roberts, and Mrs. Ibbey Roberts." That after the execution of the last-named note the Slack Company failed in business, and that he never received any more of the whisky from them; that Slack represented at the date of the execution of the note that the whisky was in bond in his warehouse in Louisville, but that he did not give him any warehouse receipt therefor; that he simply took his word that the whisky was there; that he usually ordered two barrels at a time, and paid for it when it came; that he was induced to buy 35 barrels by the Slack Company agreeing to abate from the price 25 cents a gallon below their ordinary charges. Both the vice president of the bank and the cashier testified that the bank acquired the original note for \$686 in due course of business, for value, without notice of any lack of consideration for its execution, and that when it fell due both Roberts and the Slack Company were notified thereof by mail; that a day or two afterwards he met T. T. Roberts on the bridge, and Roberts requested him to send the note to the Slack Company, and offered to show him the written contract executed by the Slack Company to him; that he did not read it, but Roberts explained its contents; that he sent the note to the Slack Company, and shortly thereafter he received a check for \$140, and the note sued on, in renewal of the balance of the original note. He denied that Roberts notified him not to take any more of his notes, or informed him that they were executed without consideration at the date of his conversation on the bridge with reference to the original note; but said that the first time he ever heard of this claim was after the publication in a paper that Slack & Co. was broke, when Roberts came to the bank for the first time, claiming that he had notified him, when the first note fell due, not to buy any more of his notes.

The partial or total failure of consideration, or fraud, in the execution of a note made payable and negotiable at an incorporated bank, which has been discounted before maturity by a bank of this commonwealth or organized under the laws of the United

States, is not available as a defense to it, if purchased in good faith by the bank without notice of such infirmity. See section 483, Ky. St. 1903. Kelly v. Smith, 58 Ky. 313; Hargis v. Louisville Trust Co. (Ky.) 30 S. W. 877; Moreland's Assignee v. Citizens' Savings Bank, 97 Ky. 211, 30 S. W. 637; Clark v. Tanner, 100 Ky. 275, 38 S. W. 11. There is nothing in the written contract relied on by appellee which suggests any lack of consideration for the execution of the original note; it was simply an agreement on the part of the Slack Company to buy back the whisky in the event of the death of appellee. As he was alive at the date of the maturity of the note, he certainly could not rely upon this agreement to defeat recovery; and there was no claim by appellee that appellant had notice of his alleged contemporaneous parol agreement with the Slack Company that he was only to pay for the whisky as delivered, previous to or at the time of the purchase by them of the original obligation of November 22, 1901. The law presumes a consideration for the execution of bills of exchange, and negotiable notes placed upon the footing of bills of exchange by the statute, for the benefit of the holder, in an action against the maker or indorser of such paper. Besides, it was not competent for appellee to impeach his written contract by testimony of a contemporaneous parol agreement providing for a different time and manner of payment. The note sued on was simply the renewal of the balance due upon the original obligation, which appellant had purchased in due course of business without notice. It was not a new transaction. Even if it be conceded that appellee notified appellant's cashier, at the time he was called upon to pay the original obligation, of his parol agreement with the Slack Company that he was only to pay for the whisky as it was delivered, and that the original note was without consideration, this would not have been sufficient to impeach the consideration of a note, subsequently executed by him to the Slack Company for the balance due, in the hands of an innocent purchaser for value.

We have reached the conclusion that there was no competent testimony to support the plea of no consideration relied on to defeat recovery, and that the trial court should have given the jury a peremptory instruction to find for the plaintiff. The judgment is therefore reversed, and cause remanded for proceedings consistent with this opinion.

ANDREWS v. ERWIN.

(Court of Appeals of Kentucky. Feb. 23, 1904.)

LEASE—TERMINATION—BREACH OF COVENANT—CONSTRUCTION—FORCIBLE DETAINER—DEMAND FOR POSSESSION—NECESSITY.

1. Ky. St. 1903, § 2295, provides that, where a tenancy for a year or more is about to expire on a certain date, the tenant shall abandon the

premises on that day, or be subject to suit for possession without demand or notice for 90 days, after which he shall be secure in his possession for another year. Under sections 2293-2296, 2326, 2327, the reservation of rent and allegiance to the title are distinguishing characteristics of the relation of landlord and tenant. Civ. Code Prac. § 452, defines a forcible detainer as the refusal of the tenant to give possession to his landlord after the expiration of his term. The owner of land executed a writing reciting that she had leased to a certain person certain described land for five years from a certain date, that the lessee agreed to fence and put the land in a good state of cultivation, and remove the timber, except the stumps, therefrom, within three years, "or to forfeit all work done and all claims on said land. * * * This indenture binds all heirs and assigns of both parties." The tenant and a purchaser of his term both failed to fulfill the covenant as to cultivation and removal of timber. *Held*, that the lessor was entitled to maintain forcible detainer against such purchaser.

2. The lease expiring by its own limitation, no written demand for possession was necessary as a preliminary to such action.

Appeal from Circuit Court, Calloway County.

"Not to be officially reported."

Action by Mollie J. Andrews against Joe J. Erwin. Judgment for defendant, and plaintiff appeals. Reversed.

Zeb Stewart and Will Linn, for appellant. Sims & Thompson, for appellee.

BURNAM, C. J. On the 5th of June, 1890, the appellant, Mollie J. Andrews, contracted in writing with H. L. Thompson as follows: "This indenture witnesseth: Mollie J. Andrews of Dexter, Calloway county, Kentucky, has this day leased to H. L. Thompson of the same place all her timber land lying west of Rock Grass Creek and east of the N. C. & St. L. R. R., for a term of five years from the 1st day of January, 1900. Said H. L. Thompson agrees to clear, fence and put said land in a good state of cultivation and remove all timber except stumps from said land by the first day of January, 1903, or to forfeit all work done and all claims on said land. * * * This indenture binds all heirs or assigns of both parties to fulfill said article same as the original parties." On the 21st of January, 1903, Mollie J. Andrews instituted a proceeding in the Calloway quarterly court, in which she alleged that her original lessee and tenant, Thompson, had died on the — day of —, 1900, and that all of his rights and interest in the real estate leased from her had been sold at public outcry, and that appellee, Erwin, became the purchaser thereof, and subrogated to the rights, liabilities, and covenants of Thompson with reference to the lease, and that he had taken possession thereunder; that neither her original lessee, Thompson, nor his vendee, Erwin, had complied with the covenants of the lease to clear, fence, and put the leased premises in a good state of cultivation by

removing the timber, except the stumps, therefrom, by the 1st day of January, 1903; and that in accordance with the terms of the lease she had demanded possession thereof, which he refused to surrender, and forcibly detained possession thereof without right or consent on her part; and asked that he be adjudged guilty of a forcible detainer, and that she have restitution of the premises. The defendant, Erwin, filed a general demurrer, which was overruled, and thereupon filed an answer in which he denied that either he or Thompson had failed to comply with their contract, or that by reason of such failure he had forfeited his lease, and alleged that prior to the institution of this proceeding he had not received any notice to surrender the possession of the land, and moved the court to dismiss the petition. The motion was overruled, and, the law and facts being submitted to the court, it was adjudged that the defendant, Erwin, was guilty of the forcible detainer complained of, and that the plaintiff should have restitution of the premises. The defendant traversed the finding of the lower court, and carried the case to the circuit court, where he renewed his motion to dismiss the proceeding on the face of the papers, which was sustained by the trial court over the objections of plaintiff, and she has appealed.

It is the contention of appellee that the judgment of the circuit court should be affirmed on two grounds: First, because the written contract does not specifically provide that the tenancy or term of lease is to expire on a certain day, as required by section 2295 of the Kentucky Statutes of 1903, and, second, because no demand or written notice for possession was served upon him prior to the institution of this proceeding. There can be no doubt that the relation of landlord and tenant is created between the parties by the written contract, and a forcible detainer is defined by section 452, Civ. Code Prac., as the "refusal of a tenant to give possession to his landlord after the expiration of his term, or of a tenant at will or by sufferance to give possession to the landlord after the determination of his will." The reservation of rent in some form and allegiance to the title are the distinguishing characteristics of a contract by which the relation of landlord and tenant exists. Sections 2293-2296, 2326, 2327, Ky. St. 1903. And the rule is well settled that, where a lease expired by its own limitation, no written demand from the landlord for possession is necessary in order to bring an action for forcible detainer. While the lease in this case is for five years, it distinctly specifies that if the lessee shall fail to clear, fence, and put the land in good cultivation, and remove all timber, except stumps, by the 1st day of January, 1903, he shall forfeit all work done and all claims under the lease, and that this provision in the contract shall bind both the heirs and assigns. We therefore conclude that the circuit judge

¶ 2. See Landlord and Tenant, vol. 22, Cent. Dig. § 1218.

erred in dismissing appellant's petition before trial.

Judgment reversed, and cause remanded for proceedings consistent herewith.

ROBINSON et al. v. MARSHALL.

(Court of Appeals of Kentucky. Feb. 19, 1904.)
FORCIBLE ENTRY—TERMINATION OF TENANCY
—SURRENDER OF POSSESSION—SUFFICIENCY OF EVIDENCE.

1. Under Civ. Code Prac. § 452, subsec. 1, defining forcible entry as "an entry without the consent of the person having the actual possession," the only inquiry on the trial of the writ of forcible entry is whether defendant entered on land in the actual possession of plaintiff, and defendant cannot justify by showing title or right of entry.

2. Where a tenancy is ended, and the tenant leaves the property, consenting that the landlord shall take possession, his doing so is not a forcible entry within Civ. Code Prac. § 452, subsec. 1, defining a forcible entry as one without the consent of the person having the actual possession.

3. Evidence in an action of forcible entry considered, and held to require the submission to the jury of the question whether plaintiff, who had occupied as defendant's lessee, had not, on the termination of the tenancy, consented to defendant's resumption of possession.

Appeal from Circuit Court, Scott County.

"Not to be officially reported."

Action by Mary Marshall against W. L. Robinson and others. Judgment for plaintiff, and defendants appeal. Reversed.

Montgomery & Lea, for appellants. Victor F. Bradley, for appellee.

BURNAM, C. J. On the 7th day of August, 1902, the appellee, Mary Marshall, sued out a writ charging the appellant W. L. Robinson with having forcibly entered and taken possession of a house and tract of 35 acres of land, of which she was in the actual possession, and with refusing to surrender the possession thereof. The inquisition on the premises resulted in a verdict of a jury finding the defendant guilty of forcible entry, and a judgment for possession in favor of appellee. W. L. Robinson traversed the inquest, and executed the bond required by law, and carried the case to the circuit court. A trial in the circuit court resulted in a verdict, pursuant to a peremptory instruction by the court, finding the defendant guilty of the forcible entry complained of. The defendant filed grounds and made a motion for a new trial because the court erred in giving the jury a peremptory instruction to find the defendant guilty of the forcible entry complained of; second, because the court erred in refusing to permit the defendant to testify that he had a deed from Richard Marshall, the brother of the plaintiff, for the land in controversy, dated in 1898, and that Marshall was his tenant at the time of his death, and his term expired upon his death; third, because the court erred in refusing to permit the witness F. H. Abbott to testify

that the appellee promised him that she would get her things out of the house and give him possession; fourth, in refusing to instruct the jury to find the defendant not guilty.

Upon the trial the deposition of appellee was read to the jury, in which she deposed that she had lived upon and occupied the premises in dispute with her brother, Richard Marshall, and his wife, for some eight or nine years; that after the death of her brother and his wife she continued in the actual possession of the premises, retaining the key to the dwelling house, and expected to remain there if she could get anybody to stay with her; that defendant on one occasion borrowed the key of the house from her, but subsequently brought it back to her; that the house was locked up; that by agreement between herself and Richard Marshall she occupied the place with him and his wife. She denied that she had ever agreed with defendant that she would take her belongings out of the house, or consented that Abbott, his tenant, should have possession. She testified that she had a bed, a bureau, a trunk, two chairs, and a looking glass, and some clothes in the house at the time of the entry by defendant. She also introduced several witnesses, who testified that she lived on the land in controversy with her brother for several years before his death, and was there when he died. The appellant Robinson, on the other hand, testified that he had been in the undisputed possession of all the land in controversy since 1898; that Richard Marshall had married his mother, and he had agreed to allow them to occupy the house and premises as his tenants as long as they lived; that appellee lived with her brother and his wife, and was also living there when he died; that after the death of Richard Marshall he administered upon his estate, and sold his personal property; that his wife occupied the house from the death of Richard Marshall until the day of the sale, and that appellee stayed with her, and left the premises on the same day, leaving a few articles of furniture; that he left the key with her, so that she could get them out when she found a place to take them; that he notified her that he had rented the house to F. H. Abbott, and that he would want possession in a week or so, and directed her to give him the key to the house when he called for it, and that she said she would do so, and would get her things out of the house as soon as possible, and would not leave them in Mr. Abbott's way; that he lived several miles from the house in controversy, in Owen county; that when Abbott went to take possession of the property he supposed that appellee had taken her things out, but found that she had not; that he did not know where she was at the time he took possession of the house; and that he entered through a door which was not fastened. Appellant also in-

¶ 1. See Forcible Entry and Detainer, vol. 23, Cent. Dig. § 61.

introduced Mrs. Lynn, who testified that a short time after the death of Richard Marshall Robinson came to her house to see Mary Marshall, and asked her for the key, and told her that he had rented the house to Abbott, and that he would move in in a week or so; that appellee responded "All right," that she would move her things out so that they would not be in Mr. Abbott's way; that Robinson told her that if she could not get a place to take them that she could put them upstairs out of the way, but that appellee said not to put them upstairs, that she would take them away immediately. Robinson also told her that Abbott would be there to plow the garden the next day, and she did not object. William True testified that he had rented the land in controversy from Robinson for three years immediately preceding the death of Richard Marshall, and cultivated it as his tenant. Fenton Jones testified that he had seen a contract in writing between Richard Marshall and Robinson, which provided that appellee, Mary Marshall, should live with Richard Marshall on the place as long as Richard Marshall and his wife lived.

Subsection 1 of section 452 of the Civil Code of Practice defines a forcible entry "as an entry without the consent of the person having the actual possession." In order to entitle one to maintain an action for forcible entry, he must show that he was at the time of the entry in the actual and peaceable possession of the premises in question. The specific acts and conditions required to constitute actual possession differ according to the peculiar circumstances of each case. Generally, any overt acts indicating a purpose to occupy, and not to abandon, the premises, will satisfy the requirements as to possession. 13 A. & E. En. of Law, 748. The only legitimate inquiry upon the trial of a writ of forcible entry is whether the defendant entered upon the land which at the time of the entry was in the actual possession of the plaintiff. The defendant cannot justify an entry in such a case by showing title or right of entry. See *Hunt v. Wilson*, 53 Ky. 38. But if a tenancy be determined, and the tenant has gone away and locked up the house, consenting that the legal owner, either in person or by his tenants, should take possession of the property, and he does so, under such a state of case he would not be guilty of "forcible entry." We think there was ample testimony introduced by appellant in this case conducing to show that appellee consented for appellant to enter the house, and that the trial court erred in not leaving the determination of this question to the jury. As to the land outside of the house, the overwhelming weight of the testimony is that it was actually in the possession of the appellant, and had been for several years.

For reasons indicated, the judgment is reversed, and cause remanded for proceedings consistent with this opinion.

LITER v. JOHNSON'S EX'R et al.

(Court of Appeals of Kentucky. Feb. 19, 1904.)
ADMINISTRATION—PROPERTY BELONGING TO ESTATE—EVIDENCE—SUFFICIENCY.

1. Evidence considered, and held sufficient to establish, as against an executor, the ownership of a house and lot claimed by the executor as a part of his intestate's estate.

Appeal from Circuit Court, Fleming County.

"Not to be officially reported."

Petition by S. P. Scruggs, executor of James T. Johnson, deceased, for the settlement of his estate, and for the sale of real estate to pay debts. From a judgment disallowing the claim of Mary R. Liter to a house and lot, claimed by the executor as a part of the estate, she appeals. Reversed.

John P. McCartney, for appellant. B. S. Grannis, for appellees.

NUNN, J. One Jas. T. Johnson, of Fleming county, Ky., died in February, 1899, testate. By his will, made in the year 1895, he directed his debts paid by the sale of such personal property as could best be spared, and gave all the balance of his property, real and personal, to his wife, Eliza Johnson, for life, at her death all to be sold and divided amongst his six children, after charging his son John with \$1,000, and his daughter, Mary Ruth Liter, with \$1,500. When he made his will he was practically out of debt, but afterwards, by reason of the failure of the Exchange Bank of David Wilson, his brother-in-law, he became much involved, and at the time of his death he owed some \$7,000 or \$8,000, an amount largely in excess of his personal property. S. P. Scruggs, his son-in-law, was appointed and qualified as his executor of the will, and on the 9th of March, 1899, filed his petition in the Fleming circuit court for the settlement of the estate, and for a sale of enough of the real estate of the decedent to satisfy the debts. At the time of decedent's death he owned a farm, near Johnson's Junction, of 150 acres, worth about \$12,000, certain lots at the junction worth some \$1,500, 90 acres known as the "Clark Farm," worth \$2,000, and held the paper title to the house and lot in controversy, worth about \$600. Appellant filed her answer to this petition, and denied that Jas. T. Johnson owned this house and lot, and claimed that under the statute of 15 years' adverse possession she was the owner of it; that her father paid \$600 of the purchase price, and that \$500 of the \$1,500 charged to her as an advancement against her in his will was made on that account; and that the legal title was taken to Jas. T. Johnson by mistake. The issues were formed, proof heard, and the trial resulted in a judgment for appellee, to reverse which this appeal is prosecuted.

The proof shows that some years prior to the year 1883 the appellant married Joseph

Liter, and her father, Jas. T. Johnson, advanced her \$1,000 to aid her and her husband to purchase a farm. On account of the poor management and intemperate habits of her husband, they soon lost the farm, and then her husband bought a small house and lot, in the town of Elizaville, from a Cincinnati firm, Lee & Pinckard, and paid \$100 in cash, and executed their notes for the balance, taking from them a bond for title. Shortly after this her husband died. She and her husband took possession of this house and lot in the year 1883, and she has resided in this house continuously from that time until the trial, claiming it adversely to all. She listed it and paid the taxes from 1883 up to the present, and he never did list it or pay any taxes thereon. She had made and paid for all the repairs on the property, and it was generally known and understood to be her property all the time. Soon after the purchase of this property, Lee & Pinckard began to press for the purchase price, and threatened a suit for that purpose. Appellant wrote to her father, who was then in the state of Missouri, appealing to him for assistance. He wrote to David Wilson to pay the unpaid purchase price, which Wilson did, and caused a deed to be prepared from Lee & Pinckard to Jas. T. Johnson. David Wilson died before this action was instituted, and it is not shown whether this deed was prepared in accordance with any direction of Jas. T. Johnson or not, but it is shown that appellant did not know that the deed was so made until a long time afterwards. It is further shown in the proof that, when Jas. T. Johnson became largely involved by reason of the breaking of Wilson's bank, he executed a mortgage to secure the sum for which he was liable, and in this mortgage he included his homestead and every piece of real estate owned by him, naming and describing them, but did not include this house and lot in controversy. It is reasonable to infer, under the facts proven in this case, that \$500 of the \$1,500 charged to appellant in the will of Johnson represented \$500 of the \$600 paid to Lee & Pinckard on this house and lot. In opposition to these facts and circumstances, there are some statements said to have been made by Jas. T. Johnson after he became involved by the failure of this bank, but these statements were not made in the presence of appellant. In addition to this, it was proven by appellee that at the house of Jas. T. Johnson, when Johnson was a corpse, the appellant, in the presence of the appellee, said to her mother, when the latter was bewailing her condition of being left alone with all these debts against the estate, which would take from her her home: "Mother, don't grieve so; you have a home at Elizaville. If they sell you out, come live there, and I'll rent a house." We are unable to construe this language, used under the circumstances related, as a disclaimer of ownership of the house and lot. It, at least, is not sufficient

to overcome and outweigh all the evidence introduced in her behalf.

We are of the opinion, under the proof in this case, that the appellant was the owner of the house and lot in controversy, and the lower court should have so adjudged. Wherefore the judgment of the lower court is reversed, and the cause remanded for further proceedings consistent herewith.

ROW v. JOHNSTON et al.

(Court of Appeals of Kentucky. Feb. 24, 1904.)

ABATEMENT—PENDENCY OF ANOTHER ACTION—SUITS BY ADMINISTRATRIX AND HEIRS—ELECTION—STATUTE OF LIMITATIONS—RESULTING TRUST.

1. A father, who had sold land to his son, became the son's administrator before any part of the purchase price was paid, and on advice of counsel assigned the purchase-money notes to a son-in-law, and suit was brought, and judgment recovered in the latter's name. The father purchased the land at the judgment sale in the son-in-law's name, and a commissioner's deed to the latter was delivered to the county clerk, but not recorded. All these transactions were without the knowledge of the son-in-law. The father took possession of the land, treating it as his own for over 10 years, to the knowledge of the son-in-law. On the death of the father and claim of ownership by the son-in-law, decedent's widow, as administratrix, sued the son-in-law, charging fraud, and praying that, if defendant failed to convey to the heirs, plaintiff be adjudged a lien for the purchase money. Later the heirs sued praying to be adjudged the owners. *Held*, that the pendency of the suit by the administratrix could not be pleaded in abatement of that by the heirs, the parties and rights sought to be enforced being different.

2. The action by the administratrix was not an election to sue for the purchase money preventing the heirs from afterward suing for the land, because the acts of the administratrix could not bind the heirs.

3. The lapse of over 10 years between the making of the deed and the bringing of the action did not bar a recovery under Ky. St. 1903, §§ 2515, 2519, requiring actions for fraud to be commenced in 5 years after discovery of the fraud, and declaring that no action shall be brought more than 10 years after perpetration of the fraud; since there was no acceptance of the deed when made, and no rights could accrue against the son-in-law without acceptance.

4. A resulting trust may be established by parol.

5. The statute of limitations does not operate to perfect the title of a grantee not in possession.

Appeal from Circuit Court, Todd County.
"Not to be officially reported."

Action by John S. Johnston and others against John H. Row. From a judgment for plaintiffs, defendant appeals. *Affirmed*.

W. L. Reeves, for appellant. Perkins & Trimble and S. Y. Trimble, for appellees.

HOBSON, J. On September 15, 1885, R. H. Johnston conveyed to his son, Jake M. Johnston, a tract of land known as his "river farm" in consideration of \$1,500, to be paid in one, two, and three years. Jake M.

¶ 1. See *Adverse Possession*, vol. 1, Cent. Dig. § 71.

Johnston died in the year 1888, without having paid anything on the land. His father, B. H. Johnston, qualified as his administrator. When he consulted an attorney as to bringing a suit to foreclose his lien on the land for the purchase money, he was advised by the attorney that he had better not bring the suit in his own name, as he was the administrator of his son, and would thus be both plaintiff and defendant. He replied that he would transfer the notes then to his son-in-law, John H. Row, and requested the attorney to write the transfer, which he did. Johnston thereupon signed the transfer indorsed on the back of the notes, and delivered them to the attorney, with directions to institute the suit, and subject the land to the payment of the notes. This the attorney did. He had no communication with Row; was not acquainted with him. Judgment was obtained for the sale of the land. Johnston attended the sale, and bid in the land in the name of Row. The sale was confirmed, and the commissioner executed a deed to the purchaser, which was approved by the court, and ordered to the proper office for record. The deed was delivered by the circuit clerk to the county clerk, who placed it in a box, and did not record it, as the tax was not paid. Row took no part in the suit, was not present at the sale, and seems not to have known that the deed was made to him. This was in the year 1889. B. H. Johnston took possession of the land, and held and used it from that time until his death on April 24, 1900. He used and claimed it as his own, built a barn on it, had a dispute with a neighbor about one of the lines. His home place was adjoining, and he held the whole boundary alike, shifting the fences as he pleased, and treating it all as one farm. Row was a man of moderate means, and lived about five miles from Johnston. He was well acquainted with Johnston's holding and use of the land. After Johnston's death, Row said at first that Johnston had only asked him to let him sell that land in his name, and he told him all right; that he had not paid a dollar on it, and it was no more his than it was the rest of the heirs; that he had not thought about it from the day he and the old man made the arrangement until then. After this, however, he set up claim to the land as his own, one of Johnston's sons having found the deed lying in the county clerk's office, and had it recorded. B. H. Johnston's widow qualified as his administratrix, and on October 19, 1900, filed a suit in equity against Row, alleging these facts, and charging fraud, and praying that, if the defendant failed to convey the land to the heirs of B. H. Johnston, then she be adjudged a lien on it for the purchase money. On November 12, 1900, the children and heirs at law of Johnston filed a suit against Row, alleging the same facts, and praying that they be adjudged the owners of the land. The two suits were consolidated. On final hearing the

court dismissed the action of the administratrix, and adjudged the land to be the property of the children and heirs at law of B. H. Johnston. From this judgment Row appeals.

He pleaded the pendency of the first action by the administratrix in abatement of the second action by the children and heirs at law. The plea was properly held bad, because the actions were by different parties, and sought the enforcement of entirely different rights. He also relied on the first action as an election to sue for the purchase money, and insists that after this election was made the heirs could not sue for the land. But the administratrix, who represented only the personal estate, could not, by any action of hers, prejudice the rights of the real representatives. Besides, the second action was brought very soon after the first, and before Row was in any way prejudiced by the bringing of the first action. In other words, he was in no worse position than if that action had not been brought. He was misled in no way, and lost no right which he would otherwise have had. There is therefore no substance in either of these objections.

It is also insisted that the deed to Row, as long as it stands, is an insuperable barrier to the recovery of the land by the heirs of Johnston, and that there can be no recovery on the oral contract, or relief on the ground of fraud, under sections 2515, 2519, Ky. St. 1903, providing that an action for relief on the ground of fraud or mistake must be commenced within five years next after the cause of action accrues; that the cause of action shall not be deemed to have accrued until the fraud or mistake is discovered; but that no action shall be brought ten years after the time of the making of the contract or the perpetration of the fraud. No title passes by a deed until it is delivered. There is no delivery without an acceptance. Row did not know that the deed was made, or know that it was in the county clerk's office, until after Johnston's death. No liability could be imposed upon him by reason of this deed until he accepted it, and no rights can accrue to him without an acceptance of it. Besides, if the deed was made to him in trust for Johnston, and he in fact held the title in trust for him, this trust may be established by parol, and may be enforced. Row's whole conduct, as well as his declarations, indicate that he had not accepted the deed, and that he recognized that such title as he had was held by him in trust for Johnston. By a long line of cases it has been held that a trust of this sort may be established by parol. *Williams v. Williams*, 8 Bush, 241; *Webb v. Foley* (Ky.) 49 S. W. 40; *Butler v. Prewitt* (Ky.) 53 S. W. 20; *Brothers v. Porter*, 6 B. Mon. 109; *Faris v. Dunn*, 7 Bush, 278; *Miller's Heirs v. Antle*, 2 Bush, 408, 92 Am. Dec. 495; *Green v. Ball*, 4 Bush, 586; *Martin v. Martin*, 16 B. Mon. 8. The statute

of limitations is equally inapplicable. Row was never in possession of the land. Johnston took possession after the commissioner's sale, and continued in undisputed possession until his death, more than 11 years afterwards; Row acquiescing all this time in Johnston's ownership of the land. The title of the trustee cannot ripen into a perfect title in him simply because he stands by without claim to the property, and permits the real owner to enjoy for over 10 years. To so hold would be to make the statute of limitations a sword, and not a shield, and to adjudge that long acquiescence in their claims to the property was a sure means in the hands of the crafty to bar the true owners of their rights. In *Burt & Brabb Lumber Company v. Bailey* (Ky.) 60 S. W. 485, a man obtained from two ignorant old people, who could not read or write, a deed for 4,000 acres of land, telling them it was a different kind of paper. They remained in possession of the land, and did not learn of the fraud for 10 years, when they brought an action to enjoin him from cutting their timber or disturbing them in the possession of the land. He relied on limitation of 10 years, but it was held that the statute was not applicable, as he was never in possession of the land. This case was followed and approved in *Sewell v. Nelson* (Ky.) 67 S. W. 985, where the court said, speaking of the plea of limitations: "The argument is a novel one. It is that one out of possession under a fraudulent and void conveyance, it may be, can have such conveyance ripened by time into a perfect one; that it may sustain an action of ejectment against one originally having the better title and in possession. The position is fallacious. The statutes of limitation do not apply (as respects property) to any one not in possession." These cases were followed in *Potter v. Bengé* (Ky.) 67 S. W. 1005.

The proof in the case clearly establishes the facts above stated, and leaves no room for doubt of the correctness of the chancellor's judgment. The judgment is therefore affirmed.

CHINN v. SHACKELFORD.

(Court of Appeals of Kentucky. Feb. 24, 1904.)

STATES—CLERK OF COURT OF APPEALS—COLLECTION OF FEES.

1. Acts 1893, p. 1157, c. 226, § 44, providing that, when the term of any chief officer shall expire, he or his personal representative, trustee or committee, as the case may be, shall at once deliver to his successor in office all accounts, claims, and fees due to such officer in his official capacity, applies only to those officers who are required monthly to report the amount in their hands and pay it into the state treasury, and are allowed to draw back from the treasury, for salaries and expenses, not exceeding 75 per cent. of the amount so paid in, and does not apply to the clerk of the Court of Appeals, who collects his fees, pays the salaries and expenses of his office, and at the end of the year pays the balance into the treasury.

2. When the term of the clerk of the Court of Appeals expires, his successor takes up the office where his predecessor put it down, and may properly collect any outstanding fees due the office and apply the money to the conduct of the office, just as his predecessor might have done had he continued as clerk.

Appeal from Circuit Court, Franklin County.

"To be officially reported."

Agreed case between S. J. Shackelford and J. Morgan Chinn. From the judgment, Chinn appeals. Reversed.

Robt. L. Greene, for appellant. N. B. Hays, for appellee.

HOBSON, J. The term of S. J. Shackelford as clerk of this court expired on the first Monday in January, 1904. He was succeeded by J. Morgan Chinn. At the expiration of the term there were a number of fee bills outstanding, and unpaid, due the clerk of this court for services rendered. This agreed case between Shackelford, Chinn, and the Auditor of the State was filed to determine what should be done with these fee bills. The question turns on the construction of the provisions of sections 38-54 of the act "relating to fees," approved June 15, 1893 (Acts 1893, pp. 1156-1162, c. 226), which, with some amendments, now constitute sections 1761-1777, Ky. St. 1903. As the question before us turns on the construction of the original act, we will refer to the sections of it.

Section 38 is in these words: "The clerk of the circuit court, the clerk of the county court, commissioners, receivers, examiners, and the sheriff of each county having a population of seventy five thousand or over, shall, after the terms of the present incumbents, respectively, expire, and on the first day of each month, severally send to the Auditor of Public Accounts a statement, subscribed and sworn to by each of them, showing the amount of money received or collected by or for each of them the preceding month as fees or compensation for official duties, and shall, with such statement, send to the Auditor the amount so collected or received." Section 39 provides that each of the officers mentioned above shall receive an annual salary of \$5,000, and that the number of deputies, their compensation, and the necessary expenses of the office shall be fixed by an order of court, which shall be forwarded to the Auditor. Section 40 provides that the chief deputy shall receive a salary of \$2,000, and the other deputies not exceeding \$1,500 each. Section 41 provides that the salary of each officer and his deputies, and the expenses of the office, shall be paid monthly by the Treasurer of the State upon the warrant of the Auditor, if 75 per cent. of the amount paid into the treasury during the month is sufficient to pay them, and that if there is a deficit for any month it may be made up out of the amount paid in any suc-

ceeding month. Section 42 provides a penalty if the officer fails to make the report or pay the money any month. Section 43 makes it a felony if the officer knowingly makes a false report. Then follows section 44, which is in these words: "When the term of any chief officer shall expire, or he shall die or resign, or be removed from office, he or his personal representative, trustee, or committee, as the case may be, shall at once deliver to his successor in office all accounts, claims and fees due to such officer in his official capacity; and it shall be the duty of such successor to have such fees, claims and accounts collected, or the Auditor may, in his discretion, when said accounts, fees and claims are so delivered to the successor, appoint some person to collect them, and if he does, the successor shall at once, or at any time when demanded by such person, deliver to him all accounts, fees and claims uncollected. The successor or the person appointed by the Auditor, as the case may be, shall, every sixty days after receiving such accounts, fees and claims, report to the Auditor, under oath, the amount collected thereon, and, at the same time, pay to the Auditor the amount so collected, and shall continue to so report for three years, unless the accounts, fees and claims are sooner collected." Section 45 directs that the Auditor shall draw his warrant on the Treasurer in favor of the person collecting for an amount equal to 20 per cent. of the sums so paid into the treasury, and that this shall be in full of the compensation allowed to collector. Section 46 provides that, if the amount paid to any officer during his term shall not have been sufficient to pay the salaries and expenses of the office, the Auditor shall, out of the money so collected, pay to the person entitled thereto an amount sufficient to supply the deficit due for salaries and expenses, but that he must not so pay exceeding 75 per cent. of the amount of fees which accrued during the term, and were collected and paid into the treasury. Section 47 and section 48 provide penalties for the violation of the above provisions. Sections 49-52, make similar provisions as to the jailer in counties having a population of 75,000 or over, the principal difference being that the jailer is required to report monthly not only his collections, but also all sums due him, money due from the state being treated as paid. Section 53 regulates the jailer, county clerk, circuit clerk, commissioners, receivers, examiners, and sheriff in a county having a population of over 40,000 and under 75,000. These are required to make annual reports, and to pay over annually the balance in their hands. Then follows section 54, which is the only one in which the clerk of the Court of Appeals is mentioned. So far as material, it, as originally enacted, reads as follows: "The clerk of the Court of Appeals and each assessor in a county having a population of over sev-

enty five thousand shall annually in the month of January report to the Auditor under oath the amount received by him on account of his official duties or position, from all sources during the preceding year, as well as the amount paid out by him for deputies or assistants, giving the amount paid to each and for expenses of his office; and if it shall appear from such statement that any such officer received as compensation on account of his office from all sources more than four thousand dollars (\$4000.00) after the payment of his deputies or assistants and all the expenses of his office, such officer shall with such statement pay to the Auditor the amount so received in excess of \$4,000.00. * * * The salaries of the deputies of the clerk of the Court of Appeals shall be fixed by an order of the Court of Appeals, a copy of which order shall be filed with the Auditor by the clerk of said court when made." By an act approved March 4, 1898 (Acts 1898, p. 85, c. 31), the following words were added to this section: "If it shall appear from the reports required to be made to the Auditor by the clerk of the Court of Appeals under this section, that the amount earned and received by said clerk on account of his office is not sufficient to pay him \$4,000.00 together with the salaries of his deputies or assistants and the other legitimate expenses of his office, in any year, then said officer may retain out of money earned or received by him on account of his official duties in said office during the year or years following, enough to make up such deficit." Another amendment to the act was made by the act of March 21, 1900 (Acts 1900, p. 73, c. 25), but it refers only to commissioners and receivers in counties having a population of 75,000 or over, being an amendment to section 38 above quoted, and is therefore not material here. The case before us turns on the question whether section 44, above quoted, applies to the clerk of the Court of Appeals. If it does not, the fees due at the end of Shackelford's term, being due the office, may be collected by the incumbent of the office. But if this section applies, these fees, whether collected by Chinn or by a person appointed by the Auditor, must be paid into the treasury, and are not available for the payment of the salaries or expenses of the office under section 54.

It will be observed that section 38 refers only to the clerk of the circuit court, the clerk of the county court, commissioners, receivers, examiners, and the sheriff of each county having a population of 75,000 or over. After the amount of the salaries of the officers and their deputies, and the necessary expenses of the office, are regulated in sections 39 and 40, it is provided in section 41 that 75 per cent. of the amount paid in by them monthly may be used to pay these salaries and expenses. In other words, the officers named are required to make monthly payments and

monthly reports to the auditor, and are allowed to draw back 75 per cent. of the amount so paid in. Then follow two sections relating to penalties, and then comes section 44, on which the case turns. At first blush it must strike any one that this section refers to the officers above mentioned, and that the reason why the fees must be collected and paid into the treasury is that the salaries and expenses of the officers may be paid out of the treasury as provided in section 41; and that this is the meaning is shown by section 48, which provides that out of the money so collected the Auditor shall pay any deficit due for salaries and expenses, not exceeding 75 per cent. of the amount paid into the treasury, which is the same provision as to the per cent. as contained in section 41, which by its express terms applies only to the officers named in section 38. The clerk of the Court of Appeals is not so limited to 75 per cent. of the fees collected by him. The next four sections of the act, 49-52, apply only to the jailer in counties having a population of 75,000 or over. Section 53 applies to officers in a county having a population of over 40,000, and under 75,000. Section 54 applies to the assessor, in counties having a population of over 75,000, and the clerk of the Court of Appeals. It will thus be seen that by the act the officers are divided into four classes: (1) The clerk of the circuit court, clerk of the county court, commissioners, receivers, examiners, and the sheriff in counties having a population of 75,000 or over; (2) the jailer in counties having a population of 75,000 or over; (3) the jailer, county clerk, circuit clerk, commissioners, receivers, examiners, and the sheriff in counties having a population over 40,000 and under 75,000; (4) the clerk of the Court of Appeals, and assessors, in counties having a population of over 75,000. In classes 1 and 2 the money must be paid into the treasury by the officer, and only 75 per cent. of the amount so paid in can be paid back on account of salaries or expenses of the office. In these classes, also, monthly reports are made and monthly payments. In classes 3 and 4 the officer pays the salaries and expenses out of his receipts, and pays into the treasury the balance in his hands. Annual reports are made, and an annual payment of the balance in the hands of the officer. As to classes 3 and 4, there is no provision of law for any money which is paid into the treasury being paid back to the officer, in any event, on account of salaries or the expenses of the office; and, if section 44 were held applicable to the clerk of the Court of Appeals, it would follow that, if the clerk should die or resign, all fees due the office would have to be collected and paid into the treasury, and only 75 per cent. of the money could be withdrawn to pay the salaries and expenses of the office; although, if the clerk had lived or had not resigned, the whole fund might have been used for this purpose. In carefully thus classifying the different offices,

and making essentially different provisions as to them, the Legislature showed a clear purpose not to put the clerk of this court under the provision enacted for certain offices in counties having a population of over 75,000; the reason being, no doubt, that litigation in this court varies, and it was deemed uncertain what, if any, surplus would be left to the state after paying the expenses of the office; so it was deemed unwise to place such restriction as might cripple the public service.

For these reasons we conclude that section 44 does not apply to the clerk of this court, but that, as shown by section 48 and the context, it applies only to those officers who are required monthly to report the amount in their hands and pay it into the state treasury, and are allowed to draw back from the treasury, for salaries and expenses, not exceeding 75 per cent. of the amount so paid in; that it is intended to carry out this plan in case of the death or resignation of these officers, or the expiration of their term; for without it there would be no way of paying the salaries and expenses of the office unpaid at the death of the occupant or the expiration of his term—the plan being that, if the officer lives or continues in office, he shall collect the fees and pay the money into the treasury; and if he dies or his term expires, another shall do so. But as to the clerk of this court, a different scheme is made. He collects his fees, pays the salaries and expenses of his office, and at the end of the year pays the balance in his hands into the treasury. There is no reason under this plan that there should be a change at the end of the term of the clerk, or when he dies or resigns. When Shackelford's term expired and Chinn succeeded him, the incumbent of the office only being changed, the latter took up the work where the former put it down, and might properly collect any outstanding fees due the office, and apply the money to the conduct of the office, just as the former might have done had he continued as clerk. In order that a proper settlement may be had by the Auditor with each of them, a list of these unpaid fees should be made out, and Chinn should receipt to Shackelford for them. Then the records of the office will show just what each received, and proper settlements can be made.

Judgment reversed, and cause remanded for a judgment as herein indicated.

CITY OF LEXINGTON v. WOOLFOLK.

SAME v. HAYMAN.

(Court of Appeals of Kentucky. Feb. 25, 1904.)
MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—LIENS—SALE—RIGHT OF REDEMPTION—STATUTES—COMPLAINT.

1. Ky. St. 1903, § 3187, requires tax bills to be sold by the city treasurer at public auction to the highest bidder, and provides that the owner of any lot, the tax bill on which has been sold, shall have the privilege of redeeming

the same within one year. It also provides that, if no one will offer the face of the tax bills, the auditor shall bid them in for the city, and that, when the city shall bid in the tax bills, the city solicitor shall, by proper proceeding in the name of the city, enforce the lien on the property for the city. *Held*, that a property owner who allows his property to be sold for street improvements, and bid in by the city, has no right of redemption.

2. Under Ky. St. 1903, § 3100, providing against errors in the proceedings of the general council invalidating the taxpayers' obligation after the work has been done, and that the general council and the courts in which suits may be pending shall make all corrections, rules, and orders to do justice to all parties concerned, it was intended to avoid a strict construction with reference to such proceeding.

3. Where a city buys in property sold for street improvement assessments under Ky. St. 1903, § 3187, providing that, if no one will offer the face of the tax bills, the auditor shall bid them in for the city, the penalties and compound interest to be imposed when the sale of the tax bill by the treasurer is to another than the city do not apply.

4. Under Ky. St. 1903, § 3187, requiring delinquent tax bills to be advertised by the auditor and sold by the treasurer on the first Monday in the next month after they shall have come to his hands as such, the fact that the sale of the tax bills did not take place, and were not advertised to take place, on the first Monday in the next month after they had been listed with the treasurer, does not invalidate the purchase of the tax bills by the city.

5. Where a petition by a city to enforce a lien on property for unpaid assessments for street improvements, predicated on certain city ordinances, refers to them in a general way, and recites that a copy of such ordinance is filed with and made part of the petition, the pleading is sufficient, though the copy is not in fact filed therewith.

Appeal from Circuit Court, Fayette County.

"To be officially reported."

Actions by the city of Lexington against W. T. Woolfolk and J. Q. A. Hayman. From judgments for the defendants, plaintiff appeals. Reversed.

Allen & Duncan, for appellant. Morton, Webb & Wilson, for appellee Woolfolk. L. J. Moore, for appellee Hayman.

O'REAR, J. The city of Lexington is attempting by these suits to enforce liens on appellees' lots abutting certain of its streets for the cost of reconstructing the streets with brick at those points. The circuit court dismissed the city's petitions on demurrers.

Under section 3096, Ky. St. 1903, the general council of a city of the second class may by ordinance provide for the reconstruction of its streets, upon the petition of the owners of a majority of the property abutting the streets to be improved, or by a two-thirds majority vote of all the members elected to each board of the general council. The costs of such reconstruction is one half chargeable to the abutting property, pro rata per the front foot, and the other half to be paid by the city. By section 3101 it is provided that the general council may provide that any such reconstruction shall be made on the 10-year plan. In that event, upon

public notification, the property owners who are charged with half the cost of the improvement are required to pay their respective portions of the assessment in cash at a time fixed in the notice. Upon default of such payment, the general council is authorized to borrow money to discharge the cost of the improvement, and to issue the city's bonds therefor, payable in equal installments through 10 years, and bearing interest. The abutting owners, who have not paid in cash their assessments, are required to pay one-tenth of such assessment, and 5 per cent. per annum interest thereon, and 5 per cent. per annum interest on the remaining assessment unpaid, annually, at such time as shall be specified in the assessing ordinance. The manner of collecting the annual installments, and, indeed, of collecting the whole assessment, is the main point in controversy in these suits. By section 3096 it is provided: "There shall be a lien upon such lots or parcels of real estate for the part of the cost of such improvement so assessed thereon, and the same shall bear interest from the time of the assessment. All such liens may be enforced by action." In section 3101, speaking of the default in paying the annual installments discussed above, it is provided: "In default of such payment at such times, the same penalty shall attach on the amount so payable as attaches to the non-payment of other municipal taxes, and shall be collected, together with the amount so due from the owner or owners of such lot or parcel of land, in the same manner as other city taxes and penalties are collected for municipal purposes, and such assessments and penalty shall be and remain a lien upon such lot or parcel of land until the same has been fully paid and satisfied."

The general council of Lexington ordained that the streets in question be improved by brick paving, having been petitioned by the owners of a majority of the front-foot property abutting the proposed improvement. The work was completed, inspected, and accepted; and the general council ordained that the assessment for these improvements be paid on July 1, 1895, and annually thereafter for 10 years. Appellees failed to pay their assessments in cash. In May, 1903, the city caused the tax bills, including the assessments and penalties and interest for each of the years 1895, 1896, 1897, 1898, 1899, 1900, 1901, and 1902, to be offered for sale at public outcry. There being no other bidder, they were bid in by the city. This proceeding was taken by the city under section 3187, Ky. St. 1903, governing the method of collecting "other city taxes and penalties." Section 3187 requires the delinquent tax bills to be advertised by the auditor and sold by the treasurer "on the first Monday in the next month" after they shall have come to his hands as such. The sale must be for cash "at public auction to the highest bidder." The auditor then returns the bills to

the treasurer, who on said day offers them for sale as advertised, if then unpaid. "If no one will offer the face of said bills for them, he shall buy them in for the city." The section continues: "The owner or owners of any lot, the tax-bill on which has been sold, shall have the privilege of redeeming the same within one year of the day of sale by paying to the treasurer the said bill, with all penalties and interest as herein provided to the day of payment."

It is the contention of appellees that the taxpayers—in these cases, the lot owners—have one year from the date of the sale of the delinquent assessments or tax bills in which to pay the amount, before a suit can be brought by the city to enforce the lien on the lots. The complication in the application of this provision is doubtless due to the fact that it is particularly applicable in all its features to the collection of ordinary tax bills alone. There is no provision in the chapter governing cities of the second class, other than in this section, for a lien upon specific property of the taxpayer to secure his city taxes. This lien is made to attach upon the sale of the tax bill as above provided. The purchaser of the tax bill at such sale acquires a lien on the lot described in the tax bill, but which he cannot enforce for one year from the date of sale. The section, contemplating that the city might buy in the bills, provides in that event: "When the city shall buy in the tax bills, the city solicitor shall, by proper proceedings in the name of the city in the circuit court, enforce the lien on the property for the city." There is no express reference in the section or elsewhere to a time for redemption from the sale to the city. It is argued that the Legislature could not have intended that the taxpayer should have one year in which to redeem from the sale if the bill was sold to any other person, while, if it was sold to the city, there would be no time for redemption. The argument proceeds upon the theory that the Legislature was looking alone to the interests of the delinquent taxpayer. This supposition is erroneous. The first thing in view in enacting the section was to provide a sure and speedy method of collecting the city's revenues, so essential for the maintenance of its government. The rights of the taxpayer were regarded merely incidentally, and must be secondary to the right of the city to subsist. There could be no good reason for putting the delinquent taxpayer's interest first. After having been afforded a fair chance, and reasonable time within which to meet his tax obligation, further indulgence by way of encouragement to more protracted delinquency, and to further postpone the collection of the city's revenues, would be contrary to the purpose of the statute. That the city was not to be put off longer is reasonably certain from the whole section. Note that the sale of the tax bill was to be by summary proceeding, and for cash in hand. The

purchaser was given a liberal interest, in the way of percentage and penalties, to justify his investing his money, so as to encourage his bidding. This was an inducement to insure the city's getting the money due it quickly, and not as a punishment to the delinquent. True, the latter is given a year in which to redeem from that sale. A shorter time would scarcely have afforded enough of interest to justify an outsider's buying in such claims. Yet to give the whole of an adequate penalty to such purchaser at once might be very harsh treatment of the taxpayer, so that, by giving the purchaser a good bargain to tempt him to buy and part with his money, and by giving the delinquent a whole year in which to redeem from that sale, something of an equitable arrangement is made, and the city is relieved. But none of these reasons apply where the city is the "purchaser" of the tax bill. The delinquent taxpayer has already been given his full time—the same as given all others—to pay the tax. Under the law, the city cannot levy more than enough to pay its current and fixed expenses. Consequently it cannot have a surplus of ready money to meet deficits. The city's administration of its government, as well as its credit, depends on its ability to promptly collect the taxes due it—the principal and practically the sole source of its income. When no one else will offer to buy the tax bill at the sale, the city has exhausted all efforts, save one, to collect the tax. It already has a lien on the property. The penalties have been added already, not as a matter of speculation or gain to the city, but as an incentive to the taxpayer to pay promptly, so as to avoid them. They have been unavailing, though. Why should the city be compelled to wait another year before taking the only remaining and efficient step to get its money? No other consideration could be advanced than a sentimental regard for the delinquent, who has been deaf to every call and impervious to every claim that he should meet his obligation. In the absence of express declaration that such was the legislative intent, we cannot reasonably adopt it; it is so obviously at war with the whole purpose of the section being interpreted. Furthermore, the section does not, in terms, give the right of extended redemption when the city buys in the bill, as it does where another buys it.

It is argued that the statute must be construed strictly against the city and in favor of the taxpayer; that all laws must be construed strictly against the taxing power. When the inquiry is, has the power to tax been granted, has it been exercised, or is its object a governmental purpose, such construction would doubtless be followed. But when the power exists, and has been exercised in aid of a governmental function, why should the statute regulating the manner of collecting the tax be strictly construed? It is true, taxes are not debts. Yet they are

obligations of the very highest nature, imposing at least a patriotic duty on the citizen to pay them. The sustenance of the government, and consequently the enjoyment of all its privileges, depend upon the prompt collection of its revenues. Statutes imposing and providing for the collection of taxes are to be construed fairly with regard to their purpose: the office of construction being to help do what the Legislature intended should be done in enacting the law. In applying and enforcing such statutes, we are not yielding the stubborn submission of unwilling subjects, but are applying those reasonable and necessary provisions for the maintenance of an orderly social compact among a self-governing people. A rule of strict construction that thwarts the purpose of the Legislature, and makes unduly difficult the thing that was intended to be made simple, direct, and easy, will be rejected. The rule of interpretation here adopted is in harmony with the legislative direction in this respect. Section 8100, Ky. St. 1903, expressly provides against errors in the proceedings of the general council invalidating the taxpayer's obligation after the work has been done. But it is stated that "the general council or the courts in which suits may be pending shall make all corrections, rules and orders to do justice to all parties concerned." This was intended to avoid that line of strict construction adopted with reference to such proceedings, and to place them on the same footing in the courts as other claims of liens sought to be enforced.

From these sections, we conclude that the abutting lots were in lien to the city for these assessments, which were due in installments on July 1st, annually, beginning with the year 1895, but not including the penalties and compound interest to be imposed where the sale of the tax bill by the treasurer was to another than the city; that the city, by buying in the tax bills, got no new or greater lien than it had before; and that the provision for a year for redemption does not apply where the city "buys in the bill"—that is, fails to sell it. We are also of opinion that the circuit court had the jurisdiction to entertain these suits at any time after the assessments became finally delinquent.

Appellees contend that as the sale of the tax bills did not take place, nor were they advertised to take place, on the first Monday in the month after they had been listed with the treasurer, the city has acquired no rights by the sales, and that they were invalid. Authorities are cited to the effect that, when a tax sale is required to be had on a day named, a sale on any other day is void. But none of those authorities hold that for that reason the tax assessment is void, or that the lien is extinguished or lessened. The argument, followed out, would mean that these assessments can never be collected, for, the first Monday of the first month after they became delinquent having

passed without an advertisement or sale of the bills, they can never be legally offered, and therefore no right to sue to enforce the lien given by them can ever accrue to any one. If the sales had been made in fact, and some one had bought the tax bills, then this defense might be pertinent. But here there was no sale. There was merely an offer of sale. This section wherein the city is permitted to sell the delinquent tax bills is manifestly for the benefit of the city. Before another than the city could have the right to maintain a suit to enforce a lien on the lot, the statute giving such right must be shown to have been substantially complied with. If the city failed to offer the tax bill for public sale, the lot owner has no ground of complaint. He still owes the assessment. It is past due and delinquent in every sense of the word. Section 3096 gave the lien, and the right of the city to sue in the circuit court to enforce it. The provision of section 3101 as to offering the tax bill for sale is merely cumulative, enabling the city to realize the money due it quicker, possibly, than by suit.

Very earnest complaint is made by appellees of the form and sufficiency of the petitions. It is argued that the general demurrers were properly sustained on this ground, if no other. The pleader, in setting out the various ordinances and steps by which the city obtained the lien on appellees' lots for the cost of the improvement of the abutting ways, did not plead the ordinance at length. The following from one of the petitions will serve to illustrate the matter complained of: "High street * * * is one of the public streets of the plaintiff. That the owners of a majority of the front or abutting feet of the real estate abutting on said street petitioned the general council to provide for the reconstruction of said street with brick. That thereafter the general council (two-thirds of the members elect in each board voting therefor) passed Ordinance No. 422, which was duly approved and published in the official newspaper (a copy of said ordinance being filed herewith, marked 'Exhibit A,' and made a part hereof, the same as if fully written herein), directing the roadway of the street aforesaid to be constructed by blocks with brick. That the city engineer, in accordance with the directions contained in said ordinance, prepared accurate profiles, plans, specifications, and estimates for the reconstruction of said street with brick, which were accepted and approved by the general council by Ordinance No. 458, which was approved and published in the official newspaper (a copy of said ordinance being filed herewith)"—and so on, setting out similarly every essential step required by the statute to be taken to make a valid contract for the improvement. It is insisted that the ordinances are not sufficiently pleaded. We think they are. Good pleading not only does not require, but forbids, the setting out of

each step with undue prolixness. Although the copies of ordinances referred to as exhibits are not filed with the petition, the averments are sufficient. That an ordinance to improve a certain street with brick was duly passed, is enough to state. That the engineer did make and file plans and specifications, which were adopted by the council, fully apprises the other party and the court that those necessary steps had been taken. So the substance of the contract by which the lowest bid was accepted is enough to be pleaded.

The judgments sustaining the demurrers and dismissing the petitions appear to us to be erroneous, and are, for the reasons above stated, reversed, and the causes are remanded for further proceedings consistent herewith.

LOUISVILLE & N. R. CO. v. DICK.

(Court of Appeals of Kentucky. Feb. 25, 1904.)

RAILROADS — PERSONAL INJURIES — NEGLIGENCE — INSTRUCTION — PLEADING AND PROOF — MEASURE OF DAMAGES.

1. Where the evidence is conflicting on material issues, it is for the jury to determine the weight and effect thereof.

2. In an action against a railroad for personal injuries received by plaintiff in attempting to cross defendant's tracks, an instruction that if those in charge of the train which struck plaintiff saw his peril, or by the exercise of ordinary care could have seen it, in time to have avoided the injuries, and yet failed to do so, then the jury should find for the plaintiff, is proper; the injury having occurred at a place where it was by law made the duty of those in charge of the train to keep a lookout for those on or about the crossing.

3. Where plaintiff's pleadings in an action against a railroad for personal injuries received by plaintiff in attempting to cross defendant's tracks charged negligence, carelessness, and recklessness in the management and operation of the train, whereby plaintiff was run over and injured, there was sufficient notice to the defendant that the method and manner of operating the train would be brought into question on the trial, though the particular acts of negligence on the part of those in charge of the train were not specified.

4. In an action by a married woman for personal injuries, plaintiff may recover for any impairment of her power to earn money, though there is no proof that she had ever earned any money.

Appeal from Circuit Court, Jefferson County, Common Pleas Division.

"Not to be officially reported."

Action by Sophia Dick against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Helm, Bruce & Helm and Benjamin D. Warfield, for appellant. Bennett H. Young, Dayton T. Mitchell, and J. L. Dorsey, for appellee.

NUNN, J. This is the second time this case has been in this court. The decision of the first appeal will be found in 64 S. W. 725.

In the month of April, 1893, appellee was walking east on Broadway street, in the city of Louisville, and, when crossing appellant's track where it intersects Broadway, she was struck by one of appellant's north-bound trains, and suffered such injury as resulted in an amputation of her foot. Appellant has two tracks, about six feet apart, running north and south, crossing Broadway; the railroad coming out of Brent street, which intersects Broadway at this point. The south-bound train runs on the western, and the north-bound train (the one that injured appellee) on the eastern, track. There were gates or poles on each side of the track across Broadway street, used by appellant to warn persons of the approach of trains. When the train is expected to approach, these poles were let down to keep people from crossing, and when the train had passed, and the danger was over, these poles were raised. The appellee, in her pleadings, alleged, in substance, that appellant's agent in charge of these safety gates was incompetent, negligent, and careless in the handling and management of them, and when she arrived at the crossing she found the gates or poles up, and did not know that a train was near, and that, by reason of the fact that the gates were up, she had the right to assume that it was safe to cross the appellant's track, and started across, and immediately the appellant's agent lowered the gates or poles, and thus hemmed her in and prevented her escape, and that the board crossing, prepared by appellant, whereon pedestrians were expected to cross the tracks, was in a defective, unsafe, and dangerous condition, which fact was known by appellant, and by reason thereof, together with the negligent and improper management of the gates at the crossing, she was thrown or caused to fall down, and, while down and unable to escape, appellant's agents in charge of a train ran the train at a reckless, rapid, and dangerous rate of speed, and ran it in such a careless, negligent, and reckless manner as to run it upon appellee, and so mangled and injured one of her feet that it was necessary to amputate it, and her foot was amputated near the ankle. The answer was a traverse of these allegations, and a plea of contributory negligence, and also was added the following: "Denies that by any negligence or carelessness whatever on its part, or that of its agents or servants, or any or either of them," appellee was caused to suffer, or was damaged in any sum. The contributory negligence was denied by appellee. A trial was had, which resulted in a verdict and judgment for appellee in the sum of \$5,000, from which the appellant has appealed.

There were many grounds assigned for a new trial, but counsel for appellant only assigns three reasons why this court should reverse the judgment: (1) That there was not sufficient evidence to sustain it; (2) that

the court, by its instructions Nos. 3, 4, and 5, submitted to the jury issues not raised by the pleadings; (3) that the court gave erroneous instructions on contributory negligence and the measure of damages.

With reference to the matter of insufficient evidence to sustain the verdict and judgment, it is sufficient to say that the evidence on all the questions at issue was very conflicting. If the testimony of appellee's witnesses was true, the agent of appellant who managed the gates or poles was very careless and negligent. Likewise, the agents whose duties required them to make and keep in repair a reasonably safe crossing over the tracks, and also the agents in charge of the train, were negligent in the management and operation of the train, and, as a result of all these negligent acts combined, or any one of them, the jury was authorized to find for appellee. On the other hand, appellant's testimony, if true, established the fact that the gates and trains were managed and operated with prudence and skill, and the injury of appellee was not caused by any act or negligence of theirs, but was produced by her own negligence; and it was also shown by appellant's testimony that the crossing made for pedestrians over the tracks was in a safe and proper condition. This court, in the former opinion, said: "We are of the opinion that, if the testimony of appellant's [now appellee] witnesses be taken as true, she may recover." The testimony for appellee, as appears of record, is stronger than on the former appeal, and it was the province of the jury to determine the weight and effect of the testimony.

The instructions of the court, Nos. 3, 4, and 5, did not, in our opinion, submit to the jury issues not raised or made by the pleadings. These instructions said to the jury, in effect, that if those in charge of the train saw appellee's peril, or by the exercise of ordinary care could have seen it, in time to have avoided the injury by the exercise of ordinary care, and yet failed to do so, then they should find for appellee. This injury occurred at a place where it was made the duty of those in charge of the train to keep a lookout for those on or about the crossing. See *Pittsburgh, etc., R. R. Co. v. Lewis* (Ky.) 38 S. W. 482. But appellant says the pleadings did not authorize these instructions. It is true that this court has decided repeatedly that it is sufficient to charge negligence in general terms, without specifying the particular acts of negligence, but, if the particular acts of negligence are specified in the petition, no other acts of negligence can be submitted to the jury than those specified. The reason for this rule is that to permit a party to state in his petition one cause of action, and recover on another cause not stated, would simply entrap the defendant, because the latter is led by the petition to believe that he is to meet one state of case, and then on the trial he is called on to meet

a different state of case. We are of the opinion, however, that this rule does not apply to the pleadings in this case. In the pleadings of appellee it is alleged that she received her injury as the result of one of three causes, or by the combination of the three: (1) The negligent acts of the keeper of the gate. (2) The failure to make and maintain a reasonably safe crossing. (These two acts of negligence were particularly specified.) (3) The negligent, careless, and reckless management and operation of the train, whereby she was run over and injured. The particular acts of negligence on the part of those in charge of the train were not specified in the petition. The appellant made an issue with appellee on these allegations of negligence, and also denied that its agents, in the operation of the train, were guilty of any negligence of any kind or character. Under this state of pleading, the appellant cannot say that it was entrapped or surprised at any proof which tended to show that the train was run carelessly, negligently, recklessly, or unnecessarily upon her. There was sufficient notice to appellant that the method and manner of operating the train would be brought into question on the trial.

The objection of appellant to instruction on contributory negligence is not well taken. It is the usual instruction given on the subject, and often approved by this court.

The instruction on the measure of damages is in the usual and proper form, but appellant objects to that part of it which authorizes the jury to allow her anything "for any impairment of her power to earn money caused her thereby," for the reason that she was a married woman, and there was no proof that she ever had earned any money, and for her labor in performing household duties she was not entitled to anything. In the case of *South Covington & Cincinnati Street Railway Company v. Bolt* (Ky.) 59 S. W. 26, the court said: "Our opinion is that, if a married woman is injured by the negligent act of another, she is entitled to maintain an action for damages, and the same criterion of recovery exists as to her as to a man or a single woman."

Perceiving no error prejudicial to the substantial rights of appellant, the judgment is affirmed.

HANNA'S ASSIGNEES v. GAY et al.

(Court of Appeals of Kentucky. Feb. 23, 1904.)

HOMESTEAD — SALE — NECESSITY OF JOINING WIFE — DOWER — RELINQUISHMENT — ELECTION TO TAKE — EFFECT ON HOMESTEAD.

1. A married woman's potential dower interest in her husband's land can be relinquished only in the statutory modes; that is, by the execution of a deed with her husband, or by separate deed if he has already conveyed, and by privy acknowledgment before a proper off-

¶ 1. See *Dower*, vol. 17, Cent. Dig. § 144.

cer. The execution of an assignment for creditors by the husband, in which the wife does not join, has no effect on her interest.

2. On the death of her husband a widow's inchoate dower becomes consummate, and she can then sell it by deed or contract.

3. Where a widow voluntarily filed her answer in a suit for the specific performance of a contract made by her husband's assignees for the sale of his property, and offered therein to conclude an agreement which she had made during marriage to release dower and homestead in the property, and executed a deed, and received the consideration stipulated in the contract, she divested herself of her dower in the land.

4. Under Ky. St. 1903, § 1707, which declares homestead to be for the benefit of the widow and infant children of a decedent, where the widow elects to take dower in lieu of homestead, the infant children's right to a homestead attaches to the land set apart as the widow's dower.

5. Although, by Ky. St. 1903, § 1706, a debtor cannot mortgage his homestead without joining his wife, he may nevertheless sell it, whether she joins in the deed or contract or not, in which case, if he dies first, however, her dower right will to that extent prevail over the deed.

6. Where a husband contracts and binds himself to convey all the title he has in land, he necessarily divests himself, and all others entitled thereto by relation, of a homestead in the land.

Appeal from Circuit Court, Shelby County.
"To be officially reported."

Suit for specific performance by J. S. Hanna's assignees against J. T. Gay and others. From so much of the judgment for plaintiff as set apart homestead money for the widow and children of plaintiff's assignor, plaintiffs appeal. Reversed.

Willis & Todd and J. C. Beckham, for appellants. R. L. Pulliam and Pickett & Barrickman, for appellees E. V. Hanna and infant defendants. W. W. Jesse, guardian ad litem.

O'REAR, J. In May, 1902, John S. Hanna, being indebted beyond his ability to pay, executed a general deed of assignment to appellants for the benefit of all his creditors. Among the properties embraced in the conveyance was a farm of 261 acres in Shelby county. The deed contained this reservation: "Except there is expressly reserved from this deed of assignment, and there does not pass hereby, any of the property that by the law of this commonwealth is exempt from execution attachment or distress, and same is expressly reserved by first party for the benefit of himself and family." The debtor's wife did not join in the deed. It is admitted that neither her potential right to dower nor the debtor's right to a homestead of \$1,000 in value passed by this deed. In the following July the assignees contracted with appellee J. T. Gay to sell him this farm at the price of \$18,000. The debtor and his wife joined in the contract. The contract contained this agreement, as affecting directly the interests of the debtor and his wife: "In consideration of \$3,000 cash to be paid to Mrs. E. V. Hanna, wife of John S.

Hanna, they, John S. Hanna and E. V. Hanna, his wife, hereby agree and bind themselves to sign the deed hereinbefore set out, and to release and relinquish all claims to dower and homestead in the property hereinbefore described. But it is expressly agreed if the deed herein provided for shall not be made, or for any reason this contract shall not be consummated, then the aforesaid three thousand dollars shall not be taken or considered in any way the value of said dower or homestead in future transactions, this agreement as to same being applicable to this agreement only." Before the contract of sale could be confirmed by the county court, to whom it was submitted by the assignees, and before the deed could be executed, the debtor, John S. Hanna, died. This suit was brought by the assignees against the purchaser, J. T. Gay, for a specific execution of the contract. The widow and children of John S. Hanna were made parties to the suit. J. T. Gay answered that he was willing to accept the title to the land if it could be conveyed by the judgment of the court, and was willing to pay for it as agreed. The widow answered that she was willing to join in the deed if she was paid the \$3,000 mentioned in the contract, but not otherwise. A guardian ad litem for the infant children answered, claiming a homestead of \$1,000 value out of the proceeds of the sale. The circuit court adjudged the specific execution of the contract, required the adult heirs to sign the deed with the assignees, required the widow to do the same, and had the commissioner of the court convey for the infants. But the court adjudged, and there was paid over to the widow the \$3,000 mentioned, and \$1,000 additional of the proceeds of sale to Gay were set aside as a homestead for the widow and children during the life of the former and the minority of the latter. The assignees have appealed from as much of the judgment as set apart the homestead money for the widow and children.

By the contract the wife of the debtor was not bound at all. A married woman's potential dower interest in her husband's land can be relinquished only in the modes pointed out by the statute—by the execution of a deed with her husband, or by separate deed if he has already conveyed, and by privy acknowledgment before a proper officer of her execution of the deed. After the death of her husband Mrs. Hanna's inchoate dower became dower consummate. As to it, she could then sell it by deed or contract. Voluntarily filing her answer in the suit, offering thereby to conclude the agreement made by her during marriage, and executing the deed and receiving the consideration stipulated in the contract, she divested herself of dower in the land. It has been repeatedly held that the widow of a decedent cannot claim both dower and homestead in his lands; but she may elect which she will

take. The homestead in the decedent's land is declared by statute (section 1707, Ky. St. 1903) to be for the benefit of the widow and infant children of the decedent. Therefore, if she elects to take dower in lieu of homestead, the infant children's right to a homestead, to be jointly occupied with their mother during their minority, would attach to the land set apart as the widow's dower. But a more serious question arises in this case. Was there a right of homestead available to either the widow or infant children? The statutes prohibit the subjection of the debtor's homestead to the payment of his debts only when it is attempted to be taken under an execution, attachment, distress, or judgment. But it does not prevent the debtor's selling his homestead. The debtor cannot mortgage his homestead without his wife joins in the mortgage. Section 1706, Ky. St. 1903; *Thorn v. Darlington*, 6 Bush, 448; *Wing v. Hayden*, 10 Bush, 276; *Lear v. Totten*, 14 Bush, 101. But he may sell it whether or not she joins in the deed or contract. *Brame v. Cragg*, 12 Bush, 404; *Whitesides v. Cushenberry*, 8 Ky. Law Rep. 590; *Gullett v. Arnett* (Ky.) 44 S. W. 957. Of course, if he should die first, her right to dower would then prevail over the deed to that extent. In this case it will be observed that the debtor had sold by executory contract all of the remaining title in fee owned by him in the land. There cannot be a homestead without title to the land, and, as the husband had contracted to convey and had bound himself to convey all the title he had in the land, it necessarily divested him, and all others who might have been entitled by relation to it, of a homestead in the land. The cases of *Schnabel v. Schnabel's Ex'r* (Ky.) 56 S. W. 983, and *Kiesewetter v. Kress* (Ky.) 70 S. W. 1065, relate alone to where the owner of the homestead died having title to it, and treat of the power of the widow to elect, or to waive or relinquish a homestead, so as to defeat the claims of the infants, which would attach but for such waiver or election.

The judgment is reversed, and cause remanded, with directions to the lower court to set aside so much of the judgment as sets apart the \$1,000 to the widow and infant children as a homestead in this case, and for further proceedings not inconsistent herewith.

WEST KENTUCKY TELEPHONE CO. et al. v. PHARIS.

(Court of Appeals of Kentucky. Feb. 25, 1904.)

MUNICIPAL CORPORATIONS — STREETS — OBSTRUCTIONS — TELEPHONE WIRES — LIABILITY OF CITY — LIABILITY OF TELEPHONE COMPANY — CONTRIBUTORY NEGLIGENCE — ESSENTIALS OF RECOVERY — DAMAGES — EXCESSIVE VERDICT.

1. It is the duty of a telephone company to use ordinary care to keep its poles and wires in repair, and, if they fall in the street, to prevent them from remaining therein to the interruption of travel. If the presence of wires in the street makes travel dangerous, and injuries to

a pedestrian are sustained by reason thereof, the telephone company is liable, if it knew, or by the exercise of ordinary care could have known, that the wires were in the street, in time to have removed them before the injury.

2. It is the duty of a city to use ordinary care to see that its streets are kept reasonably safe for the use of travelers, and though a telephone company was negligent in allowing its wires to obstruct a street, so as to render it dangerous, whereby a pedestrian was injured, if such dangerous condition of the street was known, or by the exercise of ordinary care could have been known, to the city in time for it to have removed the same before the injury, it was equally liable with the telephone company for failure to do so.

3. General knowledge of the existence of an obstruction in a street, on the part of one injured by contact therewith, is not of itself sufficient to show contributory negligence, though it is a fact competent to be considered in determining the question of contributory negligence.

4. Where plaintiff received her injuries from contact with a telephone wire lying in the street, at half past 6 o'clock on a cloudy morning, as she was hurrying to her work through falling snow, with her mind dwelling on the serious condition of a sick sister whom she had attended through the greater part of the previous night, the mere fact that she had on another occasion, within four days before receiving her injuries, observed the wire with which she came in contact, was not sufficient to show contributory negligence as a matter of law.

5. In order to authorize a verdict for injuries sustained by contact with a wire in a street, the jury must find that the falling of the wire rendered travel dangerous to pedestrians using the same with ordinary care, that plaintiff was injured by contact with the wire while using the street with such care, and that the dangerous obstruction of the street by the fallen wire was known, or by the exercise of ordinary care could have been known, to defendant city and telephone company in time to have enabled them to remove them before the injury.

6. Plaintiff was confined to her bed or room for about six months, during which time she suffered physically and mentally, and was unable to work. She incurred a considerable medical bill, and her injuries laid her under a permanent partial disability, whereby her earning capacity was reduced from \$1 per day to 35 cents per day. *Held*, that a verdict for \$250 was not excessive.

Appeal from Circuit Court, Graves County.

"Not to be officially reported."

Action by Tennie Pharis against the West Kentucky Telephone Company and the city of Mayfield. From a judgment for plaintiff, defendants appeal. Affirmed.

W. J. Webb, Robbins & Thomas, and Ed Crossland, for appellants. W. H. Hester and J. N. Oruchfield, for appellee.

SETTLE, J. The appellee, Tennie Pharis, recovered judgment against the appellants, West Kentucky Telephone Company and the city of Mayfield, in the Graves circuit court, for \$250 each in damages, from which judgments they have appealed.

On the night of January 27, 1902, a heavy and destructive sleet fell in the western part of this state, which broke down much tim-

¶ 3. See *Municipal Corporations*, vol. 38, Cent. Dig. § 1677.

ber, and many wires and poles of telephone and telegraph companies, throughout that section. The appellant West Kentucky Telephone Company lost many of its poles and wires by this sleet, in and contiguous to the city of Mayfield. Two of its telephone poles with their wires fell and lay across the south end of Main street, near its intersection with College street, in that city, Main street being one over which there was much travel. These telephone poles and wires were allowed to remain down and in and across Main street from the night of January 27th to the 10th of February, 1902, on which last-named date the appellee, a woman 58 years of age, while passing along Main street on the way to her employment at a factory in the city, caught her foot in a loop of the telephone wire mentioned, and was thrown violently down upon the street, thereby sustaining the dislocation of her shoulder and other serious injuries to her person, for which she recovered of appellants damages as stated. At the time of the accident travel by pedestrians was necessarily confined to a beaten path or track in the street, which had been made rough by vehicles and horses, whereby it became less slippery and dangerous than was the sidewalk, which had temporarily been abandoned on account of its extremely slippery condition, and the presence thereon of broken limbs of trees and other débris. It further appears from the evidence that the telephone wires at the place of the accident were partly submerged by ice and snow, but in places stood up above the ice and snow in loops, which seemed to be especially true of their condition directly in the traveled way which was followed by the appellee. At the time of the accident appellee was carrying in one hand a bucket containing her dinner, and in the other an umbrella to protect her from the snow that was then falling.

We are of opinion that the several elements essential to a recovery have been shown to exist in this case, as the evidence conduced to prove, first, that the presence of the fallen wires in the street rendered travel thereon under the circumstances dangerous to pedestrians; second, that the appellee was injured thereby without any contributory negligence on her part; third, that the dangerous obstruction of the street by the fallen wires was known, or by the exercise of ordinary care could have been known, to the appellants in time for them to have removed the same, and thereby prevented appellee's injuries; It was primarily the duty of appellant telephone company to use ordinary care to keep its poles and wires in repair, and, if they fell in the street, to prevent them from remaining therein to the interruption or injury of persons traveling thereon; and if the presence in the street of the wires made travel thereon dangerous, and appellee's injuries were sustained by reason thereof, the telephone company was and is responsible in damages for such injuries, if it

knew, or by the exercise of ordinary care could have known, of the presence in the street of the wires in time to have removed them, and thereby prevented appellee's injuries. It was likewise the duty of the city to exercise ordinary care to see that its streets were kept reasonably safe for the use of persons traveling thereon, and though the telephone company may have been negligent in allowing its wires to so obstruct the street as to render it dangerous to the traveling public, and by reason thereof appellee was injured, if the dangerous condition of the street thus caused by the presence of the telephone wires was known, or by the exercise of ordinary care could have been known, to the city in time for it to have removed, or caused the telephone company to remove, the wires before appellee was injured, and it failed to do so, it thereby became equally responsible with the telephone company to appellee for the damages resulting from her injuries. The law applicable to the case at bar has been repeatedly declared by this court, in the following cases: *City of Covington v. Asman* (Ky.) 68 S. W. 646; *Same v. Johnson* (Ky.) 69 S. W. 703; *City of Wickliffe v. Moring* (Ky.) 68 S. W. 641; *City of Louisville v. Johnson* (Ky.) 69 S. W. 803; *City of Midway v. Lloyd* (Ky.) 74 S. W. 195; *City of Carlisle v. Secrest* (Ky.) 75 S. W. 286.

It is, however, insisted for appellants that, inasmuch as it was admitted by appellee in her testimony before the jury that the wire over which she fell had been seen by her on a previous occasion, she must be presumed to have known of its presence at the time of the accident, and of the necessity of avoiding contact with it; therefore, in failing to avoid such contact, she was guilty of contributory negligence, for which reason the peremptory instruction asked by appellants should have been given by the court. It appears from the evidence that appellee saw the fallen wire four days before receiving her injuries, as she was walking along Main street. The view thus obtained was merely accidental, and at most cursory. According to the authorities, general knowledge of the existence of such an obstruction on the part of one who is injured by contact with it is not of itself sufficient to show contributory negligence, though it is a fact competent to be considered by the jury in determining whether the person injured was or not guilty of such negligence. It must be borne in mind that the appellee's injuries were received at the early hour of 6:30 o'clock on the morning of a cloudy day, as she was hurrying to her work through the falling snow, with her mind, as she testified, dwelling upon the serious condition of her sick sister, whom she had attended through the greater part of the previous night. Under such circumstances it is not strange that she should have forgotten the presence of the fallen wires, or the danger of catching her foot in one of their loops.

In the *Modern Law on Municipal Corporations*, § 1292, it is said: "The fact that plaintiff had knowledge of the dangerous condition of a street will not prevent his recovery, if he used reasonable diligence to prevent injury; hence his traveling on a sidewalk known to be out of repair is not negligence of itself. It may be evidence of negligence to use a street in a dangerous condition, but it is not negligence as a matter of law. * * *" It is further said, in section 1294 of the same work: "Although a person is perfectly familiar with the dangerous condition of a sidewalk by reason of its frequent use, yet if, through forgetfulness, he walks into a hole in such walk and is thereby injured, it is not contributory negligence." In *City of Carlisle v. Secrest* (Ky.) 75 S. W. 236, which was an action similar to the one at bar, this court said: "The evidence shows that appellee knew of the defective condition of the sidewalk in question, but momentarily forgot it. The fact that a pedestrian knows generally of the defect in a sidewalk does not make his use thereof negligence per se." In *City of Mayfield v. Guilfoyle* (Ky.) 62 S. W. 493, this court also said: "It cannot be fairly said, as a matter of law, that appellee was guilty of contributory negligence by forgetting for the time the existence of the defect." From the foregoing authorities it is clear that the trial court could not have held, as a matter of law, that the appellee was guilty of contributory negligence in the matter of receiving her injuries, consequently the peremptory instruction was properly refused.

An examination of the instructions given and refused convinces us that the trial court did not err as to the law of the case. Those given told the jury in substance that, in order to authorize a verdict for the appellee, they must believe from the evidence, first, that the falling of the telephone wires in the street rendered travel thereon dangerous to pedestrians using the same with ordinary care; second, that appellee was thereby injured while using the street with such care; third, that the dangerous obstruction of the street by the fallen wires was known, or by the exercise of ordinary care could have been known, to the appellants in time to have enabled them to remove them, and thereby prevent appellee's injuries. We think the finding of the jury in appellee's favor is reasonably sustained by the evidence.

There can be no doubt, from the evidence, of the seriousness of appellee's injuries. They confined her to her bed or room for about six months, during which time she suffered greatly, both physically and mentally, and was incapacitated from doing work of any kind. She therefore lost the whole of that time, and incurred a considerable medical bill, to say nothing of the partial permanent disability under which, by reason of her injuries, she must labor for the remainder of her life, whereby her earning capacity has been reduced one-half, for it was shown by

the evidence that she was earning \$1 per day in a woolen mill at the time she was injured, whereas her wages since that time have not exceeded 35 cents per day. In view of the character and extent of appellee's injuries, we are of opinion that the amount of damages allowed her by the jury was moderate in the extreme.

The record being free from prejudicial error, the judgment is affirmed.

C. E. SLAYTON & CO. et al. v. HORSEY.

(Supreme Court of Texas. Feb. 25, 1904.)

JUSTICES OF THE PEACE—REVIEW OF PROCEEDINGS—APPEAL BOND—OBLIGEEES.

1. Under Rev. St. 1895, art. 1670, providing that in order to appeal from a justice's judgment "the party appealing" shall give bond "payable to the appellee," one of several defendants not adversely interested may appeal without naming his codefendants in judgment obligees in the bond.

Certified Questions from Court of Civil Appeals of Fifth Supreme Judicial District.

Action by W. F. Horsey against C. E. Slayton & Co. and another in justice court. From a judgment in favor of plaintiff, defendants appealed to the county court. The appeal was dismissed by the latter court, and they then appealed to the Court of Civil Appeals, which certifies questions for an opinion.

W. H. Brown and Templeton & Harding, for appellants. J. B. Bisland and T. H. Collier, for appellee.

GAINES, C. J. This is a certified question from the Court of Civil Appeals for the Fifth Supreme Judicial District. The certificate is as follows:

"Appellee instituted this suit in justice court against C. E. Slayton & Co., a firm composed of C. E. Slayton and Earnest Slayton, as one of the defendants, and Virge Murray as the other defendant, claiming damages against all of the defendants for the conversion of personal property. Upon a trial of the case in justice court, appellee recovered judgment on the 30th day of January, 1903, against C. E. Slayton & Co. and Virge Murray for \$90. Slayton & Co., within ten days from the date of the judgment, filed an appeal bond for the purpose of appealing the case to the county court, which bond was made payable to W. F. Horsey alone. On June 18th appellee filed his motion in the county court to dismiss the appeal from the justice court because the bond was not made payable to Virge Murray as well as to appellee, which motion the court sustained, and dismissed the appeal by its judgment. By reason of the conflict between the decision of this court in the case of *Baldwin v. White* [Tex. Civ. App.] 26 S. W. 455, and following cases: *Martin v. Lapowski* [Tex. Civ. App.]

¶ 1. See *Justices of the Peace*, vol. 21, Cent. Dig. § 553.

33 S. W. 300; *Ayers v. Smith* [Tex. Civ. App.] 28 S. W. 835; *M., K. & T. Ry. Co. v. Mosty* [Tex. Civ. App.] 27 S. W. 1057; *Cross v. Moores* [Tex. Civ. App.] 55 S. W. 373; *Bal-lard v. Coker* [Tex. Civ. App.] 49 S. W. 921; *Landa v. Lattin*, 19 Tex. Civ. App. 246 [46 S. W. 48]—it is made our duty to certify the case to the Supreme Court.

"Question 1. Did the county court err in dismissing the appeal?"

"Question 2. Can one of several defendants in justice's court, where such defendants are not adversely interested, appeal without nam-ing his codefendants in judgment obligees in the bond?"

We are of the opinion that both questions should be answered in the affirmative. We think the opinion of Mr. Justice Stephens in the case of *Martin v. Lapowski* (Tex. Civ. App.) 33 S. W. 300, announces the correct rule. It is there pointed out that the ruling of the court in that case was not in conflict with the decision of this court in the case of *Moore v. Jordan*, 65 Tex. 395. The latter grew out of the previous case of *Jordan v. Moore*, which also came to this court and is reported in the same volume (Id. 363). *Jor-dan v. Moore* was a suit instituted in a jus-tice court by Moore against David Jordan and Tamer Jordan, who was his wife, to foreclose a mortgage on personal property. A writ of sequestration was sued out by the plaintiff, and under it the property was seized by the officer. The defendants gave a replevy bond, with sureties as provided by law. The trial resulted in a judgment in favor of the plaintiff against the defendants and the sureties upon their replevy bond for the value of the property, with interest and costs. From this judgment David Jordan alone ap-pealed, and gave an appeal bond payable to Moore only. The case was removed into the district court by reason of the disqualifica-tion of the county judge, where, upon a mo-tion by appellee, the appeal was dismissed on the ground that the bond did not describe the judgment. Upon appeal to this court, this action was held erroneous. That is the case reported in 65 Tex. 363. But after the appeal had been dismissed by the district court, and while that matter was on appeal to the Supreme Court, Moore, the plaintiff, caused an execution to issue upon the origi-nal judgment against Tamer Jordan and the sureties upon the replevy bond against whom it had been rendered. Thereupon David Jor-dan and the sureties brought suit to enjoin the execution. The district court rendered a decree enjoining the execution, and the de-cree was affirmed upon appeal to this court. This is the case reported in 65 Tex. 395. It is apparent from this statement that it was not ruled in either case that where a judg-ment is rendered in a justice court against two or more defendants one of them may not appeal as against the plaintiff without mak-ing his codefendants parties in the appeal bond. On the contrary, it was distinctly

held in *Jordan v. Moore* (the first case) that the appeal was good. The question there de-cided would have been precisely the same as the question here certified, had the appellee moved to dismiss for the want of proper par-ties to the appeal bond. But the motion there was based upon other grounds. Further-more, we find no principle announced in either opinion from which it is necessarily deducible that one defendant against whom a judgment has been rendered in a justice court may not appeal without making a co-defendant a party.

The statute prescribes, in effect, that, in order to appeal from a justice's judgment, "the party appealing" shall give bond "pay-able to the appellee." Rev. St. 1895, art. 1670. By "appellee" is meant the party against whom the appeal is taken; that is to say, the party who has an interest adverse to setting aside the judgment. In this case the judgment was rendered against *Slayton & Co.* and against *Murray* as wrongdoers, and if both the firm and *Murray* were liable at all they were severally liable to the plaintiff, and neither had any interest in a judgment for or against the other.

FT. WORTH & R. G. RY. CO. v. SWAN.

(Supreme Court of Texas. Feb. 23, 1904.)

RAILROAD COMPANY—KILLING STOCK—FENCES—LIABILITY FOR FAILURE TO FENCE.

1. 2 Batts' Civ. St. art. 4528, which provides that "every railroad shall be liable for all stock killed or injured," but that "if the railroad fence in their road they shall only be liable in case of injury resulting from want of ordinary care," renders a railroad company that has not fenced its track absolutely liable for the killing or injuring of live stock.

2. A railroad track is not fenced, within 2 Batts' Civ. St. art. 4528, declaring that "if the railroad company fence in" its track it shall only be liable in case of injury to stock result-ing from want of ordinary care, where it is in-closed on two sides and on the one end, leaving the other open.

Certified Questions from Court of Civil Ap-peals of Second Judicial District.

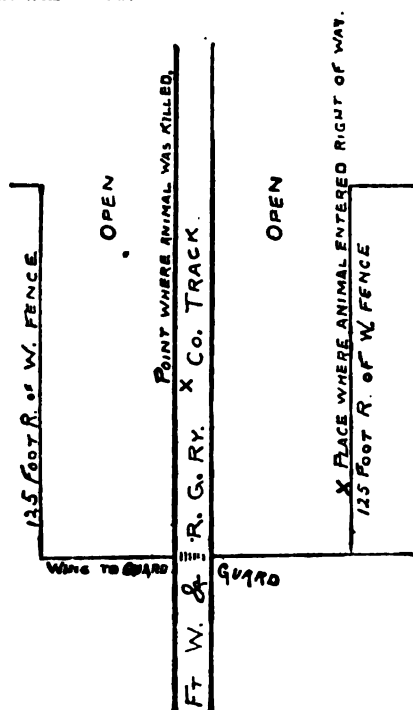
Action by Nancy Swan against the Ft. Worth & Rio Grande Railway Company. From a judgment for plaintiff, defendant ap-peals. Certified questions from the Court of Civil Appeals. Questions answered.

Theodore Mack and West, Chapman & West, for appellant. Reeder & Cooper, for appellee.

GAINES, C. J. This is a certified question from the Court of Civil Appeals for the Sec-ond District. The certificate is as follows:

"We certify to your honors for answer the question whether or not the appellant in the above styled and numbered cause now pend-ing before us is liable to appellee for the value of a mule killed by it under the follow-ing circumstances. The undisputed facts are: (1) That plaintiff owned the mule the value

of which is sought to be recovered in this case. (2) That the said mule was of the value of one hundred and one dollars (\$101.00). (3) That said mule was killed on August 8, 1902, by one of the defendant's trains in Hood county, Texas, without any negligence on the part of the engineer or other servants in charge of said train. (4) That at the time of the killing of said mule defendant had and maintained a good and lawful wire fence on either side of its right of way opposite the place where this animal was killed for 125 feet; that the track at this point ran east and west; that there was a cattle guard at the west end of these two 125-foot fences, with wing fences connecting said cattle guard with the west ends of the two 125-foot fences; that the right of way at the east ends of these two 125-foot fences was open, there being no cattle guards or wing fences at that point. (5) That the said mule before the injury was in the field or pasture south of the railway; that it escaped through a private gateway in said lawful 125-foot fence on the south side of said right of way without any fault on the part of defendant's company, and was killed on defendant's railway at a point about 50 feet east of the above-mentioned cattle guard, and without any fault on the part of the servants of defendant in charge of the train which killed said mule. (6) I also find that the following or diagram represents the relative positions of the railway, cattle guards, wing fences, place where the animal was killed, and the two 125-foot fences opposite the point where the animal was before the injury and opposite the place where the animal was killed:



"The gist of our query is, first, was appellant's road fenced in, within the meaning of our statute, at the point where the animal entered and was killed; and, second, if not, does the fact that the failure to fence in no way caused or contributed to cause the injury relieve the company from liability, since no other negligence, if this be negligence, is shown. See *Railway v. Cocke*, 64 Tex. 151; *Railway v. Willis* (Tex. Civ. App.) 42 S. W. 371; *Railway v. Hudson*, 77 Tex. 497, 14 S. W. 158; *Alsop v. Railway*, 19 Ill. App. 292; *Great W. R. Co. v. Hanks*, 36 Ill. 281; *Illinois C. R. Co. v. Finney*, 42 Ill. App. 390; *Jefferson, M. & I. R. Co. v. Lyon*, 72 Ind. 107; *Wabash Ry. Co. v. Forshee*, 77 Ind. 153; *Louisville, E. & St. L. Ry. Co. v. Thomas*, 106 Ind. 10, 5 N. E. 198; *Indiana, B. & W. R. Co. v. Quick*, 109 Ind. 295, 9 N. E. 788, 925; *Louisville, N. A. & C. Ry. v. Etzler*, 3 Ind. App. 562, 30 N. E. 32; *Kansas City, Ft. S. & G. Ry. Co. v. Burge*, 40 Kan. 736, 21 Pac. 589; *Green v. Railway*, 60 Minn. 134, 61 N. W. 1130; *Witthouse v. Railway*, 64 Mo. 523; *Snider v. Railway*, 73 Mo. 465; *Foster v. Railway*, 90 Mo. 116, 2 S. W. 138; *Ehret v. Railway*, 20 Mo. App. 251; *Sullivan v. Railway*, 19 Or. 319, 24 Pac. 408; *Bennett v. Railway*, 19 Wis. 145; *Bremmer v. Railway*, 61 Wis. 114, 20 N. W. 687; *Sappington v. Railway* (Mo. App.) 69 S. W. 32; *Kimball v. Railway* (Mo. App.) 73 S. W. 224."

The statute referred to in the certificate is as follows: "Each and every railroad company shall be liable to the owner for the value of all stock killed or injured by the locomotives and cars of such railroad company in running over their respective railways, which may be recovered by suit before any court having competent jurisdiction of the amount. If the railroad company fence in their road, they shall only then be liable in cases of injury resulting from want of ordinary care." 2 Batts' Civ. St. art. 4528. The intention of the Legislature could hardly have been more clearly expressed. The provision simply means that in case a railroad company shall fail to fence its tracks where it is lawful to do so it shall be liable in damages to the owner for the killing or injury of all live stock by the operation of its locomotives or cars; but, in case the company shall fence its track, then it shall be responsible only when the injury has resulted from the want of care on part of its servants to prevent the injury. The statute was so construed in the cases of the *Texas Central Railway Company v. Childress*, 64 Tex. 346, and of *International & Great Northern Railway Company v. Cocke*, Id. 151. In the case of the *Gulf, Colorado & Santa Fe Railway Company v. Hudson*, 77 Tex. 494, 14 S. W. 158, the language of the opinion in the case first cited by us is quoted with approval, and the decision adhered to; and it is also there held, in effect, that in case a railway company has not fenced its track, no inquiry as to the ques-

tion of care or want of care on part of the company is admissible.

It follows from these rulings that where a railroad company has not fenced its tracks its liability for an injury to live stock, caused by the running of its trains, is absolute, and we are of opinion that they correctly construe the statute.

The question, however, remains, was the track of the railroad company, under the circumstances of this case, "fenced in," within the meaning of the provision? We think that it was not. A fence means an inclosure, and a railroad track cannot be said to be fenced unless it be completely inclosed. A rectangular space extending in length east and west 125 feet, and 100 feet wide, which is inclosed on the two sides and on one end, but which is open at the other, cannot be said to be inclosed. To "fence in" a place as against live stock means to surround it by a fence so as to prevent the intrusion of such animals upon the inclosed premises.

From these conclusions it follows that, in our opinion, both questions should be answered in the negative, and it is accordingly so ordered.

BLACK et al. v. POOL et al.

(Supreme Court of Texas. Feb. 23, 1904.)

ELECTIONS—RIGHT TO VOTE—PAYMENT OF POLL TAX—EXTENSION OF TIME BY LEGISLATURE.

1. Const. art. 6, § 2, as amended by resolution of the Twenty-Seventh Legislature (Gen. Laws 1901, p. 322), provides that any voter who is subject to pay a poll tax shall have paid the same before he offers to vote at any election, and shall hold a receipt showing such payment before the 1st day of February next preceding the election, or if he shall have lost such receipt he shall be entitled to vote on making affidavit to that effect. Gen. Laws 1903, p. 63, c. 45, § 1, provides that the time for the collection and payment of all county and state tax in certain counties for the year 1902 shall be extended until October 1, 1903. On May 30, 1903, a local option election was held in one of these counties. Held, that the effect of the statute was not to do away with the constitutional requirement, for such election, of prepayment of poll tax, but that if it did have such effect it would be unconstitutional, having been passed after the time had elapsed for such payment.

Certified Questions from Court of Civil Appeals of Third Supreme Judicial District.

Election contest by F. A. Black and others against R. B. Pool and others. From a judgment for defendants, entered on sustaining a general demurrer and special exception to the petition, plaintiffs appealed to the Court of Civil Appeals, which certifies questions to the Supreme Court. Answered in part.

Henderson, Morrison & Freeman, for appellants. W. W. Chambers, R. B. Pool, and Hefley, McBride & Watson, for appellees.

BROWN, J. We make the following condensed statement of the contents of the original and amended petitions in the above-styled

cause as certified by the Court of Civil Appeals. The contents of the original and the first amended original petition are substantially the same, with the exception that in the amended petition the same facts as were charged in the original as grounds for contesting the election are alleged, and, in addition, that the acts so done by the defendants were done "fraudulently," and "for the fraudulent purpose" of preventing a fair and impartial election in the said county, and averred that the local option law is unconstitutional.

The allegations of the amended petition show that on May 11, 1903, a petition signed by more than 250 legal voters of Milam county was presented to the commissioners' court of the said county, asking that body to order a local option election for Milam county, and on the 12th day of that month the commissioners' court ordered the election to be held on the 30th day of May, 1903. The election was held and returns made as required by law, the commissioners' court entered an order declaring that the election had resulted in favor of prohibition by 210 majority, and ordering it to be published as the law required, and the county judge selected the Cameron Herald, a weekly newspaper published in that county, to make the publications. On the 26th day of June, 1903, F. A. Black, W. A. Alcorn, and Eli Peoples, citizens, taxpayers, and qualified voters of Milam county, filed in the district court of the said county their petition to contest the said election and to enjoin the publication of the order of the commissioners' court. It was alleged that the contestants were engaged in retail of spirituous liquors in Milam county under license duly and regularly issued to them by the county officials and by the municipal authorities, they having paid all the license taxes required by law, and given bond as the law required them to do. It was further alleged that the said parties held license as retail liquor dealers from the government of the United States.

The petition named as defendants, or contestees, R. B. Pool, county judge, Porter Stevens, P. V. Bodiford, W. C. Ross, and W. C. Weise, county commissioners of Milam county, and O. F. McAnnaly, the editor and publisher of the Cameron Herald.

For grounds of contest of the election, the petition charged that for the fraudulent purpose of preventing a fair and impartial election on the 30th day of May, 1903, and with the fraudulent intent to deter and prevent the voters of Milam county from voting at the said election, the county judge and the county commissioners did conspire and confederate together to announce and declare, to publish and have delivered, to each officer appointed to hold the election, certain rulings and opinions to the effect that each voter of Milam county would be required to present his poll-tax receipt, or make oath that it had been lost, and that he had paid

his poll tax prior to February 1, 1903, or said judge should not permit such voter to cast his ballot.

It is also alleged that the officers of the election, at the different precincts in the county, entered into the said conspiracy, and that the said opinions, orders, and publications, having been delivered to each of the said officers of election and circulated among the people at large in the county, had the effect to deter and prevent many of the voters of the said county from presenting themselves at the different places of elections to exercise their privilege of voting. The petition names six persons who presented themselves and claimed the right to deposit their ballots, without presenting their receipts for poll tax, who were denied the privilege, and states that there were others, but does not give the names.

The petition also alleges that, with like fraudulent purpose and intent, the county judge and the commissioners did combine and confederate together to issue, publish, and distribute to each officer appointed to hold the election, and to the people at large, rulings, opinions, and declarations to the effect that no person would be allowed to vote at said election unless he had paid his poll tax prior to the 1st day of February, 1903, and said rulings, orders, and publications were made, distributed, and delivered to the said officers of election, and to the people at large, with the unlawful and fraudulent purpose of deterring the voters of Milam county from appearing at the polls on said election day and casting their ballots. It is alleged that there were about 8,000 voters in Milam county, and that about 3,700 registered, and of these 3,884 voted at said election. The petition charges that a great number of persons legally qualified to vote were deterred from casting their ballots at said election, to wit, about 1,500, and, if the said orders, rules, and regulations had not been so distributed, a large number of those who did not appear would have voted at said election against prohibition, and the result would have been different.

The Twenty-Eighth Legislature passed an act entitled "An act to extend the time of payment of the state and county taxes for the year 1902, in the counties of Milam, Caldwell, and Colorado, until October 1, 1903." The first section of the said act reads as follows: "That the time for the collection and payment of all county and state tax in the counties of Milam, Caldwell and Colorado for the year 1902 be extended until October 1, 1903." Gen. Laws 1903, p. 63, c. 45. The act took effect on March 30, 1903.

The trial court sustained a general demurrer and special exceptions to the petition, and the case was dismissed. The Court of Civil Appeals propounds the following questions to this court:

"(1) Does the amended petition set up a new cause of action?

"(2) Was it essential to the qualification of a voter at the election in question that he should have paid his poll tax on or prior to the 1st day of February, 1903?

"(3) Are the facts alleged in the original petition or amended petition, or both, wherein a conspiracy is alleged to prevent and deter voters from voting at the election in question, grounds sufficient upon which to base the contest in question?

"(4) Did the trial court err in sustaining the general and special demurrers to plaintiffs' pleadings?"

We answer the second question in the affirmative, and the third question in the negative.

Section 2 of article 6 of the Constitution of this state, as amended by resolution adopted by the Twenty-Seventh Legislature at the regular session thereof, contains this proviso: "That any voter who is subject to pay a poll tax under the laws of the state of Texas shall have paid said tax before he offers to vote at any election in this state and hold a receipt showing his poll tax paid before the first day of February next preceding such election. Or if said voter shall have lost or misplaced said tax receipt, he shall be entitled to vote upon making affidavit before any officer authorized to administer oaths that such tax receipt has been lost. Such affidavit shall be made in writing and left with the judge of the election, and this provision of the Constitution shall be self-enacting without the necessity of further legislation." Gen. Laws 1901, p. 322. The requirements of this section of the Constitution are so plain as to preclude construction. It is clear that it was intended to prescribe, as a condition precedent to the exercise of the elective franchise, that all persons subject, under the Constitution and laws, to the payment of a poll tax, should make payment thereof before the 1st day of February next preceding the election. It is claimed, however, that the act of the Twenty-Eighth Legislature by which the collection of taxes in Milam county was extended until the 1st day of October, 1903, relieved all voters of Milam county of the effect of a failure to comply with the provisions of the Constitution, and that in that county all citizens otherwise qualified were entitled to vote whether they had paid that tax or not. If the Legislature had the power to relieve from a constitutional disqualification resulting from the failure to pay taxes as required, it did not attempt to do so; there is nothing in the act which would justify such construction. But we are of the opinion that if the Legislature had attempted to relieve the voter of the disqualification by that act, passed after the time had elapsed for the payment of the tax, it would have been in direct conflict with the provisions of the Constitution.

It being true that a citizen of Milam county who had not paid his poll tax prior to the

1st day of February, 1903, was not entitled to cast his ballot in the election for local option in that county on the 30th day of May, 1903, it follows that the alleged combination and conspiracy to distribute information of the law which should govern the officers in conducting the election could not constitute a cause for contesting the election, nor could it have had the effect to deter any persons lawfully qualified to vote at said election from presenting themselves and casting their ballots. The allegation of a fraudulent intention to prevent a fair election can have no effect, since the acts done were lawful. A short time had elapsed since the adoption of the amendment to the Constitution, and the officers who were to hold the election, and the people, were not informed of its requirements; therefore it was not improper for the members of the commissioners' court to give such instructions to the officers of the election as would enable them to conduct it in accordance with the Constitution.

In the case of *Stinson v. Gardner*, 78 S. W. 492, 9 Tex. Ct. Rep. 171, we held that the fact that the officers in charge of the election did not require the voter to produce his receipt for poll taxes did not constitute a ground for contesting the election. It does not follow, however, that officers in charge of such election might not have required the presentation of receipts for poll taxes; but it is unnecessary for us to decide that question, since the petition alleges that six qualified voters presented themselves and were denied the privilege of voting at the election because they failed to produce their tax receipts at the time. If the six had voted against prohibition it would not have changed the result, therefore it is immaterial in this case.

In view of our answers to the second and third questions, 1 and 4 are immaterial, and will not be answered.

CITY OF CORSICANA v. ZORN et al.

(Supreme Court of Texas. Feb. 18, 1904.)

MARRIED WOMEN—DEEDS—ACKNOWLEDGMENT—STREETS—DEDICATION—ACCEPTANCE—CITY COUNCIL—REMOVAL OF OBSTRUCTIONS.

1. A husband platted his wife's land with her knowledge and consent, and the subdivision was designated on the map as that of the husband. The map was recorded with the consent of the wife, but was never acknowledged by her. Thereafter the wife conveyed by properly acknowledged deeds, according to the streets and alleys on the map. Held to constitute a sufficient dedication of the alleys and streets in question to the public.

2. The right acquired being irrevocable, there was no necessity for acceptance of the dedication by the town.

3. Under Rev. St. 1895, art. 375, giving city councils exclusive control of streets, and power to abate and remove obstructions, a city has a right to remove fences obstructing streets to

the use of which the city became entitled because of conveyances in accordance with a plat showing streets and alleys.

Certified questions from Court of Civil Appeals of Fifth Supreme Judicial District.

Action by Johanna Zorn and others against the city of Corsicana. On certified questions from the Court of Civil Appeals.

Richard Mays, for appellant. Ballew & Wheeler, for appellees.

BROWN, J. This is a certified question from the Court of Civil Appeals for the Fifth District. The statement and questions are as follows:

"Johanna Zorn, a married woman, owned in her separate right about ten acres of land within the corporate limits of the city of Corsicana, which was designated upon the map of the city as 'Block 373.' In the spring of 1899, H. Zorn, husband of said Johanna, with her knowledge and consent, concluded to subdivide said land into lots and blocks for the purposes of sale, and W. M. Elliott, city surveyor, was employed for that purpose. This he did, setting up stakes at all lot corners, after which, in pursuance of his employment, he drafted a map showing the lots, blocks, streets, and alleys upon said property. This subdivision was designated on the map as 'H. Zorn Subdivision of Block 373 of the City of Corsicana.' This map was caused to be recorded by H. Zorn in the Navarro county record of deeds with the knowledge and consent of the said Johanna. At the time Elliott surveyed and platted the land as aforesaid, the Zorns occupied it as a homestead. Soon thereafter their dwelling was burned, and they moved to another house owned by them in another part of the city, where they have resided ever since. Johanna Zorn and husband, by warranty deeds duly executed, conveyed lots to various parties as follows: To W. C. Ralston, May 30, 1899; to Webb & Bee, July 5, 1899; to Sallie P. Cromwell, December 8, 1899; to Mrs. A. R. Bonner, April 6, 1900; to Emma Land, July 19, 1900. In all of said deeds the parcels sold were described as lots and blocks of H. Zorn's subdivision of Block 373 of the city of Corsicana, Texas, setting out the field notes, calling for streets and alleys as shown by said map. The deed to Webb & Bee of July 5, 1899, after naming the lot and block in said subdivision, recites, 'as per map on file in the record of deeds of said county,' and in the deed to Emma Land of July 19, 1900, after naming the lot and block of said subdivision, recites, 'as per map or plat of same recorded in the deed records of Navarro county, Texas, to which reference is made for particular description,' etc. There is no direct evidence as to when the map was recorded. Said map is not acknowledged by either H. or Johanna Zorn. H. Zorn exhibited the map to the purchasers, and they bought under the belief that the streets in-

¶ 2. See Dedication, vol. 15, Cent. Dig. § 64.

dedicated on the map would be opened. The land was wholly inclosed when the first sale was made, and fences were withdrawn only as lots were occupied, and only so far as the lots sold abutted on the designated streets. Mrs. Zorn exhibited the map to one purchaser, and promised to open the street abutting on his lot. A portion of the streets shown by the map were opened by the Zorns. In 1900 the authorities of the city of Corsicana tore down the fence inclosing the unsold portion, and entered thereupon and began to improve the streets, claiming that the same had been dedicated to public use. This suit on January 4, 1902, was then brought to restrain further action of the city, and to recover possession of the land. Plaintiffs' petition, among other things, states that a former proceeding was instituted to restrain the city from trespassing upon said property, and a temporary injunction was issued to that end, and that thereafter, to wit, about December 20, 1901, said proceeding was dismissed without their consent, and that since said dismissal said city was again trespassing, etc. The city answered, disclaiming any right to the land, except the right to open and improve the streets and alleys which it claims had been dedicated to public use.

"Questions.

"(1) Can a married woman make a valid dedication of her separate realty to public use? If so, is it necessary for her to execute a deed for that purpose, and privily acknowledge the same, as required by statute for other conveyances by her?

"(2) If, in answering the above, you hold that she can make such dedication without the statutory acknowledgment, do the facts as above stated show a dedication to public use of the streets and alleys designated on said map?

"(3) If a dedication was made, was the city, under the circumstances, authorized to enter upon said streets as stated, and improve the same, over the protest of the Zorns?"

Answer to the first and second questions: The facts stated by the court show that Mrs. Zorn, joined by her husband, made a valid dedication of the streets and alleys in question to the use of the public. The law prescribes that, when a married woman conveys lands, her separate property, she must acknowledge the deed as prescribed, to give it the effect of a conveyance; but, when the deed has been executed and acknowledged as the law requires, there is no difference in its effect as a conveyance from that of a feme sole or of a man. If Mrs. Zorn had been a feme sole, the effect of her deeds would be to convey to each one of the purchasers of lots a right to have all the streets and alleys represented upon the map or plat kept open for public use. Her deeds, duly executed, must be given their full effect. *Oswald v. Grenet*, 22 Tex. 94; *Heltz v. City of St.*

Louis, 110 Mo. 618, 19 S. W. 735; *Rowan's Executor v. Town of Portland*, 8 B. Mon. 232; *Mayor and Council, etc., v. Franklin*, 12 Ga. 289; *Town of Derby v. Alling*, 40 Conn. 410; *Meier v. Portland Cable Co.*, 16 Or. 500, 19 Pac. 610, 1 L. R. A. 858. In the case of *Oswald v. Grenet*, before cited, this court, quoting from a case cited, said: "If the owner of land lays out and establishes a town, and makes and exhibits a plan of the town, with various plots of spare ground, such as streets, alleys, quays, etc., and sells the lots, with clear reference to that plan, the purchasers of the lots acquire, as appurtenant to their lots, every easement, privilege, and advantage which the plan represents as belonging to them, as part of the town, or to their owners, as citizens of the town. And the right thus passing to the purchasers is not the mere right that the purchaser may use these streets or other public places according to their appropriate purposes, but a right vests in the purchasers, that all persons whatever, as their occasions may require or invite, may so use them. In other words, the sale and conveyance of lots in the town, and according to its plan, imply a grant or covenant to the purchasers that the streets and other public places, indicated as such upon the plan, shall be forever open to the use of the public, free from all claim or interference of the proprietor inconsistent with such use." In *Rowan v. Portland*, before cited, the court said: "Nor can it be doubted that in purchasing and paying for his lot he purchased and paid for, as appurtenant to it, every advantage, privilege, and easement which the plan represents as belonging to it as a part, or to its owner as a citizen, of the town, and that a conveyance of each lot with reference to the map, or merely as a part of the town, was a conveyance of all these appurtenances, as ascertained by the map, which is the basis of the town, as such, and identified with it." The effect of the deed, then, from Mrs. Zorn and her husband to the different purchasers of lots in Zorn's Addition, was to convey to such purchasers the right that they and all persons should be permitted to use the streets and alleys for the purposes designated upon the said plat for all time, and this conveyance vested in the public and in the city of Corsicana, as the organized representative of the public, the right to take possession of and use said streets and alleys whenever the progress and development of the town should make it necessary so to do. *Meier v. Portland*, before cited; *Elliott on Roads & Streets*, § 118; *Town of Derby v. Alling*, before cited. It is objected on the part of Mrs. Zorn that there has been no acceptance by the city of the dedication. There was no necessity for such acceptance, for the right which vested in the purchasers of the different lots, and through them in the public, was irrevocable. It was not expected that the streets and alleys should all be opened at once, but, as is

well known in the history of such transactions, many years might elapse before the settlement of that part of the city would require the use of such streets. In the case of *Meier v. Portland*, before cited, the court said: "Nor does the proprietor or the purchasers anticipate that all the streets shown upon the plat will be immediately opened and used. It is generally known and understood that a large portion of them will not be required for use for many years after the town is laid out, that their necessity will depend upon its future development and growth, and that they will remain in abeyance until the public exigencies demands that they be opened and improved. Nor does the dedication impose any such burden upon the public as would imply that its acceptance might be refused."

To the third question we answer: The city of Corsicana had the legal right to remove the fences from the streets in question. Article 375, Rev. St. 1895, confers power upon the city council "to have the exclusive control and power over the streets, alleys, public grounds and highways of the city and to abate and remove encroachments or obstructions thereon." The city, having a legal right to the possession and control of the streets, was by the statute empowered to enter upon the said streets and remove whatever of obstructions might be found therein. *Heitz v. St. Louis*, before cited.

SAMPSON v. STATE.

(Court of Criminal Appeals of Texas. Jan. 20, 1904.)

CRIMINAL LAW — APPEAL — REVIEW — STATEMENT OF FACTS—FILING AFTER TERM—EXTENSION OF TIME—FAILURE TO ENTER ORDER.

1. The refusal of a continuance and the instructions are not reviewable in the absence of a statement of facts.

On Rehearing.

2. Acts 28th Leg. p. 82, § 1, c. 25, provides that a party may be granted 20 days after the adjournment of the term to file a statement of facts, by an order to that effect entered on the docket. *Held*, that where defendant's motion for 20 days in which to file a statement of facts was granted, but the court inadvertently failed to enter the order on the docket, a statement filed after adjournment, and within 20 days, could not be considered on appeal.

Appeal from District Court, Jefferson County; W. H. Pope, Judge.

Sam Sampson was convicted of murder in the second degree, and he appeals. Affirmed. Rehearing denied.

Howth & Adams, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of 15 years. An examination of the transcript shows that the term of

the court adjourned on November 28, 1903, and the statement of facts was filed December 1, 1903. There is no order in the record granting defendant the right to file statement of facts after the adjournment of the term. Consequently the facts cannot be considered. In motion for new trial, appellant insists that the court erred in refusing his application for continuance, and in the charge applying the law of self-defense to the facts. These matters cannot be reviewed in the absence of the facts.

No error appearing in the record, the judgment is affirmed.

On Rehearing.

(Feb. 24, 1904.)

The judgment was affirmed at a former day of this term, and is now before us on rehearing. In the original opinion we held we could not consider the statement of facts in the absence of an order authorizing the same to be filed after the adjournment of the term of court. Attached to appellant's motion for rehearing is the affidavit of Hon. W. H. Pope, the judge presiding at the trial of this case, showing the following facts in reference to said order: That on the 31st day of October, 1903, motion for new trial was duly presented in the case of *State of Texas v. Sam Sampson*. The same, after argument, was overruled, and defendant gave notice of appeal to the Court of Criminal Appeals of the state of Texas. That defendant's counsel asked that an order be entered granting defendant 20 days after adjournment in which to file statement of facts and bill of exceptions, and the court granted the order, and told counsel he would enter it. That the judge was then on the bench, with the motion docket before him, and, while counsel was present, began the making of the entry on the docket of said order. That he made a partial entry of such request on the docket, but, on account of some interference, as he verily believes, he omitted to enter the order that defendant be allowed 20 days in which to make out and file statement of facts and bill of exceptions. That the fault to so make said entry was purely the judge's fault, and the failure to enter the same upon the docket was the act of omission of the court. By the acts of the Twenty-Eighth Legislature (section 1, p. 32, c. 25) it is provided "that parties to causes tried in the district and county courts of this state may, by having the order to that effect entered on the docket, be granted twenty days after the adjournment of the term at which said cause may be tried, to present and have approved and filed the statement of facts and bill of exceptions." We hold that, under this statute, it is the imperative duty of counsel for appellant to see that said order is entered by the judge on the docket, and inadvertence or neglect on the part of the judge will not excuse appellant's counsel

for the failure to have this order so entered. Under the old article in reference to filing statement of facts after adjournment of the term, we held it was the duty of counsel for appellant to see that the 10-day order was properly entered of record—*Smith v. State* (Tex. Cr. App.) 53 S. W. 632; *Brown v. State* (Tex. Cr. App.) 44 S. W. 174; *Denton v. State*, 42 Tex. Cr. R. 428, 60 S. W. 670—and, where there was a failure to so enter said order, we would not consider the statement of facts. We see no occasion, under the article now under consideration, of changing the rule, but still hold it is the duty of appellant's counsel to see the order is so entered.

Without the facts, which we are not authorized to consider, we see no reason for changing the original opinion. The motion for rehearing is accordingly overruled.

MURRAY v. STATE.

(Court of Criminal Appeals of Texas. Jan. 20, 1904.)

MURDER—PLEA OF GUILTY—TRIAL—DEGREE OF CRIME—INSTRUCTIONS.

1. Under Pen. Code 1895, art. 912, providing that if a jury shall find any person guilty of murder they shall also find the degree, and that if any person shall plead guilty to murder a jury shall be summoned to find the degree, etc., the court is not required to charge on murder in the second degree, where after a plea of guilty to a charge of murder the evidence excludes murder in the second degree.

Appeal from District Court, Jefferson County; W. H. Pope, Judge.

William Murray, alias Michigan Kidd, was convicted of murder, and appeals. Affirmed.

Matt Cramer, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. The record shows that appellant pleaded guilty to the indictment charging murder in the first degree, and after the introduction of the evidence the jury returned a verdict of guilty, assessing his punishment at death. The plea was received after appellant had been duly warned by the court as the law requires in such cases. The state introduced ample evidence to show the commission of the offense and appellant's connection therewith. In our opinion the evidence clearly demonstrates that appellant was guilty of murder in the first degree, and thoroughly authorized the extreme penalty of the law.

No error appearing in the record, the judgment is affirmed.

On Rehearing.

(Feb. 24, 1904.)

The judgment was affirmed at a former day of this term, and is before us on rehear-

ing. Appellant insists that where defendant has pleaded guilty it is error for the court to instruct the jury, either directly or by implication, that the plea of guilty is a plea of guilty of the highest grade charged, as was done in this case. In support of this contention appellant cites *Sanders v. State*, 18 Tex. App. 372; *Giles v. State*, 23 Tex. App. 281, 4 S. W. 886. The statutes provide that if a jury shall find any person guilty of murder they shall also find by their verdict whether it is of the first or second degree, or, if any person shall plead guilty to an indictment for a murder, a jury shall be summoned to find of what degree of murder he is guilty; and in either case they shall also find the punishment. It does not appear in the *Sanders Case* that any evidence was introduced on the plea. Be this as it may, the case does support appellant's contention that, where defendant pleads guilty to an indictment charging murder in the first degree, it is the duty of the jury to find of what degree of murder he is guilty. However, this case was practically overruled in *Blocker v. State*, 27 Tex. App. 18, 10 S. W. 439. In that case it was held that, the accused being on trial for murder, under the law of this state it is not the duty of the trial judge in murder cases, without regard to the evidence adduced, to instruct the jury as to the law of murder in the second degree; but it was held that, notwithstanding the apparent plausible construction of the statute upon which the proposition is maintained, the doctrine obtains in this state that the trial court may decline to submit to the jury the issue of murder in the second degree when the evidence wholly fails to present that issue. In *Martin v. State*, 36 Tex. Cr. App. 632, 36 S. W. 587, 38 S. W. 194, we held, on a trial for murder, where defendant persists in pleading guilty to the charge, article 712, Pen. Code 1895, requires that two things be done: First, a jury must be summoned; second, evidence must be adduced, and the jury impaneled to find the degree of murder; and this cannot be waived. In addition to this, the court should instruct the jury as to the elements of murder in the first, and, if necessary, murder in the second, degree. The trial is precisely the same under the plea of guilty as under the plea of not guilty. A plea of guilty is not tantamount to a confession of murder in the first degree. Under the facts of the case before us, the evidence conclusively shows appellant is guilty of murder in the first degree; and his plea of guilty, as stated above, will be treated as a plea of not guilty. Where the evidence excludes murder in the second degree, the plea of guilty does not require the court to charge on murder in the second degree. Under appellant's plea of guilty, the court correctly instructed on murder in the first degree only. This was amply authorized by the evidence. But, as stated, if the evidence had suggested murder in the second degree, then it would

¶ 1. See *Homicide*, vol. 26, Cent. Dig. §§ 536, 646.

have been the duty of the court to have submitted murder in the second degree.

We see no reason for changing the original opinion, and the motion for rehearing is accordingly overruled.

WILLIAMS v. STATE.

(Court of Criminal Appeals of Texas. Feb. 10, 1904.)

ESTRAYS—TAKING UP AND USING.

1. Under Pen. Code 1895, art. 918, making it an offense for one, without complying with the laws regulating estrays, to take up and use or otherwise dispose of an estray, one who takes up a stray hog, and puts it in the pen with his own, for the purpose, according to his evidence, of protecting his crops—keeping and feeding it there with them for several months, till it gets out, or is turned out, and dies—is not guilty, the animal not being used.

Appeal from Denton County Court; I. D. Ferguson, Judge.

E. Williams appeals from a conviction. Reversed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was charged with taking up and using a hog which is alleged to have been an estray. Article 918, Pen. Code 1895, reads: "If any person shall, without complying with the laws regulating estrays, take up and use or otherwise dispose of any animal coming within the meaning of an estray, he shall be punished as prescribed in the preceding article." The evidence seems to be uncontroverted to the effect that appellant took up a stray hog, and put it in a pen with his own hogs; and that it remained there from six to eight months to over a year (the witnesses disagreeing as to the length of time); that, while remaining in the pen, appellant treated this hog as he did his own (fed them in same way); that it remained there until it got out, or was turned out, and died. Appellant's evidence, both by himself and other witnesses, is to the effect that he took the hog up because he had planted some potatoes, and was protecting that part of his crop against this and his own hogs. This is the case. The question is, does the evidence justify a conviction under article 918, supra. We do not believe the facts constitute a violation of that article. That statute seems to contemplate that the animal must not only be taken up, but must be used. This hog, so far as the evidence before us shows, was not used, unless it was for the purpose of eating whatever food may have been given it by defendant. This character of use is not contemplated by the statute. As the record is before us, we do not believe the facts justify the conviction under the charge specified in the pleadings.

The judgment is reversed, and the cause remanded.

Ex parte WELLS.

(Court of Criminal Appeals of Texas. Feb. 24, 1904.)

INTOXICATING LIQUORS—LOCAL OPTION—CREATION OF DISTRICT—POWERS OF COMMISSIONERS' COURT—STATUTORY PROVISIONS—VALIDITY.

1. Const. art. 16, § 20, which requires the Legislature to enact a law whereby a local option may be effected in any county, justice's precinct, town, or city, or such subdivision of a county as may be designated by the commissioners' court, renders void an act authorizing the commissioners' court to designate a subdivision of a county composed of seven justices' precincts for the holding of a local option election.

Appeal from Erath County Court; L. N. Frank, Judge.

Application by Will Wells for a writ of habeas corpus. From a judgment denying the writ and remanding him to custody, he appeals. Reversed.

Nugent & Carter and J. E. McCarty, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was arrested by the sheriff of Erath county under a capias and complaint charging him with violating the local option law in force in Erath county in justices' precincts 1, 2, 3, 4, 5, 6, and 8. He applied to the county judge to be discharged under the writ of habeas corpus, which upon hearing was denied, and he was remanded to custody and appeals. He contends that inasmuch as the local option election was held for a subdivision of Erath county designated by the commissioners' court, which consisted of a combination of seven justices' precincts, he is entitled to his discharge, under the decision in *Ex parte Heyman*, 78 S. W. 349, from Cooke county. The majority opinion in that case holds that the act of the Legislature authorizing the commissioners' court to designate "subdivisions" by combining justices' precincts violated section 20 of article 16 of the Constitution. Accordingly it is held that the local option law was not properly voted upon in the seven precincts of Erath county; that the election was illegally held, and appellant is entitled to be discharged.

The judgment of the lower court is accordingly reversed, and appellant ordered discharged.

IRVINGTON v. STATE.

(Court of Criminal Appeals of Texas. Feb. 10, 1904.)

JAIL DELIVERY—WHAT CONSTITUTES A JAIL.

1. A building used as a jail, and in which a prisoner is confined for a violation of law, is within the protection of the statute punishing jail deliveries, though it is not situated in an incorporated town, and is not the property of the county.

Appeal from District Court, Wood County; R. W. Simpson, Judge.

R. T. Irvington was convicted of breaking into a jail and rescuing a prisoner, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted for breaking into jail and rescuing a prisoner. The name of the prisoner was Hugh J. Russell, and he had been placed in jail for disturbing the peace. Appellant and Russell had gone to a religious meeting, where they became boisterous, and for this reason Russell was arrested and put in jail for the night. Appellant forced the door open, and released Russell. The indictment sufficiently charges the offense, and the evidence supports the conviction.

Appellant requested a charge to the effect that if the jail was not in an incorporated town, and was situated on Dr. Smith's land, and built by private subscription, the same did not belong to Wood county; therefore, if the jury believed these facts, the house broken into was not, in contemplation of law, a jail. This charge was properly refused. It was not necessary that the town should be incorporated, to constitute the structure a jail; nor was it necessary that it should be the property of Wood county, under our statute. It was used as a jail or calaboose; and when that is the case, and the prisoner is confined for a violation of the law, it is under the protection of the statute.

We find no error in the record. The judgment is affirmed.

HAM v. STATE.

(Court of Criminal Appeals of Texas. Feb. 10, 1904.)

RAPE — WITNESSES — COMPETENCY — DISCRETION OF TRIAL COURT — LEADING QUESTIONS — ABSENCE OF PREJUDICE — APPEAL — BILL OF EXCEPTIONS.

1. Bills of exceptions to the competency as a witness of prosecutrix in rape are not reviewable where her testimony is not shown therein.

2. The competency as a witness of prosecutrix in rape, on account of her youth and lack of intelligence, is a matter within the sound discretion of the trial judge.

3. A conviction of rape would not be reversed on account of leading questions asked of prosecutrix, where she was a young child, timid and embarrassed, in the absence of a clear showing of injury to defendant's rights.

4. It is within the discretion of the court to permit the introduction of testimony at any time before the argument is closed.

Appeal from District Court, Grayson County; Rice Maxey, Judge.

John Ham was convicted of rape, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of rape, and his punishment assessed at confinement in the penitentiary for a term of 10 years.

He complains that the court erred in permitting prosecutrix, who was only 11 years of age, to testify as a witness; his insistence being that she was not of sufficient intelligence to understand the nature and obligations of an oath. This matter is presented by two bills of exceptions, neither of which show the testimony of prosecutrix. We cannot review the bills in the absence of her testimony. However, the matter of the competency of the witness was within the sound discretion of the trial judge, and we cannot say, even waiving the defect in the bill cited, that he abused his discretion.

Bill No. 2 complains of the court permitting state's counsel to ask prosecutrix leading questions. This bill has the same defects as the other bills, in that it fails to show the answer given by witness. The court states, however, that prosecutrix was a child, very timid, and seemed very much embarrassed when interrogated. Under circumstances of this character, we will not reverse a case for the asking of leading questions, unless there is a clear injury shown to the rights of appellant.

Appellant also insists that the court erred in permitting Dr. Freeman to testify after the state and defendant had closed their testimony. It is within the discretion of the court to permit the introduction of testimony at any time before the argument is closed. The explanation of the court to the bill shows that no injury was wrought to the rights of appellant.

Appellant's last insistence is that the evidence is insufficient to support the verdict. The evidence of the prosecutrix alone is not sufficient. However, we take it that the evidence of the father, in connection with appellant's confession and the testimony of the physician who examined the private parts of prosecutrix, is sufficient to show penetration.

No error appearing in the record, the judgment is affirmed.

REDDEN v. STATE.

(Court of Criminal Appeals of Texas. Feb. 10, 1904.)

ASSAULT — INTENT — BURDEN OF PROOF — FAILURE TO OBJECT TO INSTRUCTION — RESISTING ASSAULT — NECESSARY FORCE — PROPRIETY OF INSTRUCTION.

1. In a prosecution for assault, any error in instructing that it rests with the one inflicting a violent injury to show accident or innocent intention is not ground for reversal, in the absence of an objection taken below.

2. Where, in a prosecution for assault, it appears that the prosecutor made the first assault on defendant, using only his hands, and that defendant immediately struck him with a knife, an instruction that, where violence is permitted to effect a lawful purpose, only that degree of force must be used which is necessary to effect such purpose, is proper.

† 4. See Criminal Law, vol. 14, Cent. Dig. § 1622.

Appeal from Grimes County Court; J. G. McDonald, Judge.

Lige Redden was convicted of assault, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of simple assault, and his punishment assessed at a fine of \$5; hence this appeal.

There is nothing in appellant's contention that the complaint should be quashed because not signed. The original has been sent up, and the name of the affiant appears to be affixed thereto.

Appellant excepted to the court's charge, but, in our opinion, none of the exceptions are well taken. The court did not instruct the jury that the knife in question was a deadly weapon, but left the jury to determine that question, as we read the instruction; but evidently they did not consider the knife a deadly weapon, as they only found appellant guilty of a simple assault.

We note that appellant objected to the concluding paragraph of the court's charge No. 4. There was no error in this portion of the charge. If there was any error, it was in the preceding portion of said charge, which, in effect, told the jury that an injury caused by violence to the person intended to be injured is presumed, and it rests with the person inflicting the injury to show accident or innocent intention. This is statutory, but it appears shifted the burden of proof. However, as stated, no objection was taken to this portion of the charge, and it cannot be revised. We think the court very properly told the jury that where violence is permitted, to effect a lawful purpose, only that degree of force must be used which is necessary to effect said purpose. This issue was directly involved in the case, as unquestionably the prosecutor made the first assault upon appellant, though only with his hands. Defendant, according to the testimony, immediately struck him with a knife, and the question to be determined by the jury in the case was whether or not the force used was excessive. The court might have gone further in charging on this subject than it did, but no special instruction was asked, and no question raised as to further instruction.

There being no error in the record, the judgment is affirmed.

CUNNINGHAM v. STATE.

(Court of Criminal Appeals of Texas. Feb. 10, 1904.)

CARRYING PISTOL—JUSTIFYING CIRCUMSTANCES—IMPENDING DANGER.

1. One who is in imminent and threatening danger at a place where there are no officers of the law is not guilty of violating the law against carrying a pistol because he arms himself therewith in preference to withdrawing from or staying away from the vicinity of the danger.

Appeal from Palo Pinto County Court; W. E. McConnell, Judge.

L. P. alias Will Cunningham was convicted of unlawfully carrying a pistol, and appeals. Reversed.

J. Hall Bowman, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted for unlawfully carrying a pistol, and his punishment assessed at a fine of \$25.

Bills of exceptions Nos. 1 and 2 do not show any error, in the light of the explanation of the trial court appended to said bills.

In motion for new trial appellant complains of the following portion of the charge of the court: "You are further charged that defendant had a right to arm himself, if it was done for the purpose of defending himself or his family against serious bodily injury or death, and the danger was so imminent and threatening as that he could not have time to procure the protection of the law. This right, however, would be compromised if you should find from the evidence that defendant could have avoided the danger by withdrawal from its vicinity or by staying away from the vicinity of such danger." The evidence shows defendant was at a picnic, with others, camped there for a day or so. No officers were near the picnic grounds, according to this record. If the danger was imminent and threatening, defendant would not have to withdraw from the vicinity or stay away from the vicinity of such danger. We think the charge was erroneous.

For the error discussed, the judgment is reversed, and the cause remanded.

PERRIN v. STATE.

(Court of Criminal Appeals of Texas. Feb. 10, 1904.)

MANSLAUGHTER—INSTRUCTIONS—ELEMENTS OF OFFENSE—INTENT—REPETITION—APPLICATION TO FACTS—SELF-DEFENSE—REASONABLE DOUBT—MAIMING OF DEFENDANT.

1. The statute relative to manslaughter provides that where a party, with a weapon not calculated to kill, does kill in a sudden transport of passion, he is not guilty of manslaughter unless the intent to kill evidently appears. In a prosecution for manslaughter it appeared that decedent struck defendant twice, and then turned from him; whereupon defendant struck decedent on the head with a stick four and a half feet long and one and a half inches in diameter, the blow resulting in death. The court instructed that if the jury believed that defendant, with the stick, which they found was a deadly weapon or instrument reasonably calculated to produce death by the manner of its use, in a sudden transport of passion, aroused by adequate cause, and not in self-defense against an unlawful attack, etc., unlawfully struck and killed decedent, he would be guilty of manslaughter. *Held*, that the instruction was erroneous as omitting the element of intent to kill.

2. It is error in a criminal case to frequently repeat a principle of law involved so as to create an impression on the jurors' minds as to

the court's opinion of the facts to which the principle is applicable.

3. In a prosecution for manslaughter the court instructed that the instrument used was to be considered in judging intent, and if it were one not likely to produce death the intent to kill was not to be presumed unless it evidently appeared from the manner of use; also, that where homicide occurred under the influence of sudden passion, by means not in their nature calculated to produce death, the person doing the killing was not guilty of homicide, unless the intent to kill appeared, but he might be prosecuted for any grade of assault and battery. It then instructed that if the jury found defendant struck decedent and killed him, but did not find that he intended to do so, they might find defendant guilty of aggravated assault and battery. Then followed a number of definitions relative to assault and battery, and then the court instructed that if defendant struck decedent with a stick with no intention of killing, and he was not justified on the grounds of self-defense, etc., they might find defendant guilty of assault and battery. *Held*, that the first two instructions were not objectionable on account of failure to apply the principles therein enunciated to the facts of the case.

4. In a prosecution for manslaughter an instruction that if the jury have a reasonable doubt as to whether the killing was in justifiable self-defense they will acquit defendant is proper.

5. Where, in a prosecution for manslaughter, it appears that decedent struck defendant in the face, and gave him a serious wound, or, at least, such a wound as caused pain and bloodshed, but it does not appear that he thereby maimed defendant, a failure to charge on the law of maiming is not error.

Appeal from District Court, Fannin County; Ben H. Denton, Judge.

Kenneth Perrin was convicted of manslaughter, and appeals. Reversed.

Jas. H. Lyday, for appellant. J. C. Meade, Dist. Atty., and Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of manslaughter, and his punishment assessed at confinement in the penitentiary for a term of five years. The evidence shows that appellant was fireman at the gin in the town of Honey Grove, Fannin county. Deceased was unloading wood at the edge of the shed, over the furnace, when defendant told him not to pile the wood so high, as he could not reach it. Some words passed between them, which are not made clear by the evidence. Deceased got off his wagon, and defendant started toward the wagon, they meeting about halfway. Deceased struck defendant a blow with his fist, and perhaps a second blow, and turned, and just as he did so defendant struck deceased on the top of the head with a stick about 4½ feet long and an inch and a half in diameter. At the time the blow was struck deceased's back was to defendant. Deceased immediately fell backwards towards defendant in an unconscious condition, in which state he remained about 50 hours, and died from the result of the blow. A short while after the difficulty defendant was arrested. The evidence shows that the parties had been on friendly terms for some

months prior to the difficulty, and as far as the record shows there were no antecedent malice or former grudges.

In the third ground of his motion for new trial appellant insists the court erred in giving the following charge: "If you believe from the evidence beyond a reasonable doubt that defendant with a stick or club, which you find was a deadly weapon or instrument reasonably calculated and likely to produce death by the mode and manner of its use, in a sudden transport of passion aroused by adequate cause, as the same is herein explained, and not in defense of himself against an unlawful attack reasonably producing a rational fear or expectation of death or serious bodily injury, did in Fannin county, Texas, at any time prior to February 18, 1903, unlawfully strike and kill Will Massey, the deceased, as charged in the indictment, you will find defendant guilty of manslaughter," etc. Appellant objected to this charge because it should have submitted the question of intent to kill, which was the crucial point; and, having limited defendant's right to slay and kill to self-defense, the charge was equivalent to and did eliminate this question on a vital point from the consideration of the jury, and was in effect a charge on the weight of the evidence, and left the jury to conclude that in the opinion of the court defendant struck the fatal blow with the intent to kill, and that if the killing was not in self-defense it was necessarily manslaughter, because, the weapon used not being a deadly weapon, defendant could not be convicted of any degree of any felonious homicide, unless it evidently appeared that defendant intended to slay. The charge given is not the law applicable to the facts of this case, as appellant insists, since the statute provides that where a party with a weapon not calculated to kill, in a sudden transport of passion, does kill, he is not guilty of manslaughter, unless the intent to kill evidently appears. This charge would authorize the jury to convict defendant of manslaughter if the facts existed; that is, if defendant, in a sudden transport of passion, struck deceased with a deadly weapon or instrument reasonably calculated and likely to produce death by the mode and manner of its use, and killed the adverse party, then, in that event, he would be guilty of manslaughter. This would be true if he intended to kill, but without this intent he would not be guilty of manslaughter. We think the charge is subject to appellant's criticism.

Appellant also insists that the court erred in frequently and repeatedly defining manslaughter, and in giving undue prominence before the jury to the injury of defendant. We find three separate charges on manslaughter in the court's main charge. It is error for the trial court, by frequent repetition, to place too prominently before the jury any principle of law involved in the case. Such repetition may tend to create an im-

pression upon the minds of the jury as to what may be the opinion of the court with regard to the facts to which the principle is applicable. *Bonner v. State*, 29 Tex. App. 224, 15 S. W. 821.

Appellant insists that the court erred, in the twenty-eighth and twenty-ninth paragraphs of the charge, in failing to apply the facts of the case to the principles of law therein correctly and negatively given, in order that the jury might apply them to the evidence, and because the same were not properly placed in said charge along with the instructions applicable to the defense. We do not think these criticisms are well taken. These charges are as follows:

"(28) The instrument or means by which a homicide is committed are to be taken into consideration in judging the intent of the party offending. If the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless from the manner in which it was used such intention evidently appears.

"(29) Where a homicide occurs under the influence of sudden passion, and by the use of means not in their nature calculated to produce death, the person killing is not deemed guilty of the homicide, unless it appears that there was an intention to kill, but the party from whose act the death resulted may be prosecuted for and convicted of any grade of assault and battery.

"(30) If you find that defendant struck Will Massey, and thereby killed him, and do not find that he intended to kill him, then you may find defendant guilty of an aggravated assault and battery, if he was not justifiable, and if the evidence shows he was guilty of that offense.

"(31) The use of any unlawful violence upon the person of another with intent to injure him, whatever be the means or degree of violence used, is an assault and battery. Any attempt to commit a battery or any threatening gesture, showing in itself or by words accompanying it an immediate intention coupled with an ability to commit a battery, is an assault.

"(32) By the expression, 'coupled with an ability to commit a battery,' is meant that the person making the assault must at that time be in such position and within such distance of the person assaulted to enable him to commit a battery on such person by the means used.

"(33) An assault and battery becomes aggravated when a serious bodily injury is inflicted upon the person assaulted or when committed with a deadly weapon. A deadly weapon is one which, from the manner used, is calculated or likely to produce death or serious bodily injury.

"(34) If you find that defendant struck Will Massey with a stick or club with no intention to take his life, and that he was not justifiable on the ground of self-defense, and if you further find that such stick or club

was then and there a deadly weapon, or that by means of such assault serious bodily injury was inflicted upon Will Massey, then you may find defendant guilty of an aggravated assault and battery, and if you find him guilty you will assess his punishment at a fine not less than \$25 nor more than \$1,000, or by imprisonment in the county jail not less than one month nor more than two years, or by both such fine and imprisonment."

And then, in a subsequent portion of the charge, the court applies the reasonable doubt between manslaughter and aggravated assault. In our opinion these charges are correct.

Appellant also complains that the court erred in the last two lines of paragraph 25 of his charge, wherein he uses the following language, to wit: "Or if you have a reasonable doubt as to whether such killing was in justifiable self-defense or not, you will acquit defendant." We see no error in this charge, but believe it is favorable to appellant. The court in another paragraph of the charge gives the usual charge on reasonable doubt. Here he tells the jury, if they have a reasonable doubt as to whether or not such killing was in justifiable self-defense, they will acquit. This charge was certainly favorable to appellant.

Appellant also insists that the court erred in failing to charge the law of maiming. We do not think the evidence raises this issue. Appellant was struck in the face by deceased, and given a serious wound, or at least such wound as caused pain and bloodshed; but the record does not show any maiming of defendant. We do not deem it necessary to review the other errors assigned.

For the errors discussed, the judgment is reversed and the cause remanded.

FIELDS v. STATE

(Court of Criminal Appeals of Texas. Feb. 10, 1904.)

CARRYING PISTOL—WHAT CONSTITUTES OFFENSE.

1. The owner of a pistol, who had placed it in the hands of a prospective purchaser, was sent by his employers to collect bills, one being against such purchaser. While at the purchaser's place of business the owner inquired if he desired to buy the pistol, and, being told that he did not, got the weapon and started back to his place of employment. On the road he was assaulted, and exhibited the pistol in self-defense. The road he traveled in returning was the ordinary one. Prior to the assault he stopped at two places in an effort to sell the pistol. Held, that he was not guilty of violating the law against carrying pistols.

Appeal from Hill County Court; L. C. Hill, Judge.

Wright Fields was convicted of carrying a pistol contrary to law, and appeals. Reversed.

Walter Collins, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of violating our statute prohibiting carrying pistols. It is a question as to the sufficiency of the evidence. The pistol had been given appellant, and had been carried by him from the residence of the giver to the store at which he was working. He had endeavored to sell the pistol, and finally it found its way into the hands of one Wetherby, who took it on trial, with view of purchase. Wetherby worked at a barber shop. Appellant was sent around the town by his employer to collect bills, and among others one from Wetherby. While at Wetherby's place of business appellant inquired as to Wetherby's desire to purchase the pistol, and, being informed he did not want it, he got the pistol and started back to his place of employment. En route he became involved in a difficulty, and the evidence shows that two parties had set upon him, one armed with a knife. He retreated, and as a means of protection exhibited the pistol. The route he was traveling from where he secured the pistol of Wetherby was the ordinary traveled route to appellant's place of employment. He had stopped at two places en route for the purpose of selling the pistol. These attempted sales occurred before the attack was made on him. We are of opinion, under the decisions of this court construing the pistol law, this was not a violation of the law.

Because the evidence does not justify the conviction, the judgment is reversed, and the cause remanded.

BELT v. STATE

(Court of Criminal Appeals of Texas. Feb. 10, 1904.)

INTOXICATING LIQUORS—VIOLATION OF LOCAL OPTION LAW—SALES—EVIDENCE—INSTRUCTIONS—WITNESSES—IMPEACHMENT.

1. On a prosecution for violating the local option law, evidence of a sale at another and different time than that charged is inadmissible, unless such sale is a part of the *res gestæ* or serves to show criminal intent.

2. Where, on a prosecution for violating the local option law, there was evidence showing straight sales for money by defendant, and nothing to show any sale by a peculiar device so as to raise an issue whether such act constituted a sale, an instruction that defendant could not be convicted for any other sale than the one alleged, but that any other sales could be considered as a circumstance to show the system under which defendant was acting, was erroneous.

3. A witness cannot be impeached by proof of his general bad character, but the proof must be limited to his bad character for truth and veracity.

Appeal from Collin County Court; F. E. Wilcox, Judge.

Bud Belt was convicted of violating the local option law, and appeals. Reversed.

Abernathy & Abernathy and Abernathy & Margum, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25 and 20 days' confinement in jail.

The second bill of exceptions states that the state was permitted to prove by Charley Mann that while defendant was running a boarding house on the northeast corner of the square in Farmersville he sold to Mann one pint of whisky for 75 cents, and that defendant delivered this whisky to Mann back of Holsenbach's store, which was on the east side of the square, and near where defendant was running the boarding house. It appears from the bill that this sale took place after the offense charged in this case and at another and different time. There is no pretense on the part of the state that there was any testimony as to a system under which the sale was made in the case now under consideration, nor that the sale testified to by the witness Mann was a part of the *res gestæ* or served in any way to show the criminal intent of defendant. Unless it is so shown, such testimony is not admissible. And bill No. 3 complains of similar testimony.

Appellant excepted to the following portion of the court's charge as on the weight of the evidence: "You are instructed you cannot convict defendant for any other sale than the one alleged to have been made to prosecuting witness Wilcoxson, and such other sales, if any, can only be considered by the jury as a circumstance to show the system under which defendant was acting at the time." This charge is erroneous, in view of what has been said before. There being no evidence in this record to show any particular system, simply straight sales for money by defendant to various parties could not constitute a system, but would merely evidence a wanton continuing violation of law. If the evidence had shown that defendant made a sale by some device and peculiar manner, and it became an issue as to whether or not said acts were a sale, then similar acts evidencing and showing a sale might be admissible on the ground of system. But where there is no question, as this record shows, but that the sale was made to Wilcoxson, the fact that he sold whisky to other parties at other and different times could serve but to prejudice the jury against defendant, and in the nature of things would not demonstrate that he sold the whisky to prosecuting witness.

Bill No. 4 complains that the court erred in excluding testimony by witness Carver and others tending to show the general bad character of prosecuting witness Wilcoxson. State's counsel objected that was not the proper way to impeach the witness. The bill further shows that said witnesses would have testified that they were acquainted with the general reputation of Wilcoxson in the community in which he lived, and that the general reputation of Wilcoxson in the com-

munity in which he lived was that of general bad character. The court did not err in excluding this testimony. The only character pertaining to any issue in this case was the general bad character for truth and veracity.

For the errors discussed, the judgment is reversed and the cause remanded.

FRANKLIN v. STATE.

(Court of Criminal Appeals of Texas. Feb. 10, 1904.)

FORGERY—INDICTMENT—SUFFICIENCY—CONTINUANCE—REFUSAL.

1. An indictment charging defendant with 'forgery by altering a check, which sets out the check as originally drawn, specifies the alterations therein so as to make it call for the payment of \$60 instead of \$6, as originally drawn, and which sets out the check as altered, is sufficient.

2. Refusal to grant a continuance for the absence of a witness is not error when diligence is totally lacking, and the testimony of the absent witness is not probably true.

Appeal from District Court, Jefferson County; A. T. Watts, Judge.

G. W. Franklin was convicted of forgery, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of forgery, and his punishment fixed at two years' confinement in the penitentiary. The charging part of the indictment is as follows:

That G. W. Franklin on September, 1903, " * * did then and there unlawfully, and without lawful authority, and with intent to defraud, willfully and fraudulently alter an instrument in writing then and there already in existence, and which had heretofore been made by E. V. Hayden, and which at the time it was so made, and before it was altered as aforesaid by the said G. W. Franklin, was to the tenor as follows:

"Beaumont, Texas, Sept. 7, 1903, No. 239.

"Beaumont National Bank,

"Pay to the order of G. W. Franklin,
"\$60.00 Six Dollars.

"E. V. Hayden, Oil Account."

"And the said G. W. Franklin did then and there alter the said instrument in the manner following, to wit: He, the said Franklin, placed naught (0) after the '\$6,' making it read \$60.00, and placed the letters 'ty' after the word 'six,' making it read 'sixty.'

"And the said instrument, after the said alteration by the said G. W. Franklin, thereby became and then and there was of the tenor following:

"Beaumont, Texas, Sept. 7, 1903, No. 239.

"Beaumont National Bank,

"Pay to the order of G. W. Franklin,
"\$60.00 Sixty Dollars.

"E. V. Hayden, Oil Account."

—Against the peace and dignity of the state."

Appellant filed a motion to quash the indictment; but, in our opinion, the indictment follows the approved forms, and the court was correct in overruling the motion.

Appellant made a motion for continuance for want of the testimony of John McWalters. However, diligence is totally lacking. But, even conceding diligence, the testimony is not probably true, in the light of this record.

The form of the verdict of the jury is not subject to the criticisms urged by appellant. It is proper form. The evidence amply supports the finding of the jury, and the judgment is affirmed.

PAYNE v. STATE.*

(Court of Criminal Appeals of Texas. Jan. 27, 1904.)

CRIMINAL LAW—EVIDENCE—DYING DECLARATIONS—CONSTITUTIONAL LAW.

1. The admission in evidence of dying declarations is not in violation of Const. art. 1, § 10, requiring that in all criminal trials the defendant shall be confronted with the witnesses against him.

Appeal from District Court, Navarro County; L. B. Cobb, Judge.

Amy Payne was convicted of murder, and appeals. Affirmed.

W. W. Ballew and Lewis Carpenter, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of murder in the second degree, and her punishment assessed at confinement in the penitentiary for a term of ten years; hence this appeal.

The only question presented for our consideration is the objection urged by appellant to the admission by the court of the dying declaration of deceased, Chas. Foster. No question is made as to the predicate laid for the introduction of this evidence, but it is insisted that the introduction of dying declarations is violative of section 10, art. 1, of the state Constitution, which requires in all criminal trials that defendant "shall be confronted with the witnesses against him." Appellant concedes that this matter has long been settled in this state adversely to her contention; but appellant's counsel urge it has been wrongly settled, and he asks the court to review the admission of this character of evidence, in connection with the clause of the bill of rights in question. Appellant also refers us to *Cline v. State*, 36 Tex. Cr. R. 320, 36 S. W. 1099, 37 S. W. 722, 61 Am. St. Rep. 850, as recognizing the principle for which he contends here. However, since the decision in *Cline's Case*, the court passed upon this very question in *Taylor v. State*, 38 Tex. Cr. R. 552, 43 S. W. 1019, holding dying declarations admissible. We see no occasion to

*Rehearing denied February 24, 1904.

¶ 1. See *Homicide*, vol. 26, Cent. Dig. § 427.

review this question, as it may be considered settled.

Appellant also contends that the testimony is not sufficient to support the conviction. An examination of the record does not sustain this contention. The conviction is supported by the testimony of one witness, and in addition thereto the dying declarations of deceased. The theory of appellant was that deceased either accidentally or intentionally shot himself. The charge of the court properly presented both theories, and the jury found against appellant. No reason is shown why the verdict of the jury should be disturbed.

The judgment is affirmed.

MENZING v. STATE

(Court of Criminal Appeals of Texas. Feb. 10, 1904.)

INTOXICATING LIQUORS—SALES TO MINOR—EVIDENCE.

1. Evidence on a trial for selling liquor to a minor *held* to sustain conviction.

Appeal from Erath County Court; L. N. Frank, Judge.

A. Menzing was convicted of selling intoxicating liquor to a minor, and appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for selling intoxicating liquor to a minor. There is no question but that the sale was made, and that defendant was a minor, he being only 16 years of age. There are three grounds urged in the motion for new trial, but they are all involved in the same proposition; in fact the same proposition asserted in three different forms to wit, that the evidence is insufficient to show that appellant knowingly sold intoxicants to a minor. There is neither bill of exceptions nor a charge of the court in the record, and, as stated, the only question raised is the sufficiency of the evidence. Appellant testified, as did the minor, that appellant was informed by the boy that he was 21 years of age at the time of the purchase. If appellant believed the boy was 21 years of age at the time he was entitled to an acquittal, though the boy was in fact under 21, at least it would have suggested the question of mistake of fact. We think the evidence is sufficiently cogent to show that appellant was put upon notice that the boy was not 21, and that he simply took the statement of the boy to that effect. The personal appearance of the boy was not brought out as distinctly as it should have been, yet it occurs to us, from what is in the record, and the fact that the boy was before the jury when testifying, the jury may have been thoroughly warranted in reaching the conclusion that no reason-

able man could have been misled as to the age of the boy, and that defendant did not have reasonable grounds for believing he was 21. However, the evidence is of such character that the jury perhaps could have taken either view of it and be justified. They have found against defendant, and we do not believe the facts justify us in reversing the judgment. The judgment is accordingly affirmed.

ADAMS v. STATE.

(Court of Criminal Appeals of Texas. Feb. 10, 1904.)

OCCUPATION TAX—TRAVELING MEDICAL SPECIALIST—EVIDENCE.

1. A physician maintaining four offices in different towns, and keeping an assistant at each place, and treating patients at the places at stated intervals, but having his headquarters at one of the places, where he lives with his family and receives his mail, is not within Sayles' Rev. Civ. St. 1897, art. 5049, imposing an occupation tax on medical specialists traveling from place to place.

Appeal from Young County Court; Jo W. Akin, Judge.

J. L. G. Adams was convicted of pursuing the occupation of a medical specialist traveling from place to place without having paid the occupation tax, and he appeals. Reversed.

John C. Kay, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of pursuing the occupation of a medical specialist traveling from place to place, without having paid the occupation tax prescribed by article 5049, Sayles' Rev. Civ. St. 1897, his punishment being assessed at a fine of \$75.

The undisputed facts show that appellant came to Graham about May 1, 1903, and established and equipped an office; that he maintained an office at Ellaville, in Young county, and at Jacksboro and Brison, in Jack county; that appellant divided his time between these offices, and kept an assistant at each place, and treated patients at the places at stated intervals; that prior to coming to Graham he had his headquarters and lived at Mineral Wells, and had practiced there and at Jacksboro, and had lived at Mineral Wells 18 months; that upon leaving Mineral Wells he moved with his wife and children to Graham, where they lived at a hotel up to within three weeks of the time of filing the information, when his wife and children went on a visit to relatives at Quanah. Appellant received his mail at Graham, which was his headquarters, and practiced nowhere except at his offices before mentioned. In our opinion these facts do not constitute appellant a traveling physician as contemplated by article 5049, supra. For a full discussion of the matter, see *Hairston v. State*, 36 Tex. Cr. R. 470, 37 S. W. 838, and

Broiles v. State (Tex. Cr. App.) 68 S. W. 685.

The judgment is accordingly reversed, and the cause remanded.

RATLIFF v. STATE

(Court of Criminal Appeals of Texas. Feb. 10, 1904.)

INTOXICATING LIQUORS—ILLEGAL SALE—INSTRUCTIONS.

1. On a trial for violating the local option law, there being simply a question whether defendant made a sale, a charge that, when the facts have been proved which constitute the offense, it is for defendant to establish the facts on which he relies to excuse or justify the prohibited act, is inapplicable, and ground for reversal.

Appeal from Young County Court; Jo W. Akin, Judge.

Buck Ratliff appeals from a conviction. Reversed.

Jno. C. Kay and C. W. Johnson, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of violating the local option law, the penalty assessed being a fine of \$25 and 20 days in jail. There is one fatal error in the charge, to wit: "On the trial of any criminal action, when the facts have been proved which constitute the offense, it devolves upon the accused to establish the facts or circumstances on which he relies to excuse or to justify the prohibited act." This charge is not applicable to the facts of this case, and has been frequently held to be reversible error. *Richardson v. State*, 32 Tex. Cr. R. 524, 24 S. W. 894; *Burney v. State*, 21 Tex. Cr. App. 565, 1 S. W. 458; *Jones v. State*, 13 Tex. App. 1; *Dubose v. State*, 10 Tex. App. 230; *Luera v. State*, 12 Tex. App. 257; *Ainsworth v. State*, 8 Tex. App. 532; *Guffee v. State*, 8 Tex. App. 187. It is useless to cite other authorities. The charge and conviction was for violating the local option law; and it was simply a case, under the facts, as to whether appellant sold the whisky or not. There were none of those questions raised as defensive matter to which article 52, Pen. Code 1895, applied. The testimony leaves it in serious doubt, in our opinion, as to whether there was a sale. The alleged purchaser, Lax, testified that on the day of the alleged sale his partner, Pogue, told him, as he was starting down the street, if he saw defendant, to get his (Pogue's) whisky, if it had come; that Lax found Ratliff at the blacksmith shop, and got a pint of whisky; that Lax offered pay for the whisky, but Ratliff refused to take the money, saying the whisky had been paid for. Witness thereupon said: "I owe you for vegetables;" and Buck Ratliff said, "Well, I owe you an account at the blacksmith shop;" and Ratliff finally took and kept the seventy-five cents. At the time Ratliff owed us \$2 or \$3 at the shop, and I owed him some for vegetables. We had not settled our accounts,

and have not yet." This is the state's case. Pogue testified that he and appellant had sent for the whisky; that they had sent the money off in the order, and the bottle he requested his partner to secure was his part of the whisky; that they had ordered it from Ft. Worth. If this was Pogue's whisky, or it was delivered to Lax for Pogue, under Pogue's statement it could not possibly constitute a sale to Lax. However, if Lax went down and got the whisky from appellant, and paid the 75 cents for it, this might warrant the jury in finding it was a sale to Lax, and not the whisky of Pogue. In order to justify a conviction, the jury must find that it was a sale to Lax by reason of his paying the 75 cents for it. The fact that he got Pogue's whisky, if they believed that theory, they should be instructed to acquit.

On account of the error in the court's charge, the judgment is reversed, and the cause remanded.

BROWN v. STATE.*

(Court of Criminal Appeals of Texas. Jan. 27, 1904.)

BURGLARY—EVIDENCE—SUFFICIENCY.

1. On prosecution for burglary, evidence examined, and held to sustain a conviction.

Appeal from District Court, Hunt County; T. D. Montrose, Judge.

John Brown was convicted of burglary, and appeals. Affirmed.

A. J. Gates, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of burglary, and his punishment assessed at five years' confinement in the penitentiary; hence this appeal.

There are no bills of exception in the record, and the only contention made is that the evidence is not sufficient to support the verdict. The evidence, though purely circumstantial, in our opinion is fully sufficient to support the finding of the jury. Appellant was found in possession of some of the goods taken in the alleged burglary a little over a month thereafter; that is, the testimony tends to show circumstantially that appellant was in possession of said goods. The trunks, etc., were removed from the house occupied by him and placed in the barn, and a few days thereafter, on the examination of the trunks, etc., said burglarized goods were found. Besides, there were other circumstances in the case tending to connect appellant with the offense. We do not deem it necessary to go into a discussion of the facts, but in our opinion they were ample to sustain the conviction. *Gass v. State* (Tex. Cr. App.) 56 S. W. 73.

There being no error in the record, the judgment is affirmed.

*Rehearing denied February 24, 1904.

SMITH v. STATE.*

(Court of Criminal Appeals of Texas. Jan. 27, 1904.)

JUSTICES OF THE PEACE—APPEAL BOND.

1. Where, on appeal from a justice to the county court, the bond did not state the time of holding the next regular term of the county court, as required by article 889, Acts 27th Leg. p. 291, the appeal should be dismissed.

Appeal from Navarro County Court; A. B. Graham, Judge.

Gus Smith was convicted before a justice of the peace of an assault, and from the judgment of the county court, dismissing his appeal, he appeals. **Affirmed.**

J. T. Williams, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was prosecuted in the justice court of Navarro county for an assault, was convicted, and his punishment assessed at a fine of \$5; from which conviction he attempted to appeal to the county court, executing an appeal bond, as follows: "Whereas on the 7th day of May, 1903, in said justice court, judgment was rendered and entered against Gus Smith, defendant in the above entitled and numbered cause, that the State of Texas, have and recover of and from the said Gus Smith, the sum of five dollars fine, and all costs of said prosecution. That in said cause, defendant Gus Smith was convicted on complaint charging him with a misdemeanor; that said defendant has appealed to the county court of Navarro county, Texas. Therefore we, Gus Smith, as principal, and the others signed hereto, as sureties, hereby bind ourselves heirs and legal representatives jointly and severally to pay to the State of Texas, the sum of Eighty Dollars, conditioned that the said Gus Smith, shall well and truly make his personal appearance before the county court of Navarro county, Texas, at the next regular term, to be holden, on the 3rd day of August, 1903, at the courthouse in the city of Corsicana, Texas, and there remain from day to day and term to term and answer in said cause on trial in said court. Now, therefore, if the said Gus Smith shall well and truly comply with all of the conditions of this bond, then the same shall be null and void, otherwise to remain in full force and effect," etc. Which bond was signed by sufficient number of sureties, and approved by the justice of the peace. When the case was called in the county court, the county attorney moved to dismiss the appeal because said bond is not conditioned as required by law, and because said appeal bond is conditioned for the personal appearance of defendant on the first Monday in August, 1903, and not for his personal appearance before this court at its next regular term after the trial of said cause in the court below, and wholly fails to correctly state the time at

which any term of this court is to be held. The court below sustained the motion. In this there was no error. Article 889, Acts 27th Leg. p. 291, in stating the requisite of an appeal bond from the justice to county court, requires that the time and place of holding the next regular term of the court shall be stated in the bond. The bond in this instance does not so state. The caption shows that the term of the county court convened on the 6th day of July, 1903. The action of the lower court was correct.

The judgment is affirmed.

THURMAN v. STATE.

(Court of Criminal Appeals of Texas. Feb. 10, 1904.)

INTOXICATING LIQUORS—LOCAL OPTION—CRIMINAL PROSECUTIONS—INDICTMENT—EVIDENCE—INTERNAL REVENUE INTEREST.

1. An indictment charging that defendant "on or about the ____ day of ____, A. D. 190-, * * * did then and there unlawfully, on October 15, 1901, an election in accordance with the laws of this state was held, * * * and thereafter on, to wit, the 1st day of January, 1903, in said county, did then and there unlawfully sell to one * * * intoxicating liquors in violation of said law," is improper in failing to intelligently allege whether the dates mentioned referred to the local option election or the date of the sale, and in failing to intelligently specify on what particular date the sale was made.

2. True copies of books of record from the office of the internal revenue collector are admissible, but statements which the witness swears he saw recorded in such books are incompetent.

3. A witness' opinion that a record of entries in the office of the internal revenue collector covered taxpayers from June 1, 1902, to the same date in 1903 is inadmissible.

Appeal from Eastland County Court; S. A. Bryant, Judge.

Bub Thurman was convicted of violating the local option law, and appeals. **Reversed.**

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Conviction for violating the local option law, penalty assessed being a fine of \$25 and 20 days' confinement in the county jail.

Appellant moved to quash the indictment because the date of the offense as alleged is uncertain, and it charges the offense was committed on two or more separate and distinct dates. The indictment is as follows: "That Bub Thurman, on or about the ____ day of ____, A. D. 190-, and anterior to the presentment of this indictment in the county and state aforesaid, did then and there unlawfully on October 15, 1901, an election in accordance with the laws of this state was held, under authority of an order of the commissioners' court of Eastland county, Texas, theretofore duly made and published, to determine whether or not the sale of intoxicating liquors should be prohibited in said

*Rehearing denied February 24, 1904

county, and the qualified voters at said election did then and there determine that the sale of intoxicating liquors should be prohibited in said county, and thereupon the commissioners' court of said county did then and there pass and publish an order declaring the result of the said election and prohibiting the sale of intoxicating liquors in said county, and thereafter, on, to wit, the 1st day of January, 1903, in said county, Bub Thurman did then and there unlawfully sell to one Richard Walker, intoxicating liquors in violation of said law, against the peace and dignity of the state." It will be observed that in the first portion of the indictment, it is charged that Bub Thurman "on or about the — day of —, A. D. 190—, and anterior to the presentment of this indictment," committed the offense. It is further alleged that he "did then and there unlawfully on October 15, 1901, an election in accordance with the laws of this state was held," etc. This seems to be a mere jargon of words more than an intelligent allegation of anything. If this was intended to allege the date of the sale, then we have two dates, one in the year 190— and the other in 1901. But it is so thrown in that it seems to be disconnected with everything, and it is difficult to tell whether the pleader intended it should refer to the local option election, or to the date of sale, or either. It will be further observed there is a date near the conclusion of the indictment, which alleges the sale "on the 1st day of January, 1903." This character of pleading should not be tolerated.

By bill of exceptions No. 6 it is shown that the witness L. A. Hightower was permitted to testify that he had been to Dallas, and into the office of the United States revenue collector of the Fourth District of Texas, and had gone over book No. 10, record of special taxpayers, and gotten therefrom the following: "Name of J. M. Thurman. Business R. M. L. D. 4 Place Carbon. From what time—Aug. Amt. paid, \$18.33. When paid—Aug. 22nd. Serial number 9907." And in connection with this the witness was permitted to further testify as follows: "My understanding is that the record covered taxpayers for present year from June 1 or July 1, 1902, to same date in 1903." Various, sundry, and divers objections and exceptions were urged to the introduction of this testimony. We have held that copies of books or record from the office of the internal revenue collector could be used in evidence. *Gersteman v. State*, 35 Tex. Cr. R. 318, 33 S. W. 357; *Lucio's Case*, 35 Tex. Cr. R. 320, 33 S. W. 358; *Pitner v. State*, 37 Tex. Cr. R. 268, 39 S. W. 662. But here the testimony is not a copy of any form. If this is shown to be a true copy of the book mentioned, it would be admissible, but not so if the statement is what the witness swears he saw recorded in the book. We are further convinced that the witness Hightower's con-

clusion or opinion, or understanding, as he calls it, that this record covered taxpayers from June or July 1, 1902, to the same date in 1903, is inadmissible. This bill of exceptions is well taken. Other bills of exception are so indefinite and uncertain that we premit no discussion.

For the error indicated, the judgment is reversed, and the prosecution ordered dismissed.

TOWNSELL v. STATE.

(Court of Criminal Appeals of Texas. Dec. 16, 1903.)

HOMICIDE—GRADE—MITIGATING CIRCUMSTANCES — EVIDENCE — RELEVANCY — APPEALS — STATEMENT OF FACTS—TIME FOR FILING.

1. A motion for a continuance will not be considered on appeal where the statement of facts was not filed within the time allowed by the order of court.

2. In a prosecution for homicide, evidence that defendant, as secretary of a negro society, along with other members of the society, or the society as a whole, furnished evidence to the grand jury as a predicate for indictments for fornication against deceased and others, was irrelevant.

3. Where the purpose of testimony sought to be attained is not shown in bills of exceptions, they cannot be considered.

4. The fact that deceased had accused defendant and his wife of having a venereal disease could not be used to reduce the killing of deceased from murder to manslaughter; the language being spoken directly to defendant, and the killing not occurring for a week or 10 days thereafter, and there being no evidence of intervening insulting language.

On Rehearing.

5. The order limiting the time within which to file a statement of facts must be entered at the term at which the conviction is had, and cannot be entered nunc pro tunc at the following term.

Appeal from District Court, Kaufman County; J. El Dillard, Judge.

George Townsell was convicted of murder in the second degree, and appeals. Affirmed.

E. H. Wicks and Wm. H. Allen, for appellant. T. R. Bond, J. S. Woods, Co. Atty., and Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of murder in the second degree, and his punishment assessed at five years' confinement in the penitentiary.

The term of court adjourned on July 25th and the statement of facts was filed on August 14th. The order of the court allowed ten days after adjournment in which to file the statement of facts. The motion for continuance will not be discussed, because the statement of facts was not filed within the ten days allowed.

Bill of exceptions was reserved to a statement of the county attorney to the effect that it was "moonshine to talk about one having a right to kill another because the other man is guilty of fornication or living in adultery.

and all this evidence has nothing in the world to do with the murder of Henry Shaw. In this case the killing was a premeditated and unprovoked murder, and no person can shoot another down like a dog simply because deceased happens to be guilty of fornication." These remarks were made by the county attorney in response to some remarks by appellant's counsel where it was sought, in cross-examination of witness Tom Shannon, to develop the fact that indictments for fornication which were pending against deceased and others were instigated by what is termed the "Good Living Society," of which defendant was secretary. These remarks were made to the court in arguing objections pro and con in regard to the offered, but rejected, testimony. We do not understand the relevancy of this testimony, and it is not made to appear by bill of exceptions. Nor is it made to appear how the remarks of the county attorney could have injuriously affected defendant. In fact, the bill fails to show or connect up the facts so that this court can understand the force and effect of the testimony, or how the remarks of the county attorney could have injured appellant in any way. That the Good Living Society may have instigated indictments against some of its members or other negroes (and it seemed to be a negro society) could have benefited appellant is not shown by the facts, or how it could have injured him, or why it should have been in the case, one way or the other. If, as a matter of fact, appellant, as secretary of the Good Living Society, along with the other members of the society, or the society as a whole, furnished evidence to the grand jury as a predicate for the indictments, it would not have been any excuse, extenuation, or mitigation on the part of defendant in killing deceased. Nor, as we understand the law, would it furnish a reason for impeaching the witness Shannon.

The purpose and object of the testimony sought to be attained as set out in bills Nos. 4 and 5 is not shown or stated in the bills. Therefore they cannot be considered.

By the sixth bill it is shown the witness Fields had testified for defendant that on Saturday, before the homicide the following Sunday, deceased told him that he had heard that he (deceased) had been indicted for fornication, and he heard that appellant or Jones Ross must have sent his name in, and that, if either of them told him he had done it, he would kill the one who said it, and showed the witness a pistol, saying he was fixed, and would make a good job of it. The state then asked the witness, on cross-examination, to whom had he stated this before the trial; and he replied he had not told it to any one for a long time after the killing, because he did not want to be a witness, and did not like defendant, because defendant had procured an indictment against one of his sons for fornication at the same time Henry Shaw (deceased) was indicted, but that he told Esquire

Frank about deceased having the pistol, and showed it to witness on Saturday before the killing, but had not told Esquire Frank what deceased had said. Defendant excepted to this on the ground that it was immaterial, and the court overruled the objection. Esquire Frank then stated that witness Fields had never stated to him anything about having a conversation with deceased, or in regard to deceased showing him a pistol. We suppose this was introduced on the theory of impeachment. The bill does not show, and the facts are not before us.

A bill of exceptions shows that evidence was introduced going to show that, a week or ten days before the homicide, deceased had accused appellant and his wife of having a venereal disease; that appellant immediately threw a beer glass at deceased, and they were separated by the barkeeper. On these facts, the county attorney, it seems, was arguing the law and discussing the facts before the court and jury; insisting that under no event could the facts in evidence reduce the killing from murder to manslaughter on the ground of insulting language to the mother or wife of the defendant, as used by deceased, for the reason that defendant had not proven that his wife and mother were virtuous, or that their reputation for chastity was good, and, until this was done, adequate cause did not exist to reduce the offense to manslaughter. And in view of this argument, appellant presented a charge to the court, which was refused. As before stated, the facts are not before us, and cannot be considered. If this was all the language used by deceased, and this was the only occasion, the testimony, of course, could not be used to reduce from murder to manslaughter, because it was spoken directly to appellant, and the killing did not then occur, nor did it occur for a week or ten days thereafter; and there was no evidence of intervening insulting language. So, as this bill is presented, there is nothing to consider. If, as a matter of fact, insulting conduct or language—either or both—intervened, which would have tended to reduce, if found by the jury to be true, the murder to manslaughter, subsequent to the occasion mentioned in the bill of exceptions, perhaps there might have been some reason for the court to have guarded the jury. But the matter is not presented by this bill, and it is therefore unnecessary to discuss it.

As the record is presented, we are of opinion that this judgment should be affirmed.

On Rehearing.

(Feb. 24, 1904.)

The judgment was affirmed at the Tyler term. The statement of facts was not considered, because not filed within the 10 days allowed by the court after the adjournment of the term in which to file the same. On rehearing, it is made to appear that appellant

asked that the court enter an order allowing 20 days, but, instead, the court made an entry for 10 days. The judgment allowing the 10 days was rendered at the May term, and at the following December term of court an order was entered nunc pro tunc allowing 20 days. This cannot be done. The proper order must be entered at the term at which the conviction was had. *Sampson v. State* (this day decided) 78 S. W. 926.

The motion for rehearing is accordingly overruled.

DODSON v. STATE.

(Court of Criminal Appeals of Texas. Feb. 10, 1904.)

HOMICIDE — SELF-DEFENSE — INSTRUCTIONS — REASONABLE BELIEF.

1. In a prosecution for homicide an instruction on self-defense that, if deceased was a county convict, and was placed in defendant's custody to perform labor on the public road, and was superior in strength to defendant, and defendant attempted to chastise deceased for violating a rule for the government of convicts, and deceased struck defendant, and defendant believed, and had the right to believe, that deceased was about to take his life, or inflict on him some serious bodily injury, and, so believing, shot and killed deceased, he should be acquitted, was improper in coupling distinct matters so as to require the jury to believe all in order to acquit.

2. On the issue of self-defense a charge that, in order to acquit, the jury must not only believe that defendant believed deceased was about to take his life or inflict some serious bodily injury, but that defendant had the right to reasonably believe that he was about to take his life or inflict serious bodily injury, was misleading, as merely a reasonable appearance of danger of loss of life or of serious bodily injury would have given defendant the right to act in self-defense.

Appeal from District Court, Ellis County; J. E. Dillard, Judge.

Sam Dodson was convicted of manslaughter, and appeals. Reversed.

M. W. McKnight and Templeton & Harding, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of manslaughter, and his punishment assessed at confinement in the penitentiary for a term of five years. This case was before us at the Tyler term, 1902, and was reversed for reasons set out in the opinion as found in 70 S. W. 909. The facts are not materially different, as reported in that case, than those found in the record now before us. Error is assigned upon the charge of the court on the issue of self-defense: "The jury are further instructed, * * * if they believe from the evidence that defendant, Sam Dodson, shot Allen Brown, deceased, with a pistol and killed him, as alleged in the indictment, but further believe that at the time of doing so, if he did, that said Allen Brown was a county convict, and had been placed

in the custody and under the control of defendant by the proper authorities of Ellis county to perform labor upon the public road, and that he was a man who was superior in strength to defendant; and if they further believe from the evidence that defendant attempted to chastise said Allen Brown with a strap of leather for violating a rule established by the commissioners' court of said Ellis county for the government of county convicts; and if they should further believe from the evidence that he, the said Allen Brown, assaulted defendant with his hands, and attempted to take his pistol away from him, and struck defendant with his fist, or with a rock, or some other hard substance; and if the jury further believe and find from the evidence that defendant believed, and had the right reasonably to believe, viewed from defendant's standpoint at the time, and viewed in the light of all the surrounding circumstances, that deceased was then about to take his life, or inflict upon him some serious bodily injury, and, so believing, if he did, he shot deceased with a pistol, and killed him—then it would be the duty of the jury to acquit defendant upon the ground of self-defense." An exception was reserved to this charge, and a special charge requested, which was refused, as follows: "If you believe from the evidence that defendant, in the reasonable exercise of his right to inflict chastisement, undertook to chastise Allen Brown with a strap, and that while in the act of doing so Allen Brown grabbed defendant, and assaulted him, and you further believe from the evidence that by reason of the acts, strength, and conduct of Allen Brown, if any, defendant was put in danger of loss of life or serious bodily harm, or if you believe that it so appeared to defendant at the time, viewed from defendant's standpoint, under all the surrounding circumstances, and that so believing he shot and killed Allen Brown—then you will find the defendant not guilty. If you have a reasonable doubt upon this question, you will give defendant the benefit of it, and acquit him." Among other criticisms of this charge on self-defense is that it coupled distinct matters and linked them together one upon the other, and required the jury to believe all of them in order to acquit; that, should the jury disregard any one of these enumerated grounds, they would not be authorized, under the court's charge to apply the law of self-defense. We believe this criticism is correct. The charge on self-defense should have been given substantially as requested by appellant, and it was not necessary, under the circumstances, that all these matters should be believed in order to justify an acquittal. The jury may have and doubtless did believe that, before they could acquit, every one of the circumstances linked together by the court's charge should have taken place, and, if they should not believe any one of the grounds specified, they could not acquit.

The charge is further criticised—and, we believe, correctly—because the court stated the ground of reasonable belief entirely too strong against accused in informing the jury that, in order to acquit defendant, they must not only believe from the evidence that defendant believed deceased was about to take his life or inflict upon him some serious bodily injury, but that defendant “had the right to reasonably believe” that he was about to take his life or inflict upon him serious bodily injury. If the facts or circumstances were such that it reasonably appeared to defendant that he was about to lose his life or have serious injury inflicted upon him, he had a right to act in self-defense. Upon another trial this phase of the law should be given as heretofore indicated by the decisions. It may be that the jurors understood from this manner of putting the reasonable appearances of danger that they were required to find that the facts did in fact exist. This charge is misleading to say the least of it, and this phase of the law should be given as we have always understood the law of reasonable appearances of danger. *Richardson v. State*, 7 Tex. App. 493.

The charge of the court on manslaughter is also criticised; that is, the action of the court is complained of with reference to the omission of the charge as to the infliction of a wound by deceased upon appellant, producing pain or bloodshed. The court's charge was general upon the question of manslaughter, and authorized the jury to take into consideration all the facts and circumstances. If the jury had only given two years, or the minimum punishment, the failure to give this phase of the law would have made no difference. Upon another trial, however, it would be safer and better for the court to charge the jury directly and pertinently with reference to pain or bloodshed that may have been caused by striking defendant with a rock. From the defendant's standpoint, perhaps this was the crucial fact bearing upon manslaughter. The statute specifies a wound of this sort as adequate cause.

Because of the error of the court in his charge upon self-defense, the judgment is reversed, and the cause remanded.

THOMPSON v. STATE

(Court of Criminal Appeals of Texas. Feb. 10, 1904.)

CRIMINAL LAW—LARCENY—EVIDENCE—RES GESTÆ—INSTRUCTIONS—APPEAL—BILL OF EXCEPTIONS.

1. On appeal from a conviction for the theft of a lap robe, objections to testimony concerning other lap robes in the possession of the accused, on the ground that there was no testimony showing that they were stolen, or stolen at the same time and place with one in question, and that it was “irrelevant and immaterial,” will not be considered where the bills of exceptions do not show whether there was testimony tending to connect the other lap robes with the one in question.

2. Where a buggy harness was with a lap robe, and was shown to have been taken at the same time, evidence concerning it was admissible in a prosecution for theft of the lap robe, as part of the *res gestæ*, though it was not traced to the possession of the accused.

3. An instruction that if the lap robe in question was stolen, and recently thereafter was found in the accused's possession, and he gave an explanation that was reasonable and probably true, and accounted for his possession in a manner consistent with his innocence, the jury must consider the explanation true, is not erroneous in failing to state that there could be a conviction only in case it was shown that the explanation was false.

4. Where, on a trial for theft of a lap robe, there was no controversy that it was worth a dollar, and the court submitted a misdemeanor to the jury, there was no error in failing to submit some proved value to the jury.

Appeal from Erath County Court; L. N. Frank, Judge.

Bill Thompson was convicted of a theft of property, and appeals. Affirmed.

J. M. Carter, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of the theft of property under the value of \$50, and his punishment assessed at a fine of \$1, and 10 days in the county jail; hence this appeal.

During the trial appellant excepted to the introduction in evidence of testimony concerning certain other lap robes besides that charged in the indictment. Bill No. 9 on this subject is substantially as follows: Ed Wilson testified, on direct examination for the state, that defendant turned over to him said lap robes; that he did not buy the lap robes from defendant. When defendant turned them over to him he told him to keep them; that if he never called for them to consider them his (witness'); that he kept seven lap robes for two months and a half, and then turned them over to Squire Farrar at Hico. This testimony was objected to on the ground, as stated, that there was no testimony showing that said other lap robes were stolen, or, if stolen, that they were stolen at the same time and place. The bill does not apprise us otherwise, with regard to said lap robes, than as stated above; much less does the bill show that there was no testimony tending to connect the other lap robes with the one in question. The bill does not even show that the lap robe in question was included in the seven turned over to the witness. The bill itself should have shown enough in its statement of facts to indicate that the court erred in admitting the testimony. The statement of objection is not a certificate by the judge that the facts therein stated existed. In the absence of a showing in the bill that the testimony was not admissible under any conditions, we will not assume that the court erred in its admission. *Cline v. State*, 34 Tex. Cr. R. 347, 30 S. W. 801; *Wright v. State*, 36 Tex. Cr. R. 35, 85 S. W. 287; *McGlasson v. State*, 38 Tex. Cr. R. 351, 43 S. W. 93; *Baldrige v. State* (Tex. Cr. App.) 74

S. W. 916. We would further remark, in connection with this bill, that it does not show that said lap robes were stolen at all, and, for aught that appears, no prejudice could have resulted to appellant by the introduction of said evidence.

By bill of exceptions No. 10, appellant objected to the testimony of the witness Herring to the effect that he was justice of the peace of precinct No. 4 of Erath county, and, some time in August, 1903, the witness Wilson turned over into his care and keeping seven lap robes, for the theft of one of which defendant was on trial. This testimony was objected to on the ground that it was immaterial how many lap robes were turned over to witness by Ed Wilson; that said testimony was irrelevant, and calculated to prejudice the rights of defendant before the jury. We make the same observations with reference to this bill as to the preceding bill. For aught that appears, these other lap robes may have been taken at the same time and place as the one for which defendant was being tried, and constituted a part of the *res gestæ* of the transaction; and so were admissible. Moreover, the objection to the testimony—"irrelevant and immaterial"—is not a good objection.

What we have said with reference to these bills is equally applicable to appellant's bill No. 11, which relates to the admission in evidence of a set of buggy harness, except that, in our opinion, the bill directly shows the testimony relating to the buggy harness was admissible. It was with the lap robe alleged to have been stolen, and was shown to have been taken at the same time, and evidently the person who took the lap robe must have taken the harness. The taking of it was a part of the *res gestæ* of the transaction, and was admissible in evidence, though it was not traced to the possession of appellant. It will be noted, in regard to all of this testimony, that the court did not give an instruction as to how the jury should regard it, but no exception was taken to the charge of the court on that account.

Appellant urged various objections to the charge of the court, none of which, in our opinion, are tenable. The court's instruction to the jury as to how they should regard the possession by appellant of the lap robe in controversy was in accordance with the rules of law, and more favorable to him than the requested instruction on that subject. The court simply told the jury, if they believed the lap robe in question had been stolen from the prosecutor, and that recently thereafter it was found in possession of appellant, and that he gave an explanation of how he came by it, and that the same was reasonable and probably true, and accounted for appellant's possession in a manner consistent with his innocence, the jury must consider such explanation true, and acquit him. Appellant insists in this connection that the jury should have been further instructed that the state

could only insist on a conviction in case it had shown that the explanation was false. The charge requested has frequently been held to be a charge on the weight of testimony, and the court properly refused to give it. The charges given, as stated, very properly told the jury to acquit defendant if they believed his explanation true, and refrained from telling them that they could convict appellant on his possession if they believed his explanation false. The court also gave a charge presenting the same theory of defense, when the jury were told, if they believed defendant traded for the lap robe, to acquit him. This was the same matter involved in appellant's explanation.

Nor did the court err, in applying the law to the facts of the case, in failing to submit some proved value of the lap robe in question to the jury. There was no controversy as to its value, the evidence showing without question that it was worth a dollar, and the court only submitted a misdemeanor to the jury.

It is not necessary to discuss other propositions raised by appellant, as they are not well taken. We have examined the record carefully, and, finding no errors therein, the judgment is affirmed.

HUCKABY v. STATE.

(Court of Criminal Appeals of Texas. Feb. 17, 1904.)

FORGERY — WILL — SUFFICIENCY OF INDICTMENT—TESTATOR'S DEATH—ELEMENT IN OFFENSE.

1. Where an indictment for forgery sets out the instrument according to its tenor, and there is no similarity of names between the person whose act it purports to be and defendant, it is not necessary to allege that it purports to be the act of another than defendant.

2. An indictment for forging a will must allege that the purported testator was possessed of an estate subject to be disposed of by will, and that he was dead at the time of the forgery.

3. One cannot be prosecuted for having a forged will in his possession, with intent to utter, until after the purported testator's death.

4. Pen. Code 1895, art. 530, declares guilty of forgery one who, without authority, and with intent to injure or defraud, makes a false instrument, purporting to be the act of another, in such manner that it would, if true, "have created, increased, diminished, discharged or defeated any pecuniary obligation, or would have transferred or in any manner have affected any property whatever." Article 536 declares that "pecuniary obligation" means every instrument having money for its object, and every obligation for the breach of which a civil action for damages may be brought. Article 537 provides that by an instrument which would "have transferred or in any manner have affected" property is meant every species of conveyance or undertaking in writing which supposes a right in the person purporting to execute it to dispose of or change the character of property of every kind, and which can have such effect when genuine. *Held*, that a will is not an instrument subject to forgery during the lifetime of the purported testator.

Brooks, J., dissenting in part.

Appeal from District Court, Freestone County; L. B. Cobb, Judge.

Henry E. Huckaby was convicted of forgery, and appeals. Reversed.

H. B. Daviss, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of uttering or passing as true a forged instrument in writing, and his punishment assessed at two years' confinement in the penitentiary; hence this appeal.

Appellant made a motion to quash the indictment on several grounds, which was overruled by the court. In order to present the matter, we will set out the charging part of the second count, under which appellant was convicted, to wit, that Henry Huckaby, on or about October 21, 1898, "did then and there, unlawfully and knowingly and fraudulently, have in his possession, with intent to use and pass the same as true, a false and forged instrument in writing, to the tenor following: 'In the Name of God, Amen. I, Bry Huckaby, of Dew, Texas, Freestone county, do hereby make, publish and declare this my last will and testament, hereby revoking any and all wills heretofore made by me. First, I direct by executors hereinafter named, to pay my funeral expenses, and all my just debts and liabilities as soon as can be done after my decease. Second, I give and bequeath to my son, Bry, and daughter Mary's heirs, executors, administrators and assigns forever, two-thirds of my real-estate, except my grand-son Henry, who is exempted. (3) I give and bequeath to my wife Easter, the remaining one-third of my real-estate, the same to contain my dwelling house and the improvements around the same. (4) I further agree to give my wife Easter, all of my personal property after my debts and other liabilities are paid. (5) I hereby appoint my wife, Easter, executrix, and my son, Bry, executor, of this my last will and testament. In witness whereof I have hereunto subscribed my name and affix ^{his} my seal, this 2nd of July, 1897. Bry X mark.

Huckaby. [Seal.] Signed, sealed and published and declared by the said Bry Huckaby, as and for his last will and testament, of us, who at his request in the presence of him and of each other have hereunto subscribed our names as witnesses. Mary Wilson of Corsicana, Texas. H. E. Huckaby, Luna, Texas—against the peace and dignity of the state."

Appellant insists that the indictment should have been quashed because it is not alleged in said count that it purported to be the act of Bry Huckaby; that is, the act of another person than appellant. As a matter of fact, there is no such allegation in the second count, and we are not authorized to bring this allegation forward from the

first count. In *Anderson v. State*, 20 Tex. App. 595, which was a case of forgery, the court appears to hold that this averment is necessary. However, in that case the allegation was contained in the indictment, and the question was not before the court. *Rhudy's Case* (Tex. Cr. App.) 58 S. W. 1007, follows the above case, but holds that, while it is necessary to allege that the act purported to be that of another than defendant, it is not necessary to state the name of such other person alleged to be forged. In *Webb v. State*, 39 Tex. Cr. R. 584, 47 S. W. 356, the court went still further, and held in a forgery case that the indictment need not allege that it was the act of another where the instrument was set out in the indictment according to its tenor. This case cites *Thurmond v. State*, 25 Tex. Cr. App. 366, 8 S. W. 473, which is authority for holding, in a charge for uttering a forged instrument, it is not necessary to allege that it purports to be the act of another, where the instrument alleged to be forged was set out according to its tenor. From this statement it seems that the authorities on this subject are in a state of some confusion. We believe, under our system of pleading, that the last two cases announce the correct doctrine. Of course, there might be a case where there was similarity of names between that of the alleged forger and the party whose name is charged to have been forged, and in such case it might be necessary to allege that the forged instrument purported to be the act of another than the party charged with forging the instrument. We accordingly hold that the indictment is good, as to this objection.

Appellant also questions the indictment because it does not import an obligation on its face, and, if it was the subject of forgery, this should be shown by extrinsic and explanatory averments. It is the rule in this state, where the instrument does not show on its face that it imports an obligation in regard to money or property, but is the subject of forgery, and can be shown to be such by extrinsic averments, that these extrinsic or explanatory averments must be alleged. See *Cagle v. State*, 39 Tex. Cr. R. 112, 44 S. W. 1097; *Womble v. State*, 39 Tex. Cr. R. 24, 44 S. W. 827; *Crawford v. State*, 40 Tex. Cr. R. 344, 50 S. W. 378; *Colter v. State*, 40 Tex. Cr. R. 165, 49 S. W. 379; *Black v. State*, 42 Tex. Cr. R. 585, 61 S. W. 478. The instrument here, which is charged to be the subject of forgery, is not one of the ordinary instruments used in commercial transactions, such as a note, draft, bond, contract, etc., but purports to be the will of Bry Huckaby. Before this paper could have the effect to create or discharge a pecuniary obligation, or transfer or in any manner affect any property, certain facts would have to be proven; that is, that the alleged testator was possessed of an estate subject to be devised by will. And we also believe, as will be shown hereafter, it would have to be proven that

he was dead at the time of the alleged forgery. None of these matters are alleged in the indictment. We believe it was defective on this account. We understand it to be conceded in the statement of facts that the testator was alive at the time of the alleged forgery; nor is there anything in the agreement to show that he has since died. The agreement appears to indicate that he was still living at the time of the prosecution.

Appellant insists that, under these circumstances, the alleged instrument purporting to be the last will of Bry Huckaby could not be the subject of forgery, and, per consequence, he could not be held for passing or uttering as a forged instrument. In *Johnson v. State*, 9 Tex. App. 249, it is held that, although an instrument may not be the subject of forgery at the time it is made, yet if subsequently a law is passed which makes such an instrument forgery, and it is subsequently uttered, a prosecution for passing the same as true may be sustained. If it be conceded that this decision announces a sound doctrine, and is applicable to a case of this character, then it would follow, if the will could not be forged during the lifetime of Bry Huckaby, but it might become the subject of prosecution for knowingly having same in possession, with intent to pass it as true, after his death, in such case the death of said Huckaby must be alleged and proven, in order to sustain a conviction. The death of said Huckaby is not shown in the agreement, and consequently there can be no illegal uttering of the will—much less, having same in possession, with intent to utter—as we believe no one will contend that the will had any legal efficacy to affect property during the lifetime of the alleged testator, and could only affect property under certain formalities after his death. Rev. St. 1895, arts. 1842, 1884, 1904–1907, 5333–5335. The above-cited articles show statutory formalities which must be observed in order to give a will any legal efficacy or standing for the purpose of transferring or affecting property.

However, the most important question raised by appellant is that, under our statute, a will is not the subject of forgery during the life of the declarant. In England, as we understand the authorities, it is distinctly held that forgery can be committed by falsely making the will of a living person. See *Russell on Crimes*, vol. 2, p. 748. We are cited to a number of cases in the text-writers which support this view, but the cases cited are mostly, if not all, English cases. These cases would only be persuasive if under a definition of forgery similar to our own statutory definitions of that offense. But as we understand the English or common-law definition of "forgery," the instrument must be such that, if genuine, it would be apparently of some legal efficacy. *Bishop, Cr. Law*, vol. 2, § 523. And it is not necessary, as under our statute, that the instrument

must be such that, if the same were true, it would have created, diminished, discharged, or defeated any pecuniary obligation, or would have transferred or in any manner have affected any property whatever. The injury intended must be such as to affect one pecuniarily, or in relation to his property. See articles 536, 537, Pen. Code 1895. It will be noted that all the provisions of our statute are used in the past, and not the present, tense—that is, the language is, "would have created, would have transferred"—and do not depend on some future contingency in order to give them legal efficacy. Now, can it be held that the will, if genuine, during the lifetime of the testator would have the effect, in present, to create or discharge any pecuniary obligation, or to transfer or affect any property whatever? It is essentially ambulatory during the lifetime of the declarant, subject to his revocation at any time, and cannot possibly take effect until his death. Being such an instrument, we hold that it is not the subject of forgery, where the making of the instrument occurs during the life of the testator. It is hardly necessary to observe that all our offenses are purely statutory, and the statute must clearly define and cover the offense before a prosecution can be maintained. We cannot have recourse to the common law to make out an offense. *Rogers v. State*, 8 Tex. App. 401. As, in our forgery law, defects in the past have been discovered and amended by the Legislature, so as to embrace matters not theretofore criminal, we here call the attention of the Legislature to this matter, in order that the statute with reference to forgery may be amended so as to embrace wills, if deemed necessary.

For the errors discussed, the judgment is reversed, and the prosecution ordered dismissed.

BROOKS, J. (dissenting). I do not agree with the opinion of the majority, reversing and dismissing the case, and will state my views:

Appellant insists that the indictment is defective, because the will was written during the lifetime of the testator, Bry Huckaby, and could have no legal effect until probated after his death; hence it was of itself void and of no legal effect, and would not, if true, have created, increased, diminished, discharged, or defeated any pecuniary obligation, nor would it have transferred or in any manner have affected any property whatever, and was therefore not the subject of forgery, as required by law. And because the said will alleged to have been forged plainly shows upon its face that it is not a proper instrument to be admitted to probate, in this: that the two subscribing witnesses thereto each have an inheritance under and by virtue of said pretended will, and said will could not be admitted to probate, and otherwise be made to have any legal effect whatever, until one

or both of said witnesses should renounce and relinquish his said interests thereunder, and hence said will is void. I will discuss these propositions in their converse order:

Article 5348, Rev. St., provides: "Should any person be subscribing witness to a will, and be also a legatee or devisee therein, if the will can not be otherwise established, such bequest shall be void, and such witness shall be allowed and compelled to appear and give his testimony in like manner as if no such bequest had been made. But if in such case the witness would have been entitled to a share of the estate of the testator had there been no will, he shall be entitled to so much of such share as shall not exceed the value of the bequest to him in the will." Article 5349 provides: "In the case provided for in the preceding article, such will may be proved by the evidence of the subscribing witnesses corroborated by the testimony of one or more other disinterested and credible persons, to the effect that the testimony of such subscribing witnesses necessary to sustain the will is substantially true, in which event the bequest to such subscribing witness shall not be void." These two articles dispose of appellant's contention that the will is void because the legatees in the will are subscribing witnesses, since said articles show that the will is not void by reason of said fact.

As to the other proposition: The agreed statement of facts shows that appellant was guilty of having in possession the forged instrument alleged, if the will is the subject of forgery during the lifetime of the testator.

Article 530, Pen. Code 1895, provides: "He is guilty of forgery who, without lawful authority, and with intent to injure or defraud, shall make a false instrument in writing purporting to be the act of another, in such manner that the false instrument so made would (if the same were true) have created, increased, diminished, discharged or defeated any pecuniary obligation, or would have transferred, or in any manner have affected any property whatever." Article 537: "By an instrument which would 'have transferred or in any manner have affected' property, is meant every species of conveyance, or undertaking in writing, which supposes a right in the person purporting to execute it, to dispose of or change the character of property of every kind, and which can have such effect when genuine." In order to ascertain the meaning of the above articles, it becomes necessary to review the common law on this question, and to ascertain therefrom, by judicial construction, which the statutes expressly authorize, the legislative intent in enacting these articles, and as to whether these articles cover the forgery of a will, testator being living. Bishop, *Crim. Law*, § 603, subd. 2, vol. 2, says: "It does not impair the criminality of forging a will that the supposed testator is living." Russell on Crimes, vol. 2, pp. 749-751, states: "The doctrine is

established by several cases, that forgery may be committed by the false making of an instrument purporting to be the will of a person who is still living; notwithstanding the objection that during the life of a party his will is ambulatory; and can have no validity as a will until his death. Thus, a prisoner was convicted of forging a seaman's will, who, it appeared, was still alive, and had returned to England two years after the prize money had been received by the prisoner under a forged will. [Citing *Murphy's Case*, 10 St. Tri. 183 (Hagr. Ed.); 2 East, P. C. c. 19, § 43, p. 949.] In a subsequent case, where the prisoner was indicted for forging the last will and testament of a woman who was still living, and was a witness on the trial, and convicted, the judgment was respited upon a doubt whether, as the supposed testatrix was living, the prisoner was legally convicted of having forged her last will and testament; there being no such instrument as a last will and testament, in contemplation of law, until after the death of the person making it. But the judges are said to have been unanimously of opinion that an instrument may be the subject of forgery, although in fact it should appear impossible for such an instrument as the instrument forged to exist, provided the instrument purports on the face of it to be good and valid as to the purposes for which it was intended to be made. The point was again referred to the consideration of the judges in a case where the prisoner was indicted and convicted for knowingly uttering and publishing as true a certain false and forged will and testament of one J. G., late a seaman belonging to a merchant vessel, etc., and it appeared that the said J. G. was living. All the judges held that the conviction was right. It was observed by the learned judges who delivered their opinion that every will must be made in the lifetime of the party whose will it was; that it existed as a will in his lifetime, though it did not take effect till his death, and that the making of a false instrument, importing on the face of it to be a will, was equally forgery, whether the person whose will it purported to be were dead or alive at the time of making it; that a contrary doctrine would operate as a repeal of the law, for, if the act of making the will were not forgery at the time, a publication afterwards would not make it so. Buller, J., thought the very definition of 'forgery' decided the doubt, for it was the making a false instrument with intent to deceive, and that here the intention to deceive had been established by the jury, and the instrument purporting to be a will was clearly false. On an indictment for forging a will, the probate of that will, unrevoked, is not conclusive evidence of its validity, so as to be a bar to the prosecution." The same author says that it was an offense to probate the will of a nonexistent person. Patteson, J., in passing on the question, said: "There is nothing to limit the offense to the

forgery only of the wills of persons that have existed, and it has been expressly held that forgery may be committed by the false making of the will of a living person." In Archbold, *Crim. Prac. & Plead.* vol. 2, p. 1639, we find this language: "Will, testament, codicil, or testamentary writing may be described in the indictment as a certain will, or a certain will and testament, or a certain codicil to a will, without saying of whom, or the date or other particulars. Forgery may be committed of the will of a person who is alive, or the will of a person who never existed. Where, upon indictment for forging a will, the prosecutor, in the course of his evidence, put in and proved the probate, it was thereupon objected, for the prisoners, that this, whilst unrevoked, was conclusive evidence that the will was genuine and valid, Garrow, B., overruled the objection, and, the prisoner being convicted, the judge held the conviction to be right." Mr. Wharton, in his excellent work on Criminal Law, § 682, says: "It need scarcely be said that whatever falls under the heads of bonds, deeds, commercial paper, or receipts and kindred writings, may be the object of forgery at common law. For the purpose of detail enumeration, however, it may be mentioned that the principle has been specifically applied to bonds, deeds, to commercial paper of all kinds, to wills, etc., and, in fine, to all written or other instruments which may be the foundation of a suit against another." Section 695 of the same work states: "A man may be convicted of forging the will of another who is still alive, as upon the latter's death the will, being genuine, would be the basis of legal procedure." Section 714 says: "The fact that no person is at the time legally in a situation to be defrauded by the act is no defense, if there is a possibility of such fraud." Again, in section 739: "It is not necessary, therefore, to the validity of the indictment, that the forged instrument should appear to be one which could be used immediately as legal proof. It is enough if it can be so used at some future period. Thus an indictment is good which charges the forgery of a will of a living person, although such will could not be the foundation of legal process until after the death of the person whose name is forged." In McClain's work on Criminal Law, vol. 2, § 744, the common-law definitions of forgery, as laid down by Blackstone, are given, as follows: "The fraudulent making or altering of a writing to the prejudice of another man's right. Furthermore, some English judges have spoken of it as 'the making of a false instrument with intent to deceive, but the deceit must involve danger of pecuniary loss'; and it is suggested that the expression 'with intent to deceive in such manner as to expose any person to loss or the risk of loss,' would accurately express the idea. Forgery of wills was early recognized as a crime; and it was held

to be immaterial that the supposed testator was living, or that there was no such person as the one the instrument purported to name." Section 768 lays it down "that it is not necessary that the injury be pecuniary. It is sufficient that the intention be to deprive the other of a legal right." In *Scott v. State* (Tex. Cr. App.) 48 S. W. 524, it was held that the intent to injure or defraud is only necessary; that the act need not injure. See, also, *Howell v. State*, 37 Tex. 591. And again in *Lassiter v. State*, 35 Tex. Cr. R. 540, 34 S. W. 751, it was said that the deed, although not acknowledged, is the subject of forgery, though it may be necessary subsequently to take steps to make it valid.

In view of the above excerpts from the common law and authorities of this court, I will proceed to discuss the statutes of forgery as contained in our Penal Code. Would the forged will of a person still living come within the provisions of these articles? It will be noted from the above excerpts that it was so at common law. It will be noted that the intent to injure is the gravamen of the offense, even under our own authorities, as well as the common law. It will be noted from one of the above excerpts from the common law that the courts have held that wills are the subject of forgery under ordinary statutes similar to our own. If this forged will were a valid instrument, it would have transferred or in a manner have affected the property of the testator. Therefore I believe that it was the subject of forgery, regardless of the testator being dead or alive, and therefore the appellant's contentions are not correct. Certainly, if this instrument had been true, and had not been revoked by the testator, or supposed testator, at his death, the same would have transferred, and to a large extent would have affected, the property he might have left, and would have been a legal method to dispose of and change the title of property of all kinds belonging to the testator. To hold this instrument invalid would be to say there is no law in Texas, as held by the majority, for punishing a person for the forging of a will; and such a construction would lead me to the converse conclusion. Clearly, when the Legislature enacted these statutes, they had in contemplation the forgery of wills, as well as any other instrument that would change or affect property. This was the common law, and in the light of such construction said statutes were evidently adopted. In view of this fact, I think the clear legislative intent, as well as the words of these articles under consideration, makes it imperative on this court to hold that the forgery of a will of a person living is forgery, within the contemplation of our law.

In my opinion, the indictment is properly drawn, and charges an offense against the laws of this state; and, no error being manifested in the record, I believe the judgment should be affirmed.

PATRICK v. STATE.

(Court of Criminal Appeals of Texas. Feb. 10, 1904.)

INTOXICATING LIQUORS—LOCAL OPTION LAW—
VIOLATION—DEFENSES—MISTAKE OF
FACT—EVIDENCE—INSTRUCTIONS.

1. Where, in a prosecution for violating a local option law, defendant's attorney stated that he expected to prove that members of the jury had a prejudice against a person who, from his occupation, might be in a position to violate the local option law, he should have been permitted to ask the jurors whether they had such prejudice.

2. In a prosecution for the illegal selling of intoxicating liquors, evidence as to what was said and done between the parties at the time of the delivery of the bottle claimed to contain intoxicating liquor was admissible.

3. In a prosecution for violating a local option law, evidence as to a conversation between a third party and prosecutor that caused them to go to the place where the liquor was alleged to have been sold was inadmissible; accused not being present.

4. In a prosecution for violating a local option law, evidence that others who might be equally guilty with defendant were not indicted was inadmissible.

5. Evidence that an investigation was made by the grand jury, and that they failed to find that any drunkenness occurred at the saloon where defendant worked, and where it was claimed he had illegally sold intoxicating liquor on the day in question, or that any drunkenness could be traced to such saloon on that day, was inadmissible.

6. Where, in a prosecution for illegally selling intoxicating liquor, defendant claimed that he was only temporarily employed in the saloon where the offense was alleged to have been committed, he should have been permitted to prove that he had only been employed for the day to wash bottles, and had no authority to make sales or receive money, and that he took the bottle in question to the alleged purchaser at the command of one of the clerks, and received the money, and turned it over to such clerk.

7. Where, in a prosecution for violating a local option law, the state's witness testified that the beverage sold tasted like whisky, and in his opinion was whisky, but there was other evidence that defendant's employer only sold cider and nonintoxicating drinks, but that he had previously received some tablets, which, when placed in water, produced a drink very much like whisky, but did not contain any alcohol, etc., defendant was entitled to an instruction that, before he could be convicted, the proof must show that he sold prosecutor liquor of an intoxicating character.

8. Pen. Code 1895, art. 43, providing that no mistake of law will excuse one committing an offense, but that, if a person laboring under a mistake as to a particular fact does an act that would otherwise be criminal, he is guilty of no offense, applies to a prosecution for violating a local option law.

9. In a prosecution for violating a local option law there was evidence that defendant was employed in a saloon temporarily to wash bottles, etc., and that at the request of a clerk he handed a bottle to prosecutor, and received from him the price, which he immediately delivered to the clerk, and that the bottle contained a liquid which, though tasting like whisky, in fact contained no alcohol, and was delivered to prosecutor by mistake for cider, defendant was entitled to an instruction that, if he delivered the liquor under mistake of fact, believing it to be nonintoxicating, he was not guilty, under Pen. Code 1895, art. 43.

Brooks, J., dissenting.

Appeal from Ellis County Court; Lee Hawkins, Judge.

Henry Patrick was convicted of violating the local option liquor law, and he appeals. Reversed.

W. H. Fears, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$25 and 20 days' confinement in the county jail.

In the impanelment of the jury appellant proposed to ask the jurors if they had such prejudice against a person who, from his occupation or surrounding at the time, might be suspected of being in a position to enable him to violate the local option law, that might influence their action as jurors. Appellant said he expected to prove that they did have such prejudice. We think the investigation should have been permitted. The answers of the jurors might have at least furnished some information to appellant by which he could more intelligently exercise his peremptory challenges.

We think it was competent for the state to show what was said and done between the parties at the time of the delivery of the bottle claimed to be intoxicating liquor. It was a part of the *res gestæ* of the transaction, and was calculated to shed some light on it. We do not believe it was admissible to prove what occurred between Dick Turner and the prosecutor, Brooks, that caused them to go to the cold storage where appellant was at work. This was a conversation in the absence of appellant, and was calculated to prejudice him, inasmuch as it was a conversation between said purchaser and Dick Turner as to their expectation of getting some whisky at Pridmore's, where the alleged offense occurred. Nor was it admissible on the part of appellant to show that others, who might be equally guilty with appellant, if he was guilty, were not indicted, although an investigation was made as to the conduct of such other parties. Nor was it competent to prove that investigation was made by the grand jury, and they failed to find that any drunkenness occurred at said Pridmore's saloon, or that could be traced to said Pridmore's saloon, on the day of the show—being the date of the alleged offense.

In our opinion, appellant should have been permitted to show the character of his employment at Pridmore's saloon, to wit, that he was incidentally there, having been employed on that day to wash bottles, and that he had no authority to make sales and receive money for the same; that he was simply a servant, and that what he did was merely at the instance of one of the clerks (Tune) to take the bottle in question to the alleged purchaser, and receive the money from him, and turn it over to Tune. We are not prepared to say that the circumstances connected with this transaction, thus refer-

red to, together with other circumstances in proof, might not have constituted appellant the seller; but still the testimony should have been admitted, and the question left to the jury under appropriate charges as to whether or not he was such seller.

It occurs to us that the court should have given appellant's second requested special instruction; that is, that before appellant could be convicted, the proof must show that he sold to the prosecutor spirituous, vinous, or malt liquor of an intoxicating character. True, the state proved by its witnesses that it tasted to them like whisky, and that, in their opinion, it was whisky; but, on the other hand, there was proof showing that the employer of appellant was only engaged in selling cider and nonintoxicating cold drinks, but that some time previous he had received some tablets, which, when placed in water, produced a drink or beverage that tasted very much like whisky, but did not contain any alcohol. According to the witnesses, it contained pepper and cocaine, and maybe some other ingredients. And it was suggested in the evidence that possibly one of these bottles, that had been left on the shelf, may have been handed out by Tune to appellant, who gave it in turn to the prosecutor, Brooks. To meet this phase of the evidence, appellant was entitled to a charge on this subject.

Appellant also excepted to the charge of the court for its failure to instruct the jury on mistake of fact, insisting that the evidence required such a charge on that subject. Although this court has decided this question otherwise, yet the decisions are against our statutes on the subject, and the generally received doctrine as to all other crimes. It is conceded that the cases of *Penn v. State*, 43 Tex. Cr. R. 608, 68 S. W. 170, and *Williams v. State*, 77 S. W. 215, 8 Tex. Ct. Rep. 709, are directly against this contention; but it is urged that these cases violate our statute, and are not founded upon correct legal principle, and so should be overruled. We believe the doctrine appellant asserts is sound, and that article 46, Pen. Code 1895, which says, "No mistake of law excuses one committing an offense, but if a person laboring under a mistake as to a particular fact shall do an act which would otherwise be criminal, he is guilty of no offense," is applicable to all offenses, unless it be that such offenses are taken out of the statute by some special provision of the law. Certainly, if it is applicable to a murder case, and a party charged with that crime could shield himself under a mistake of fact, it ought to be at least equally applicable to a sale of whisky under a mistake of fact. Mr. Bishop, in his work on Criminal Law, vol. 1, § 303, says: "The wrongful intent being the essence of every crime, it necessarily follows that whenever one without fault or carelessness is misled concerning facts, and

thereon acts as he would be justified in doing were they what he believes them to be, he is legally innocent, the same as he is innocent morally." And in his work on Statutory Crimes he says: "There is no difference between a mistake of fact as to the sale of intoxicating liquor and other crimes. It applies likewise to the question of the intoxicating quality of the liquor sold, but there are cases in denial of this." So that whatever may have been heretofore held in the cases referred to, and others holding the same views, such cases are hereby overruled.

In this case, appellant's theory, which the evidence of himself and other witnesses tends to support, shows that he was not a regular employé at Pridmore's place of business, but that he was employed there that day, it being a day in which a show was in town, and his employment was for the purpose of cleaning up and washing bottles. The proof further tended to show on his behalf that since local option had gone into effect, which was a day or two before, the owner did not sell intoxicating drinks, but sold cold drinks and nonintoxicating beverages merely; that appellant was not permitted to go behind the bar, or make any sales; that, standing on the outside, he was asked by the prosecutor to get him a bottle of something to drink; that appellant told him he could get what the others were getting; that prosecutor gave him a dollar, and he brought him a bottle of some liquid, and handed it to him, and brought him back 50 cents in change; that appellant had no idea that it contained whisky, but thought it was cider. As stated before, there was some evidence that this bottle might have contained some of the liquid made out of the tablet of pepper and cocaine; that it might have been handed out by appellant to Tune instead of a bottle of cider. Under this view of the case it appears to us that appellant was entitled to a charge on mistake of fact. If he was, indeed, the seller, and represented Tune in the transaction, he may have been the innocent agent of Tune, if the liquid sold was intoxicating, although Tune may have had knowledge that it was intoxicating; or, if Tune intended to hand out cider, and handed out instead by mistake intoxicating liquor, of course, under such circumstances, he must have used, so far as he was concerned, and so far as appellant was concerned, due caution to avoid any mistake. We are not holding there is not other testimony in the case which might authorize a conviction; but we are holding that, so far as this question is concerned, appellant had a right to have the court give a charge predicated on mistake of fact.

For the errors discussed, the judgment is reversed, and the cause remanded.

BROOKS, J., dissents.

CHISM v. STATE.

(Court of Criminal Appeals of Texas. Feb. 10, 1904.)

HOMICIDE—INSTRUCTIONS—PROVOKING DIFFICULTY—MANSLAUGHTER—SELF-DEFENSE.

1. On a prosecution for murder, defendant's theory was that he was trying to induce deceased to return defendant's horse to the stable, and that deceased ordered defendant to leave, and threatened to kill him if he did not; that defendant rode away and secured a pistol, and returned and caught the horse by the bridle, and that deceased reached for a pistol, whereupon an altercation ensued which led to the killing. The court instructed that if defendant sought the meeting with the intent to take deceased's life, and by his acts or words provoked the difficulty, defendant would not be permitted to justify his act on the ground of self-defense. *Held* that, under the facts, the charge was a sufficient exposition of the law, and not objectionable as limiting the right of self-defense to the mere purpose and intent with which defendant sought deceased.

2. On a prosecution for murder, defendant's contention was that, a short time before the difficulty, deceased had cursed him, with a threat that, if he did not get out of deceased's way, deceased would shoot him, and that defendant then rode away some distance, and, having secured a pistol, sought deceased for the purpose of making him return defendant's horse, which deceased was driving, and that, when he met deceased a second time, deceased used language indicating animosity, and made, as defendant thought, a demonstration to take out a pistol. The court instructed that the jury should consider all the facts and circumstances in determining the condition of defendant's mind at the time of the killing, and the adequacy of the cause producing such condition, and that, though the law provides that provocation causing a sudden passion must arise at the time of the killing, the jury should determine whether defendant's mind was incapable of cool reflection, and whether the circumstances were sufficient to produce such a state of mind. *Held*, that under the facts the charge was sufficient.

3. Where, on a prosecution for homicide, the defense is self-defense, and the question is one not of real, but of apparent, danger, the court must instruct that the danger need not be real, but that it is sufficient if it reasonably appears so to the defendant at the time.

4. On a prosecution for murder, it appeared that deceased at the time of the killing was not armed, and defendant's theory was that deceased had reached for something, and led defendant to believe that deceased was trying to get a pistol. The court charged that if, by reason of the acts or words of deceased, defendant reasonably apprehended that defendant was in danger of losing his life, he had the right to defend himself, as it reasonably appeared to him from his standpoint, and that if defendant went to demand his team from deceased, and was refused, and deceased showed a purpose to assault defendant, and defendant shot and killed deceased, defendant would be justified. *Held*, that the instruction on apparent danger was sufficient.

5. On a prosecution for murder, it appeared that defendant met a woman who had hired a horse and buggy from him, and that he tried to induce her and deceased, who was riding with her, to return the horse, and that deceased and defendant fell into an altercation, and defendant went away and armed himself and returned, whereupon the trouble was renewed and the killing occurred. Defendant's contention was that he returned merely for the purpose of having the horse taken to the stable. *Held*,

that it was not error to refuse to charge on the law applicable to manslaughter, as it did not appear that, if defendant provoked the difficulty, he did it for any other purpose save that of killing deceased.

6. The special venire having been exhausted, the sheriff and his deputies, before going out to select talesmen, were sworn as required by law. The talesmen selected were exhausted, and additional talesmen were ordered, but the officers were not sworn before starting out the second time. *Held*, that an objection that the officers were not properly sworn was untenable.

7. An objection on appeal that officers were not properly sworn before entering on the duty of selecting talesmen cannot be reviewed where no exception was taken to it and the action of the court not criticised until the filing of a motion for a new trial.

Appeal from District Court, Jefferson County; W. H. Pope, Judge.

H. H. Chism was convicted of murder in the second degree, and he appeals. Affirmed.

Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The punishment assessed is 25 years in the penitentiary for murder in the second degree.

The charge of the court on self-defense is criticised because it limits that right to the intent and purpose with which defendant sought deceased. This really was intended to refer to that portion of the charge which applies the doctrine of provoking a difficulty. We do not believe the criticism is correct, when the full charge on the question of provoking the difficulty is read. That portion of it bearing upon this phase of the case is as follows: " * * * unless you further believe from the evidence, beyond a reasonable doubt, that defendant sought the meeting with said Dan McCrea with the intent to take the life of said Dan McCrea, or to do him such serious bodily injury as might probably end in the death of the said Dan McCrea; and if you so believe from the evidence, beyond a reasonable doubt, then you are instructed that if defendant sought such meeting for the said purpose and with such intent, and that, after finding the said Dan McCrea, defendant, by his acts or words, if any, or by his acts coupled with his words, if any, did bring on and provoke the difficulty with the deceased, Dan McCrea, which resulted in his death, then and in that event defendant would not be permitted to justify his act in taking the life of said Dan McCrea on the ground of self-defense." We believe this charge is a fair and correct exposition of the law of provoking the difficulty, as applied to the facts. Of course, if appellant simply sought Dan McCrea with the intent and purpose of provoking a difficulty with the ultimate view of taking his life, and the judge had stopped at this point, it would have been insufficient. But the charge does not stop here. The court informs the jury that, before appellant would be guilty after seeking the meeting for that purpose and with that intent, he must have then, by his

acts or words—either or both—brought on and provoked the difficulty. We think this is in compliance with the law.

The charge of the court on manslaughter is criticised because the jury were not specifically told they might look to antecedent threats or acts of deceased to determine whether the acts of deceased at the time of the homicide were sufficient to show adequate cause. The charge on manslaughter in regard to this question is as follows: "Although the law provides that the provocation causing the sudden passion must arise at the time of the killing, it is your duty, in determining the adequacy of the provocation, if any, to consider in connection therewith all the facts and circumstances in evidence in the case; and if you find that, by reason thereof, defendant's mind at the time of the killing was incapable of cool reflection, and that said facts and circumstances were sufficient to produce such state of mind in a person of ordinary temper, then the proof as to the sufficiency of the provocation satisfies the requirements of the law; and so in this case you will consider all the facts and circumstances in evidence in determining the condition of defendant's mind at the time of the alleged killing, and the adequacy of the cause, if any, producing such condition." This charge, under the facts, is sufficient. The court usually is not required to single out particular facts upon which to submit the issue of manslaughter. Appellant's contention was that a short time prior to the difficulty deceased had cursed him, coupled with the threat that, if appellant did not get out of his way, he would "shoot him out of the way." Appellant then rode away some distance and secured a pistol, and sought deceased, for the purpose, he says, of making deceased and the woman riding with him in the buggy return the horse of appellant, which they were driving, to the livery stable, and that, when he met him the second time, deceased used language indicating animosity, and, as appellant thought, made a demonstration to get a pistol. The threats upon which appellant based his criticism of the charge were the threats and language used upon the first meeting, and shortly before the killing. We believe the charge on manslaughter, as applicable to the facts here, is sufficient.

The charge of the court on self-defense is criticised because the court failed to charge the jury that the danger with which defendant was threatened need not be real; it is enough if it reasonably appears so to defendant at the time. Wherever the question is one of apparent, and not real, danger, such a charge as contended for should always be given. This is a case of apparent, and not real, danger. Deceased was unarmed, and appellant's theory was that, at the time of the shooting, deceased had reached for something, and led appellant to believe he was trying to get a pistol with which to fire up-

on him. The whole charge on self-defense is submitted upon the theory of apparent danger. The court instructed the jury: "Upon the law of self-defense, you are further instructed that if, from the acts of the said Dan McCrea, if any, or from his words coupled with his acts, if any, there was created in the mind of defendant a reasonable apprehension that he (defendant) was in danger of losing his life or of suffering serious bodily harm at the hands of the said Dan McCrea, then defendant had the right to defend himself from such danger or apparent danger as it reasonably appeared to him at the time, viewed from his standpoint, and no other." The court further instructed the jury: "If defendant went to demand his team from the persons in possession of same, and his demand, if any, was refused by the persons in possession thereof, he had a right to make this demand, and if, in so doing, the deceased, by words or acts, or both, showed a purpose to assault defendant, viewed from the defendant's standpoint alone—that he was about to suffer serious bodily injury or death at the hands of deceased—then, under these circumstances, if he shot and killed deceased, he would be justified in law, and you should acquit him." He further charged the jury: "If defendant did not use any violence in attempting to get possession of the team, and deceased, by words or acts, or both, if any, showed an immediate purpose to assault defendant, and these words or acts, or both, if any, were of such a nature as to reasonably impress upon the mind of defendant that deceased was about to do him serious bodily injury or kill defendant, then defendant would have the right to defend himself against such assault, even to the taking of the life of deceased; and, in determining if said assault was threatened or made, you will view the question from defendant's standpoint alone." These charges sufficiently present the question of apparent danger, and from every standpoint, as we understand the record, made by the testimony bearing on the question of self-defense.

Appellant contends the court prejudiced his case in omitting to charge the law applicable to manslaughter, in case the jury should find that defendant sought deceased and brought on the difficulty in which deceased lost his life, not for the purpose and with the intent of killing deceased or doing him serious bodily harm. After an inspection of the testimony, we do not believe this issue was in the case. Appellant's theory was that the woman who was in the buggy had hired the horse and buggy for a certain period of time, and that time had expired, and he was trying to induce the woman with whom deceased was riding to return the horse to the livery stable, and that deceased, who was drinking, became enraged, and ordered him to leave, and threatened to kill if he did not; that appellant immediately rode away and secured a pistol, and sought de-

was driving by the bridge, and demanded that they return the horse or deliver to him at once. His contention was that at this point deceased reached for a pistol, or he believed he was reaching for a pistol, and began firing, and continued firing until he fired four shots. Defendant's theory, therefore, was that he did not seek deceased for the purpose of bringing on a difficulty with him at all, but simply to have his horse returned to the livery stable. The state's theory was that appellant, enraged by the conduct, acts, and words of deceased upon the first meeting, went away, armed himself, sought deceased, and brought on the difficulty for the purpose of killing him; that deceased was unarmed, and made no demonstration and did no act which justified appellant in doing what he did; and that these acts and words and conduct of appellant were used towards deceased in order to provoke him into a difficulty; and the fact that he went off and armed himself, and immediately went in pursuit or search of deceased, and his words, acts, and conduct immediately upon finding him were intended to provoke the difficulty that was brought about. To our minds, there is no evidence showing that he provoked the difficulty for the purpose of doing anything else but to kill him, if he provoked the difficulty. Perhaps it is a more serious question as to whether the law of provoking the difficulty was called for by the facts, but we do not feel justified in reversing the case on that account. There is sufficient evidence, perhaps, to justify a charge upon this subject. As we understand this record, the charge of the court is not criticised because this charge was given, but "the charge as given" is the criticism.

It is claimed that the judge did not swear the sheriff when sent out to select talesmen, the special venire having been exhausted. However, the court says that when the venire was exhausted he called the sheriff and his deputies, and administered to them the oath required by law, and instructed them with reference to selecting talesmen; that these were exhausted, and additional talesmen were ordered, and, as the court was in the act of administering the oath the second time, defendant's counsel, in the presence of defendant, stated to the court it was unnecessary, and defendant would waive the same, and it was under those circumstances that the oath was not administered, as complained of in the motion for new trial. There was no exception taken at any time to this action of the court, nor to the talesmen when tendered, save in motion for new trial. This explanation of the court eliminates any question of error on this line—first, because the officers were sworn; and, second, no exception was taken to it, nor was the action of the court criticised until the filing of the motion for new trial. This was too late,

finding no reversible error in this record, the judgment is affirmed.

JAMES v. STATE.

(Court of Criminal Appeals of Texas. Feb. 10, 1904.)

INTOXICATING LIQUOR—LOCAL OPTION LAW—EVIDENCE—SALES—LOCUS—POWERS OF LEGISLATURE — INSTRUCTIONS — ALTERNATE THEORIES.

1. In a prosecution for violating the local option law, where the prosecutor's evidence established defendant's guilt, and his own evidence established his innocence, both theories of the case should have been presented to the jury in appropriate instructions.

2. Evidence that defendant sent an order for liquor for prosecutor, with the money accompanying it, to his principal, in another city, and had him express the whisky addressed to prosecutor in defendant's care, and that defendant, when he received the package, turned it over to prosecutor, the latter having previously not only paid for the liquor, but also paid the expressage on the same, showed that the liquor became the property of the prosecutor when delivered to the express company by the principal, so that there was no violation of the local option law by defendant.

3. Act 27th Leg. p. 262, providing that where orders are solicited for intoxicating liquor in local option territory, and subsequently filled, the sale shall be construed to have been made at the place where the order was solicited, is beyond the power of the Legislature, as arbitrarily attempting to define a sale and fix its locus, regardless of the rules of contract law.

4. Evidence that prosecutor said he wished he had some whisky, and that defendant said he ordered whisky, and stated what it was worth, whereupon prosecutor gave him the price, and defendant went off towards town, and in about 20 or 30 minutes thereafter prosecutor found a quart of whisky lying on his table, which had been placed there during his absence, showed a violation of the local option law by defendant.

Brooks, J., dissenting.

Appeal from Fannin County Court; Tom C. Bradley, Judge.

B. A. James was convicted of violating the local option law, and appeals. Reversed.

Thurmond & Steger and G. W. Wells, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of violating the local option law, and his punishment assessed at a fine of \$50, and 20 days' confinement in the county jail; hence this appeal.

The evidence presents two theories, both of which should have been properly presented to the jury. However, the court seems to have ignored the theory based on the prosecutor's testimony, and to have tried the case solely on the testimony adduced by appellant. As we understand the state's testimony, it shows that prosecutor, Mappin, was an attaché of a traveling show then at Honey Grove, Fannin county; that he and a colored man were at the tent, peeling potatoes; and appellant, James, happened to be there.

Prosecutor remarked to the negro that he wished he had some old Paul Jones whisky. Appellant said there were three or four parties in town who ordered whisky, and that he did so himself. Prosecutor asked him how long it would take to get it. He replied that he could get it on the 11:30 train. Prosecutor told him that that was too long, to which appellant replied, "Well, a showman could get it quicker." It was then about 10:30 or 10:40 a. m. Prosecutor asked what a quart would be worth, and he said, "\$1.10." Prosecutor gave him \$1.10, and he went off towards town, and in about 20 or 30 minutes prosecutor found a quart of whisky lying on the table in the tent. This was placed there during prosecutor's temporary absence. The negro told him that defendant had brought and left it there. Prosecutor denies that he made any written order with reference to this whisky, and, when he was cross-examined with reference to ordering a bottle of whisky, he replied that, if he gave defendant an order at all for whisky, it was after this, when he got drunk. The transaction proved by appellant was: That prosecutor came to his place of business in Honey Grove, where he was running a cold storage, which prior to the adoption of local option had been a saloon. That on Sunday afternoon, about 5 o'clock of September 6, 1903, prosecutor, Mappin, came in and asked if there was a chance to get some whisky. Appellant replied that there was no way to get it, unless to order and wait for it to come. That he asked him what a quart would cost, and he told him it would cost \$1.10 to order and get it, and that prosecutor paid him \$1.10, and he filled out an order on B. P. Shirley, Paris, for one quart of whisky, and signed his name to it, and gave said order to appellant, which was introduced in evidence and identified by appellant and others. That appellant sent this order and the money to Paris for the whisky, and a quart bottle of whisky was sent the next day, inclosed in a box expressed to appellant, containing other things, but the bottle was tagged with the address of prosecutor. That, as soon as he (appellant) received said whisky, he took it out of the box, and carried it down to the tent, and gave it to the negro at the tent; Mappin being at the time absent. That the \$1 was for the whisky, and the 10 cents was for the expressage. Appellant further testified that he did not make anything out of the transaction, but that he did it for accommodation.

Now, if there was but one transaction, and appellant and his witnesses told the truth about it, in our opinion, there was no offense, and appellant should have been acquitted. If, on the other hand, the transaction occurred as the prosecutor testified it did, appellant was guilty, and should have been convicted. These two theories should have been presented by the court in appropriate instructions. Instead thereof, the court, in effect, instructed the jury as to only one transaction,

and that predicated on the testimony of appellant and his witnesses; and the jury were instructed, substantially, if the transaction occurred as insisted by appellant, to find him guilty. For instance, the court told the jury, if they believed from the evidence, etc., that appellant was the agent of Shirley, in Fannin county, etc., and that, as such agent, he solicited said Mappin to order the whisky mentioned in this case, and, as such agent, collected from said Mappin the purchase price thereof, and procured Shirley to send him (defendant) certain whisky from Paris to Honey Grove, and defendant delivered said whisky to Mappin, to find him guilty. Now, there was really no testimony that appellant was the agent of Shirley. The only testimony on this subject, aside from the transaction, came from appellant himself, in which he specifically denied he was the agent of Shirley, or in any wise concerned in his business. But concede there was some testimony tending to raise the issue as to appellant's agency for Shirley, and also concede there is testimony tending to show appellant solicited the order from prosecutor; then we have an effort on the part of the court to make appellant liable for a criminal offense if he sent an order for the prosecutor, with the money accompanying it, to Shirley, at Paris, and had him express the whisky, addressed to prosecutor, in care of appellant, at Honey Grove, and that appellant, when he received the package, turned it over to prosecutor; the prosecutor having previously not only paid for the whisky, but paid the expressage on the same from Paris to Honey Grove. Evidently, under the authorities, this transaction was consummated at Paris. The whisky was paid for before it was sent, and the expressage prepaid, and, when the whisky was delivered to the express company at Paris, it became the property of the prosecutor. *Bruce v. State*, 36 Tex. Cr. R. 53, 39 S. W. 683; *Sinclair v. State*, 77 S. W. 621, and authorities there cited; and for collation of authorities, see *Amer. & Eng. Ency. of Law*, vol. 17, pp. 300, 301.

It is insisted that, although this may have been the law prior to the act of the Twenty-Seventh Legislature (page 262), the effect of that enactment was to change the rule. We reply that it is not competent for the Legislature to define a sale and fix its locus, regardless of the known rules of law, which authorize parties to make their own contracts, making the place of the sale depend on the place where the property is transferred and title passes. Much less is it competent for the Legislature to reverse the decisions of the courts upon questions of this character. While that body is supreme in the exercise of its functions, it can no more fix the place of sale of liquor, as between contracting parties, in contravention of the rules of law, than it can determine the place of a sale of any other community, or than it can define what intoxicating liquors are. If

it can do the one, it can do the other, and, as its whim or caprice might suggest, it could define away intoxicating liquors altogether.

We believe, under the facts of this case, from appellant's standpoint, that there can be no question that the sale of the liquor was completed at Paris, and that the property vested in the prosecutor there. Neither the law with reference to C. O. D. packages, nor the provision with reference to the solicitation of liquors in a local option territory, can alter or change the facts which constituted the prosecutor owner of the property as soon as it was placed by the consignor in the hands of the common carrier at Paris. The court, instead of charging the jury to convict appellant on the testimony of himself and his witnesses, should have instructed them, if they believed the facts so to be, to acquit him. On the other hand, if the jury believed the facts to have been as testified to by prosecutor, they should have been authorized to convict him upon that theory.

We do not deem it necessary to discuss other criticisms of the charge of the court presented by appellant, nor is it necessary to discuss the special charges requested. We believe the case was tried on a false theory.

The judgment is reversed, and the cause remanded.

BROOKS, J., dissents.

GALVESTON, H. & S. A. RY. CO. v. SCHLATHER.

(Court of Civil Appeals of Texas. Feb. 10, 1904.)

JUSTICE'S COURT—PRACTICE—APPEAL—JURISDICTION—ACTIONS—ABANDONMENT.

1. Where defendant failed to offer evidence in support of its cross-action, it thereby abandoned the same as effectively as if withdrawn in open court.

2. Where defendant's abandonment of its cross-action before a justice left the only matter in dispute plaintiff's claim for \$20, the county court had no jurisdiction of an appeal from a judgment for plaintiff under Const. art. 5, § 16, and Rev. St. 1895, art. 1158, limiting the jurisdiction of county courts on appeals from justices' courts to cases involving more than \$20.

Appeal from Guadalupe County Court; Jas. Greenwood, Judge.

Action by George Schlather against the Galveston, Harrisburg & San Antonio Railway Company. From a judgment of the county court dismissing defendant's appeal from a justice's judgment for plaintiff, defendant appeals. Affirmed.

Dibrell & Mosheim, for appellant. Wurzbach & Woods and Adolph Seideman, for appellee.

NEILL, J. This suit was originally brought by appellee against the appellant in the justice's court to recover \$24 for a heifer alleged to have been killed by the negligence of the company. After it was instituted, appellee

amended his petition, and sued for \$20 only. The railroad company pleaded in reconvention a claim for \$110 damages against the appellee. Upon the trial in the justice's court appellant introduced no evidence upon its counterclaim, and judgment was rendered in favor of appellee for the \$20. From this judgment the railway appealed to the county court, where the case was dismissed for want of jurisdiction of the subject-matter. From such judgment it has appealed here.

The appellant, having failed to offer evidence in support of its cross-action, is deemed to have abandoned it as effectively as if it had withdrawn it in open court. *Schulz v. Tessman*, 92 Tex. 490, 49 S. W. 1031; *Railway v. Perkins* (Tex. Civ. App.) 44 S. W. 547. And as such abandonment left the matter in controversy beneath the appellate jurisdiction of the county court (article 5, § 16, Const.; Rev. St. 1895, art. 1158), the appeal was properly dismissed.

The judgment is affirmed.

TEXAS & P. RY. CO. et al. v. MURTISHAW.

(Court of Civil Appeals of Texas. Feb. 10, 1904.)

CONNECTING CARRIERS—SHIPMENT OF LIVE STOCK—INJURY—VENUE—INTERSTATE SHIPMENT—APPLICABILITY OF STATUTE—DEPOSITIONS—NOTICE OF INTERROGATORIES—WAIVER—BILL OF EXCEPTIONS—ADMISSION OF INCOMPETENT EVIDENCE—HARMLESS ERROR—INSTRUCTIONS—SEVERAL LIABILITY OF DEFENDANTS—CAUSE OF INJURY—FAILURE TO PLEAD—MEASURE OF DAMAGES—INTEREST ON RECOVERY.

1. Laws 26th Leg. p. 214, c. 125, § 1, provides that, whenever any freight or other property has been transported over two or more railroads operating in the state and having an agent therein, suit for loss or damage thereto may be brought against any one or all of such railroad corporations in any county in which either of them extends or is operated. *Held*, that a shipment of live stock, accompanied by the shipper, and transported by connecting railroads, fell within the statute, so that one railroad could not object that an action for injury to the shipment was brought in a county in which it did not have its domicile.

2. Laws 26th Leg. p. 214, c. 125, § 1, providing that when any freight, etc., has been transported over two or more railroads operating in the state, suit for loss or damage thereto may be brought against any one or all of such companies in any county in which either of them extends or is operated, applies to a shipment, the destination of which is beyond the state boundary.

3. In order to make available an objection to depositions that the opposite party was not served with notice of the interrogatories, his bill of exceptions must negative waiver of notice.

4. Where the same facts are shown by other testimony admitted without objection, the admission of incompetent testimony is harmless error.

5. In an action against two railroad companies for injury to a shipment of live stock, the court instructed that each defendant was responsible for the damage occurring on its own line only, and that the jury were not authorized to return a verdict against either defendant unless they found that damages occurred on its line; and also that the jury would assess

only such damage against each defendant as the evidence showed was sustained while the shipment was in its possession. *Held*, that an instruction requested by one defendant, that if the stock sustained damage on another road, which only became apparent while it was in the hands of such defendant, it would not be liable therefor, was properly refused.

6. In an action against two railroad companies for injury to a shipment of live stock, evidence as to the cause of injury on one line, elicited by the cross-examination of plaintiff by the other company, is admissible, though plaintiff did not plead such cause of injury.

7. In an action for injury to a shipment of live stock, evidence that some of the mares were caused to lose their foals after reaching their destination is admissible to show the extent of injuries received.

8. The measure of damages for injury to a shipment of live stock is the difference in value at the destination between the condition in which the stock arrived and that in which it should have arrived.

9. In an action for injuries to a shipment of live stock, interest on the recovery from the date of the injury at 6 per cent. is properly allowed, where the pleadings asked therefor.

Appeal from Tom Green County Court; Milton Mays, Judge.

Action by John Murtishaw against the Texas & Pacific Railway Company and others. Judgment for plaintiff, and defendants appeal. *Affirmed*.

T. J. Freeman, Hall, Flippen & McCormick, J. W. Terry, and Ballinger Mills, for appellants. Hill & Lee, for appellee.

STREETMAN, J. Appellee recovered judgment against the Gulf, Colorado & Santa Fé Railway Company and the Texas & Pacific Railway Company for injuries sustained by a shipment of horses and mules, from which said railway companies have appealed.

The shipment traveled from San Angelo, Tex., to Temple, Tex., and from Temple, Tex., to Dallas, Tex., over the Gulf, Colorado & Santa Fé Railway; from Dallas, Tex., to Shreveport over the Texas & Pacific Railway; and from Shreveport to Vicksburg, Miss., over the Vicksburg, Shreveport & Pacific Railway. Appellee sued the first two railway companies for damages on account of rough handling, delay, and failure to properly feed and water said stock. The Texas & Pacific Railway Company made the Vicksburg, Shreveport & Pacific Railway Company a party defendant, seeking judgment over against them for such damages as might be shown to have occurred on said line. Upon the trial all parties agreed that the shipment was properly handled by said railroad company, and that no damages were sustained on that line. Plaintiff alleged that the two railroads sued by him were jointly interested in the shipment, and that each acted as the agent for the other, etc. Said two railroads each filed answers, denying partnership, agency, and any sort of joint liability; and the Texas & Pacific Railway Company alleged that its domicile was in Dallas county,

Tex., and not in Tom Green county, and pleaded its privilege to be sued in Dallas county, Tex. This plea of privilege was overruled by the court, and the first assignment of error of the Texas & Pacific Railway Company complains of this ruling.

Section 1, c. 125, Gen. Laws 26th Leg. page 214, provides: "That whenever any freight, baggage or other property has been transported over two or more railroads operating any part of their roads in this state, and having an agent in this state, or operated by any assignee, trustee or receiver of any such railways, suit for loss or damage thereto, or other cause of action connected therewith, or arising out of such transportation or contract in relation thereto, may be brought against any one or all of such railroad corporations, assignees, trustees, or receiver operating any of such railways in any county in which either of such railroads extends or is operated."

Said Texas & Pacific Railway Company insists that this act does not apply to a case of this character. We are of the opinion, however, that the statute was enacted to meet just such a case as is presented by the pleadings and evidence in this record. As said by Judge Gaines in the case of *T. & P. Railway Co. v. Lynch*, 75 S. W. 486, 7 Tex. Ct. Rep. 806: "Before the passage of the act it was a matter of not infrequent occurrence that live stock which had been shipped over two or more lines of road, under separate and independent contracts, arrived at their destination in a damaged condition, and the shipper was at a loss to know how much of the damage was attributable to the one line and how much to the other, or others in case there were more than two. The evident purpose of the act was to relieve shippers of this difficulty, and to provide a joint action against all the carriers, where there was a reasonable probability that each was responsible for some part of the whole damage." This case comes clearly within the letter of the act, and within its spirit, as construed by the Supreme Court in the case cited. It is true that the shipper in this case accompanied the shipment, and yet it was impossible for him to determine in advance the exact amount of damage for which each company would be liable under the facts when fully developed.

It is also insisted that the statute quoted is not applicable to an interstate shipment. It does not attempt to regulate interstate commerce, but simply affords a remedy for the recovery of damages which have been sustained under a contract of that character, and is, for that reason, applicable as well to an interstate shipment as to one wholly within the state. *Armstrong v. Railway Co.* (Tex. Sup.) 46 S. W. 33.

The second, third, fourth, and sixth assignments of error of the Texas & Pacific Railway Company complain of the admission of the depositions of C. L. McManus and J. W.

† 2. See *Carriers*, vol. 9, Cent. Dig. § 964.

Coutret, introduced by the Gulf, Colorado & Santa Fé Railway Company. These witnesses testified to the contents of a receipt given to the Gulf, Colorado & Santa Fé Company by the Texas & Pacific Company at Dallas, Tex., showing said animals to be in good condition when received by the latter company at Dallas.

The second and third assignments complain of the admission of this testimony because no notice of the interrogatories to said witnesses was served upon said Texas & Pacific Railway Company. The objection to the depositions appears to have been made in the trial of the case, and it is probable that the objections relate to the manner and form of taking the depositions, and should have been raised by motion to strike them out. But whether this is true or not, the qualification of the bill of exceptions by the court shows that it is possible that notice of the interrogatories may have been waived by the Texas & Pacific Company. In order to make the objection available, the bill of exceptions should have negatived the fact that notice had been waived by said company.

The fourth and sixth assignments of error complain of the admission of said testimony because said witnesses did not have personal knowledge of the matters about which they testified, but only testified from records that they did not make, and that they simply had in their custody, and did not state that they made the entry from which they testified, or that they knew it to be correct. This seems to be true with reference to the witness McManus. The witness Coutret, however, testifies that it was his duty to keep these records, and that they were in his custody. However, if the testimony would not be admissible for this reason, the error was harmless, for the reason that another witness, L. C. Sharp, introduced by the defendant Texas & Pacific Railway Company, testified, without objection, that he was yardmaster of the Dallas Union Stockyards, and, as such, handled the shipment in question; that he made a personal inspection of the stock, both in and out of the car, and found none of them injured or damaged. These were the only facts sought to be shown by the testimony of the witnesses McManus and Coutret, and, as they were shown without objection by the witness Sharp, any error that may have been committed by the admission of said depositions was thus eliminated.

The eighth assignment of error of the Texas & Pacific Railway Company complains of the court's charge upon the measure of damages, because it does not confine the damages to such as arose by reason of the negligence of the defendants. This portion of the charge, when taken in connection with that preceding it, shows that the jury were only authorized to find for plaintiff such damages as arose from the negligence of the defendants.

The Texas & Pacific Railway Company

requested two special instructions, to the effect that if said stock sustained damages on another road, which only became apparent or developed while the same were in the hands of said Texas & Pacific Railway Company, said company would not be liable for such damages. The principle of law stated in these charges is correct. *Railway Co. v. Daggett*, 87 Tex. 322, 28 S. W. 525. The court, however, gave the following charges: "You are further charged that each of the other defendants is responsible for the damages occurring on its own line of road only. You are therefore instructed that you are not authorized to return a verdict against either one of the defendants without you find from the evidence that damages occurred on its line." The jury were also instructed that they would "assess only such damages against each defendant as the evidence shows was sustained by plaintiff to said shipment while in the possession of such defendant." We do not believe, in view of the charges given by the court, that it was necessary to give the special instructions requested.

The eleventh assignment of error of said Texas & Pacific Railway Company complains of the verdict on account of the evidence. In our opinion, the evidence justified the finding of the jury.

The first assignment of the Gulf, Colorado & Santa Fé Railway Company complains because the plaintiff was permitted to testify that there were some nails on the inside of the car in which the horses were shipped from San Angelo to Dallas, which would scratch and bruise the horses, and injure them, and that there was a slat loose near the bottom of the car, which caused the horses' legs to get through between the loose slats, and to be skinned and bruised and crippled. The complaint is that there is no allegation in the plaintiff's pleadings which would entitle him to recover for this character of damage. This evidence, however, was developed upon the cross-examination of the plaintiff by the Texas & Pacific Railway Company. While it might not have been admissible if it had come from the plaintiff, yet we think, in this character of suit, it was clearly admissible for the Texas & Pacific Railway Company to show how the injuries inflicted upon the animals were caused, so as to avoid liability on its own part, whether such character of injuries were alleged by the plaintiff or not.

Complaint is also made by this appellant of the testimony of appellee that some of the mares were caused to lose their foals after they reached Vicksburg, Miss. We think this evidence was admissible to show the extent of the injuries received by the animals, and it was limited to this purpose by a special charge given by the court.

The third, fourth, fifth, and sixth assignments of the Gulf, Colorado & Santa Fé

Railway Company complain of the court's charge upon the measure of damages, and of the refusal of certain special instructions requested by said defendant. We do not deem it necessary to discuss these assignments separately. The charge of the court upon the measure of damages was, in our opinion, correct. The case was treated, both by plaintiff and the defendants, as one of interstate shipment, originating at San Angelo, Tex., and ending at Vicksburg, Miss.; and the measure of damages as to the injured stock was the difference in value at their destination between the condition in which they arrived and that in which they should have arrived; and we think that the court's charge was sufficiently full as to all of the matters embraced within the special instructions requested.

The seventh assignment of error complains of that part of the verdict and judgment which allows interest upon the damages from the date when they occurred. The pleadings asked for interest, and the verdict awarded interest from the date of the injuries at 6 per cent. In this there was no error. *Ft. Worth & D. C. Ry. Co. v. Great-house*, 82 Tex. 104, 17 S. W. 834.

There being no error in the judgment, it is affirmed.

McCALEB et al. v. RECTOR et al.

(Court of Civil Appeals of Texas. Feb. 10, 1904.)

PUBLIC LANDS—WITHDRAWAL FROM LOCATION—ORGANIZED COUNTIES—EVIDENCE—MATERIALITY—APPEAL—PRESUMPTIONS IN FAVOR OF JUDGMENT.

1. Gen. Laws 1879, p. 48, c. 52, providing that separate tracts of unappropriated public land situated in organized counties, and containing not more than 640 acres, shall be appropriated and set apart for sale, and, after survey thereof, any location on it shall be null and void, withdrew the land embraced within the reservation from private appropriation by a colonist or other certificate holder, and rendered locations made within the limits of the reservation void.

2. Where the court, in its charge, stated that the undisputed testimony showed that a certificate located by plaintiff was located on a tract of land in an organized county, containing less than 640 acres, and the bill of exceptions disclosed a stipulation that the county was organized at a certain time, it would be assumed on appeal, in the absence of a statement of facts, that the county was organized at that time, and that the land was located after that time.

3. Gen. Laws 1879, p. 48, c. 52, withdrawing from location tracts of unappropriated public land situated in organized counties, and containing no more than 640 acres, applied to counties afterwards organized, as well as those already organized when the law was enacted.

4. Conceding that a county organized in 1880 was not within the provisions of Gen. Laws 1879, p. 48, c. 52, withdrawing from private appropriation certain lands in organized counties, it was brought within the provisions of that act by its re-enactment March 11, 1881 (Gen. Laws 1881, p. 27, c. 35).

5. The fact that the first entry in a surveyor's entry book was made in 1882 is not evidence on the issue as to when the surveyor was elected.

6. On the issue as to the date of the organization of a county, evidence that the commissioners' court provided in a certain year that the transcript of the surveyor's records of a certain land district be received and placed in the custody of the county surveyor, was immaterial.

7. Where the district court found that a certain county was "organized," within the purview of Gen. Laws 1879, p. 48, c. 52, withdrawing certain land of organized counties from private appropriation, it would be presumed on appeal, in the absence of a statement of facts and in favor of the judgment, that every act necessary to constitute that county an organized county was done.

Appeal from District Court, Dimmit County; E. A. Stevens, Judge.

Action by Walter McCaleb and others against Laura A. Rector and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

F. Vandervoort, for appellants. N. A. Rector, for appellees.

FLY, J. Appellants instituted this action against appellees to try title to survey 17, certificate No. 1,236, made for F. M. McCaleb, assignee of the Houston, East & West Texas Railroad Company. The court gave the following charge to the jury: "The undisputed testimony in this case shows that the certificate located on the land in controversy, if located on a vacancy, was located on a vacancy less than 640 acres in extent; that Dimmit county was organized November 20, 1880, and therefore such location was forbidden by law and void. You are therefore instructed to return a verdict in favor of the defendants." In obedience to the instruction, a verdict was returned in favor of appellees, and upon it the judgment was rendered.

There is no statement of facts in the record, but it is stated in a bill of exceptions taken by appellants that it had been agreed by the attorneys of the parties to the suit that Dimmit county was organized on November 20, 1880, and that appellants had shown that an order was made by the commissioners' court of Dimmit county on February 28, 1882, that the transcript from the records of the surveyor's office of the Bexar land district be received and placed in the custody of the county surveyor of Dimmit county, and also the first entry in a record book of the surveyor of a survey made on March 2, 1882. The bill of exceptions from which the above statements are taken seems to have been reserved to the action of the court in instructing a verdict in favor of appellees, and while it was unnecessary, if proper, the facts stated therein will be taken as having been proved.

It is provided in the act of July 14, 1879 (Gen. Laws 1879, p. 48, c. 52), that all vacant

and unappropriated land situated in certain counties therein named, together with such separate tracts of unappropriated public lands situated in organized counties of this state as contain not more than 640 acres, should be appropriated and set apart for sale, and that after survey of any such public domain any location on it should be null and void. On March 11, 1881 (Gen. Laws 1881, p. 27, c. 35), the act of 1879 was re-enacted. In the case of *Gammage v. Powell*, 61 Tex. 629, the Supreme Court held that the part of the act in question which provided that a location made after a survey of the lands referred to was not intended to leave the land open to ordinary location until such surveys were made, and continuing said: "The land located and patented and claimed by the appellant being within the reservation, the location and patent must be held equally void. *Kimmell v. Wheeler*, 22 Tex. 77; *Sherwood v. Fleming*, 25 Tex. Supp. 427; *Woods v. Durrett*, 28 Tex. 430. We may say of the act of July 14, 1879, and of the location and patent of the appellant, as was said in *Sherwood v. Fleming*: "The former withdrew the land embraced within the reservation from private or individual appropriation by a colonist or other certificate, and that a location made within the limits of the reservation during its continuance was void." In *Snyder v. Compton*, 87 Tex. 374, 28 S. W. 1061, the above-cited case was cited with approval.

Among the lands reserved from location by the law of 1879 were "such separate tracts of unappropriated public land situated in organized counties of this state, as contain not more than six hundred and forty acres," and in the charge of the court it is stated that the undisputed testimony showed that the certificate located on the land by appellants was located on a tract of land in an organized county containing less than 640 acres. In the absence of a statement of facts, and in view of the fact that the bill of exceptions discloses that it was agreed in writing by appellants that Dimmit county was organized in November, 1880, it must be taken that the county was organized at that time, and that the land was located after that time. In fact, it is admitted in appellants' brief that appellants made their location on the land in controversy after November 20, 1880. It is the contention of appellants, however, that, Dimmit county not being organized when the act of 1879 was passed, the land within its borders does not come within the purview of the statute. We do not think there is any force in the contention. Whenever a county was organized while the law was in force, it passed under its provisions, and the public lands would be governed by them. But if this were not true, the law of 1879 was re-enacted on March 11, 1881, and undoubtedly would apply to Dimmit county, which was organized in 1880. The law does not say that it applies to counties that have

been organized for surveying purposes, but it applies to all organized counties.

Even if the statutes of 1879 and 1881 confined its operation to counties in which surveyors had been elected, there is nothing in the record that indicates that a surveyor had not been elected at the time that appellants sought to locate on the land. The fact that the first entry in the surveyor's record book was made in 1882 does not indicate when the surveyor was elected, nor is anything material on the question of organization of the county shown by proof that the commissioners' court provided in 1882 that the transcript of the surveyor's records of the Bexar land district be received and placed in custody of the surveyor of Dimmit county.

In the absence of a statement of facts it will be presumed, in aid of the judgment of the district court, that every act necessary to be done to constitute Dimmit county an organized county, within the purview of the statute, was done. *Wallace v. Bogel*, 62 Tex. 636.

The judgment is affirmed.

STATE v. TEXAS LAND & CATTLE CO.

(Court of Civil Appeals of Texas. Feb. 10, 1904.)

TRESPASS TO TRY TITLE—EVIDENCE— —SUFFICIENCY.

1. In trespass to try title by the state against defendants claiming under a Spanish grant, evidence held sufficient to sustain a finding that, either by actual survey or according to the intention of the parties, the defendants were entitled to all the land held by them under the grant.

Appeal from District Court, Travis County; R. L. Penn, Judge.

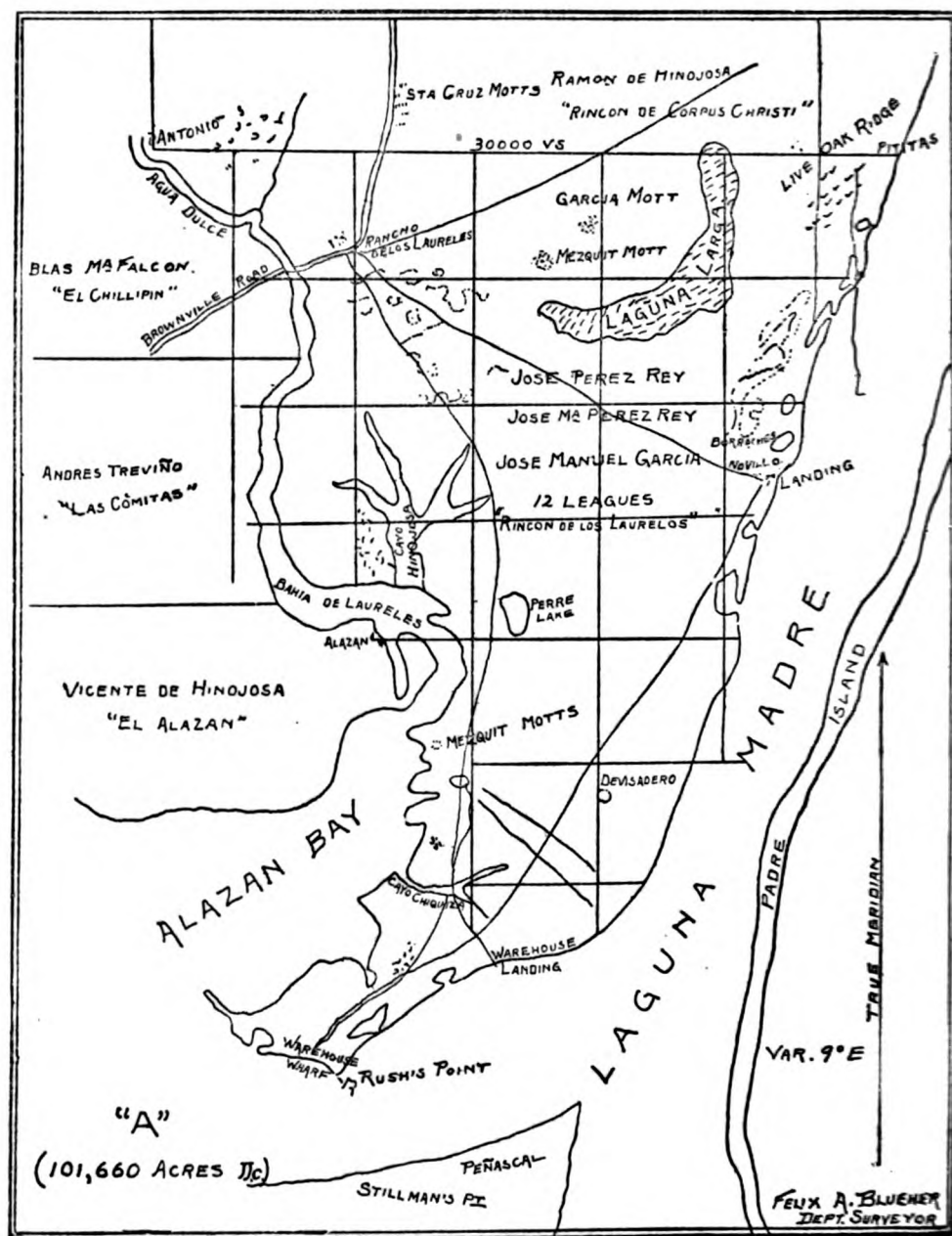
Action of trespass to try title by the state against the Texas Land & Cattle Company. From a judgment for defendant, the state appeals. Affirmed.

O. K. Bell, Atty. Gen., for the State. Jas. B. Wells and Chas. W. Ogden, for appellee.

STREETMAN, J. The state of Texas brought this suit originally in the form of an action of trespass to try title for a tract of about 100,000 acres of land known as the "Los Laureles Ranch," in Nueces county.

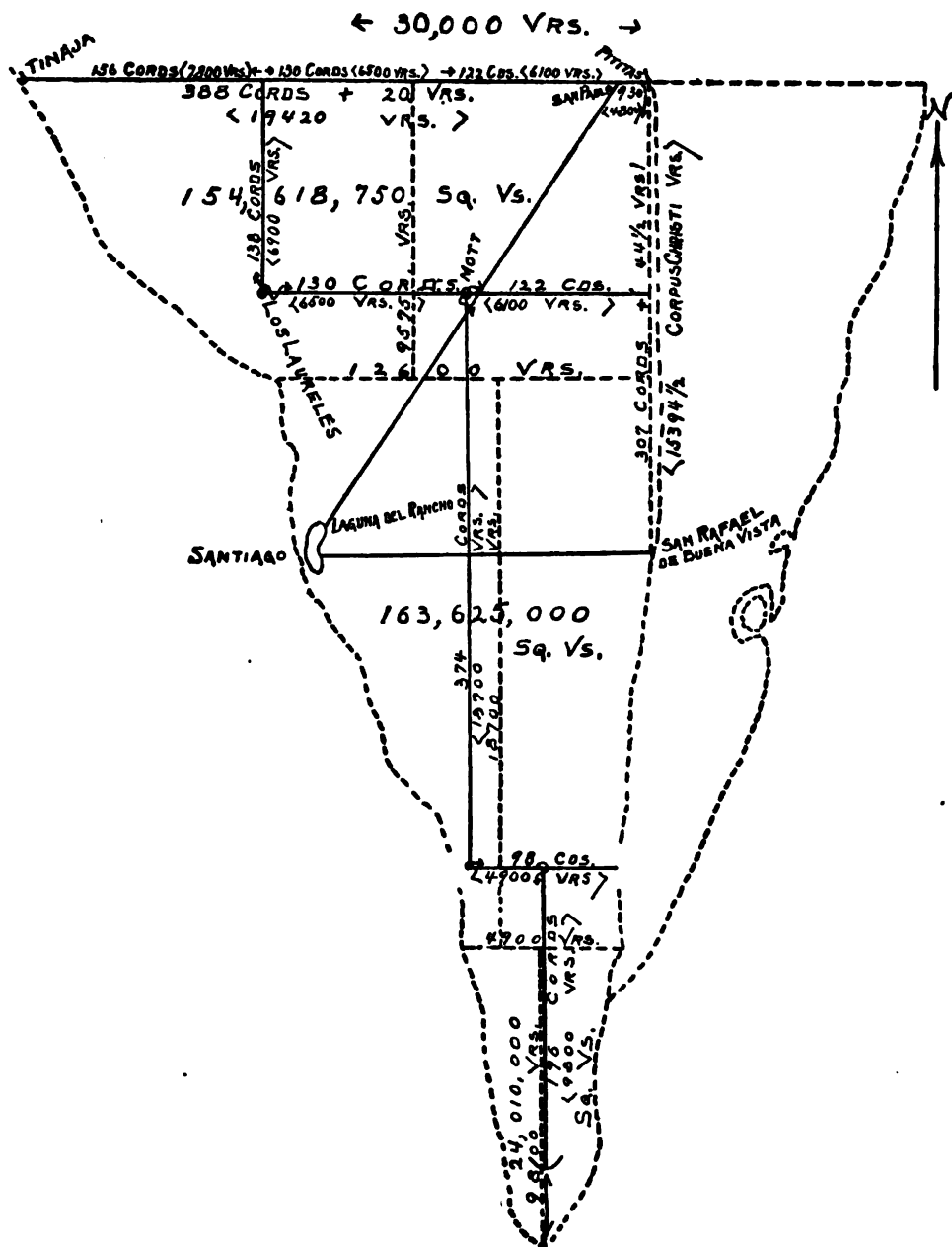
The appellee answered by a plea of not guilty, and in reconvention alleged that the land sued for was granted by the Spanish government in May and June, 1807, to Jose Perez Rey, Jose Maria Perez Rey, and Jose Manuel Garcia, and that its title emanated from said Spanish government, and had its origin at such time as to be within the protection of the treaty of Guadalupe Hidalgo, on the 4th of July, 1848, and prayed for judgment against the state confirming its title to

ernment in May and June, 1807, granted to the parties above named 12 leagues of land; and the principal question involved in the case is whether the lands granted by said government embrace all of the land sued for, or only a portion thereof. This became an issue of fact. The location of the land in controversy is shown by the following map, made from a survey of Felix A. Blucher, April 7, 1872:



The general description which precedes the field notes in the grant is as follows: "On the east side, this tract of land is bounded by an arm of the sea, called Corpus Christi; on the west side by a laguna called Bahía de los Laureles, connected on the south with said same arm of the sea, for which reason this tract forms a closed pasture."

The evidence shows that the arm of the



sea above mentioned was called Laguna Madre, and the laguna called "Bahia de los Laureles" is also known as the "Agua Dulce." The northwest corner of the grant, known as "San Antonio," and also called "Tinaja," is marked by bearing trees and a stone monument, and is located on the ground with reasonable certainty. There is nothing on the ground to mark the location of the northeast corner, called "Pittitas." There is some discrepancy in the grant as to the length of the north line, but it is fixed at approximately 20,000 varas. If this line extends entirely across the peninsula, as claimed by the defendant, it is, in effect, about 30,000 varas, making an excess of some 10,000 varas. In the northeastern portion of the grant there is a large lake, known as the "Laguna Larga."

It is the theory of the state either that an actual survey was run and stopped at the distance of 20,400 varas from the northwest corner, or, if there was no actual survey run, that the surveyor mistook the Laguna Larga for the Laguna Madre, and called for the latter by mistake, actually intending only to go to the western side of the Laguna Larga. The theory of the defendant is, either that no actual survey was made of the entire north line, or else that the survey did in fact reach the Laguna Madre, and that the call for the distance is in either case a mistake.

As shown by the report of the commissioner in the original grant, the survey was made in the following manner: It began in the morning at the point marked "Los Laureles" on the second sketch above shown, and extended east 6,500 varas. In the afternoon this line was extended 6,100 varas in the same direction, and the call at the end of this line is for the Laguna Madre. The surveyor then returned on this line to the Mott indicated, and ran south 18,700 varas and reached the Agua Dulce or Bahia de los Laureles. Being unable to go further in this direction, they then ran east 4,900 varas and again reached the Laguna Madre. Returning upon this line some distance, they then ran south 9,800 varas and reached the lower end of the peninsula. The surveyor then ascertained that a sufficient amount of land was not embraced, and found it necessary to include the necessary quantity on the north end of the grant. He then returned to the point from which he began, and ran north 6,900 varas, and, running west from that point 7,800 varas, established the northwest corner, known as "San Antonio or Tinaja." The report then states that by three surveys in the same direction, of 7,800, 6,500, and 6,100 varas, he again reached the Laguna Madre, and the survey was then closed. And afterwards a division of the entire survey was made between the three grantees.

As we have already stated, the distance called for upon the north line does not reach the Laguna Madre by about 10,000 varas, and it is possible that the theory insisted up-

on by the state, that there was an actual survey made which stopped at this point, may be true. If this theory were established, the state might be able to recover, because in some cases a call for distance, when shown to be correct, will prevail over a call for natural objects. *Sloan v. King* (Tex. Civ. App.) 77 S. W. 48, and cases cited. There are many facts in the record, however, which, in our opinion, clearly warranted the lower court in concluding, either that an actual survey of this entire line was not made, or that, if it was made, it actually extended to the shore of the Laguna Madre. It will be noted that the last call upon the north line is precisely the same length as the last call upon the first north line run by the surveyor, that is, 122 cords, or 6,100 varas. This is a rather striking coincidence, and might indicate that the surveyor did not in fact run this portion of the line, but simply assumed that the east line of the survey was practically a straight line, and inserted the length from the line previously run, in fact intending it to extend to the Laguna Madre. If this were true, the defendants would be entitled to recover. *Boon v. Hunter*, 62 Tex. 589. If, however, an actual survey of this line was made, there was abundant evidence to authorize the lower court in finding that the surveyor did not stop at the west side of the Laguna Larga, as insisted by the state, but reached the shore of the Laguna Madre. The description of the Laguna Madre as the eastern boundary of the survey is so full and specific that it renders it improbable that the surveyor mistook the Laguna Larga for this body of water. In the report contained in the grant is the following: "On the eastern part it is bounded by an arm of the sea called Corpus Christi. This is in some places more than two leagues in width, and exceedingly abundant in fish. On the western side it is bounded by an arm of the Laguna called Laureles. It may be a league wide in some places. It rises and falls as an inlet from the aforesaid arm of the sea, and on the south end the arm of the Laguna connects with the arm of the sea, in this manner forming an inclosed pasture, which has an entrance from the north only." In addition to this description of the Laguna Madre, there is contained in the original grant a map made by the surveyor, which shows in the northeastern part a body of water; and there is testimony in the record that this body of water, as shown in the original map, approximately represents the location and shape of the Laguna Larga, and indicates very strongly that the surveyor knew the location and shape of this body of water, and did not mistake it for the Laguna Madre. The evidence also shows that the land upon the eastern side of the peninsula has been gradually extended by the deposit of sand, and that it is considerably larger now than it was 100 years ago, when the original survey was made; and this

the surveyor, having surveyed the first line, in giving the distance of the north line assumed that the east line of the survey ran directly north and south. If this be true, it would account largely for the discrepancy, because the distance from the eastern extremity of the first line to the Laguna Madre would probably not be more than half as great as the distance from the northeast corner, as claimed by the state, to said body of water; the course of the Laguna Madre being northeast and southwest, instead of north and south. However, whether the discrepancy can be accounted for or not, we are satisfied that the evidence in the record abundantly warranted the lower court in finding that, either by actual survey or according to the intention of the parties, the north line extended entirely across the peninsula, and that the survey embraced all of the land sued for.

It is further contended by the state that it was entitled to recover the land built up on the eastern side of said peninsula since the date of the grant, because the extension had not been so gradual as to make it an accretion, which would belong to the owner of the adjoining land. The law applicable to this question has been fully stated by this court in the case of *Denny v. Cotton*, 3 T. C. A. 634, and, applying the rules there laid down to the facts in the case, we think it clear that the lower court was authorized in concluding that such extension of the land as was shown belonged as an accretion to the adjoining owner.

Finding no error in the judgment, it is affirmed. Affirmed.

GULF, C. & S. F. RY. CO. v. WARE & WALKER.

(Court of Civil Appeals of Texas. Feb. 10, 1904.)

CARRIERS—DAMAGES TO CATTLE—MEASURE OF DAMAGE.

1. In an action against a railroad company for damages caused to a shipment of cattle by delay and rough handling, the measure of damages was the difference between the market value of the cattle at the time and in the condition they were on arrival at their destination, and their value at the time and in the condition in which they should have arrived there.

Error from Bell County Court; G. M. Felts, Judge.

Action by Ware & Walker against the Gulf, Colorado & Santa Fe Railway Company. From a judgment for plaintiffs, defendant brings error. Reversed.

J. W. Terry and Ballinger Mills, for plaintiff in error.

of a shipment of cattle from Belton to Ft. Worth. From a verdict and judgment in favor of the plaintiffs, the railroad company has brought the case to this court by writ of error.

In stating the measure of damages, the court instructed the jury as follows: "The measure of damages in this case, if any you find, would be the difference in market value in Ft. Worth of said cattle in the condition in which they were sold, or in which they reached Ft. Worth, and the market value of said cattle in the condition in which they should have reached said place, or sold, if shipped with due caution, care, and dispatch." This charge is assigned as error, and we sustain the assignment. The testimony shows that some of the cattle were not sold until three days after they reached Ft. Worth, and were delivered to the consignee, and it is not shown that the market had not declined during the three days referred to. The correct measure of damages was the difference between the market value of the cattle at the time and in the condition they were in on their arrival at Ft. Worth, and the time and condition in which they should have arrived there, regardless of the time they were sold. As a matter of fact, if the record is correct, no proof was made of the market value of such cattle at the time the plaintiffs alleged they should have reached their destination, and therefore the jury had no proper standard by which to determine the amount of damages the plaintiffs had sustained.

Judgment reversed, and cause remanded.

PITMAN et al. v. HOLMES.

(Court of Civil Appeals of Texas. Feb. 10, 1904.)

FRAUD—LIMITATIONS—IMPEACHING WITNESS—NEW TRIAL.

1. Where a mother takes money left by her deceased husband, and invests it in land, and afterwards divides the land with their child, on the basis that the money was, as she falsely told the child, community property, limitations do not commence to run against an action by the child to set aside the partition for fraud, on the ground that the purchase money was the separate property of deceased, till she knows, or by the exercise of reasonable diligence should know, the facts.

2. Though a witness does not remember having made a statement out of court contrary to his testimony, such contradictory statement is admissible.

3. Though a party may not impeach his witness, he may prove the truth of a fact by testimony in direct contradiction to that of the witness.

4. Refusal of new trial for newly discovered evidence is not reviewable in the absence of an abuse of discretion.

¶ 1. See *Carriers*, vol. 9, Cent. Dig. § 964.

¶ 1. See *Limitation of Actions*, vol. 23, Cent. Dig. §§ 480, 490.

their misrepresentations and fraud, she and her husband entered into a partition agreement with defendants, by the terms of which she received from them a deed to about one-half of the 638 acres of land retained by her mother after her conveyance of 200 acres out of the 850 acres originally purchased to Adams; that is to say, they conveyed her 319 acres, specifically described by metes and bounds. And at the same time, and in the same manner, plaintiff and her then husband conveyed to defendants all their right, title and interest in the other one-half of said land; the quantity of land conveyed being 319 acres, which is specifically described in the deed, and such description set out in her petition. That, at the time of said partition and execution of the partition deeds, defendants knew said lands had been purchased with the money belonging to the separate estate of plaintiff's father, acquired by him prior to his marriage to her mother, but that plaintiff had no knowledge of such fact, and did not know of it until many years thereafter. That, for the purpose of cheating and defrauding plaintiff, defendants fraudulently concealed such fact from her, and, for the purpose of inducing plaintiff to make said partition, and to accept one-half of the 638 acres as her share, falsely and fraudulently represented to her that said lands were purchased by defendant Hester A. Pitman, while Hester Vivian, with the money belonging to the community estate of herself and deceased husband, and that in consequence it was community property, and that plaintiff was entitled to but one-half of the property. That, with full faith and childish confidence in said representations of her parents, and relying thereon, plaintiff executed said deed, believing, as defendants stated, that said land was purchased with community funds, and not with the separate funds of her deceased father, and, so believing, she accepted the deed to the 319 acres of land as her share of the 638-acre tract. That in 1885 her husband, J. L. Johnson, died, and plaintiff again became an inmate of her mother's household, where she continued to reside until the 19th day of December, 1886, when she married Solomon Holmes, and moved with him from Bexar county, far away from her relations and relatives of her father, and did not return until 1901, when, for the first time, she discovered that defendants had practiced the fraud upon her in the partition of said lands. Then she learned for the first time that the lands had been purchased and paid for with money acquired by her father previous to his marriage with her mother, and discovered that defendants' statements and representations made at the time of the partition, and on divers occasions prior thereto, were wholly false and fraudulent. Plaintiff prayed that

NEILL, J. Defendant in error (plaintiff below) on the 23d day of January, 1902, exhibited her original petition in the district court against plaintiffs in error, Hester A. Pitman and her husband, C. R. Pitman, defendants below, praying for a cancellation of a certain partition of lands evidenced by the deeds of the respective parties, made between them on the 21st day of October, 1884. In the first amended petition, on which the case was tried, it is alleged, in substance: That on the 1st day of January, 1871, plaintiff's father, T. J. Vivian, died intestate, leaving defendant Hester A. Vivian (now Pitman), his wife, and plaintiff, then an infant two months old, surviving him, as his only heirs, and that there never was any administration upon the estate, nor partition of the property, save such as is by this suit sought to be set aside. That at the time of his death Vivian resided in Bexar county, and owned personal property, consisting of money, cattle, and horses, of the value of \$12,000, all of which was acquired before his marriage to Hester A., and was at the date of his death his separate estate. That, when plaintiff was two years old, her mother, Hester A., married her codefendant, C. R. Pitman, and that from then plaintiff resided with them until she was married, on the 17th day of July, 1884, in her thirteenth year, to one J. L. Johnson. That, upon the death of her father, her mother took possession of his money, horses, and cattle, assumed absolute control thereof, and used, managed, and invested the same as she saw fit. That on the 13th day of May, 1878, her mother invested \$2,500 of T. J. Vivian's money in a tract of 850 acres of land situated in Bexar county, Tex., which she purchased for that sum from Samuel Hutton. The land is particularly described in plaintiff's petition. That, by reason of the fact the land was purchased with money of the separate estate of her father, plaintiff became the owner of, and entitled to, an undivided two-thirds interest in the same, and her mother to the remaining one-third interest. That afterwards, on the 9th day of July, 1872, the defendant Hester A. Pitman (then Vivian), in violation of plaintiff's rights in said lands, made a pretended sale of about 200 acres thereof to her father, Robert Adams. The land thus alleged to have been conveyed to him is also specifically described in plaintiff's petition. That on the 21st day of October, 1884, a short time after plaintiff's marriage to J. L. Johnson, and while she was a mere child, of immatur-

her deed to defendants be annulled and canceled, and that she have judgment out of the 319 acres held by defendants for such additional number of acres as would give her two-thirds of the 638 acres, and for possession of that portion of same as the court may ascertain and declare to be her property. By the trial amendment, plaintiff alleged that she had no means of discerning the deceit and fraud complained of in her first amended original petition, as the facts therein alleged were known to her mother and Robert Adams, and her father's relations, who knew of her father's having separate means; that defendant and Robert Adams did not tell her the facts, but informed her of the matter as alleged in her first amended petition; that she did not live near her father's relatives, was not acquainted with them, had no means of communicating with them, and had no reason to suppose that they knew anything beneficial to her, nor did she have any reason to think or believe that any one else had any information that would be beneficial to her in the matter, but placed implicit trust in her mother's representations that the same was community property; that there was no record to acquaint her of the money and property left by her father, and she had no means of discovering the fraud perpetrated upon her, nor reason to suspect the same, nor notice and information of such knowledge on the part of anybody, or reason to suspect anybody knew of such facts; and that she knew of no facts or circumstances calculated to put an ordinarily prudent person upon inquiry as to the existence of the true state of facts in regard to the purchase of the land with her father's separate property. The defendants answered by general and special exceptions, a general denial, and pleas of the several statutes of limitations. The case was tried before a jury, and resulted in a verdict and judgment in favor of plaintiff, from which defendants prosecute this writ of error.

Conclusions of Fact.

As no assignment of error calls in question the sufficiency of the evidence to support the verdict, we deem it unnecessary to summarize and discuss the evidence, or do more than state that, from a careful examination and consideration of it, we have concluded that it is reasonably sufficient to sustain the verdict upon every material allegation in plaintiff's petition.

Conclusions of Law.

1. It is contended by defendants, under their second and third assignments of error, that the allegations of plaintiff are not sufficient to prevent the statute of limitations from running against her cause of action from the time the partition sought to be annulled was made between the parties, and that therefore plaintiff's petition shows upon

its face that her action was barred when this suit was instituted. It is elementary that when a party, by his own fraud, has prevented the other party from coming to a knowledge of his rights, he cannot, in good conscience, avail himself of the statute, if the fraud was concealed from the plaintiff by the defendant, or was of such a character as necessarily implied concealment. *Wood on Limit.* §§ 58, 276. There may be such relations between the parties that silence or the nondisclosure of a material fact will be a fraudulent concealment. If a person standing in a special relation of trust and confidence to another has information concerning property, and contracts with the other, and does not disclose his exclusive knowledge, the contract may be avoided. Mere silence, under such circumstances, becomes fraudulent concealment. Among the relations to which this rule applies is that of parent and child. If any of the parties standing in such relation propose to contract with persons to whom they occupy a position of trust and confidence, they must use the utmost good faith. It is not enough that they do not affirmatively misrepresent. They must not conceal. They must speak, and speak fully, to every material fact known to them, or the contract will not be allowed to stand. *Perry on Trusts* (5th Ed.) § 178. When such a fraud is unknown to the injured party, or is concealed, lapse of time will not be laches which bar relief. *Perry on Trusts*, § 230. And the statute of limitation will not begin to run until the fraud is, or ought to be, discovered. *West v. Clark* (Tex. Civ. App.) 66 S. W. 215; *Hodges v. Hodges* (Tex. Civ. App.) 66 S. W. 239. But it is the settled rule in this state that fraud will only prevent the running of the statute of limitations until the fraud is discovered, or by the use of reasonable diligence might have been discovered. *Vodrie v. Tynan* (Tex. Civ. App.) 57 S. W. 680; *Munson v. Hollowell*, 26 Tex. 475, 84 Am. Dec. 582; *Anding v. Perkins*, 29 Tex. 348; *Bremont v. McLean*, 45 Tex. 10; *Kuhlman v. Baker*, 50 Tex. 630; *Ransome v. Bearden*, Id. 119; *Alston v. Richardson*, 51 Tex. 1; *Kennedy v. Baker*, 59 Tex. 150; *Brown's Heirs v. Brown*, 61 Tex. 45; *Calhoun v. Burton*, 64 Tex. 510; *Bass v. James*, 83 Tex. 110, 18 S. W. 336. Where a person has a right in property, he is held, when the avenues of information are open to him, to reasonable diligence in the conduct of his affairs; and if, by the use of such diligence, he would have known of his right, he is held to have known it. And limitations will run against him from the time he should have made discovery by the exercise of ordinary diligence. *Gerfers v. Mecke* (Tex. Civ. App.) 67 S. W. 144.

The principles announced and authorities cited indicate the rule of pleading in cases where fraudulent concealment is relied upon to take the action of him who seeks relief against fraud from the operation of the stat-

ute of limitations. The ordinary rule is that in order it may appear that reasonable diligence has been exercised by plaintiff, or that he has been guilty of no laches, to discover, or in failing to discover, the fraud, he must allege the fact upon which he relies, so the court may determine from the pleadings whether he is entitled to the relief sought, assuming such allegations are true. If from such allegations the court can say, as a matter of law, that, by the exercise of reasonable diligence, plaintiff could have discovered such fraud within such time as his action would have been barred when the suit was filed, then his petition would be subject to such exceptions as are urged against the plaintiff by the assignments of error now under consideration. If, on the other hand, the court cannot so say from the allegations, the question is one of fact and must be submitted to the jury.

It cannot, in view of the facts alleged by the plaintiff in this case, be said, as a matter of law, that she, by the exercise of reasonable diligence, could have discovered prior to the four years next preceding the institution of this suit the fact that the land was purchased with the funds of her father's separate estate. She was a baby when the money was invested. The presumption that the money on hand when her father died was community property was strengthened by what her mother told her about its being invested in the land. Though married, she was under 14 years of age, and prohibited by law from marrying (Rev. St. 1879, art. 2839), when the land was partitioned between her and her mother. She was informed by her mother and grandfather that the land was community property. It was the duty of her mother to tell her the truth. She had the right to believe, and did believe, she had been told the truth. She was in possession of no information and had no means of acquiring such knowledge as would lead her to suspect that her mother had misrepresented the facts in regard to the land. No inventory had been filed or record made of her father's separate property to put her upon notice or inquiry, as in the case of *Gerfers v. Mecke*, supra.

Under the facts alleged, as well as proved, the land having been bought with the money of her father's separate estate, and the deed being taken in the name of her mother, plaintiff was the equitable owner of two-thirds of it, her mother holding the legal title in trust for her; and, not knowing the extent of her interest at the time, and having been induced by her trustee to believe such interest was only one-half, and having no reason to disbelieve her mother, she could not be bound by the partition, but her mother would still be charged, as the trustee of plaintiff, for her remaining interest in the land. And limitations would not commence to run against her until she knew or was charged with the knowledge of her interest, and of the facts showing her mother had repudiated the trust.

2. Upon the question of limitations the court instructed the jury as follows: "On the defense of limitation, you are instructed that, as more than four years elapsed from the making of the partition deeds between the plaintiff and defendants, the plaintiff's cause of action is barred by limitation; and you are instructed to find for defendants on said plea, unless you believe from the evidence that the defendants, or either of them, fraudulently concealed from plaintiff that the money with which the Hutton land was bought, or a part of it, belonged to her father, T. J. Vivian, at the time of his marriage, or was derived from property belonging to him at said time, if you find it was, and that she did not know said fact, and could not have discovered the same by the use of reasonable diligence. If you believe from the evidence that defendants, or either of them, fraudulently concealed the fact that the money which was paid for the Hutton land, or a part of it, belonged to T. J. Vivian at the time of his marriage, or was derived from the sale of property belonging to him at said date, if you find it was, and that plaintiff did not know said fact, and could not have discovered the same, by the use of reasonable diligence, more than four years prior to the date of the filing of this suit, to wit, January 28, 1902, then the plaintiff would not be barred by said four years' statute of limitation." The four-years statute is the one applicable to actions of this character (*Watson v. T. & P. Ry.* [Tex. Civ. App.] 73 S. W. 830; *Cetti v. Dunman* [Tex. Civ. App.] 64 S. W. 787; *Heidenheimer v. Loring* [Tex. Civ. App.] 26 S. W. 99); and, the court having submitted the issue of limitation under it, no error was committed in refusing to give at defendant's request a charge on the five-years statute. If plaintiff's action was not barred by the four-years statute, it could not possibly be barred by the one of five.

3. The charge of the court upon the statute of limitations, when taken in connection with the preceding paragraphs, is not obnoxious to the objection urged in the seventh assignment of error.

4. There is no merit in the eighth assignment of error. That a witness does not remember having made statement out of court contradictory to his testimony will not prevent the admission of his contradictory statements. *Johnson v. Brown*, 51 Tex. 65. It is not shown by the bill of exceptions taken to the court's action in refusing the motion to exclude the testimony of the witness Beck whether such testimony was contradictory to that of witness Adams, sought to be impeached by it, or not. If the statement made by Adams, as testified to by Beck, contradicted the latter's evidence introduced by the defendants, a proper predicate having been laid for its introduction, Beck's testimony was admissible. If the statement made to Beck was not contrary to Adams' testimony given for defendants, but in con-

their motion.

5. The rule that a party will not be permitted to impeach the general reputation of his own witnesses for truth, or to impugn their credibility by general evidence tending to show them unworthy of belief, does not preclude the party from proving the truth of any particular fact by any other competent testimony in direct contradiction to what the witness may have testified. Greenl. Ev. § 443. Hence it was not error to permit the plaintiff to testify, contrary to the testimony of the witness Burton, that said witness never told her anything about her father's property or money.

6. The remaining assignment of error complains of the court's refusal to grant a new trial upon the ground of newly discovered evidence. When a new trial is applied for on this ground, it is necessary to show that a knowledge of the existence of the new evidence was acquired subsequent to the former trial, and that it was not owing to the want of diligence that it was not discovered and obtained in time to be used when the case was tried; that the evidence is material, and not merely cumulative, and, if admitted, would probably change the result upon another trial. Such a motion is addressed to the sound discretion of the trial court, and, unless it appears that such discretion has been abused in overruling the motion, the action of the trial court is not subject to review on appeal. *S. A. & A. P. Ry. v. Moore* (Tex. Civ. App.) 72 S. W. 226. When the motion, with the affidavits attached thereto, is considered in connection with plaintiff's sworn answer thereto, as well as with the evidence, we do not believe it comes within the principles which entitle it to be granted, or that the trial court in refusing it abused its discretion.

There is no error assigned which entitles defendants to a reversal of the judgment appealed from, and it is affirmed.

BRALY v. BARNETT.

(Court of Civil Appeals of Texas. Feb. 6, 1904.)

PLEADING—CAUSE OF ACTION—VARIANCE.

1. A real estate agent could not recover commissions under a petition declaring on a written contract with his principal, where his evidence showed that the written contract had been revoked prior to the sale, which was made under a subsequent oral contract, even if the oral contract was "under the terms" of the prior written one.

Appeal from Donley County Court; B. H. White, Judge.

Action by A. J. Barnett against H. L. Braly. From a judgment for plaintiff, defendant appeals. Reversed.

Jno. W. Veale and J. H. O'Neal, for appellant. W. B. Ware, for appellee.

the sum of \$898.10, alleged to be due him commissions while acting as appellant's agent under a written contract for the sale of certain lands and cattle owned by appellant. The contract declared upon was set out in the petition. It was duly executed by appellant, appointed appellee as agent, and provided, among other things, "for the payment of 5 per cent. commission in case appellee had any connection with procuring the buyer whatever." Appellant answered by a general denial, and specially, that, if the contract declared upon had ever been executed as alleged, it had been revoked long before the sale of property charged. Upon the issues thus formed in the pleadings the court found for appellee in the sum of \$796.95, and we see no way to avoid a reversal of judgment for the error of the court as specified in the ninth and tenth assignments of error, in which complaint is made to effect that the evidence fails to support a recovery upon the case made by the petition. The evidence was conflicting on the issue whether appellee was the efficient cause of the sale, though sufficient, perhaps, to support a finding that he was. There seems, however, to be no conflict in the testimony to the effect that some time after appellant's execution of the written contract declared upon he wrote to appellee revoking his authority to act as agent. Among other things the following is taken from the record of appellee's cross-examination: "Mr. Barnett, the time you received this letter from Braly (meaning the letter of revocation of his authority to act as Braly's agent), it was a revocation, was it not, of your authority?" Ans. Yes, I regarded my agency at an end. Ques. Did you consider your authority as agent annulled at that time? Ans. Yes. Ques. Did you make any effort after that to sell this property to any one? Ans. No, not until I saw Mr. Braly, three or four days afterwards, when he told me, as I have said, that I could go ahead and sell his property under the terms of the written contract with this exception: that he would not sell the land without the cattle." If, then, appellee was entitled to recover his commission was not by virtue of the written contract declared upon, but by virtue of the oral contract subsequently made, which in some particulars was confessedly variant from the written contract. The fact, if found to be true as asserted by appellee, that the subsequent oral contract was "under the terms" of the written one, in no manner alters the fact that appellee's right of recovery, if any, must be predicated upon the subsequent contract and not upon the written. The rule that a cause of action not alleged, though proved, cannot form the basis of a decree, is a familiar one. See *Mims v. Mitchell*, 1 T. 443; *Letet v. Edens* (Tex. Civ. App.) 49 S. W. 109; *Wisbey v. Boyce* (Tex. Civ. App.)

Because the court's findings and judgment are based upon a cause of action not alleged, the judgment is reversed, and the cause remanded.

PERRY-RICE GROCERY CO. v. W. E. CRADDOCK GROCERY CO.

(Court of Civil Appeals of Texas. Feb. 6, 1904.)

PARTNERSHIP—ACTIONS—NONRESIDENT DEFENDANTS—PLEADING—MEMBERS OF FIRM—NAMES—CAPACITY OF PARTIES—CHANGE—AMENDMENT—SERVICE.

1. Where, after suit brought against nonresidents as a corporation, plaintiff filed an amended petition changing the suit to one against defendants as partners, a judgment against defendants and against a garnishee based on such amended petition could not be sustained in the absence of defendants' appearance, or service of such amended petition on defendants without the state, as authorized by Rev. St. art. 1230.

2. A judgment against a nonresident partnership cannot be sustained where the petition fails to allege the names of the members of the firm.

Error from Kaufman County Court; H. M. Cosnahan, Judge.

Action by the W. E. Craddock Grocery Company against Arbuckle Bros. and the Perry-Rice Grocery Company, garnishee. From a judgment against the garnishee, it brings error. Reversed.

Lee R. Stroud, for plaintiff in error.
Young & Adams, for defendant in error.

TALBOT, J. W. E. Craddock Grocery Company, a corporation doing business at Terrell, Tex., brought suit against Arbuckle Bros., of the city and state of New York, on December 1, 1902, to recover on a contract the sum of \$260, and on the same day sued out a writ of garnishment against Perry-Rice Grocery Company, plaintiff in error. The plaintiff in the court below, W. E. Craddock Grocery Company, alleged in its original petition that defendants Arbuckle Bros. was a corporation organized and doing business under the laws of the state of New York, with its principal office in the city of New York. A nonresident notice as provided for by article 1230 of the Revised Statutes of 1895, together with a certified copy of plaintiff's petition, was served on defendants, in the city of New York, on the 12th day of December, 1902, by delivery thereof to John Arbuckle. The garnishee, in obedience to the writ served upon it, answered on the 14th day of January, 1903, that it was indebted to the defendants Arbuckle Bros. in the sum of \$468. On February 2, 1903, during a regular term of the court, the plaintiff filed an amended petition, in which it alleged that the defendant Arbuckle Bros. was a partnership firm, composed of John Arbuckle and other per-

sons. Defendants did not answer, and the same day the amended petition was filed, plaintiff proceeded to take judgment final by default for the sum of \$260, interest, and costs. This judgment having been entered against Arbuckle Bros., plaintiff then took judgment against the garnishee, Perry-Rice Grocery Company, on its answer, for a like sum, together with all costs in the cases incurred.

Plaintiff in error has brought the case before this court for revision, and contends that the judgment rendered in the original suit is void, for want of service of notice on defendants Arbuckle Bros. of plaintiff's amended petition. This contention is believed to be correct, and requires a reversal of the judgment against plaintiff in error. The original petition, of which Arbuckle Bros. had notice, presented an action against them as a corporation, and by amendment the capacity in which they were sued was changed from that of corporation to a partnership. This was equivalent to the institution of a new suit, and, defendants not having pleaded thereto, before a valid judgment can be rendered therein against them service of such amendment must be had upon them. The seizure of a defendant's property by a writ of attachment or garnishment does not obviate the necessity of service of citation as provided by law in ordinary suits.

It has been held in this state that the mere change of parties, such as an amendment which strikes out one of the plaintiffs, or corrects the Christian name, is not such a change in the character of the suit as would give the defendant the benefit of limitations. It has also been held that the mere addition of the name of one of the partners of a firm sued, whose name had been omitted in the original petition, the other plaintiffs remaining the same, or, where suit is brought in the name of a nominal plaintiff for the use of another person, the substitution by amendment of the person for whose benefit the suit was originally brought, would not require the service of notice thereof on the adverse party. *Roberson v. McIlhenny*, 59 Tex. 615; *Martel et al. v. Somers*, 26 Tex. 551; *Price v. Wiley*, 19 Tex. 142, 70 Am. Dec. 323. But where there is an entire change in the names of the plaintiffs, or the capacity in which the defendant is sued, service of such an amendment must be made upon the other party, or judgment taken against such new party, in the absence of a voluntary appearance and answer thereto, will be void. *McIlhenny v. Lee*, 43 Tex. 205; *Roberson v. McIlhenny*, *Hutchins & Co.*, 59 Tex. 615. Again, it appears that the names of the individual members composing the firm of Arbuckle Bros. were not alleged in the amended petition, and it has been held in this state that a judgment taken without such allegation is invalid. *Frank v. Tatum*, 87 Tex. 204, 25 S.

der to warrant and sustain a judgment against a garnishee, there must be a valid judgment against the defendant in the original proceedings. If that judgment is void, the garnishment judgment falls with it. *Edrington v. Allsbrooms*, 21 Tex. 186.

Our conclusion is that the judgment taken by W. E. Craddock Grocery Company against Arbuckle Bros. is void because notice of the amended petition, wherein the capacity in which they were sued was changed from that of a corporation to a partnership firm, was not served upon them; and such judgment is further insufficient to support the judgment taken by them against the plaintiff in error as garnishee, for the reason that the names of the individual members composing the firm of Arbuckle Bros. was not alleged.

For these reasons, the judgment of the court below is reversed, and the cause remanded.

ALTGELT v. CAMPBELL et al.*

(Court of Civil Appeals of Texas. Feb. 3, 1904.)

MUNICIPAL CORPORATIONS—CLAIMS—PAYMENT—WARRANTS—ISSUANCE—ORDER—OFFICERS—DUTIES—PERFORMANCE—MANDAMUS—APPEAL—STATEMENT OF FACTS—FINDINGS—CONCLUSIVENESS.

1. The drawing of a warrant by a municipal officer for the payment of a definitely ascertained demand is a ministerial act, the performance of which may be enforced by mandamus.

2. Where, in mandamus to compel city officers to issue a warrant for payment of relator's demand against the city, the court found that there had been no absolute refusal on the part of the officers to execute the warrant in the regular order in which relator's demand had been established as a claim against the city, but that the city auditor, in drawing warrants, had not reached relator's claim in regular order, and that when it was reached a warrant would be drawn, plaintiff was not entitled to a writ.

3. In the absence of a statement of facts, the findings of the trial court are conclusive on appeal.

Appeal from Bexar County Court; R. B. Green, Judge.

Action by George O. Altgelt, as administrator of the estate of Amalie Elmendorf, deceased, against John P. Campbell and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

I. O. Baker and Aug. E. Altgelt, for appellant. J. E. Webb and T. J. Newton, for appellees.

NEILL, J. This suit was brought by George O. Altgelt, as administrator of the estate of Amalie Elmendorf, deceased, against John P. Campbell, mayor, George Stuemke, city clerk, and Vinton L. James, city auditor, of the city of San Antonio, for a writ of mandamus to compel them, as officers of said

city, to issue a warrant for the payment of said estate, against the city of San Antonio, for \$219.24, with 6 per cent. interest per annum from date of judgment, together with costs of suit, amounting to \$8.60. The defendants answered, admitting that they are the officers of the city, as charged in plaintiff's petition; that plaintiff recovered a judgment against the city, as alleged; and that said judgment is in full force and effect. They alleged that at the time the judgment was rendered it was the duty of the city clerk to draw all warrants on the treasurer, and countersign the same, and keep accurate accounts thereof in a book kept for that purpose. That it was the duty of the city auditor, as general accountant of the city, to keep accounts of all its receipts and disbursements of money and that it is the duty of the mayor to sign all orders and drafts upon the treasurer for money. That the city charter provides that "all creditors of the city having audited or established claims against the city shall be entitled to warrants therefor drawn upon the city treasurer, which shall be numbered, designating the fund out of which the same is payable, but such warrants shall not bear interest and shall be paid in the order of their issuance by months and by number so that no preference shall be shown to any person; but said warrants shall be drawn in the same order as the claims may be audited, approved or established by the action of the council, or under its direction, or by the judgment of a court of competent jurisdiction." That section 114 of said charter provides that: "Before the delivery of any warrant by the auditor to the payee thereof, the auditor shall carefully ascertain whether or not such person is in any manner indebted to the city for matured taxes or debts of any kind, and if he shall find that such payee is so indebted to the city, he shall not deliver such warrant unless such person shall then and there actually pay such taxes or debts to the proper receiving officer. If such payee refuses to pay such taxes or debts, the auditor shall refuse delivery of such warrant, and shall make report thereof at the next meeting of the city council, together with a statement of the nature of the claim asserted by the city against the payee, and in such case the auditor shall await the action of the council before delivering such warrant; provided, however, that this section shall apply only to persons receiving warrants for the compensation, and shall not apply to current wages of those persons who are to be paid weekly." That at the time and upon the dates when plaintiff claims to have demanded a warrant from defendants for his judgment he, as administrator of the estate of Amalie Elmendorf, deceased, owed the city of San Antonio the sum of \$456.78 taxes, which amount was then and is still due and owing to the city, and that therefore defendant

*Rehearing denied February 24, 1904.

¶ 1. See *Mandamus*, vol. 23, Cent. Dig. § 217.

under the charter, have no right to issue and deliver plaintiff a warrant on the city treasurer for the amount due upon said judgment. That on the 10th day of August, 1903, the city council of the city of San Antonio, by resolution adopted, instructed the city auditor to complete a list of all the creditors of the city, and to draw warrants to cover same in the order as the claims may be audited, approved, or established by the action of the council, or under its direction, or by judgment of a court of competent jurisdiction. That the auditor, in accordance with such order, has compiled such list, and as soon as petitioner's claim is reached on said list in the order of its filing the auditor will issue to petitioner a warrant covering his claim, and will deliver the same to petitioner when he complies with the charter provision of the city of San Antonio, and pays the taxes due by the estate which he represents. The case was tried before the court without a jury, and judgment rendered in favor of the defendants.

There is no statement of facts in the case, but the trial judge found the following conclusions of fact and law: That plaintiff is the duly appointed, qualified, and acting administrator of the estate of Amalie Elmen-dorf, deceased. That as such administrator he, on May 21, 1903, recovered in the county court of Bexar county, Tex., a judgment against the city of San Antonio for the sum of \$219.24, with 6 per cent. interest thereon from such date, together with \$6.60 costs, and that said judgment is unpaid. That on the 8th day of June, 1903, plaintiff filed a copy of said judgment in the office of the city auditor of the city of San Antonio, Vinton L. James, and demanded a warrant of the city from said auditor for the amount of said judgment, and that the auditor refused to issue it to him. That on the 11th day of July, 1903, plaintiff demanded of John P. Campbell, the mayor of said city, to issue to him a warrant for the amount of said judgment, and demanded that he sign such warrant, to be issued in plaintiff's favor, which Campbell refused to do. That on the same day plaintiff demanded of George Stuemke, city clerk, that he, in his official capacity, sign a warrant in favor of plaintiff for the amount of said judgment, which he refused to do. That at the same time plaintiff made demand of Vinton L. James, city auditor, that he, as city auditor, sign a warrant in plaintiff's favor for the amount of said judgment, which James refused to do. That it is the duty of the auditor to draw all warrants upon the city treasurer, which warrants shall be numbered, designating the fund out of which they are payable, said warrants to be paid in the order of the issuance by months and by numbers, so that no preference shall be shown to any persons. That warrants shall be drawn in the same order, and the claims made audited, approved, or established by the action of the council, or

under its direction, or by the judgment of a court of competent jurisdiction. That at the time plaintiff demanded a warrant the auditor was busily engaged in drawing warrants for all claims against the city in the order in which they were audited, approved, or established, and that he had not yet been able to reach the claim of plaintiff in its regular order, and to have drawn and signed the same at the time demanded by plaintiff would have been irregular, and against the charter provisions of the city, and against the resolution of the council adopted August 10, 1903, instructing the auditor to issue warrants in conformity with said charter provisions. That the auditor would reach the claim of plaintiff in its regular order in about a week of the date after the trial of this case, at which time the warrant would be drawn. That it is the duty of the mayor of the city of San Antonio to sign all warrants upon the treasurer, and that at the time plaintiff demanded of the mayor that he sign a warrant it was impossible for the mayor to do so, for the reason that the auditor, under the law, had not been able to draw the warrant upon plaintiff's claim. That it is the duty of the city clerk to attest all warrants drawn upon the treasurer, and at the time the demand for him to sign said warrant was made by plaintiff it was impossible for him to do so for the same reason that it was impossible for the mayor so to do. From these findings the court rendered, in favor of defendants, the judgment appealed from.

It is contended by appellant that under the facts found by the trial court a mandamus compelling appellees to issue the warrant should have been awarded. The drawing of a warrant for the payment of a demand or claim which has been audited, approved, or established by the action of the city council, or by a judgment of a court of competent jurisdiction, is regarded as a duty purely of a ministerial nature, and hence properly falling within the scope of mandamus. And whenever the demand has been definitely ascertained as prescribed by law (as it was in this case by a judgment of a court of competent jurisdiction), and the duty is plainly incumbent upon a particular officer or officers of drawing, signing, and attesting such warrant upon the treasurer for the amount due, a refusal to perform such duty warrants the interposition of the courts by mandamus to compel them to discharge such duty. High's Ex. Legal Rem. (3d Ed.) § 104. The facts found by the trial judge unquestionably entitle appellant to the issuance of the warrant upon his judgment in the order in which it is established as a claim against the city by the judgment of the county court. And an absolute refusal by appellees to draw the warrant in its regular order, and sign and attest the same, would undoubtedly entitle appellant to a mandamus compelling them to perform this plain ministerial duty; for no

tate was indebted to the city in any amount. But from the findings of the trial court there was no absolute refusal on the part of appellees, or any of them, to draw, sign, and attest the warrant in its regular order in which it was established as a claim by the judgment of the county court. On the contrary, the facts found by the court below show that even when the case was tried the defendant James, as city auditor, in drawing warrants upon claims established against the city, had not reached appellant's judgment in the regular order for drawing a warrant thereon. Until the auditor reached it in such order, appellant was not entitled to have his warrant issued. When it should be reached in such order, the court found, as a matter of fact, the warrant would be drawn, which would be in about a week after the trial of the cause in the court below. It therefore appears from the findings of the trial court, which we must take as conclusive in the absence of the statement of facts, that appellees have not been guilty of a failure to discharge their duty towards appellant in issuing said warrant, but their duty would be discharged as soon as it was incumbent upon them and they were authorized by law to perform it.

We therefore conclude that appellant was not entitled to the mandamus prayed for, and that the judgment of the county court should be affirmed, which is accordingly done.

JAMES, C. J., did not sit in this case

WESTERN UNION TELEGRAPH CO. v. McNAIRY.*

(Court of Civil Appeals of Texas. Jan. 30, 1904.)

TELEGRAM—FAILURE TO DELIVER—DAMAGES—INSTRUCTIONS—LAW OF FOREIGN STATE.

1. Proof that the common law prevails in New Mexico does not show that damages for mental anguish are not recoverable there, and does not defeat an action against a telegraph company for mental anguish occasioned by the failure of the company to promptly deliver a telegram delivered to it in New Mexico for delivery in Texas.

2. Humiliation suffered by a sister because of the fact that her brother died in a distant place and was buried at the cost of strangers because he left no means, is too remote to constitute damages in an action against a telegraph company for failure to promptly deliver to the sister a telegram announcing the death of the brother and asking for instructions as to the disposition of the body.

3. Where in an action against a telegraph company for failure to promptly deliver a telegram announcing the death of the brother of plaintiff's wife and asking for instructions as to the disposition of the body, testimony that plaintiff's wife suffered humiliation by reason of the fact that her brother was buried at the cost of strangers is admitted in evidence, an instruction that when the nature and importance

*Rehearing denied February 20, 1904.

company liable is erroneous.

Appeal from District Court, Mitchell County; James L. Shepherd, Judge.

Action by D. H. McNairy against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals. Reversed.

Homan & Homan, for appellant. M. Carter and E. W. Bounds, for appellee.

CONNER, C. J. Appellee sued to recover damages for mental anguish, suffered by his wife, caused by delay in the transmission and delivery of the following telegraph message, dated Portales, N. M., May 27, 1902: "To Frank N. Johnson, Colorado, Texas: Tell Mrs. McNairy her brother Gid Hunter was killed here to day. Wire what to do with body. [Signed] C. J. Lamb." The defendant pleaded the general denial, and special that the damages sought were not recoverable under the laws of New Mexico, where the contract was entered into. A trial, however, resulted in a verdict and judgment for appellee in the sum of \$585, on substantial the following facts as shown in appellant's brief: "Gid Hunter, the brother of plaintiff's wife, was shot and killed at Portales, New Mexico, at 5 o'clock p. m., May 27, 1902. The message sued on was filed with the agent of defendant at Portales at 7 p. m. the same day. The message was not received at Colorado until 7:32 p. m. of May 28, 1902, and the contents were repeated by telephone to George Root, who was the deputy of Johnson, the addressee, the latter being sheriff of the county. Gid Hunter was buried at Portales between 11 a. m. and 1 p. m., May 28, 1902. Plaintiff's wife testified that she wished the body of her brother buried at her home, Colorado, Tex., and that, if the message had been promptly transmitted and delivered, she could and would have instructed Lamb to ship it to Colorado for burial, and Lamb testified that he would have complied with such request. The office hours of defendant at Portales and Colorado were from 8 o'clock a. m. to 8 p. m. The first train leaving Portales in the direction of Colorado was at 2:10 p. m. May 28, reaching Pecos, the connection with the T. & P. Railroad, at 11:35 of May 28, and the train reached Colorado from Pecos at 9:45 p. m. of the last-named date. At 3 a. m. of the morning following Hunter's death, his remains 'smelled very bad.' In the judgment of the witness, the body could not have been kept for 36 hours, and it is very doubtful if it could have been kept for 24 hours in a condition for shipment. The weather was warm, there was no one in or near Portales prepared to embalm bodies. Ice is not obtainable in Portales at all times, and it is doubtful if it could have been had at that time in sufficient quantity to ship the body in."

The principal question presented is that raised by appellant's special plea. Appellant read in evidence "provisions of the Compiled Laws of the territory of New Mexico to the effect that the common-law rule of practice and decision prevails in said territory; that the district courts there have jurisdiction of suits where the matter in controversy exceeds one hundred dollars; that appeals lie from the judgments of the district court to the Supreme Court of said territory, the decrees of which are subject to review by the United States Circuit Court of Appeals; and that the judges of the several courts named are appointed by the President of the United States, by and with the advice and consent of the Senate." In the case of *Tel. Co. v. Cooper*, 69 S. W. 427, 5 Tex. Ct. Rep. 543, in which writ of error was refused, this court held that a contract made in Texas for the transmission and delivery of a telegram to a person beyond the limits of the state was to be construed in accord with the laws of Texas authorizing recovery of damages resulting solely from mental anguish by reason of actionable breach of such contract. This holding seems to be in harmony with the principles announced in *Story on Conflict of Laws* (8th Ed.) pp. 425, 427; *Scudder v. Bank*, 91 U. S. 412, 23 L. Ed. 249; *L. & G. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 789. The cases of *Gray v. Tel. Co.*, 64 S. W. 1063, 56 L. R. A. 301, 91 Am. St. Rep. 706, by the Supreme Court of Tennessee, and *Tel. Co. v. Boots*, 31 S. W. 825, by this court, are relied upon as authority for the proposition that in cases of telegrams delivered at points beyond the state, for transmission and delivery at points within, damages as herein sought are recoverable in our courts upon proof of breach of the contract, regardless of the laws of the state or territory where the contract was entered into. And such, in effect, has been expressly so held in *Tel. Co. v. Blake*, 68 S. W. 526, by the Court of Civil Appeals for the Fourth District, not cited by appellee. We have concluded, however, that we need not determine the effect of these conflicting, or apparently conflicting, cases, and will hence not discuss them, further than to note that the decision in *Gray v. Tel. Co.* was expressly predicated upon Tennessee statutes held to there impose a liability, and that in *Tel. Co. v. Boots* the transcript discloses the fact that proof of the rule of decision in the territory from whence the telegram in that case was sent was not made. So here, the evidence quoted, we think, fails to support appellant's special plea. The laws quoted do not in terms do so, and no decision of the Supreme Court of New Mexico, or of any tribunal having revisory powers over the same, has been cited,

nor have we been able to find any to the effect that by the territorial laws of New Mexico damages for mental anguish alone are nonrecoverable. The fact that the common-law rule of practice prevails there will not suffice. Such rule, with exceptions not necessary here to notice, has been expressly imposed by our statute, and it is well settled that appellant's special plea is not maintainable in this state. The first and principal assignment is accordingly overruled.

Appellant's fourth special exception to appellee's petition was to the effect that the petition showed no legal liability for the damages claimed "by reason of the fact that said Gid Hunter was without means to properly dress and bury the body, and was buried by strangers." We think this exception well taken. Humiliation of appellee's wife, suffered by reason of such facts, was a special or remote consequence of appellant's breach of contract, not reasonably to be apprehended from the face of the telegram, and notice of the facts or consequence stated was not otherwise charged, as was necessary. See *W. U. Tel. Co. v. Turner* (not yet officially reported) 78 S. W. 362. In view of which, and of the introduction of evidence of the facts and consequence noted, the court's charge to the effect that, when the nature and importance of a telegraphic message are apparent from the terms used, no further explanation is required in order to render the company liable for negligence, was misleading as urged in the fourth assignment. In the minds of the jury there could have been no contention of an absence of liability for the ordinary and natural consequences upon proof of the breach of contract for transmission and delivery, and it is probable, if not certain, that the charge referred to was applied by the jury in the consideration of the facts that Gid Hunter was buried at the cost of strangers, and that appellee's wife suffered humiliation of mind in consequence thereof.

Other assignments need not be noticed further than to say that, in the state of the evidence as presented to us, we think, it was proper to submit to the jury the issue of whether the body of Gid Hunter could and would have been shipped in condition and time to have reasonably enabled appellee's wife to view the remains, but see no necessity for the submission of issues relating to office hours or electrical disturbances in the atmosphere, as the delays complained of do not seem attributable to such causes. The evidence upon another trial may be different, however, and the issues submitted will doubtless be framed in accordance therewith.

Because of the errors noted, the judgment is reversed, and the cause remanded for a new trial.

CAMERON MILL & ELEVATOR CO. v.
ANDERSON.*

(Court of Civil Appeals of Texas. Jan. 9, 1904.)

INJURY TO MINOR—ACTION BY PARENT—EVIDENCE—ADMISSIBILITY—COMPENSATION OF PROFESSIONAL NURSE.

1. A physician who is not a nurse, and who has never employed one, and has no personal knowledge of compensation of professional nurses in a city, except as to what a few of them told him, is not qualified to testify as to the reasonable and customary compensation of a professional nurse in such city.

2. In an action by a parent for injuries sustained to a minor child, evidence of the good morals of the child was inadmissible, though evidence that he was obedient, industrious, and economical, and that he did not use tobacco or drink, was competent, as bearing on his earning capacity and on the issue of the continuance of life.

Appeal from District Court, Tarrant County; Irby Dunklin, Judge.

Action by B. E. Anderson against the Cameron Mill & Elevator Company. From a judgment for plaintiff, defendant appeals. Reversed.

R. W. Flournoy and Geo. Thompson, for appellant. Capps & Cantey, W. R. Parker, and Theodore Mack, for appellee.

CONNER, C. J. In this case appellee sued for the loss of the value of services of her minor son F. M. Anderson, resulting from injuries received by him in falling into an unguarded excavation in an unlighted street in the city of Ft. Worth, made for the appellant company by an independent contractor, and for the value of services in nursing and for expenses of medical treatment rendered necessary by reason of said injuries. The trial resulted in a verdict and judgment for appellee in the sum of \$7,500.

The circumstances leading up to and attending the injury, and that relate to the undertaking of the independent contractor, are stated in the opinion in the companion case of Cameron Mill & Elevator Company v. F. M. Anderson, 78 S. W. 8, decided by us on December 19, 1903. We also there give our conclusions to the effect that appellant is liable, under the circumstances, for the negligence of its independent contractor in leaving the pit in question unprotected, and hence these matters need not be here repeated. We therefore overruled all assignments of error involving the vital question of appellant's liability, and devote ourselves to questions presented that pertain to the regularity of the trial, which terminated April 4, 1903.

Appellee, among other things, alleged, in substance, that at the date of the injuries alleged her said son was 14 years of age; that the value of his services from the date of his injuries to the date of filing her petition was \$500; that during the same period liability for necessary medical treatment to the ex-

tent of \$750 had been incurred; and that the value of appellee's services in nursing her son was \$1,500. The further allegations in these particulars were "that in the future plaintiff will be compelled to devote her entire time and attention to nursing and caring for her said son, and will be compelled to incur great expense in caring for him, and in the payment of doctor's and medical bills, and will also lose the value of the services of her said son, in all to her damage in the further sum of fifteen thousand dollars, for all of which she now sues."

There is evidence to the effect that the minor, F. M. Anderson, was seriously and permanently injured on the night of May 10, 1902, and that his earnings, of about \$20 per month, had been regularly delivered to appellee. There was also evidence tending to show that medicines, medical services, and careful and continuous nursing would be necessary, as theretofore, during the remaining minority of the injured boy; the appellee testifying that her services in this respect were worth \$1.50 per day and \$1.50 per night. Appellee is not a professional nurse, and by one other witness gave the value of such services. This was a Dr. McMorris, whose testimony is objected to, as shown by the following bill of exception: "Be it remembered that, upon the trial of the above styled and numbered cause, Dr. McMorris, a witness for plaintiff, on direct examination, was asked: Do you know what the reasonable value of services was for nurses in Ft. Worth? Witness answered: I think the rule is about— Defendant's counsel interrupted with the question plaintiff's counsel asked first: Do you know? Witness answered: Well, I can tell what I have heard several nurses state. Defendant's counsel requested that the witness answer the question yes or no. Witness answered: I have never hired any— Plaintiff's counsel interrupted and asked: How do you get your information? Witness answered: Three dollars a day. Defendant's counsel said: We take an exception. The witness has stuck in the three dollars a day in spite of objections. The court said: State first whether or not you must qualify—whether or not you know the value. Witness answered: Well, I am going to say this: I only know from what I have been told. Defendant's counsel moved to exclude the answer until the witness was qualified—that he has already answered, 'Three dollars a day.' The court said: I will exclude that if I decide he is not sufficiently qualified. For the present, the answer is excluded from your consideration as to the amount. By Plaintiff's Attorney: Q. Do you know the value of professional services—reasonable and ordinary value of professional nurse in the town? (Objected to. Objection sustained.) Q. Do you know the value of the services of a nurse here—the reasonable value of the services of a nurse? A. I can answer this way: I have never

*Rehearing denied February 20, 1904.

hired any nurse, but I have talked to several, and know what they said their regular price was. (Objected to as hearsay.) Court: I say the witness should answer that he knows what is customarily paid nurses. I think that would qualify him. I don't understand him to answer that way. Q. It matters not how you get your information, or the information that you have. Are you acquainted with the reasonable value of the services of a nurse to care for him? (Objected to because counsel undertakes to say it makes no difference how he got his information.) Court: I think the witness has already answered, qualifying the question; what he knows about it; what he was told. Q. From that information, do you know the value of services— Witness answered: Three dollars a day. (Defendant objected because proper predicate had not been laid in the way of qualification.) Court: Unless the qualification is more extensive—better laid than at the present time—I think the objection is good. Q. Have you made any inquiry? Have you had any nurses? Know any nursing patients? A. Yes, sir. Q. Do you know what has been paid around—what they charge? A. One young fellow that was — Q. Need not give the amount. Do you know what they have received for their services? A. I know what they told me; yes, sir; three dollars. Defendant's counsel: We ask your honor to instruct the witness not to volunteer. Court: Don't give the amount. Witness: I didn't know that. Q. Now, without first stating what they have received, I will ask you if you made an inquiry. Defendant's Counsel: Does that 'three dollars' go in this time? Court: Gentlemen of the jury, you will not consider at the present time the amount the doctor stated. Q. You have been practicing here in Ft. Worth? A. Yes, sir. Q. Are there nurses that go around and nurse the sick here? A. Yes, sir. Q. Have you conversed with them about what they received? Don't state what they received. A. Yes, sir. Q. Have you had any occasion to employ professional nurses? A. Yes, sir. Q. Have you investigated to find what the usual price for nurses is for the sick, any that you have hired for yourself? A. I can tell you what a fellow told me that waited on Hampton— Q. No; not that. Do you know what nurses reasonably receive? A. Yes, sir. (Defendant objected.) Q. Now, what is the reasonable value— (Defendant excepted.) Q. From what you know, then, do you think you know the reasonable value of their services? Defendant's Counsel: It is not a question of thinking, but of knowledge. Q. Do you know the reasonable value of the services of a person to wait on the sick? Court: Yes or no. A. Yes, sir. Q. Do you, yes or no, without stating what it is? Court: He answered yes. Witness: Well, yes. Q. Well, then, what is it? A. Well, the rule is from two and a half to three dollars a day. And the

defendant, then and there excepting, now tenders this, its bill of exception, and asks that same be approved and made of record in this cause, and it is done."

We have concluded that this witness failed to qualify himself. He was not a nurse himself, had never employed one, and had no personal knowledge on the subject. He seems to have been pressed into stating that he knew, but, as a whole, it is apparent that the basis of his opinion was what but a few professional nurses had told him, and seems altogether too inconclusive and uncertain. The character of services as to which the witness was interrogated were avowedly professional; and in a city such as Ft. Worth, having two or more hospitals and sanitariums, it must certainly be easy to secure many persons who are entirely familiar with the reasonable and customary charges for the services of a professional nurse, and we feel unwilling to approve a verdict that, for aught otherwise appearing, rests to a material extent upon testimony of the uncertain character detailed in the foregoing bill of exception. While hearsay may form the basis of receivable opinion as to value (1 Wharton, Ev. §§ 250, 449; *Clicquot's Champagne*, 3 Wall. 114, 18 L. Ed. 116; *Fennerstein's Champagne*, 3 Wall. 145, 18 L. Ed. 121), the inquiries or statements relied upon should, we think, be of such extent and character as to afford a fair inference that the witness had knowledge of the subject. Mr. Rogers, in his work on Expert Testimony (2d Ed.) § 152, in speaking of the competency of witnesses on the subject of value generally, says: "Whenever it is desired to have the opinion of a witness on the subject of value, it is always necessary, whether the witness is offered as an expert or not, to lay some foundation for the introduction of his opinion, by showing that he has had the means to form an intelligent opinion." Again, section 159, Id.: "As the value of services rendered by lawyers is shown by the testimony of those engaged in the same profession, so the value of services rendered by physicians and surgeons in the practice of their profession is proven by the testimony of their professional brethren. And it has been laid down that one who is not a physician is incompetent to testify as to the value of medical services." Page 384, Id. "As to the value of services rendered in nursing and caring for the sick, the rule is that the witnesses should be persons who have had experience in nursing and caring for the sick. Physicians and nurses are competent witnesses in such cases." Page 186. But three cases are cited by the author quoted in support of the statement that the opinions of physicians are receivable on the question here involved. In the first (*Woodward v. Bugsbee*, 4 Thomp. & C. 395) the court say: "We think the question permitted by the referee to be put to Dr. Everett was proper. He had testified that he was a physician. He had fully stat-

ed the diseases of the plaintiff's intestate, and that the same were of the most aggravated description—so much so as to be the subject of no standard price. In other words, he had testified that the deceased was so afflicted, and his disease was so loathsome, as to be entirely exceptional." In the second (*Reynolds v. Robinson*, 64 N. Y. 589) it is stated: "The plaintiff was permitted, against the objection of defendants, to prove by Dr. Martin how much, in his opinion, it was worth to dress a cancer each time; also how much, in his opinion, it was worth to take care of and nurse the testator, exclusive as well as inclusive of dressing the cancer; and also, by Dr. Moneyppenny, how much, in his opinion, it was worth to dress the testator and dress his cancer twice a day for a period of six years before his death. These doctors were not asked to give their opinion based upon the evidence of other witnesses. They had been acquainted with the testator, were familiar with the cancer and its offensive nature, and with the disagreeable service required in dressing it and taking care of him, and they knew the value of services required for nursing cancer patients. Under such circumstances, their estimates of value were competent to be placed before the referee." In the third case (*Shafer v. Dean*, 29 Iowa, 144) it was held that two witnesses, "one a physician of twenty years' standing, the other one having some experience in taking care of the sick, both knowing the deceased, and having heard the testimony in regard to his condition while in plaintiff's house and receiving his care and attention," might, upon the hypothetical case stated, give their opinion of the value of the "board, lodging, care, attention," etc., of the person there mentioned. It is to be noted, however, that in the case before us the opinion of Dr. McMorris, predicated upon personal knowledge of the case, and of the services actually performed by appellee in nursing her injured son, was not sought; and we know of no case, and none has been cited, that goes to the extent of holding that a physician may give his opinion as to the value of the services of professional nurses generally, as a basis of comparison in proving the value of a nonprofessional nurse, as was in this instance evidently the case, where it appears that the source and extent of his knowledge is as indefinite, limited, and uncertain as here shown. We conclude that the court committed material error in the particular under consideration, for which the judgment must be reversed.

Numerous other questions are presented, which will be disposed of briefly: It is insisted that the court should have sustained appellant's special exception to appellee's petition, because of the generality of the allegations with reference to the damages claimed for the future; the contention being that appellee should show in her petition the amount claimed for each several, distinct

element of damage, as for nurse hire, medical bills, and loss of services, and not state the same in an aggregate sum, as was done. At least some of us feel inclined to agree with this contention, but we will omit a discussion of the question on the ground that the objection can be easily avoided on another trial. So, too, as to the testimony that the morals of the minor were good. In the companion case before referred to, we held that evidence to the effect that he was obedient, industrious, economical, and sober, and that he did not drink intoxicants or use tobacco in any form, was relevant to the issue of the minor's probable earning capacity, and, we might here add, as tending to show his powers of endurance, and of resistance to pain and injury, viz., on the issue of his continuity of life; but we fail to see that his moral character, in a purely ethical sense, is relevant to any issue in the case. *Lipscomb v. Ry. Co.*, 95 Tex. 6, 64 S. W. 923, 55 L. R. A. 869, 93 Am. St. Rep. 804.

Finding no other material question presented by the assignments of error requiring notice, it is ordered that the judgment be reversed for the error discussed, and the cause remanded for a new trial.

ABEE v. SAN ANTONIO BREWING ASS'N et al.*

(Court of Civil Appeals of Texas. Jan. 27, 1904.)

JUDGMENTS—ENFORCEMENT—INJUNCTION— DEMANDS—PAYMENT—PLEADING.

1. Where, in a suit to restrain the sale of certain land on a judgment against complainant's former husband, a purchaser of the judgment intervened, and on the trial admitted that the judgment had been paid in full before his intervention, plaintiff was entitled to judgment on such admission, though she had not pleaded payment as a ground for relief.

Appeal from District Court, Bexar County; J. L. Camp, Judge.

Suit by Lena Jonas against the San Antonio Brewing Association and others, and C. C. Abee, intervener. From a judgment in favor of plaintiff, intervener appeals. Affirmed.

C. L. Bass, for appellant. Davis & Williams, for appellee.

FLY, J. Mrs. Lena Jonas filed a petition for an injunction to restrain the San Antonio Brewing Association and John W. Tobin, sheriff of Bexar county, from selling a certain lot 6, block 15, at the corner of Santa Clara and Peach streets, in the city of San Antonio, claiming that it was her homestead, and that the same was about to be sold by virtue of an execution issued out of the county court of Bexar county under a judgment against William Jonas, formerly her husband. Ernest Stremmel intervened

*Rehearing denied February 24, 1904.

in the suit, alleging that the San Antonio Brewing Association had obtained a judgment for \$394 against William Jonas on March 6, 1903, and that the same was recorded and became a lien on all the real estate of William Jonas, among the rest the lot in controversy, and praying that the sale should proceed under the execution. Afterwards appellant, C. C. Abee, asked to intervene in the suit, alleging that he had purchased the judgment from Stremmel after the plea of intervention of the former had been filed, and that the judgment lien on the property was in full force and effect. The cause was tried without a jury, and resulted in a judgment enjoining and restraining the brewing association, the sheriff, and intervenor from selling the property in controversy, and that the cloud cast on Mrs. Jonas' title by reason of the abstract of title be removed, and she be quieted in her title and possession of the property.

Mrs. Jonas offered to prove by William Jonas that he had paid off and discharged the judgment by virtue of which the execution was issued, and appellant objected on the ground that the evidence was irrelevant and immaterial. The objection was overruled, and appellant then admitted that the judgment had been paid in full. The judgment was satisfied before appellant intervened.

The question of homestead is of no importance in view of the fact that the execution sought to be restrained had been issued under a judgment that had been fully paid off and discharged. It does not matter that Mrs. Jonas had not pleaded payment of the judgment. Appellant had set up a right to have the land held subject to a judgment lien, and in order to establish his claim he was compelled to prove that he had an active, valid judgment. When he admitted that the judgment had been discharged, he admitted himself out of court. The payment of the judgment destroyed all liens that had arisen from the registration of the judgment. This proposition is too plain for discussion.

The judgment is affirmed.

ASCARETE v. PFAFF.*

(Court of Civil Appeals of Texas. Jan. 27, 1904.)

LANDLORD AND TENANT—LEASE—VALIDITY—CERTAINTY—PAROL EVIDENCE—WIFE'S SEPARATE PROPERTY—EXECUTION BY WIFE—ASSIGNMENT—EXONERATION OF ASSIGNOR—LIABILITY OF ASSIGNEE.

1. Where the assignment of a lease was indefinite, in not describing the same and not being annexed to it, it was competent for the assignor to testify as to the lease which was intended to be assigned.

2. Although a lease of a wife's separate estate was originally void because of her failure

to join therein, it was rendered valid and binding when, with full knowledge of the facts, she afterwards signed and acknowledged an assignment with the lease contract annexed.

3. Although, under Sayles' Ann. Civ. St. 1897, art. 3250, a tenant cannot assign or sublet the premises without the consent of the landlord, yet, when such consent is given, either in the written lease or afterwards, and the landlord accepts the assignee as his tenant, the original tenant is relieved from further liability under the lease, irrespective of the solvency of the assignee.

4. One who occupies premises is liable for the rent during the period of his occupancy, irrespective of the validity of the lease under which he purports to hold.

Appeal from El Paso County Court; Jos. N. Sweeney, Judge.

Action by W. R. Ascarete against Henry Pfaff. From a judgment for defendant, plaintiff appeals. Affirmed.

S. Engelking, for appellant. Seymour Thurmond, for appellee.

FLY, J. Appellant sought to recover of appellee the sum of \$600, alleged to be due on a rental contract between J. D. Ochoa and appellee, whereby the latter had agreed to pay the sum of \$100 a month for certain premises in the city of El Paso. The case was tried by the court, and judgment was rendered for appellee.

J. D. Ochoa had rented the premises, which were the separate property of his wife, to appellee for eight years from July, 1902, at the rate of \$100 a month, payable each month in advance; and he paid the rent up to February 1, 1903. On January 23, 1903, a lease was assigned by a written instrument, for a valuable consideration, by Ochoa and wife to appellant. By the terms of the transfer of the lease, it was to be annexed to the lease, which is in no other manner identified, but it was not so annexed. However, Ochoa testified that the transfer was of the lease made by him to appellee. Appellant sued for the rent for six months from February 1, 1903. The court admitted the transfer of the lease in evidence, but afterwards, at the instance of appellee, struck it out, because it did not identify the lease to which it referred. The court also refused to consider the lease from J. D. Ochoa to appellee because the property was the separate estate of his wife, and she had not joined him in the lease contract.

While the assignment of the lease was indefinite, in not describing the lease, and in not being annexed to it, still, when Ochoa testified as to the lease that was intended, he made certain the lease that was assigned by the writing. "For the purpose of identifying the subject-matter to which the written contract relates, parol testimony of that which was in the minds of the parties, and to which their testimony was directed at the time, may be given." *Kirk v. Brazos County*, 73 Tex. 56, 11 S. W. 143. In the case of *Dority v. Dority* (Tex. Sup.) 71 S. W. 950, 60 L. R. A. 941, it was held by the Supreme

*Rehearing denied February 24, 1904.

¶ 3. See *Landlord and Tenant*, vol. 22, Cent. Dig. § 821.

separate real property for a term exceeding one year by the husband, without the joinder of the wife in the lease, is invalid; the same formalities being required in a lease of that character as are essential in the sale of her separate estate. Mrs. Ochoa did not join in the lease to appellee, and it was therefore null and void, unless the act of the husband was ratified by the wife by her joinder in the transfer. The assignment of the lease was in writing, and was signed and duly acknowledged by Ochoa and wife. By the terms of the transfer, the lease was not only referred to, but it was intended that it should be annexed and form a part of the assignment. It appears that the wife had a full knowledge of the facts, and, when she signed and acknowledged the assignment with the lease contract annexed, it was, to all intents and purposes, a signing and acknowledging of the lease contract itself.

Under the terms of the lease contract, authority to assign the lease or sublet the premises was given the lessee, and the rule is that when a lessee, with the consent of the landlord, assigns the lease for the term, the assignee becomes charged with the rent, and the original lessee is no longer liable for the rent, unless it be specially agreed otherwise. *Loustanau v. Lambert*, 1 Tex. Civ. App. 434, 20 S. W. 937; *Giddings v. Felker*, 70 Tex. 176, 7 S. W. 694; *Le Glerse v. Green*, 61 Tex. 128; *Howland v. Coffin*, 29 Mass. 125; *Patten v. Deshon*, 67 Mass. 325. The rule is thus stated in the Massachusetts case last cited: "If the whole or part of the leased premises be transferred by the original lessee for the residue of the term, this is an assignment, and the assignee becomes liable for the whole or a proportionable part of the rent to the original lessor, at his election. The first assignee, notwithstanding the assignment, remains liable for the rent, in virtue of his express covenants, if the lessor elects so to hold him, in which case he will be entitled to the rent from the assignees. But if the original lessor assents to the assignment, and agrees to accept the assignee as his tenant—and proof of receiving rent from the assignee will be deemed evidence of such—he has no longer any right of action against the original lessee." Under the law of this state (article 3250, *Sayles' Ann. Civ. St.* 1897), a tenant cannot assign a lease or sublet the premises without the consent of the landlord is given; but when such consent is given, whether in the written lease or afterwards, the rule as to the release of the original lessee, when he assigns, from further liability, is the same announced in the Massachusetts decision.

The clause in the lease permitting an assignment of it was, in effect, granting the power to the original lessee to substitute another person in the lease, who would assume all responsibility for the rent, and the original lessee would be released from further

might be substituted, to whom the landlord would never have leased the premises; but, if he is willing to grant the authority of substitution to his tenant, he or those to whom he may assign must bear the consequences.

Appellee has absolved himself from liability under the lease by an assignment of it under the authority given him by the instrument, and on this ground alone the judgment will be sustained. Had there been no assignment by him, he would be liable for the rent for the time the premises had been used, whether the lease for the eight years had been valid or not.

The judgment is affirmed.

POWELL v. GALVESTON, H. & S. A. RY.
CO. et al.

(Court of Civil Appeals of Texas. Jan. 27, 1904.)

ATTORNEY AND CLIENT—CLAIMS—ASSIGNMENT—PRIVATE SETTLEMENT—EFFECT—RIGHTS OF ATTORNEY—CONTINUANCE OF ACTION—PREVENTION—SHARE OF SETTLEMENT.

1. Where a person having a claim for personal injuries assigned an undivided one-half interest in the cause of action, after suit brought, to his attorney in consideration of legal services, and thereafter the defendant in the action settled with the claimant with notice of the assignment, the attorney was entitled to prosecute the original suit to judgment in his own interest, and to recover to the extent thereof.

2. Where, after suit against a railroad company for injuries, the railroad, with notice that the claimant had assigned a portion of his cause of action to his attorney in consideration of the latter's services, settled the claim with the claimant, and after the settlement willfully and fraudulently prevented the attorney from continuing the suit to the extent of his interest by transporting the claimant out of the state, and so concealing him that the attorney could not obtain his evidence or prove the damages he had sustained, the attorney was entitled to recover from the railroad company his proportion of the amount of the settlement.

3. Where a claimant for personal injuries against a railroad company assigned one-half of his claim to his attorney in consideration of legal services to be rendered, a private settlement thereafter made between the claimant and the railroad company was effective only to the extent of the claimant's interest.

Appeal from District Court, Bexar County; J. L. Camp, Judge.

Action by David J. Powell against the Galveston, Harrisburg & San Antonio Railway Company and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

Shook & Vander Hoeven, for appellant. Newton & Ward and Baker, Botts, Parker & Garwood, for appellees.

JAMES, C. J. William Protector on March 11, 1902, brought suit by D. J. Powell, his

1. See Attorney and Client, vol. 5, Cent. Dig. § 414.

attorney at law, and against appellee, claiming \$30,000 damages for personal injuries inflicted on him through appellee's negligence. On January 20, 1903, Powell filed his petition of intervention in the cause, which underwent amendments, and on June 22, 1903, he filed his second amended petition of intervention. To this pleading the defendant interposed a general and several special demurrers, some of the latter being sustained, and, plaintiff declining to amend, the petition was dismissed. From this disposition of the case, Powell appeals.

This pleading, after setting forth Protector's cause of action and his (Powell's) status as an attorney at law, and his employment by Protector to bring the action for said injuries, alleged substantially: That after filing the suit, and on the same day, Protector executed to him the following assignment: "The State of Texas, County of Bexar: San Antonio, Texas, March 11th, 1902. Know all men by these presents, That for legal services rendered me, together with a valuable consideration, I hereby sell, give and assign to D. J. Powell an undivided one-half interest in cause No. 13,510, now pending in the District Court of the 45th Judicial District, wherein William Protector is plaintiff and the G. H. & S. A. Ry. Company is defendant. Given under my hand in the city of San Antonio, Texas, this 11th day of March, A. D., 1902. Wm. Protector"—which was duly acknowledged, and on same day filed among the papers of the cause and noted on the dockets in the manner required by the statute; and that defendant had actual as well as constructive knowledge of the transfer, whereby defendant was precluded from compromising or settling said cause of action without accounting to intervenor for his one-half thereof. That, notwithstanding this, defendant did on or about April 22 or 23, 1902, compromise and settle with Protector the entire cause of action for \$4,500, and paid him that sum therefor, including the intervenor's interest, and took from him a final receipt and voucher therefor, showing full settlement of the whole of the cause of action, with an agreement to have judgment in said suit entered in defendant's favor. That Protector was at the time, and has continued to be, hopelessly and notoriously insolvent, and he is now a nonresident of the state of Texas. That defendant made said settlement without the knowledge or consent of intervenor for the purpose of cheating and defrauding him of his interest in the cause of action, and without in any manner accounting to him for his one-half thereof, and on or about April 23, 1902, fraudulently transported Protector upon its railway cars beyond the limits of the state into the republic of Mexico for the express purpose of placing him beyond the jurisdiction of the courts of Texas, to the end that plaintiff would be deprived of the benefit of his testimony or his deposition, thus making it impossible for intervenor to

establish the cause of action; and defendant has concealed and continued to conceal from intervenor plaintiff's whereabouts. And intervenor accordingly charges that it is now impossible for him to establish plaintiff's original cause of action, and therefore he cannot further prosecute the original suit, and is compelled to seek to recover his one-half of said sum of \$4,500 paid by defendant to plaintiff on or about April 23, 1902, which defendant has refused to pay intervenor, though often demanded, and it would be folly to attempt to make the same out of plaintiff by law, and that defendant well knew this when it made the transaction with plaintiff. The prayer is for judgment against defendant for \$2,250, with interest and costs, and for general relief.

To this pleading defendant filed demurrers as follows: "Defendant demurs to the second amended original petition of intervention filed by D. J. Powell herein, June 22, 1903, and says that the allegations in the same are insufficient in law and show no cause of action against this defendant. And, specially excepting to said petition, defendant says the same is insufficient, for this: (1) That it appears from the record herein that the compromise of this case with the plaintiff, Wm. Protector, occurred prior to the filing of the original petition of intervention in this cause, which was done on January 20, 1903, and that therefore the intervenor had no right to intervene in this cause. (2) That the contract of assignment to said intervenor by the plaintiff, Wm. Protector, set out in said petition, is absolutely null and void, and confers upon said intervenor no right to intervene in this cause or to prosecute this suit, for the following reasons, to wit: (a) Said assignment is void for uncertainty, and does not comply with the law regulating assignments of causes of action; (b) that the consideration for said assignment is not set forth or shown; (c) that said assignment does not authorize or empower said intervenor to recover any portion of the \$4,500 alleged in said petition to have been paid by this defendant to plaintiff, Wm. Protector, but only gives to said intervenor, if any rights whatsoever, the right to maintain a separate cause of action against the defendant for one-half of the amount that said plaintiff, Protector, would have recovered had this suit been prosecuted to final judgment; (d) that said contract of assignment could not and did not in law prohibit the said Protector from compromising said suit so far as said plaintiff was concerned, and that, if said contract of assignment was intended to have that effect, it would be null and void as being contrary to public policy. (3) That the allegations in said petition do not show any right in the intervenor to intervene in this cause, but that, if he has any cause of action against this defendant, it must be asserted by said intervenor in an independent cause of action against this defendant to recover one-half

of what the said Protetor would have recovered had this suit been prosecuted to judgment. (4) That said assignment set out in said petition and the allegations in said petition do not show any right whatsoever in intervenor to intervene in this suit and recover any part of the amount alleged to have been paid to said Protetor by said defendant, but that, if the intervenor has any rights at all, it is simply a right to recover from this defendant one-half of what the said Protetor would have recovered had this suit been prosecuted to judgment. Of all of which this defendant prays judgment of the court. Newton & Ward, Attorneys for Defendant."

The court sustained the general demurrer and the special exceptions marked "c" and "d" under exception No. 2, and also sustained No. 4, but overruled all the others. To the action of the trial judge in overruling certain of the special demurrers, defendant has made no cross-assignments of error.

We can conceive of no grounds upon which the second amended original petition of intervention can be claimed to be amenable to demurrer unless it be the grounds specified in the special exceptions. The special exception No. 4 asserts that if the intervenor has any remedy at all it is a right to recover from this defendant one-half of what Protetor would have recovered had this suit been prosecuted to judgment. By sustaining this exception the court in effect held that plaintiff, under his allegations, could not recover of defendant one-half of the \$4,500. That Powell would have had a right to prosecute the original suit to judgment in his own interest, and to the extent of his interest, we think is clear. And under ordinary conditions it may be that he would be confined to such proceeding for his relief. But this petition does more than merely sue for one-half of what defendant paid Protetor to settle the claim. In reference to the original cause of action it alleges that defendant has committed acts in connection with the settlement which have rendered it useless for intervenor to attempt to avail himself of that course. If these allegations be true—and they must be so taken in considering the demurrers—defendant has willfully and fraudulently destroyed a remedy which intervenor had a right to pursue, and it is in the position of here contending that, having thus destroyed this remedy, its liability in the matter is at an end. In fact, unless intervenor can charge defendant with one-half of what defendant has paid Protetor to settle the cause of action, the latter being insolvent, he is left wholly without remedy, and this on account of defendant's acts in removing Protetor from the state and concealing his whereabouts, thereby depriving intervenor, as he alleges, of the means of presenting the original action to the courts with any chance of success.

We are of opinion that a transfer of part
78 S.W.—62

of a cause of action entitles the assignee to that proportion of the fruits or proceeds of the cause of action without so specifying. If the allegations of the petition be true, defendant has not merely attempted to entirely settle the original cause of action, but in effect has done so in fact. By depriving intervenor of the testimony, and the means of getting the testimony, of Protetor, it has, according to the allegations, effectually put an end to the original case in its favor, and therefore has for all practical purposes accomplished its settlement. Defendant, if the allegations be true, has not only deprived intervenor of evidence which was indispensable to him in prosecuting the cause of action, but necessarily at the same time destroyed his ability to arrive at the amount of damages which would have been fixed upon a successful result of such proceeding. The only measure of damages left open to intervenor is that fixed by defendant itself in the settlement with Protetor. We conclude that intervenor has stated a good cause of action.

The exception "c" under special exception No. 2 is practically disposed of by what has been said.

The exception "d" under special exception No. 2 ought not to have been sustained. While Protetor may have legally compromised the claim, he could not do so further than to the extent of his interest. There was nothing in the contract of assignment that prohibited him from disposing of his interest as he pleased.

Reversed and remanded.

SAN ANTONIO TRACTION CO. v. WILLIAMS.*

(Court of Civil Appeals of Texas. Jan. 27, 1904.)

CARRIERS—STREET CARS—INJURIES TO PASSENGERS—PLEADING—ALLEGATIONS OF NEGLIGENCE—EVIDENCE—INSTRUCTION.

1. Where, in an action for injuries to a passenger, the case was tried on a second amended petition, which alleged negligence in general terms, which would have been sufficient if alleged in the original petition, it was not defective by reason of the fact that the original and first amended petition alleged specific acts of negligence, since, under the general allegation, plaintiff was entitled to prove any negligence, including that previously alleged.

2. In an action for injuries to a passenger, the fact that he has knowledge of the particular act of negligence which caused the injury does not require him to allege such act specifically, nor deprive him of the benefit of the rule that in such action a petition alleging negligence in general terms is sufficient.

3. Where, in an action for injuries to a passenger on a street car, plaintiff and another witness testified that at the time of the accident the rear end of the car was elevated, and when it fell back it was derailed, an instruction that if plaintiff was injured by the "wreck and derailment," and such "wreck and derailment," if any, was the result of defendant's negligence, and was the proximate cause, etc., plaintiff was entitled to recover, was not objec-

*Rehearing denied February 24, 1904, and writ of error denied by Supreme Court.

tionable on the ground that there was no evidence authorizing the court to submit the question of plaintiff's injury by reason of the "derailment" of the car.

Appeal from District Court, Bexar County; J. L. Camp, Judge.

Action by Virginia F. Williams against the San Antonio Traction Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Houston Bros. and R. J. Boyle, for appellant. R. B. Minor, Perry J. Lewis, and H. C. Carter, for appellee.

JAMES, C. J. This is an action for damages from personal injuries. The case was tried on a second amended original petition filed March 9, 1903, which alleged that plaintiff, Virginia F. Williams, while a passenger on defendant's car, was injured on or about November 29, 1900, by reason of the negligence of defendant. While said car was proceeding with plaintiff along West Commerce street, the motion of said car was suddenly and violently arrested, and one end of said car was violently thrown to a great height above the track, and then fell violently down again, and said car became wrecked and derailed, whereby plaintiff was thrown violently about in said car and greatly bruised, wounded, and lacerated, etc. The original petition, which appears to have been filed September 26, 1901, alleged the negligence to have consisted in allowing the mechanism of the car to become out of order and its parts to become insecure, and that plaintiff was injured by reason of a portion of its mechanism, unknown to plaintiff, becoming detached from the bottom of said car, and falling and striking the roadbed and ties, while it was going at a rapid rate of speed, whereby the motion of the car was suddenly and violently arrested, and the car greatly and violently tilted forward and partly overturned. The first amended original petition, filed May 23, 1902, was substantially the same, except that it alleged that defendant negligently suffered the mechanism of the car to become so much out of order, and its parts, especially a certain dynamo of said car, to become so insufficiently secured, that the dynamo became detached from the bottom of the car, and fell and struck the ties, whereby the motion of the car was suddenly and violently arrested, etc.

The first assignment of error is to the overruling of a special demurrer setting up that the cause of action was barred, because the second amended original petition set up a new cause of action. Plaintiff, being a passenger, needed only to plead defendant's negligence in a general manner, as was done in the second amended petition. If this had been done in the first instance, plaintiff could have proved under it the particular negligence that was alleged in the original petition. Consequently the second amended petition embraced the particular forms or acts

of negligence alleged in the previous pleadings. The only reasonable contention defendant can make to the last petition is that it embraces any form of negligence that plaintiff might see fit to prove, and as to other forms than what had been previously alleged, and to that extent, it set up a new cause of action. It was enough for the court, in passing on this demurrer, to know that plaintiff was entitled under the last pleading to prove the case that had been originally, or in the first amended petition, alleged, in order to overrule it. The court could not know in advance what plaintiff would establish on the trial under the broad allegation of that pleading. It would therefore have been error to sustain the demurrer.

The second assignment complains of the overruling of the following special demurrer: "For further demurrer to said second amended original petition, defendant says that it is insufficient in this: that it does not allege wherein this defendant was negligent, and does not show, with sufficient certainty to put this defendant upon notice, the wrongs and negligence with which it is charged, or wherein or how it neglected its duty. Appellant concedes the rule to be that a passenger cannot be required to allege more than was done in this pleading, but urges that the reason upon which it is founded is shown by the record to be wholly wanting in this case. The brief puts it thus: That it is apparent upon this record that plaintiff was at all times cognizant of the particular act of negligence which caused the injury, and has rested her case upon such particular negligence for a long period of time, and therefore the just and equitable theory upon which the rule is based can have no application. There was nothing in the terms of the special demurrer to apprise the court that such point was intended to be made, therefore it must be regarded as made here for the first time. And, finally, we are of opinion that the law does not admit of any such exception to the rule, otherwise plaintiff, a passenger, ought to be required in every case to negative the fact of his knowledge of the form or act of negligence causing the injury, in order to warrant a petition alleging negligence in general terms.

We believe there is nothing substantial in what is said in connection with the third and fourth assignments. The testimony is that the car was to some extent derailed. First the passengers were thrown forward by the car coming to a sudden stop and the front end going down. Plaintiff says she fell the whole length of the car, and when the car fell backward she fell backward too, and that she struck her back against something—she did not know what it was. To her it seemed the car was almost straight up; then it fell back. Another witness testified that when it dropped back the center of the car burst open, and that the back part

partly off the track. It is not made clear by the testimony at what stage of the occurrence plaintiff received her injury. Appellant contends that there was no evidence which warranted the court in submitting plaintiff's having been injured by reason of the derailing of the car, the charge being, in effect, that if plaintiff was injured by the "wreck and derailment," and such "wreck and derailment," if any, was the result of defendant's negligence, and was the proximate cause, etc., to find for plaintiff. As plaintiff testified she fell backward, and when the rear end of the car fell down, and it was derailed when it fell, it can hardly be assumed that the derailment, by which one would naturally understand the period between the time the rear wheels were lifted from the track and the time they fell down away from the track, had nothing to do with causing her injuries. Moreover, it seems to us that, the derailment and wreck being one and the same event, it is evident that the court used the terms as referring to the occurrence generally, and they could not reasonably have been understood by the jury in any other sense.

We think appellant has no real ground of complaint in respect to the matters alleged in the remaining assignments.

Affirmed.

STEWART v. GALVESTON, H. & S. A. RY. CO.*

(Court of Civil Appeals of Texas. Jan. 27, 1904.)

RAILROADS—CROSSING INJURY—NEGLIGENCE—EVIDENCE—RELEVANCY—CONTRIBUTORY NEGLIGENCE—SUFFICIENCY OF PLEA—TRIAL INSTRUCTIONS—FAILURE TO REQUEST.

1. A plea "that plaintiff was guilty of negligence at and before his injury, which was the direct and proximate cause of the same," was sufficient to raise the issue of contributory negligence.

2. A general plea of contributory negligence not excepted to is sufficient to warrant the submission of the issue raised thereby, either generally, or in any and all forms which the evidence warrants.

3. Where plaintiff pleaded and relied on establishing defendant's negligence on two theories, and the court submitted the case on one theory only, plaintiff could not complain, in the absence of a request by him for the submission of the other theory.

4. In an action against a railroad for injuries at a crossing, plaintiff cannot show negligence in failure to ring the bell, blow the whistle, or in the operation of the cars, by showing an habitual failure to ring the bell and blow the whistle, and an habitual negligence in operating the cars.

Appeal from District Court, Bexar County; S. J. Brooks, Judge.

Action by William Stewart against the Galveston, Harrisburg & San Antonio Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

*Rehearing denied February 24, 1904, and writ of error denied by Supreme Court.

Parker & Garwood, for appellees.

JAMES, C. J. The plaintiff, Stewart, alleged that while crossing Walnut street the city of San Antonio, at or near where crosses Cherry alley, defendant's service engaged in operating its cars negligently backed or kicked a car or cars down on said crossing, causing him to be there struck and injured; that the ordinance the city required that a bell should be rung on all locomotives and kept ringing as approached the crossing; that the night was dark, and defendant failed to provide light on the cars, or to sound the bell or blow whistle, or to give any kind of warning on this occasion. Defendant pleaded general denial, and specially "that plaintiff was guilty of negligence at and before his injury which was the direct and proximate cause of the same." The portion in quotation marks is the language of the plea.

The first and second assignments are founded upon the contention that contributory negligence was not sufficiently pleaded to raise such issue. They are overruled.

Under the third, appellant complains of the charge which instructed the jury that plaintiff failed to look and listen for the approach of the car, etc., and if such failure, if any, was negligence, without which the accident would not have occurred, to find for defendant upon the ground that defendant had not alleged specifically any particular acts of negligence on the part of plaintiff and therefore it was improper for the court to single out and charge upon specific acts of negligence and submit same to the jury and upon the further ground that such mode of submission gave undue prominence to such particular facts. These are the objections which appellant's brief raises in propositions under the third assignment. A general plea of contributory negligence, not excepted to, is undoubtedly sufficient to warrant its submission generally or in any and all forms in which the issue is made by the evidence.

The fourth is also overruled. If, as contended by appellant, he pleaded and relied on establishing defendant's negligence on two distinct theories, and the court submitted the case on one theory, plaintiff cannot complain, it being a matter of omission, and he not having requested a submission of the other.

Under the fifth assignment the proposition is made that, when the issue is as to whether or not the bell was rung or the whistle blown on a particular train, it is admissible to show that defendant's trains habitually failed to ring the bell or blow the whistle. The testimony offered and excluded was that of Helen Robinson, who lived near the place to the effect that at the point where this accident occurred more than half the train

that passed her house failed to ring the bell or blow the whistle. The inquiry was as to the ringing of the bell, etc., in connection with the cars which struck plaintiff. We understand *Ry. v. Evansich*, 61 Tex. 6, and *Ry. v. Rowland*, 82 Tex. 171, 18 S. W. 96, as condemning the testimony offered as improper. Where the issue is whether a certain act is negligent or not, it has been frequently held proper to show what is usually done under the same circumstances. But whether or not the act itself occurred cannot, we think, be so proven.

The same conclusion requires the overruling of the sixth assignment, which is that the court erred in refusing to permit the witness Guckian to testify that it was the usual and general custom, in switching cars in defendant's yard, to kick cars, and kick the same with an engine, at or near this place, and that the cars then went on over Cherry alley by themselves, and that the switch engine stopped behind to pick up other cars, and went ahead and overtook said cars which had previously been kicked ahead of it.

The same applies to the seventh assignment.

Affirmed.

PEASLEE v. WALKER et ux.*

(Court of Civil Appeals of Texas. Jan. 20, 1904.)

PUBLIC LANDS—GRANTS—PRESUMPTION OF ACCEPTANCE—EXHAUSTION OF CONCESSION—PROMISSORY NOTES—COMPROMISE OF SUIT—CONSIDERATION—BONA FIDE PURCHASER—HOMESTEAD—INCUMBRANCE—VALIDITY.

1. A valid grant of public lands by Mexican authorities in 1833, pursuant to a concession, vested title in the grantee, in the absence of evidence that it was not accepted, or, after acceptance, was abandoned.

2. Where a valid grant was made by the Mexican authorities, pursuant to a Mexican concession, for the full amount of land embraced therein, a subsequent grant under the same concession was absolutely void, and the land covered was subject to appropriation by subsequent settlers.

3. The compromise of a suit for the recovery from defendant of land held by him under a valid grant—plaintiff's claim being based on a void grant—is nevertheless a sufficient consideration for promissory notes; it appearing that, in consequence of compromises by other defendants, the expense of continued litigation would have to be borne by the defendant alone.

4. Under Const. art. 16, § 50, providing that no mortgage, trust, or other lien on the homestead shall ever be valid, except for the purchase money therefor, whether executed by the husband alone, or with his wife, the execution of vendor's lien notes by the husband on receiving a deed to property occupied by him and his wife as a homestead under a valid public grant—the deed being executed by a claimant of the property under a void grant—creates no lien on the property.

5. A bona fide purchaser of such notes before maturity was in no better position, as regards such a lien, than the payees thereof.

Appeal from District Court, Williamson County; R. L. Penn, Judge.

*Rehearing denied February 24, 1904, and writ of error denied by Supreme Court.

Action by H. Peaslee against John Walker and Martha Walker. From a judgment granting insufficient relief, plaintiff appeals. Affirmed.

Strickland & Ward and West & Cochran, for appellant. W. W. Nelms and W. H. Nunn, for appellees.

DOOM, Special Chief Justice. This suit was instituted by H. Peaslee, plaintiff, against John Walker, defendant, to recover the amount due on two promissory notes executed and delivered by him to E. G. Hanrick and W. L. Goodrich; plaintiff alleging that he was a bona fide purchaser of said promissory notes for value and before maturity, and that they were given for part of the purchase money for a tract of 160 acres of land, less 16 acres, being the John Walker survey out of the Rafael De Aguirre grant, in Williamson county, Tex., and secured by vendor's lien on the land, which plaintiff also sought to foreclose. The defendant John Walker answered by general denial, and specially that E. G. Hanrick and L. W. Goodrich had no title, legal or equitable, to the land sold him, and that said land was in fact covered by a patented survey in his own name, and that he and his wife had long occupied the same as their homestead, and that for that reason the lien asserted by plaintiff did not exist, and prayed that the same be canceled, and that the cloud cast thereby on defendant's title be removed. Martha Walker, the wife of the defendant, intervened in the case, and set up the same facts alleged by the defendant, and that she was not a party to the execution of the promissory notes, and prayed for cancellation of the alleged lien, and removal of cloud from title. The district court rendered judgment in favor of the plaintiff against the defendant John Walker for the amount due on the two promissory notes, but refused to foreclose the vendor's lien claimed by plaintiff, and decreed that the cloud cast upon the title to the property of the intervener and defendant by reason of the execution and delivery of the two promissory notes be removed.

Conclusions of Fact.

(1) On the 4th day of October, A. D. 1833, Luke Lesassier, alcalde, in pursuance of a proper concession for 11 leagues of land, survey and field notes, and consent of the empresarios Austin and Williams, issued to Rafael De Aguirre the final title of possession to 11 leagues of land on the river Brazos.

(2) On the 22d day of October, A. D. 1833, the same alcalde, by virtue of the same concession, on another survey and field notes with consent of the empresarios Austin and Williams, issued another final title of possession to the said Rafael De Aguirre for 11 leagues of land—10 leagues on San Javial creek, and 1 league on Cow Bayou; the 10 leagues on San Javial creek being in William-

dor's lien.

(3) Prior to November 13, 1877, the defendant John Walker and his wife settled upon the land involved in this suit, and continuously since so settling thereon have been in actual possession thereof, using and occupying the same as a homestead. On August 2, 1884, the patent was issued by the state of Texas to said land to the said John Walker under the provisions of an act for the benefit of actual occupants of the public lands, approved May 26, 1873.

(4) On November 13, 1877, E. G. Hanrick instituted suit in the district court of Williamson county, Tex., against a large number of persons, claiming the land on the Rafael De Aguirre 10 leagues adverse to said Aguirre, and against the said John Walker, to recover of him the title and possession of the land now in controversy; Hanrick deraigning title thereto under the grant to Rafael De Aguirre, of date October 22, 1833; and this suit was still pending at the time of the execution of the two promissory notes sued on. On the 8th day of March, A. D. 1898, the date of the execution of the two promissory notes, the said E. G. Hanrick and L. W. Goodrich owned whatever title, if any, to the land in controversy which passed to the said Rafael De Aguirre by virtue of the said final title issued on October 22, 1833; and on said day the said Hanrick and Goodrich and the said John Walker agreed upon a compromise of the said suit, and the said Hanrick and Goodrich executed to the said Walker a deed for the land in controversy, and the said Walker, in consideration of such deed, and for the purpose of effecting such compromise, executed and delivered to the said Hanrick and Goodrich the two promissory notes, each reciting that it was given for a part of the purchase money for the land in controversy, and that a vendor's lien was retained by the said Hanrick and Goodrich to secure the payment thereof. The said John Walker, in accepting the deed from Hanrick and Goodrich to said land, and in executing the two promissory notes, acted in good faith for the purpose of settling the said suit and quieting his title to said land, and, in so doing, acted under, and in conformity with, the advice of his attorney representing him in said suit. The defendants in the suit brought by Hanrick acted together in employing attorneys and defraying the expenses of defending such suits, making a common fight, and, at the time of the compromise made by Walker, all of the other defendants had compromised with Hanrick and Goodrich; and, had Walker not compromised, he would have had the entire expense of defending the suit against him to bear from that time, and which would probably have been seven or eight hundred dollars. The wife of John Walker was never a party to the suit brought by Hanrick to recover the land. The land at the time of the

and did not consent to the compromise, and did not know of such compromise until after the same was made.

(5) The plaintiff, H. Peaslee, purchased both of the promissory notes sued on from Hanrick and Goodrich for value, and before maturity of either one of the said notes.

Conclusions of Law.

1. The concession, survey, and field notes, consent of the empresarios and final title extended to Rafael De Aguirre on the 4th day of October, A. D. 1833, for 11 leagues of land on the Brazos river, was, in form and substance, a valid grant, and, in the absence of evidence that Rafael de Aguirre never accepted the grant of the lands, or, after accepting them, abandoned them, vested title in him, and those claiming under him, to the 11 leagues of land.

2. A valid grant having been made to Rafael De Aguirre on the 4th day of October, A. D. 1833, for 11 leagues of land on the Brazos river, the power to issue title on the concession was exhausted, and the title extended to him on the 22d day of October, A. D. 1833, for the 10 leagues of land in Williamson county and 1 league at another place, was absolutely void as to all persons, and did not in any way appropriate the land or confer any right thereto; and it was public and unappropriated public domain, subject to appropriation by the defendant John Walker, at the time his survey was made. *Howell v. Hanrick*, 88 Tex. 383, 29 S. W. 762, 30 S. W. 856, 31 S. W. 611.

3. The compromise of the suit of Hanrick against the defendant John Walker for the recovery of the title to and possession of the land was a sufficient consideration for the execution of the two promissory notes sued on, and the district court correctly rendered judgment against him for the amount due on the notes.

4. The land being vacant and unappropriated public domain at the time of the settlement of the defendant and his wife, they acquired title thereto under the pre-emption law of May 26, 1873, and it became their homestead; and the suit of Hanrick against the defendant John Walker to recover the title to and possession of the land was not different from any suit which might be brought to recover the title to and possession of any land occupied as a homestead, based on no claim of right whatever.

5. The Constitution, in article 16, § 50, provides that no mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefor or improvements made thereon, whether such mortgage or trust deed or other lien shall have been executed by the husband alone, or together with his wife, and that all pretended sales of the homestead involving any condition of defeasance shall be void; and the

title of the defendant John Walker and his wife to the 160 acres of land being complete, and the land being their homestead, it was not within the power of the defendant John Walker and E. G. Hanrick and L. W. Goodrich, by a compromise of the suit of Hanrick against the defendant Walker, based on no claim of right to the land, to place a lien on the homestead to secure the payment of the money for which the suit was compromised, in the form of making a deed of conveyance to the defendant, conveying the land, and retaining a lien thereon, or in the form of a mortgage, deed of trust, or otherwise.

6. The defendant and his wife had perfect title to the land, and were living thereon, at the time the two promissory notes were executed. They made no deed of conveyance conveying the land, nor did they do any other act to mislead any one as to the character of their possession. The two promissory notes were not given for any part of the purchase money of the land, because the title to it was already complete, and the vendors, E. G. Hanrick and L. W. Goodrich, had no claim whatever to the land. The transaction amounted to nothing more than an attempt on the part of John Walker to create a lien on the homestead to secure the payment of a debt which he incurred in compromise of the suit, and the fact that the plaintiff purchased the two promissory notes for value, and before the maturity of either one of them, does not place him in any better position than he would have been if they had been secured by mortgage or deed of trust on the homestead.

The judgment of the district court was proper in all things, and is therefore affirmed.

STATE ex rel. RUSSELL v. BOX.

(Court of Civil Appeals of Texas. Feb. 6, 1904.)

SHERIFFS—REMOVAL—BONDS—FAILURE TO GIVE—NEGLIGENCE—STATUTES—APPLICATION—PROCEEDINGS—PRESUMPTION—ATTORNEYS—APPOINTMENT—DISTRICT JUDGE—DISCRETION—PLEADING—DEMURRER—EVIDENCE—VERDICT—APPEAL—JUDGMENT OF REMOVAL—APPELLATE COURT—JURISDICTION.

1. Where the petition in a proceeding to remove a sheriff from office was signed only by relator, and it did not appear on the face thereof by what attorney or attorneys it was conducted, it was not demurrable on the ground that such proceeding could only be conducted by the district attorney, or some other officer authorized to prosecute suits in the name of the state.

2. It is within the discretion of the district judge, in proceedings to remove a county officer, to require the district attorney to conduct the proceedings, or to appoint other attorneys for such purpose.

3. Where, in a proceeding for the removal of a sheriff from office for failure to qualify and to execute his bond as sheriff and tax collector of a county, defendant admitted that he had never qualified after his election, a verdict finding that defendant had not "neglected and failed to present and have proved" official bonds

as sheriff "of H. county," and "take the oath of office as such sheriff within the time prescribed by law," was ambiguous, as a negative pregnant, and insufficient to sustain a judgment for defendant.

4. Rev. St. 1895, art. 4894, providing that whenever any person elected sheriff shall neglect "or fail from any cause whatever" to give bond and take the oath of office within 20 days after notice of his election, the office shall be deemed vacant, and the county commissioners' court shall proceed to appoint a sheriff to fill the vacancy, who shall hold his office for the unexpired term, is mandatory; and hence, where a sheriff had failed to give bond within the time prescribed, and within the time as extended by the commissioners' court, he was properly removed from office, though his failure to execute such bond was not the result of negligence.

5. Where the commissioners' court removed a sheriff for his failure to give a bond as required by Rev. St. 1895, art. 4894, their motive in making such removal was immaterial.

6. Where defendant had been elected sheriff and tax collector, but, after notice of his election, he failed to give bond as required by Rev. St. 1895, § 4894, the fact that he had previously been appointed sheriff by the commissioners' court, before his election, and had given bond as such appointee, did not preclude his removal for failure to give a new bond after his election.

7. Under Const. art. 5, § 24, conferring power on the judges of the district court to remove county officers on specified grounds, on the findings of a jury, the Court of Civil Appeals, on appeal from a judgment in favor of defendant in a proceeding to remove him from the office of sheriff, was without power to render judgment of removal, though the evidence was conclusive against his right to the office.

Appeal from District Court, Lipscomb County; B. M. Baker, Judge.

Proceeding by the state, on the relation of T. N. Russell, against Joe Box, to remove defendant from the office of sheriff and tax collector of Hutchinson county. From a judgment in favor of defendant, relator appeals. Reversed.

Ben H. Kelley and C. Coffee, for appellant.
H. E. Hoover, for appellee.

STEPHENS, J. This proceeding for the removal of Joe Box from the office of sheriff and tax collector of Hutchinson county was commenced August 17, 1903, in the district court of that county, as provided in articles 3541-3543, Rev. St. 1895. The petition was signed and sworn to by T. N. Russell, as relator, and was filed in the name of the state of Texas. It was demurred to on the following ground: "Because said petition, upon its face, shows that the suit is not properly brought; and, if properly brought, said petition shows upon its face that it is not brought by the proper officer, or by the proper authority designated by law to institute and prosecute such action." This demurrer was overruled, and the proceeding went to trial on the issues made by the petition and answer, resulting in a verdict and judgment in favor of Box, from which this appeal is prosecuted.

The cross-assignments of error complaining of the ruling on demurrer must be overruled.

or other county officer can only be conducted by the district attorney, or some other officer authorized to prosecute suits in the name of the state; but, if this be conceded, it does not follow that the court erred in overruling the demurrer, since it does not appear from the face of the petition, which was signed only by the relator, by whom (that is, by what attorney or attorneys) the proceeding was to be conducted. True, the replication to appellee's answer was signed by Coffee and Kelley as attorneys for relator, and the proceeding at the trial seems to have been conducted by them, but without objection from appellee. However, if the question be treated as sufficiently raised, we are not prepared to agree with appellee that only the district attorney, or other public prosecutor, can conduct a proceeding for the removal of a county officer. Doubtless the district judge might require the district attorney to conduct such proceedings, either with or to the exclusion of other attorneys; but this he could not do in all cases, since article 3554 of the same chapter provides specially for such proceedings against the district attorney himself. The view expressed by Judge Roberts in *Trigg v. State*, 49 Tex. 675, that this matter is within the discretion of the district judge before whom the proceeding is brought, we are disposed to adopt. See, also, *Bland v. State* (Tex. Civ. App.) 38 S. W. 253.

The grounds relied on for the removal of appellee were, first, his failure to give the bond and take the oath of office required of him as the sheriff and tax collector elect of Hutchinson county after due notice of his election at the general election held in November, 1902; second, his failure to execute the new bonds required of him by the commissioners' court of said county as sheriff and tax collector, to which office he had been appointed February 11, 1902. To sustain these grounds, the following certified copies of the orders or judgments of the commissioners' court of Hutchinson county were introduced in evidence:

"Monday, December 1, 1902. The time having expired for presenting bonds for any officer elected to office at the November election, 1902, Joe Box, the sheriff elected at that time having presented no bond, and his present bond having been complained of, he was ordered to file a new bond by the 20th day of December, 1902."

"January 3, 1903. On this day came before the court the matter of the sheriff and tax collector's bonds, and it appearing to the court that the time having expired in which a sheriff can make bond under the election, and the sheriff elect, Joe Box, failing to give satisfactory reasons to the court why he did not file said bonds in compliance with law, and the said sheriff's old bonds being complained of, he, the said Joe Box, failed to file said bonds under the instructions of the

the sheriff and tax collector to be vacant, and does proceed to appoint a sheriff and tax collector to fill the unexpired term thereof."

"April 20, 1903. Now coming before the court the matters of sheriff and tax collector to fill the unexpired term of Joe Box, who having failed to make bond as required by law, and E. P. Cannady's name being before the court, it is ordered by the court that E. P. Cannady be appointed sheriff and tax collector in and for Hutchinson county, and that said Cannady make his bonds as the law directs."

"May 12, 1903. Now coming on to be considered by the court the official bonds of E. P. Cannady as sheriff and tax collector of Hutchinson county, and upon inspection of said bonds, it is ordered by the court that all bonds of the said E. P. Cannady as sheriff and tax collector be approved, and the clerk ordered to file the same, which was accordingly done. It is further ordered that the state bond for the collection of taxes be forwarded to comptroller."

No other testimony was introduced by relator.

The evidence introduced by appellee consisted alone of his own testimony and that of one other witness, and was to the effect that after receiving his certificate of election, November 11, 1902, appellee went to work at once to get up his bonds, but did not get them ready before December 20, 1902, and did not then present them to the commissioners' court, the excuse being that no term or session of the court was then held, appellee testifying: "The county judge had me open court, and then adjourn. This was about 5 or 6 o'clock in the evening." On January 3, 1903, he was personally present before the commissioners' court with his bonds, ready to give bond and take the oath of office, but did not submit them to the court, and, so far as the record shows, has never done so; and it affirmatively appears that he has never taken the oath of office since his election, yet he still holds the office. The rest of appellee's testimony related to the circumstances relied on to show an excuse for not having the bonds ready within the time prescribed by law, or within the time as extended by the order of the commissioners' court, which, in our view of the case, need not be set out.

The court, discarding the issue as to appellee's failure to give new bonds, instructed the jury to find whether he had given the bonds as sheriff and taken the oath of office required of him by law within 20 days after receiving his certificate of election, or within the further time extended to him by the commissioners' court, and, if not, whether he had been "prevented from doing so by some good reason beyond his control." The charge then proceeded:

"Now, if you find from the evidence, by a

preponderance thereof, that said Box failed and neglected to present his official bonds as sheriff to the commissioners' court of Hutchinson county within twenty days after the receipt of his certificate of election, and secure the approval of said bonds by said court, and take the oath of office as sheriff; and you further find that he was not prevented from presenting said bonds and taking said oath by some good reason beyond his control; and if you further find that the said Box failed and neglected to present to said court his official bonds, and secure the approval of said court of said bonds, and take the oath of office as required by law, within such time as may have been extended to him, if any time was extended to him, by the commissioners' court of said county, beyond the said 20 days in which he was to be permitted to present said bonds and take said oath, and that he was not prevented from presenting said bonds and taking said oath by some good reason beyond his control—then and in such case you will find for the plaintiff, and the form of your verdict will be: 'We, the jury, find that the cause in plaintiff's petition for removal of defendant, Joe Box, to wit, that he neglected and failed to present and have approved his official bonds as sheriff of Hutchinson county, and take the oath of office as such sheriff, within the time prescribed by law, is true, in point of fact.'

"If you do not find, under the foregoing paragraph, that the said cause set forth in the petition is true, in point of fact, you will find for the defendant."

The jury found that appellee had not, as expressed in their verdict "neglected and failed to present and have approved his official bonds as sheriff of Hutchinson county, and take the oath of office as such sheriff, within the time prescribed by law." That is, they found that he had not both neglected and failed to qualify within the prescribed time, but did not distinctly find whether he had failed to qualify or not. Read in connection with the charge above quoted, to which it purported to respond, the verdict seems rather ambiguous, the negative finding implying or covering up an affirmative. A denial in pleading so expressed would be termed a "negative pregnant," and would be treated as an admission of the implied fact. Anderson's Law Dictionary, p. 702; *Ex parte Wall*, 107 U. S. 265, 2 Sup. Ct. 569, 27 L. Ed. 552. While a verdict is not to be so harshly construed, it must be free from ambiguity in disposing of the material issues, before it can be made the basis of a judgment. In view of the admission in appellee's own testimony that he had never qualified after his election, it would be uncharitable to construe the verdict as finding that he had done so.

Treating the verdict, then, as ambiguous, and as leaving undetermined the alleged failure of appellee to qualify, we are brought to the question, whether a sheriff who has not

neglected to qualify within the time prescribed by law, as the jury found, may be removed from office for a failure from some other cause to qualify within that time or thereafter. The statute on this subject is article 4894. Appellee insists that this statute is merely directory as to the time within which a sheriff-elect is required to qualify, and cites the case of *Flatan v. State*, 56 Tex. 93. This decision was made in the year 1882, under article 4518 of the Revised Statutes of 1879. On account, possibly, of this very decision, that article was amended in 1885 by the substitution of what is now article 4894, Rev. St. 1895, which, instead of declaring, as the former article had done, that the office shall be deemed vacant when the person elected "shall neglect or refuse" to qualify within 20 days after notice of his election, declares the office shall be deemed vacant when the person elected "shall neglect, refuse or fail from any cause whatever, to give bond and take the oath of office within twenty days after notice of his election." In construing the old article, the court used this language in the case cited: "The plain words of the statute should have their full effect in reference to the time within which an elected person should qualify, in all cases in which there is neglect or refusal to qualify." Now that the words "fail from any cause whatever" have been added by amendment to "neglect or refuse," why should not the words of the amended statute in reference to the time within which an elected person should qualify be given their full effect in all cases where there has been a failure from any cause whatever to qualify? We see no escape from the conclusion which this question imports, without doing violence to the plain language of the statute. It may be that tender of performance in the matter of giving bonds, as in other matters, should be treated as the equivalent of performance, and hence that the person elected would not be said to have failed to qualify where he had been prevented from giving bond by the arbitrary action of the commissioners' court, but no such case is presented by this record. It is not pretended that appellee made any tender of bonds, or in any way whatever offered to qualify, within the 20 days after receiving notice of his election. If, as claimed by him, attendance as a state's witness on courts in other counties kept him away from home about 15 of the 20 days allowed by law, and thus prevented him from making his bonds, he nevertheless failed to do so, though the cause of failure may not have been due to negligence. It certainly cannot be said that he did not "fail from any cause whatever" to qualify.

However, the commissioners' court, instead of declaring the office vacant, and appointing a sheriff to fill the vacancy at the expiration of said 20 days, as provided in said article 4894, extended the time 20 days longer; thus exercising a power not ex-

pressly granted, but possibly implied in the grant of the greater power to declare and fill a vacancy; or it may be that this should be regarded as itself an appointment, which would have the effect of extending the time 20 days longer. But as before seen, appellee not only failed to give or tender any bond and take the oath of office within the extended time or at any time thereafter, but also failed even to inform the county judge at the expiration of said 20 days, December 20, 1902, when he was directed to open and adjourn the court, that he desired to qualify. In order to excuse this failure, and to invalidate the proceedings of the commissioners' court, he undertook, in his answer, to assail the motives of the county judge and two of the commissioners, charging against them a conspiracy to deprive him of the office, and now complains, by cross-assignment, of the court's action in striking out this defense. But there was nothing in this ruling to his detriment, since the facts clearly warranted the orders complained of. Where an officer has done a lawful act, it is wholly immaterial that he may have been actuated by a bad motive.

For the same reason, we need not consider the question, to which so much space is given in the briefs, whether the answer demurred out was a direct or collateral attack on the orders of the commissioners' court. Appellee's own testimony justified these orders, and this removal proceeding might have been maintained without them. The real question at issue was not so much what the commissioners' court had done or might do, as what appellee had failed to do, which was abundantly shown by his own testimony. Had this been a quo warranto proceeding like that of *Flatán v. State*, supra, in which the right to recover depended alone on the validity of the orders of the commissioners' court declaring a vacancy in office, the question discussed in the briefs might have been important.

As to appellee's claim that he was entitled to hold over, notwithstanding his failure to qualify, because he had already taken the oath of office and given bond as appointee of the commissioners' court, we need only cite the opinion of Justice Head in *Robinson v. State* (Tex. Civ. App.) 28 S. W. 566, holding to the contrary. Besides, he was required by the commissioners' court to give new bonds, which he made no pretense of doing. True, it does not appear that he was cited as provided by law where a sheriff is required to give a new bond, but no such provision is made with reference to the bond he was required to give as tax collector. *Poe v. State*, 72 Tex. 625, 10 S. W. 737.

It follows from these conclusions that the judgment must be reversed because the court erred, as appears from the charge given, the approval of the verdict, and the refusal to give appellant's fourth special instruction, in holding that appellee could only be re-

moved from office on a verdict finding him guilty of negligence in failing to qualify within the time mentioned in the charge, and in not holding him to be removable if he had failed from any cause whatever to qualify before the office was declared to be vacant by the commissioners' court.

It only remains to determine whether we should render judgment, or remand the case for a new trial; it being earnestly insisted in behalf of appellant that as the evidence was conclusive against appellee's right to further hold the office, we should here enter judgment removing him. But we doubt our power to do this. Power was conferred by section 24, art. 5, of the Constitution, on "the judges of the district court," to remove county officers on specified grounds, and for "other causes defined by law, upon the cause therefor being set forth in writing, and the finding of its truth by a jury." The failure of a county officer to qualify within a given time after notice of his election has been defined by law as a cause for removal. In *Flatán v. State*, supra, it was held by a majority of the court that one elected to an office was not a county officer, within the meaning of said section of the Constitution, until he had been inducted into office. The contrary view, however, was very strongly stated in the dissenting opinion of Justice Bonner. Accepting the view of the majority as the law, we are still confronted with the requirement of the Revised Statutes providing for the removal of county officers for various causes, including the failure to qualify, that the truth of the cause for removal shall be established by the verdict of a jury, which does not differ in substance from the requirement of the Constitution. Rev. St. 1895, arts. 3541, 3544. The proceeding to remove a county officer is special, and the same procedure is prescribed in all such cases without reference to the cause for removal. True, in article 3532 the verdict of a jury is specifically required in every case of removal provided for in the preceding article, which does not include removals for failure to qualify, which might therefore be construed to exclude such cases; but this is merely a reproduction of the language of the Constitution as interpreted by the majority opinion in *Flatán v. State*, supra. The subsequent article (3541) places removals for failure to qualify in the same category. Besides, there seems room for the contention that as appellee had been inducted into the office of sheriff under his appointment, and was holding over, the case would come within the meaning of the Constitution, which has been construed to authorize a district judge to remove a county officer only on the verdict of a jury finding the truth of the ground alleged as cause for removal. *Poe v. State*, 72 Tex. 625, 10 S. W. 737. We have finally concluded, therefore, that we should resolve the doubt as to our power against its exercise, and remand the case for a new

trial, although there seems much force in the contention that we should here render a judgment of removal on the facts established by the evidence.

Reversed and remanded.

MISSOURI, K. & T. RY. CO. OF TEXAS v. STINSON.*

(Court of Civil Appeals of Texas. Jan. 16, 1904.)

MASTER AND SERVANT — RAILROADS — INJURIES TO SWITCHMAN — ACTIONS — INSTRUCTIONS — REQUESTS — REFUSAL — DAMAGES — EXCESSIVENESS.

1. Where a special term of court had been duly ordered by the district judge, and at the time of holding such term the judge was absent in another county of his district holding a regular term of court, it was proper for the practicing attorneys to elect one of their number to hold such special term.

2. Plaintiff, a member of a switching crew, in charge of the foreman, was injured while stepping from the top of the caboose to the car ahead, on the belief that a flying switch was to be made by the train being cut at the engine. An instruction charged that before the jury could find for plaintiff they must find that it was the duty of plaintiff's foreman to notify plaintiff of the intended movement of the cars, and that his failure to do so was negligence; or that it was the duty of the member of the crew at the engine to uncouple the cars, which he failed to do, and that the uncoupling was done by another at the caboose without notice to plaintiff, and that such acts were negligence, and one or all of them, if any, was the proximate cause of plaintiff's injury. *Held*, that such charge was not erroneous, as on the weight of evidence, in that it assumed that the drawing away of the car ahead of the caboose caused plaintiff to fall, and that such drawing away was negligence causing the injury.

3. The charge was not objectionable as assuming that the foreman failed to inform plaintiff of the method of handling the cars, or as justifying plaintiff in stepping from the top of the caboose to the car ahead, and authorizing a recovery, if he believed all the cars were to be detached from the engine.

4. In an action for injuries to a switchman by falling between two cars which had been uncoupled to make a flying switch, a requested instruction that if plaintiff heard one of his fellow servants call that he would uncouple the cars he could not recover, or if a man of ordinary prudence, before attempting to step across the space between the cars, would have looked to see which car was to be uncoupled, and if plaintiff failed to look, and such failure was negligence which caused or contributed to the accident, plaintiff could not recover, was properly refused as on the weight of evidence, and as withdrawing from the jury the right to determine whether the facts stated constituted negligence.

5. The refusal of a requested instruction substantially covered by the main charge is not error.

6. Plaintiff, a railroad switchman, was 28 years of age, and was earning \$90 per month. His injuries were permanent, and at the time of the trial, 11 months after the injury, he had been unable to walk without crutches. The ankle joint of his right foot was perfectly stiff, and that foot and leg was crooked and about 1½ inches shorter than the left. A part of the larger bone of the lower right leg had been removed, and 6 inches of the remaining portion

was diseased. He suffered from sores on his leg above the ankle, which had not healed, and a physician testified that at the time of the trial the bones were in a chronic and inflamed condition, with the presence of supuration from the bone. *Held*, that a verdict for \$15,000 was not so excessive as to indicate passion and prejudice on the part of the jury.

Appeal from District Court, Hunt County; T. D. Montrose, Special Judge.

Action by G. W. Stinson against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment in favor of plaintiff, defendant appeals. *Affirmed*.

T. S. Miller and Perkins, Craddock & Wall, for appellant. Yates & Carpenter, for appellee.

BOOKHOUT, J. This suit was brought June 18, 1902, by the appellee against the appellant, for damages for personal injuries sustained by the appellee March 6, 1902, while employed as switchman by the appellant. Trial was had before a jury February 6, 1903, resulting in a judgment in favor of appellee for \$15,000. To reverse this judgment appellant prosecutes this appeal.

Conclusions of Fact.

Appellee was, on the 6th day of March, 1902, in the employ of appellant in its yards at Greenville, Tex., as a member of a switch crew, composed of A. B. Gold, foreman, R. M. Littell, known as "the man following the engine," and T. J. Howell and appellee, who were known as "fieldmen." It was the duty of the foreman to notify the other members of the crew in advance of any movement of cars, and where uncoupling of cars became necessary it was the duty of the man following the engine to perform this service. It was the duty of the fieldmen to ride upon the cars when being switched, to set and release brakes on the same, and, when riding a section of cars which had been detached from an engine, it was their duty to ride upon the front part of such detached section, to keep a lookout for the safety of such cars, as well as to protect anything which might appear in the track of the same. While so engaged in the performance of the duties of his employment on the night of March 6, 1902, the crew of which plaintiff was a member made a flying switch with a caboose, taking said caboose from one switch track, known as Track No. 2, and placing it upon another, known as the "pocket," the two tracks being connected by another track known as the "lead," to which each of the switch tracks were connected by proper switch stands. To make the flying switch with the caboose the train of cars were put in motion, and after reaching a sufficiently rapid rate of speed the speed of the engine was suddenly lessened, the caboose uncoupled from the car next to it, and then the front section of the train was drawn hurriedly away, in advance of the caboose, past the switch stand; the switch

*Rehearing denied February 20, 1904, and writ of error denied by Supreme Court.

was then thrown, and the caboose allowed to roll upon the desired switch track. Before making such flying switch the plaintiff was engaged in setting the brakes upon three other cars, when the other members of the crew detached the engine and one car from these three cars, and ran such engine and car to a point where they could back them in upon the track where the caboose and another car stood with the brakes of the caboose set thereon. After setting the brakes upon the cars upon which he had been left, plaintiff got off the same, and saw the engine and car were backing in toward the car attached to the caboose. Knowing that the brakes of the caboose were set, he got upon the same and released the brakes thereon. About the time the brakes were released by plaintiff the car attached to the engine was coupled to the car next to the caboose, and immediately the train was moved and the flying switch begun. The foreman of the crew failed to notify him that a flying switch would be made of the caboose, and the first notice he had that such a switch would be made was when the slack was given the train for the uncoupling to be made. When such slack was given, the plaintiff knew that a flying switch was to be made of some part of the train, and, having no notice from the foreman or any one what part of the train would be uncoupled, he looked for the man following the engine, whose duty it was to uncouple the cars. The man following the engine was seen standing upon the footboard of the engine, in which position he could uncouple the train at no place except to uncouple the engine from the car next to it. Plaintiff started from his position upon the caboose to go to the front end of the car next to the engine, so that he would be in the place his duties required him, when the engine was detached from the cars following it. While attempting to step from the caboose to the car ahead of the same, the caboose was uncoupled from the car next to it, and the front section of the train drawn rapidly away from the caboose, causing plaintiff to fall in front of the moving caboose, which passed over him, inflicting the injuries for which he sues. The undisputed evidence shows that when the caboose was uncoupled the man following the engine was upon the footboard of the engine, and that the caboose was uncoupled by the other fieldman, without notice from either the man whose duty it was to uncouple the cars under such circumstances, or from the fieldman who did the uncoupling. The failure of the foreman to notify appellee that a flying switch would be made with the caboose, the failure of the man following the engine to uncouple the cars, and the uncoupling of the same by a fieldman without any notice to the plaintiff that the fieldman would perform the duties required of the man following the engine, was negligence which was the proximate cause of the injury.

In deference to the verdict, we find the appellee sustained damages as the result of such injuries in the amount found by the jury.

Opinion.

1. The first assignment of error complains of the action of the court in overruling appellant's objections to the trial of the case at the special term of court. The special term had been duly ordered by the district judge, and at the time of holding such special term the district judge was absent in another county of his district, holding a regular term of court of that county. The practicing attorneys proceeded, under the statute, to elect one of their number special judge. At such election Hon. T. D. Montrose was duly elected, and held said special term of court. In this there was no error. We so held in the case of *M. K. & T. Ry. v. Huff* (decided at the present term of court) 78 S. W. 249. See, also, *Munzesheimer v. Fairbanks*, 82 Tex. 351, 18 S. W. 697.

2. It is contended that the court erred in the following paragraph of its charge:

"If you believe from the evidence that on or about the 6th day of March, 1902, the plaintiff, G. W. Stinson, was in the employ of the defendant, the Missouri, Kansas & Texas Railway Company of Texas, as a switchman in its yards in Greenville, Tex.; and if you believe that A. B. Gold was foreman of the switching crew, of which plaintiff was a member, and that it was the duty of said foreman to formulate a plan of work for said crew, and to notify the members of said crew of such plan, and to direct the manner of performing their work by said crew; or if you believe that plaintiff and T. J. Howell were members of said switching crew, and were known as 'fieldmen,' and that R. M. Littell was a member of such crew, and was known as the man following the engine; and if you further believe that the defendant had a rule or rules, or that there was a custom in said yards, known to and acquiesced in by the defendant, requiring the man following the engine to uncouple the cars in said yard when the members of said switching crew were engaged in the work of making a flying switch; and if you believe that the plaintiff was on one of the defendant's cabooses in said yard in the performance of his duty under his employment; and if you believe that said switching crew made a flying switch of said caboose while the plaintiff was on the same; and if you believe that it was the duty of said A. B. Gold, foreman, to have notified the plaintiff that said crew would make a flying switch of the caboose; and if you believe that A. B. Gold failed to give such notice, and that his failure (if he did fail) was negligence, as that term is herein defined; or if you believe that when said flying switch was made, that R. M. Littell did not uncouple said caboose; and if you believe the same was uncoupled

by T. J. Howell; and if you believe that neither the said R. M. Littell or the said T. J. Howell notified plaintiff that said caboose would be uncoupled by said T. J. Howell; and if you believe that plaintiff had no notice that said caboose would be uncoupled from the other parts of the train; and if you further believe that the uncoupling of the said caboose by said T. J. Howell, and the failure of said R. M. Littell to uncouple the same without notice to plaintiff (if he had no notice), was negligence; and if you further believe that by the negligence of the said Gold the said Howell, or the said Littell, or all of them, in the manner submitted to you (if either was negligent), plaintiff was made to believe, and did believe, that all of the cars of the train were going to be uncoupled from the engine; and if you believe that it was the duty of the plaintiff, under his employment, to ride upon the front car of the train of cars when operated and moved, when the engine is detached from the same; and if you believe that plaintiff started to step from the top of the caboose; and if you believe that the negligence, if any, of the said Gold, said Littell, and said Howell, or either of them, in the manner submitted to you, caused the plaintiff to take such step; and if you believe, while plaintiff was making such step, the car ahead of said caboose was suddenly drawn from said caboose, and the plaintiff thereby injured as set forth in his petition; and if you believe the negligence of the defendant, or its employés, Gold, Littell, and Howell, or either of them, in any of the matters submitted to you, was the direct and proximate cause of plaintiff's injury; and if you believe that he was exercising ordinary care for his own safety—you will find for the plaintiff, unless you find for the defendant under other issues submitted to you."

It is insisted that this charge is erroneous, and upon the weight of the evidence, in that it assumes that the sudden drawing away the car ahead of the caboose caused plaintiff to fall, and that such sudden drawing away of the car was negligence causing the injury. The charge is not subject to this criticism. Before the jury were authorized to find for plaintiff under this paragraph, they were in effect told that they must find (1) that it was the duty of his foreman, Gold, to give plaintiff notice of the intended movement of the cars, and that he failed to give such notice, and such failure was negligence; or that Littell failed to uncouple the cars, and it was his duty to do so, and that the uncoupling was done by Howell without notice to plaintiff, and that Littell's failure to uncouple the cars and the uncoupling of the same by Howell, under the circumstances, was negligence; and (2) that one or all of such negligent acts or omissions, if any, was the proximate cause of plaintiff's injuries. The charge required the jury to find that it was the duty of Littell to uncouple the cars, and that he failed to do so, and that such

failure constituted negligence, before they were authorized to consider the fact he was at the engine instead of the place where the cars were uncoupled.

Nor does the charge assume that the foreman failed to inform plaintiff of the method of handling the cars. The evidence tending to show that appellee had notice of the proposed movement of the cars is so slight as to amount to no evidence. Gold does not pretend to say that appellee heard the explanation which he says he made to the crew as they went in on track No. 3. On cross-examination he states appellee was from 1 to 1½ car lengths from him when he made the explanation. Littell, in effect, contradicts Gold, in that he says Gold did not make the explanation as they were going in on track No. 3, but that it was made to him as he and Gold were riding on the footboard of the engine and going in on track 2. At that time appellee was not present, and could not have heard the explanation. Appellee positively denies that Gold explained to him the proposed movement of the cars, or that he had notice from any source.

The charge is not subject to the criticism that "It justifies the appellee in taking the step from the top of the caboose upon which he was riding to the top of the car ahead of the caboose, and authorize a recovery by him if he believed all the cars were to be detached from the engine." As before stated, the charge required the jury to find that it was Littell's duty to uncouple the cars at the time, and that his failure to do so was negligence. What the effect of Littell's position had on plaintiff's mind was correctly left to the jury, and they were given strictly in charge that in no event could plaintiff recover if his foreman or any other person had notified him of the intended movement of the car, or if he failed to exercise ordinary care for his own safety.

3. There was no error in refusing defendant's requested charge No. 2, the refusal of which is made the ground of its third assignment of error. Said charge is as follows: "If you believe from the evidence that the accident happened underneath an arc electric light, and if you further believe that just before the accident Switchman Howell hallooed to Switchman Littell that he, Howell, would pull the pin, and that at that time Howell was on the southwest corner of the caboose, or on the ground at such corner, and if you further believe that the plaintiff was then on top of the caboose and heard the same, and that he thereby knew that the car next to the caboose was to be uncoupled therefrom, the plaintiff cannot recover; or if you believe from the evidence that a man of ordinary care and prudence, before attempting to step from said caboose, would have looked to see which car was to be uncoupled and dropped into the 'pocket,' and that by such looking he would have seen that the caboose was to be so uncoupled and

dropped, and if you further believe from the evidence that the plaintiff failed to so look before stepping, and that such failure, if any, was negligence, as that term is defined in the main charge, and that such negligence, if any, caused or contributed to cause the accident, you will find for the defendant." This charge was upon the weight of the evidence. It also took from the jury the right to determine whether or not the facts stated therein would constitute negligence.

4. The fourth assignment of error complains of the action of the court in refusing the following special charge: "If you believe from the evidence that plaintiff knew, or in the exercise of ordinary care, that is, such care as a man of ordinary prudence under the circumstances would have exercised, he would have known, that the caboose was to be dropped into the 'pocket' switch, he cannot recover, and you will find for the defendant." This charge, so far as applicable, was embraced in the main charge, and hence there was no error in refusing the same.

5. The sixth assignment of error complains of the action of the court in overruling its motion for a new trial because the verdict is excessive. The appellee was 26 years and 1 month old at the time he was injured, and was earning \$90 per month. He was working for appellant under his second contract of employment, and had less than two years' experience in railroad service. His injuries were serious, and are permanent. He had not, up to the time of the trial, which was 11 months after he was injured, been able to walk without crutches. The ankle joint of his right foot is perfectly stiff, and his right foot and leg are crooked. A part of the larger bone of the lower right leg has been removed. Six inches of the remaining portion of this bone is diseased. The appellee upon the trial removed his shoe and stocking and bandages, and exhibited his foot and leg to the jury. He testified: "The bone of my leg came out above my ankle, the two bones of my leg sticking out at a point 3 or 4 inches above my ankle, that part so sticking out having been cut off. The ankle joint is stiff, and I cannot move it at all. There are sores there above the ankle which have never healed. * * * The foot and leg are now crooked. * * * I suffered pain, hurting worse at night." There was testimony by a physician that at the time of the trial he found the bones all in "a chronic inflamed condition, with the presence of suppuration, evidently from the bone." The right leg is $1\frac{1}{4}$ inches shorter than the left. While the verdict is large, we are not prepared to say it is excessive. It is not so large as to indicate that it was the result of passion or prejudice on the part of the jury. We conclude that there was no error in overruling the motion for a new trial herein on the ground that the verdict is excessive.

Finding no error in the record, the judgment is affirmed.

HOLMAN et al. v. PATTERSON.*

(Court of Civil Appeals of Texas. Jan. 23, 1904.)

EASEMENT—TRACT WITHIN GRANTED TRACT—ESTOPPEL—EVIDENCE—PLEADING—DEEDS—JUDGMENT.

1. In an action for a right of way over land surrounding the plaintiff's, the answers showing from whom the defendants derived title were admissible in evidence to show the facts therein stated.

2. In an action for a right of way over land surrounding the plaintiff's, deeds of the surrounding land to the defendants, their execution having been sufficiently proven, were admissible in evidence.

3. In an action for a right of way over land surrounding the plaintiff's, the plaintiff's oral testimony, in harmony with the defendants' answers as to the title of the surrounding land, and not contradictory to the terms of deeds introduced in evidence, was admissible.

4. Where a grantor retains a tract surrounded partly by the tract conveyed and partly by land of a stranger, there is an implied reservation of a right of way over the land granted.

5. That a grantor's deed of land surrounding a tract which he retained contained terms of general warranty, and that he knowingly permitted improvements on the land granted without asserting his right of way over it, does not estop him from afterwards claiming the right of way.

6. In an action for a right of way over land surrounding the plaintiff's, a judgment for a passageway 10 feet wide, directing the sheriff to remove obstructions therefrom, is not erroneous as establishing a road for public use over the defendants' land.

Appeal from District Court, Dallas County; T. F. Nash, Judge.

Action by Ed M. Patterson against J. Q. Holman and others for a right of way. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Sauer & Sauer, for appellants. Randolph Paine and W. A. Kemp, for appellee.

TALBOT, J. J. M. Patterson and his wife, Sarah E. Patterson, formerly owned lots Nos. 12, 18, 18, and 19 in block No. 229 in the city of Dallas, Tex. On the 25th day of August they conveyed, by deed duly executed, to their son, Ed M. Patterson, appellee herein, all of said lots 12 and 19, and a strip 13 feet by 25 feet off the rear ends of the northeast halves of said lots Nos. 13 and 18. Lot 12 lies contiguous to and northeast of lot 13, and both front on Ross avenue; and lot 19 lies northeast of and contiguous to lot 18, and immediately south of lot 12; and lot 18 lies immediately south of lot 13, and both 18 and 19 front on Camp street. There is no alley between the rear ends of lots 12 and 13 and 18 and 19, and the fractional lot 13 feet by 25 feet, being taken from the rear ends of lots 13 and 18, is about midway between Ross avenue and Camp street, and is wholly surrounded by lots 12 and 19 on the northeast and the balance of lots 13 and 18 on north, south, and west. Said lots 12 and 19

*Rehearing denied February 20, 1904, and writ of error denied by Supreme Court.

¶ 4. See Easements, vol. 17, Cent. Dig. § 59.

and 13 and 18 are about 50 feet wide by 100 feet long each. In conveying lots 12 and 19 and the fractional lot 13x25 feet to appellee, the said J. M. Patterson and wife reserved to themselves a "life interest" therein. What this "life interest" was, more than the expression indicates, does not appear. On the 8th day of March, 1901, J. M. Patterson and wife and appellee, Ed M. Patterson, by separate warranty deeds, conveyed to appellants J. Q. Holman and Annie W. Holman said lots 12 and 19, and at this time his fractional lot was surrounded with a fence. Prior to this last date appellants Holman and Hughes had bought all of said lots 13 and 18, except appellee's fractional part thereof, from parties to whom J. M. Patterson and wife had conveyed. On June 4, 1902, J. M. Patterson and his wife, Sarah E. Patterson, by quitclaim deed, conveyed to appellee, Ed M. Patterson, all the interest they had reserved or had in and to said fractional lot 13x25 feet. At the date of the institution of this suit appellee, Ed M. Patterson, was the sole owner of the said parcel of land 13 feet by 25 feet, the said Holman and wife were the owners of said lots 12 and 19, and the said Holman and Hughes were the joint owners of the remaining portion of said lots 13 and 18. Appellants had built upon said lots owned by them barns and sheds of the approximate value of \$1,500, and were using the same, among other things, for a lumber yard. Some part of the sheds or barns built by appellants Holman and Hughes extended over on lots 12 and 19, and between said lots and appellee's fractional lot, and appellant Hughes owned a half interest in said sheds. Before this suit was brought appellants had inclosed the entire property with a fence, rented a part of it to appellant Chick, and appellee's ingress and egress to and from his said fractional lot was entirely cut off. There was no express reservation or mention of a right of way in appellee's deed to appellants Holman and wife for lots 12 and 19, nor in any of the deeds conveying the property mentioned. Being desirous of building a house on his said fractional lot, and having been refused admission to the same, appellee brought this suit, and prayed the court, in the event appellants refused to point out a way, that the court grant, define, and establish for his use a right of way over appellants' lands, as suggested and described in his petition. All the appellants answered by general demurrers, special exceptions, and general denial. Holman and wife pleaded specially, in substance, that they owned said lots 12 and 19, and an undivided one half interest in said lots 13 and 18, and that appellant Hughes owns the other half interest; that they had bought the same from different parties, and had no notice of any claim of right of way by appellee; that none had been asserted; and that their interest in lots 13 and 18 had been bought from adverse parties to plaintiff; that

appellants Holman and wife had bought lots 12 and 19 from appellee, paying him therefor the sum of \$3,000, and receiving from him a general warranty deed; that appellee knew appellants were making valuable improvements on the property, asserted no right to a way over their property to his, and is estopped now to claim such way. They set up their improvements, and asked judgment for their damages in case a right of way was established as prayed for by appellee. Appellant J. V. Hughes, in addition to his general and special demurrers, pleaded that he owned an undivided one-half interest in said lots 13 and 18, and that he bought the same for a valuable consideration, in good faith, from adverse parties to appellee without notice; that he acquired said property prior to the time that appellee alleges he acquired his; that appellee owned land through which he could have reserved a right of way to his property, but that he had sold it to other parties; that he had erected valuable improvements, which would be destroyed if the right of way was granted to appellee, and prayed in such event he recover his damages. Appellant Chick pleaded specially that he had for a valuable consideration, and without notice of any claim on the part of appellee to the right of way sought, leased certain buildings and premises from his codefendants, and that, if such right of way was established, it would disturb him of his lease, and damage him \$550, and prayed judgment for that amount in the event such right of way was granted. The case was tried before the court without a jury, and judgment rendered in favor of appellee for a road or passageway 10 feet wide through said lot 19, belonging to appellants Holman and wife, extending to Camp street, as defined in appellee's petition, and directing the sheriff to remove obstructions therefrom, and that costs of suit be taxed against appellants, and they recover nothing on their pleas for damages.

There was no error in the action of the court in admitting in evidence, over the objections of appellants, their answers, the several deeds offered, and the oral testimony of appellee. Appellants J. Q. Holman and wife and J. V. Hughes had specially pleaded their title and ownership of all the land adjoining and surrounding appellee's lot, and the appellant Chick that his possession was as lessee of said Holman and Hughes, and their answers were competent evidence to be considered in the establishment of such facts. The execution of the deeds was sufficiently proven, and the oral testimony of appellee was in harmony with the allegations of appellants' answers, and not contradictory of the terms and contents of said deeds. Besides, appellant J. Q. Holman testified at his own instance and the instance of the other appellants that he had bought from appellee, receiving therefor a warranty deed, said lots Nos. 12 and 19; that he and appel-

lant Hughes owned all of said 13 and 18, except the part claimed by appellee; and that appellant Chick had leased a part of the premises, but had abandoned his lease two months before the trial.

It is well established that when the owner of a parcel of land, which is wholly surrounded by other lands owned by himself, or partly by land owned by himself and partly by land of a stranger, sells it to another, a way of necessity arises to the grantee, and he is entitled to a right of way through the land of the grantor to arrive at the land so purchased. This right, it is said, is an incident to the grant, and need not be expressly granted in the deed; that it is impliedly granted in the deed by which the land sold is conveyed, and is an application of the principle that whenever one conveys property he also conveys whatever is necessary for its beneficial use and enjoyment. The title to the soil remains in the owner, and the right to the way ceases whenever the necessity no longer exists. It is also well settled that the same rule will apply if the grantor retains the inside or interior and conveys the exterior land. In the case of *Collins v. Prentice*, 15 Conn. 43, 38 Am. Dec. 61, it is said: "The way in the one case, in contemplation of law, is granted by the deed, and in the other case is reserved. For the law will not presume that it was the intention of the parties that one should convey land to the other in such manner that the grantee could derive no benefit from the conveyance; nor that he should so convey a portion as to deprive himself of the enjoyment of the remainder. The law under such circumstances will give effect to the grant according to the presumed intent of the parties." See, also, *Alley v. Carleton*, 29 Tex. 74, 94 Am. Dec. 260; *Kruegel et ux. v. Nitschmann* (Tex. Civ. App.) 40 S. W. 68; *Am. & Eng. Enc. of Law*, 97; *Seymour v. Lewis*, 13 N. J. Eq. 444, 78 Am. Dec. 108; *Pierce v. Selleck*, 18 Conn. 328; *Brigham v. Smith*, 4 Gray, 297, 64 Am. Dec. 76. Applying the principle here announced to the facts of this case, it must be held that a way of necessity in the use and enjoyment of appellee's property has arisen to him, and that such way was impliedly reserved over lots 12 and 19 in the deed by which said lots were conveyed to appellants Holman and wife. That the deed of conveyance to appellants contained terms of general warranty, and the appellee may have known that appellants were making improvements upon the lots, and asserted no right of way at the time, does not vary the rule. The principle of estoppel invoked is not applicable. The right to this way, however, is but an incident to the estate granted appellants, and must be restricted to a necessary and reasonable use of said way by appellee in going to and from his said property.

The complaint urged to the judgment of the court below to the effect that the same

established a road for public use is not sustained by the record. The judgment does no more than grant an easement to appellee of ingress and egress to and from his lot of land, and, the appellants having declined to suggest or designate where such way should be located, the same is defined by the judgment, and no greater right is conferred than is consistent with the law upon the subject. The judgment wherein it provides for the removal of obstructions to the use of the easement granted must be construed to mean simply the opening of said way by the sheriff, and not the expenditure of work and money thereon by him for its betterment.

Assignments not discussed have been considered, with the conclusion reached that no reversible error is therein shown.

The judgment of the court below is affirmed.

HOOKS & HINES v. PAFFORD et al.
(Court of Civil Appeals of Texas. Feb. 13, 1904.)

FRAUDULENT CONVEYANCES—BONA FIDE PURCHASER—SELLER'S INTENT—SUSPICION—STOCK OF GOODS—WRONGFUL LEVY—DAMAGES—WITNESSES—BIAS—EVIDENCE—PREJUDICIAL ERROR.

1. Where, in an action by H. and another for an alleged illegal levy, it appeared that a certain assault had been committed on a train on which witness and H. were riding, which assault was unprovoked, and had been the subject of much comment in the county, it was prejudicial error for the court to permit defendants to prove on cross-examination of such witness, who had previously stated that he was a special friend of H., that he was on the train with him at the time of such assault, for the purpose of proving such friendship.

2. Where, in an action for wrongful levy, it was claimed that plaintiffs' purchase of the goods levied on was fraudulent as to creditors of the seller, evidence that the seller's reputation for paying his debts in the place where the sale was made was good was admissible on the issue of plaintiffs' knowledge or notice of the seller's insolvency.

3. Where a sheriff took possession of a building rented by plaintiffs to use in connection with certain goods purchased, which the sheriff levied on as the property of the seller, and the sheriff used the building until he had disposed of the goods, and for a period longer than was necessary to make an inventory thereof, he was liable to plaintiffs for the rent, without regard to the validity of the sale of the goods levied on.

4. Instructions that if a buyer of goods is ignorant of the insolvency of the seller, and has no reason to believe him insolvent, and does not know, or has no knowledge of such facts as would be calculated to "create a suspicion," that the seller's purpose in making the sale is to defraud his creditors, and a valuable consideration is paid for the property sold, the sale is valid, were erroneous; a mere suspicion being insufficient to charge the buyer with notice of the seller's fraud.

5. An instruction that if the seller had ordered certain coal delivered to plaintiffs after they had purchased the goods and taken possession, and plaintiffs paid for the coal, they were entitled to recover the value thereof, as against the sheriff and sureties on his bond, was improperly refused.

¶ 2. See *Fraudulent Conveyances*, vol. 24, Cent. Dig. § 858.

6. Where a stock of liquors and a saloon license were sold to plaintiffs, and were thereafter wrongfully levied on as the property of the seller, by reason of which plaintiffs were rendered unable to carry on business under the license, which, under the law, was worthless to any one but plaintiffs, they were entitled to recover the value of the license, as part of their damage for such wrongful levy.

7. Where, by reason of a wrongful levy on a stock of goods belonging to plaintiffs, they were prevented from pursuing their business, they were entitled to recover, as part of their damages, the reasonable value of clerk hire contracted for, which they were compelled to pay.

Appeal from District Court, Collin County; Rice Maxey, Judge.

Action by Hooks & Hines against J. W. Pafford and others. From a judgment in favor of defendants, plaintiffs appeal. Reversed.

Garnett & Smith, for appellants. Abernathy & Mangum, for appellees.

RAINEY, J. On March 17, 1900, appellants purchased of C. H. Miller a certain stock of merchandise, consisting of liquors, cigars, etc., and took possession of same. About one week thereafter, appellee, sheriff of Collin county, by his deputy, seized said property by virtue of certain writs of attachments issued in suits brought by Miller's creditors against him. Neither the goods nor the proceeds were ever returned to appellants. The house in which the goods were situated, and which had been rented by appellants from one Seay, was also taken possession of by said deputy, and appellants were deprived of the possession and use thereof for about two months. This suit was brought by appellants against Pafford, sheriff, and the sureties on his official bond, to recover for the value of the goods, the use of the house, and the value of plaintiffs' retail liquor dealer's license, which, it was alleged, were seized and never returned to plaintiffs; also to recover clerk's hire plaintiffs were compelled to pay their clerks during the time said house was so held. The defendants defended on the ground that the sale to plaintiffs was made in fraud of creditors, and therefore void. On hearing, judgment was rendered for defendants.

The appellants complain of the action of the court in permitting the defendants, on cross-examination of plaintiffs' witness Sam McKinney, to prove by said witness that he was on the train with Hooks at the time an assault was made on one Dial. The assault was in no way pertinent to any inquiry in the case, and the only purpose this testimony could subserve was to discredit the said witness by showing his friendship for plaintiff Hooks. Witness had stated in reply to defendants' inquiry that he was a special friend of Hooks, and the fact of his being present at the time of the assault was immaterial. We understand that the bias, prejudice, interest, etc., of a witness, may be shown by proof of collateral matter; but,

where the witness admits such state, then the proof of collateral matter to show such state becomes immaterial.

It is insisted by appellees that said testimony was harmless. Possibly so. Considered abstractly, it would seem so. But it appears from the bill of exceptions that plaintiffs' counsel, when objecting to said testimony, stated to the court, in effect, that the assault had been published in every paper in the county; that there had been various trials in the courts of Collin and Hunt counties, and appeals to the Court of Criminal Appeals, and the matter had been republished; that it was a matter of general knowledge throughout Collin county, and was an unprovoked assault. Taking this statement as true, we are unable to say that said testimony was harmless.

It was also error for the court to exclude evidence offered by plaintiffs to show that the reputation of Miller in McKinney for paying his debts was good. The good faith of plaintiffs in purchasing the goods was an issue, and there was evidence to the effect that Miller was insolvent. Whether plaintiffs knew or were put upon inquiry as to such insolvency was a material inquiry, and the reputation of Miller in McKinney for paying his debts was a circumstance pertinent for the jury to consider. Mr. Greenleaf says: "Where purchasers' knowledge or ignorance, in good faith, of the transferor's insolvency, is in issue, the transferor's reputation as to solvency or insolvency, if within the same community, is admissible to indicate the purchaser's state of mind." Section 14p, p. 68.

On the issue of the right of plaintiffs to recover for the rent of the house, the court, in his charge, made the recovery depend upon whether or not the plaintiffs knew or were put upon inquiry of Miller's insolvency, his intention, and the fraudulent transaction. This was error. The right to recover did not depend upon the character of the transaction between plaintiffs and Miller. If plaintiffs had rented the house from Seay, and the deputy sheriff, in levying the writs of attachment, took possession of the house, and retained the possession thereof until he disposed of the goods, then the plaintiffs would be entitled to the rents for that time. Of course, holding the house for a reasonably sufficient time to seize and make an inventory of the goods would create no liability. A day or so would doubtless have been sufficient for this purpose in this instance.

The third paragraph of the court's charge is as follows:

"If a purchaser be ignorant of the insolvency of a seller, and has no reason to believe such to be his condition, and does not know, or have any knowledge of such facts as would be calculated to create a suspicion, that the purpose of the seller is to hinder, delay, or defraud his creditors, and the purchaser pay a valuable consideration for the

property sold, then the sale is valid, whatever may have been the intention of the seller, and although creditors of the seller may be defrauded, hindered, or delayed in the collection of their claims."

In the eighth paragraph of the charge the court again tells the jury that the burden was on the defendants to show that the sale of the property was made with the intent on the part of Miller to hinder, delay, or defraud his creditors, and the plaintiffs knew of such intent, or knew some facts or circumstances that would have excited in the mind of an ordinarily prudent man a suspicion of such intent. Appellants complain of that portion of paragraph 8 which informs the jury that, without "knowledge of such facts as would be calculated to create a suspicion that the purpose of the seller is to hinder, delay, or defraud creditors," etc., the sale would be valid. To affect a purchaser with notice, there must be something more than the possession of "facts as would be calculated to create a suspicion" of the seller's intent. If he did not know of the intent, then, to constitute notice, he must be in possession of facts and circumstances such as would put an ordinarily prudent person upon inquiry, which, by the use of proper diligence on his part, would lead to a knowledge of such intention. A purchaser might be in possession of facts that would create a suspicion as to the seller's fraudulent intent, but which by the use of proper diligence would not lead to a knowledge of such intention. Of course, if he knew facts which would excite the suspicion of a man of ordinary prudence, and put him upon inquiry, and by the use of diligence would discover the fraudulent intent, then he would be charged with notice. The charge was calculated to mislead, in that it did not fully state the law, as indicated.

The court erred in refusing appellants' tenth requested instruction, which is as follows: "You are instructed that if you find and believe from the evidence that Miller had ordered the coal testified to in the evidence, and that the same was delivered to Hooks & Hines after they had purchased the stock of goods in question, and had taken possession of the stock of goods, and that the plaintiffs, Hooks & Hines, paid for the coal, then you are instructed that the plaintiffs are entitled to recover for the value of the coal, as against the sheriff and the sureties upon his bond." This charge embraced a correct proposition of law, was applicable to the facts, and should have been given.

Appellants complain of the exclusion of testimony offered to prove the value of their state, county, and municipal licenses as retail liquor dealers, which plaintiffs allege were lost to them by the illegal seizure of the goods, house, etc. We think this was competent evidence, under the pleadings of plaintiffs. It was shown that the licenses had been transferred to plaintiffs by Miller, and under the law they were worthless to

any one else. If plaintiffs were bona fide purchasers of the goods, and the effect of the seizure of the goods was to render plaintiffs unable to carry on business under such licenses, then plaintiffs were entitled to recover the value of the licenses of which they were deprived by the wrongful levy. If, on the other hand, plaintiffs were not purchasers in good faith, then the goods were subject to the writs of attachment, and plaintiffs are not entitled to any damages resulting to them by reason of the levy on the goods. Or, if the holding of the house by the sheriff prevented plaintiffs from pursuing their business under said license, then they were entitled to recover the reasonable value to them of the licenses during the period the house was unlawfully detained.

There is testimony showing that no levy was made on the licenses, and the deputy knew nothing of them. If this is true, the mere fact that the licenses were stuck up in the building during the time it was held by the sheriff would not entitle plaintiffs to damages.

The court also erred in excluding the value of clerk's hire that plaintiffs allege they were compelled to pay, etc. If the levy was unlawful, and rendered plaintiffs unable to pursue business, or if the holding possession of the house rendered them unable to do so, and such illegal levy or such possession made it necessary for plaintiffs to pay clerks with whom they had contracted, and it was unavoidable, then plaintiffs would be entitled to recover for the reasonable amount so paid. Plaintiffs specially alleged the loss of license and the payment of clerk's hire, and the right to recover therefor depends upon the testimony introduced under the law as above indicated.

For the reasons indicated, the judgment is reversed, and cause remanded.

BATH v. HOUSTON & T. C. RY. CO. et al.*

(Court of Civil Appeals of Texas. Jan. 9, 1904.)

CARRIERS—INJURY TO COTTON—EVIDENCE—ADMISSIBILITY—OPINION EVIDENCE—HARMLESS ERROR—REMARKS OF COURT—APPEAL—STATEMENT OF FACTS—PRESUMPTION.

1. Under Rev. St. 1895, art. 998, giving Courts of Civil Appeals power, on affidavit, to ascertain such matters of fact as may be necessary to the proper exercise of their jurisdiction, such courts cannot consider affidavits by appellant's counsel and the trial judge, respectively, that a proposed statement of facts was submitted to respondent's counsel, who declined to agree thereto, and that the judge, after correcting the proposed statement, adopted it as found in the record.

2. Rev. St. 1895, art. 1879, requires the trial judge to make up the statement of facts on appeal only in case the parties fail to agree. A statement of facts bore merely the approval and signature of the trial judge, but stated that it contained all the testimony, and was filed in due time. Held, that a disagreement of the par-

*Rehearing denied February 20, 1904.

ties authorizing the judge to make up the statement would be presumed.

3. In an action against carriers for injuries by water to a shipment of cotton by both railway and ship, plaintiff offered evidence to show, as against defendant initial carrier, a railroad company, that the cotton was delivered to the railroad dry, and was sprinkled on the cars. The railroad introduced evidence to show that the cotton was exposed to rain before shipment, and was receipted for by the mate of the vessel on which it was shipped as "in good order." Plaintiff showed that the cotton was not exposed to water in the vessel, and that on its arrival it was found damaged by fresh water, and offered the deposition of the mate that some of the cotton carried by the vessel was wet when loaded, though he did not know it was that in question, and that, as a rule, cotton was receipted for as in "good condition" if it was apparently so, or not damaged too much. *Held*, that exclusion of the deposition was error.

4. One of the objections to the deposition being that the words "good order," in the receipt, were not equivalent to "good condition," in the deposition, a remark of the court, in excluding the deposition, that he did not think the words had any commercial meaning, but thought they meant what they said, was erroneous, as a comment on the evidence.

5. Objections not made to evidence at trial cannot be considered on appeal.

6. Exclusion of the opinion of a qualified expert was harmless, where he testified on the same point as a matter of fact.

7. In an action against carriers for injuries by water to a shipment of cotton by both railway and ship, in which the initial carrier, a railroad, claimed that the cotton was injured by rain before being received by it, and also that it was receipted for by the ship's mate as in good order, opinion evidence that it could not have been in good order when received by the ship, and that it would be damaged less by being handled by a railroad company for two or three days than by being exposed for three months in the open air, was properly excluded as invading the province of the jury.

Appeal from District Court, Tarrant County; M. E. Smith, Judge.

Action by Felix P. Bath against the Houston & Texas Central Railway Company and others. From a judgment for defendants, plaintiff appeals. Reversed.

Prewett & Smith and A. M. Carter, for appellant. Stanley, Spoons & Thompson, for appellees.

CONNER, C. J. Suits were instituted by appellant against the appellees severally for damage to cotton shipped from Ennis, Tex., to Galveston, Tex., and thence by vessel to Liverpool, England. The suits were consolidated, and the trial resulted in a verdict and judgment for appellees, from which this appeal has been prosecuted.

We are met in the outset with an objection on the part of appellees to a consideration of the principal assignments of error on the ground that there is no statement of facts, such as required by law, contained in the record, and it will be necessary for us first to dispose of the question thus presented. There is what purports to be a statement of facts found in the transcript, but such statement is not signed by any attorney, and has immediately following its con-

clusion only the following indorsement on the part of the trial judge, viz.: "Approved. Mike E. Smith, Judge." The statement appears to have been duly filed in the trial court, and the only objections thereto are that "the purported statement of facts in the record is not signed by the attorneys for either party, and there is no certificate of the judge that the parties disagreed, and that he prepared the statement of facts, or that the statement of facts was ever presented to the attorneys of either party; the only attestation being the word 'Approved,' following the statement of facts, with the name of the judge signed thereto, and the file marks of the clerk thereon." Appellant has filed in this court affidavits of his counsel to the effect that a statement of facts had in truth been prepared by them, and submitted to opposing counsel for agreement, as provided by the statute, and that such opposing counsel declined to agree to the statement as made, and that such statement was thereupon submitted to the judge, together with certain proposed changes desired by appellees' counsel, and that the judge thereupon adopted and approved the statement as found in the record. We have also the affidavit of the trial judge to the effect that he took the appellant's statement, together with corrections desired, as proposed by appellees' counsel, and therefrom, after correcting the same, adopted, approved, and filed the statement in question.

We have no jurisdiction to consider the affidavits referred to in aid of the statement of facts, the question not being one relating to the jurisdiction of this court. *Rev. St. 1895, art. 998; Bogges v. Harris, 90 Tex. 476, 39 S. W. 565; and Willis & Bro. v. Smith et al., 90 Tex. 635, 40 S. W. 401.* And we therefore must determine whether, as it appears in the transcript before us, the statement of facts in this case should be considered. In the case of *Hess v. State, 17 S. W. 1099*, the Court of Appeals thus dispose of a similar question: "In the case before us the only authentication of the statement of facts is in these words: 'Approved. Geo. McCormick, Judge 25th Judicial District.' There is no signature of the attorneys to the statement of facts, and the judge does not certify that they had failed to agree, and that he therefore had made out the statement of facts. If the indorsement of the judge could be considered as a certificate that the above and foregoing was a statement of all the evidence in the case, then the presumption would be indulged, and should be indulged, that the parties could not agree, and that the judge had thereupon made out the statement of facts." Citing authorities. In the case of *Renn v. Samoa, 42 Tex. 110*, our Supreme Court say, in declining to consider the purported statement of facts under consideration in that case: "It is not shown to be a statement of facts, either by agreement of counsel or certificate of the presiding judge.

It is not stated, in its beginning or conclusion, that it is a statement of the facts proved on the trial. It is a mere recitation of what we may infer was testimony in the case. At the end of it is found the name of counsel for appellant, and on the opposite side of the page from his signature is written, 'Approved,' underneath which is the signature of the judge before whom the case was tried." While it is undoubtedly true that our statute (article 1879) contemplates that there shall be a disagreement on the part of counsel in making up a statement of facts before the court is called upon to do so, yet neither the statute, nor any case called to our attention, requires such a disagreement of counsel to expressly appear from the statement itself; and we think it is to be implied from the decisions hereinbefore quoted, and also from the cases of *Barnhart v. Clark*, 59 Tex. 552, and *Lacey v. Ashe*, 21 Tex. 394, that where it is to be fairly inferred from the entire statement under consideration that the facts, and all of the facts, proven upon the trial, are contained therein, that there has been a failure of the respective attorneys to agree thereon, and that the statement has actually been approved and filed by the judge as a full statement of all of the facts, the statement should be considered by the court. We are of opinion that, considering the statement before us in all of its parts, such is the condition in this case. It is properly entitled and numbered. Its caption is as follows: "Be it remembered that upon the trial of the above-entitled cause the following testimony was introduced, and none other." Thereupon follows, in regular sequence, the testimony preceding the judge's signature, as hereinbefore noted. It appears to have been properly filed in due time, and to have been approved and ordered filed by the trial judge; and we think that it is proper, under the circumstances, to indulge the usual presumption of the regularity of official acts, and to infer that, before the judge so acted, the counsel in fact had disagreed upon the statement. So concluding, we proceed to a disposition of the questions presented by the assignments of error.

Among other things, appellant offered evidence tending to show that, when delivered to the initial carrier, the Houston & Texas Central Railway Company, the cotton was dry and in good order; that en route to Galveston it was so freely sprinkled or wet, inferentially to avoid danger from fire, as to cause the damage charged. On the other hand there was evidence that tended to show that the cotton on its arrival at Galveston was received and receipted for by the mate of the vessel as in "good order," and that the cotton for several months prior to the shipment from Ennis had been exposed to the elements; considerable evidence as to the amount of rainfall being offered. Appellant offered evidence to the effect that the cotton was securely stowed in the hold

of the vessel, and not exposed to sea or other water on its way across the ocean, and that upon its arrival at Liverpool it was found in a badly damaged condition; several experts testifying that such damage was from fresh, and not salt, water. In this condition of the evidence, appellant, upon the trial, offered the answer of Peter Forsyth, the mate of the vessel, to the third interrogatory in his deposition, which answer, among other things, contained the following statements: "I remember some cotton being wet when loaded, but could not state positively that it was this lot inquired about. * * * But as a general rule, cotton was receipted for as being in good condition if it was apparently so, or if it was not damaged too much." Appellees objected to this testimony, and moved to strike it from the record; the grounds of objection and ruling being thus shown in the bill of exception: "(1) It was not competent for the witness to testify as to some cotton being wet, there being a great number of bales in the cargo besides the cotton in controversy, and the witness did not identify the wet cotton as that involved in this suit. (2) It was not competent for the witness, after having stated that he did not know why the cotton was receipted for in good condition by the shipper, to volunteer a statement as to the general rule in regard to receipting for cotton; the said statement being a volunteer statement, and not called for by the interrogatory, irrelevant, and irresponsible thereto. (3) The receipts for said cotton by said witness and others, as shown to the court, were all signed, 'Received in good order,' and not in 'good condition,' and it was not, therefore, competent, in any event, for the witness to testify as to a general rule for receipting for cotton in 'good condition,' as the cotton in controversy was not thus receipted for. Counsel for plaintiff stated that the receipts proposed to be introduced by the defendant purported to show that the cotton was in 'good order,' and that he desired this answer to go to the jury to show that the cotton was receipted for in 'good condition,' as not contradistinguished from being in 'good order.' Counsel for defendant states that 'good order' and 'good condition' were not identical in their meaning, and the court made the following remark and ruling: 'I do not think the words have any commercial meaning. I think they mean what they say,' and sustained said objections and excluded said evidence." We are of opinion that the court's ruling and remarks to which error has been duly assigned constitute prejudicial error, for which the judgment must be reversed. It is well settled, and, indeed, appellees concede, that statements contained in receipts and bills of lading to the effect that the goods mentioned therein were received in "good order" or "good condition" are in the nature of mere admissions, mere written declarations, not conclusive or non-

explainable as against the party making them—much less, as against one who did not, as is the case here. *Hutchinson on Carriers*, § 125; *Ry. Co. v. Ivy* (Tex. Sup.) 15 S. W. 692; *Ry. Co. v. Fennell* (Tex. Sup.) 15 S. W. 693.

The bill of exceptions fails to show that the deposition in question had been on file among the papers of the cause for at least one entire day prior to the trial, and we hence do not feel authorized to dispose of the objections urged on the ground that they go to the form and manner of taking the testimony, and should therefore have been presented before the trial in formal motion to suppress the answer; but we think the objections without substantial merit, and the remarks of the court as in the nature of a comment on the weight of the testimony. As stated, the English receivers had testified that the cotton in question had been damaged by fresh water; i. e., country damage, as they term it. There was evidence, also, excluding the idea that it had been wet in the wharfhouses in Galveston, or in transit across the ocean; also that it was in good order when originally delivered to the carrier; and we see no reason why it was incompetent to show that some of the cotton was wet, even though the answer of the witness failed to identify the particular cotton of which he spoke. This objection seems to go to the weight of the testimony, and not to its competency or admissibility. The answer seems susceptible of the construction that the cotton referred to was wet when received, to the best of the witness' recollection. But if not so, it constituted but one of the stages of progress in identifying the particular cotton to which the answer of the witness must have related. Appellant could have, perhaps, gone one step further in the identification, by showing by the owners and receivers of the other shipments of cotton upon the same vessel that their cotton was undamaged, and thus have made the answer of the witness, in effect, positive in the matter of identity. The interrogatory was, among other things, "Do you know why it [the cotton] was receipted for in good condition by the shipped?" The answer of the witness as to the general rule in receipting for cotton seems responsive to this interrogatory, and the objection that the answer related to the "good condition," rather than to the words "good order," as occurring in the ship's bill of lading, we think too technical for serious consideration. We think it apparent from the whole record that the fact that the cotton was received and receipted for in good order by the steamship company was relied upon by appellees as a very cogent circumstance tending to show that the cotton had not been wet or damaged while in possession of the railway carriers, and it certainly seems material, in behalf of appellant, for him to show by a competent witness the precise force and effect to be given

to the words quoted from the ship's bill of lading; and when, to the exclusion of the explanation offered, we add the force of the court's remarks, it seems at once apparent that appellant was prejudicially affected. The remarks of the court, while doubtless not so intended, may have been, and probably were, interpreted by the jury, in whose presence they were made, as meaning that, in the court's judgment, the words in the ship's bill of lading conclusively showed that the cotton, when received on board the vessel, was in good order.

Appellees, by counter proposition, also urged the objection that the interrogatory related to receipts executed by the shipper, and not to receipts executed by the mate of the vessel referred to. No such objection, however, appears to have been offered to the evidence on the trial, which precludes its consideration now. Besides, we think it entirely without merit, in that the word "shipped" as used in the interrogatory hereinbefore quoted is evidently a clerical error in the transcript, in substituting the word "shipped" for "ship," and the answer quoted, when considered with other parts thereof, makes it evident that the answer was intended to relate to the receipt executed by the officers of the ship, and no one else.

Numerous other assignments of error are presented, some of which we will briefly notice. The witness Willmont Reed, who testified by deposition, we think clearly qualified himself to express an opinion as to whether the injury to the cotton in question was occasioned from rain or salt water; but the court's exclusion of his testimony to this effect seems harmless, in that he testified that such was the case, as matter of fact. The testimony of this witness, however, to the exclusion of which objection is made in the fifth assignment of error, to the effect that, in his opinion, the cotton in question could not have been in good order when received on the steamship, was properly excluded, in that the answer included the issue to be determined by the jury. For the reason last stated, we also think that there was error in permitting the witness A. S. Morris to testify, over appellant's objection, that, in his opinion, it would damage cotton less if handled by a railway company for two or three days, than it would for such cotton to be exposed for three months in open yards and on platforms and in fields.

The court's charge, together with special charges 1, 2, and 3 given at the request of appellees, when considered as a whole, seems subject to the objection urged in the ninth assignment of error, that undue prominence, under the circumstances in evidence, was given the provisions in the several bills of lading issued by the railway companies restricting liability to the railroad upon which the damage occurred; each of the charges referred to reiterating this feature of the

appellees' defense. The omission pointed out in objection to special charges Nos. 2 and 3, because not signed by the court, is not likely to arise upon another trial.

As presented, no other question occurs to us as requiring notice; but, for the error discussed, the judgment is reversed and the cause remanded.

TABET et al. v. POWELL.*

(Court of Civil Appeals of Texas. Nov. 18, 1903.)

PRINCIPAL AND AGENT—AUTHORITY OF AGENT—CLAIMS—SETTLEMENT—ATTORNEYS—EMPLOYMENT—SURETYSHIP—PLEADING—ABANDONMENT—EVIDENCE—DECLARATIONS OF AGENT—JUDGMENTS—REVERSIBLE ERROR.

1. Where a person injured in a collision with a railroad train gave to his brother full charge of the matter, and told the claim agent that any settlement would have to be made with the brother, such authority authorized the brother to bind the person injured by a contract employing an attorney to prosecute the claim against the railroad company, agreeing to pay such attorney one-half of the amount recovered, and securing such payment by an assignment of one-half of the cause of action.

2. Where, prior and subsequent to the execution of a contract with an attorney for services in the settlement of a claim for injuries, he rendered valuable legal services and gave advice to his clients in compliance with the contract, and did not refuse at any time prior to the private settlement of the claim to render any services required, an objection that the contract was without consideration could not be sustained.

3. In an action on a contract made by an agent, against both the agent and his principal, the principal was not estopped to object that the agent exceeded his authority in making the contract, by the principal's failure to object to the admission of the contract in evidence; the contract being admissible as against the agent.

4. Where, on an issue as to whether the brother of a person injured in a railroad collision had authority to make a contract with an attorney for services, a witness testified that the person injured stated to him that the brother had full charge of the matter, and referred witness to him, to make a settlement, the court was justified in finding that the brother had "full charge of the claim," and that his authority was not limited to the matter of settlement.

5. Where the authority of an agent to make a contract was denied by the alleged principal, the court could not consider, when determining such question, statements and declarations as to the agency made by the alleged agent to establish the agency; but after prima facie evidence of the agency is introduced, admissions and declarations of the alleged agent within the scope of his agency may be shown, as acts, admissions, etc., of his principal.

6. In an action on a contract for attorney's services, providing for payment of one-half of the recovery, and secured by an assignment of one-half of the claim, the burden of proof that such contract was void for unreasonableness was on the defendant.

On Rehearing.

7. Where, in an action on a contract made by an agent on behalf of his principal, and as his principal's surety, the principal denied the agent's authority to make the contract, and the court found that the agent signed the contract as surety only, a judgment could not be ren-

dered against the agent on the reversal of a judgment against the principal, since, until the final determination of the issue of the agent's authority, the kind of judgment to be rendered against the agent could not be determined.

8. Where an agent executed a contract sued on, on behalf of his principal, and as his principal's surety, and, in an action thereon, there was evidence that the principal had given the agent full control of the subject-matter of the contract, the fact that both the principal and the agent testified that the agent was not authorized to make the contract did not constitute an abandonment of the agent's plea of suretyship, so as to justify a judgment against the agent on the theory that, having exceeded his authority, he was personally liable.

Appeal from District Court, Bexar County; S. J. Brooks, Judge.

Action by David J. Powell against George and Elais Tabet. From a judgment in favor of plaintiff, defendants appeal. Reversed.

W. H. Lipscomb and J. L. Little, for appellants. Ridgeway & Abercrombie, for appellee.

JAMES, O J. The following contract was executed by George Tabet:

"San Antonio, Texas, March 29th, 1902. The State of Texas, County of Bexar. Know all men by these presents: That I, George Tabet, of the County and State aforesaid, acting by and for my brother, Elais Tabet, and in his name and for his benefit, do hereby employ and retain David J. Powell to act for him, the said Elais Tabet, as his legal representative in all things and matters whatsoever, especially in all things connected with and appertaining to his, the said Elais Tabet's claim against the Galveston, Harrisburg & San Antonio Railway Company, for personal injuries sustained by him, the said Elais Tabet, on or about March 7th A. D. 1902, at or near Maxon Springs, Texas, and in consideration of legal services rendered and to be rendered by the said David J. Powell, it is hereby agreed and understood and I do hereby bind myself and the said Elais Tabet, to pay to the said David J. Powell, one-half of any and all amounts that may be received by the said Elais Tabet from the said G. H. & S. A. Railway Company in the settlement of any and all claim or claims that the Elais Tabet may have against the said G. H. & S. A. Railway Company, and to secure the faithful payment of such sum or sums to the said David J. Powell an undivided one-half interest in such claim or claims is hereby sold, given, and conveyed to the said David J. Powell. Witness my hand at San Antonio, Texas, this 29th day of March, A. D., 1902. [Signed] G. Tabet. E. Tabet, by G. Tabet. Witness: Seth Testard."

Appellee brought this suit against appellants, alleging "that George Tabet was the agent of E. Tabet; and that George Tabet, as such agent, had authority to execute the contract above set forth; that he had rendered the necessary legal services; that the

*Further rehearing denied February 24, 1904.

said G. Tabet represented to plaintiff that he had full power and authority to act for and bind his brother; that he was fully authorized and duly empowered to act for, and to execute said contract for and in the name of, his brother, the said Elais Tabet; and that in fact he did have such authority." It was further alleged that George Tabet guaranteed his agency to plaintiff, and personally obligated himself to pay plaintiff whatever should become due him thereunder; that plaintiff accepted such employment; that defendants settled said claims for \$4,500; and that, under the terms of said contract, defendants were liable to plaintiff in the sum of \$2,250, which they had failed and refused to pay, and prayed for judgment against both defendants for that amount. The court rendered judgment for plaintiff for \$1,894, and this appeal is taken.

D. D. Willis, claim agent for the Galveston, Harrisburg & San Antonio Railway Company, testified that he went to Del Rio about the middle of March, where Elais Tabet resided, and called on him, and that the latter refused to talk about the matter of settlement, but referred him to his brother, who, he said, lived in San Antonio, and had a place of business on East Houston street, and told him that any settlement would have to be made through his brother, who had full charge of the matter. There was evidence to show that George Tabet was his brother, and the one who had the store on East Houston street. This is a sufficient statement of testimony to require us to overrule the first assignment of error, which is based on the idea that the testimony of Willis was inadmissible, because George Tabet was not identified as the brother in anything that Elais Tabet said to the witness.

The second, third, and fourth assignments are objections to a statement by witness Testard, "The said George Tabet always acting for himself and his brother Elais Tabet"; the statement by witness Annie T. Connors that George Tabet had stated in her presence to David J. Powell "that his brother had given him full authority to represent him in the settlement of his claim against the Galveston, Harrisburg & San Antonio Railway Company, and to employ counsel in the matter"; and by plaintiff in substance, the same as that of Annie T. Connors. The objection is the familiar proposition that agency cannot be established by the declarations of the alleged agent. This proposition requires no authority to support it; but we may pass over these assignments for the present, because, in the first place, in the above testimony of Willis there was direct evidence of George Tabet's agency in reference to this claim; and, in the second place, the case was tried by the judge without jury, and, in such cases, testimony which is not strictly admissible will not always require a reversal of the judgment, where there is proper testimony to sustain it. We shall re-

fer to this matter further when we come to consider the judge's reasons for his judgment.

The seventh assignment is that there is no evidence in the record which proves or tends to prove that George Tabet was constituted the agent of his brother to employ counsel. This is really, also, what is involved in the eighth, ninth, tenth and eleventh assignments. We think that authority conferred on George Tabet to adjust and settle the claim with the railway company would not extend to authorizing him to make a contract such as is here sued on. But Elais Tabet, according to Willis, told the latter, who had charge of the claims for the railway company, that his brother (meaning George Tabet), who had full charge of the matter, was the one with whom settlement would have to be made. The court, among other things, found that Elais Tabet told Willis that his brother had full charge of the "claim," and this finding seems to have some support in the evidence, as will be explained further on.

The twelfth assignment is, in effect, that there was no evidence of consideration for the contract. The finding of the court on this subject, which we here copy, is supported by the evidence: "That plaintiff, David J. Powell, prior and subsequent to the execution of said contract, rendered valuable legal services and advice to said defendants in prosecution of the aforesaid claim against said railway company, in compliance with said contract, and that said plaintiff never at any time refused to render any services to defendant relative to said claim, and was continuing to render services under said contract, when, some time during the month of April, 1902, defendants, without the knowledge and consent of plaintiff, settled said claim with said railway company for \$4,500, \$3,788 of which was for personal injuries sustained, and \$712 for goods destroyed, in the aforesaid wreck." It is contended by appellees that, because the contract was introduced in evidence without objection, Elais Tabet could not thereafter make any issue as to its having been executed by his authority, notwithstanding his plea of non est factum; and we are cited to *Brown v. Cheno-worth*, 51 Tex. 479. For the reason that Geo. Tabet was a party to the contract and sued thereon, and he did not plead non est factum, it was entitled to go in evidence as to him. Elais Tabet could not have kept it from going in by his objection. Therefore it would have been improper for the court to have taken this as a waiver of his plea.

The fourteenth assignment is founded upon the theory that George Tabet's authority extended no further than to adjust or compromise the claim. The evidence, however, justified finding that his authority was not limited to the settlement of the claim. If, as the district judge found, on what we consider sufficient testimony, the claim itself, and not the mere adjustment of it, was

wholly in George Tabet's hands, the latter's authority was broad enough to empower him to enforce the same by legal proceedings, and to make contracts for that purpose.

The fifth assignment questions the correctness of the judge's finding: "I find that Elais Tabet refused to discuss his claim with the railway company's claim agent, but referred him to his brother George Tabet, and stated to said claim agent that his said brother had full charge of said claim, and that any settlement would have to be made through George Tabet." It is true that Willis did not say that Elais Tabet stated to him that his brother had full charge of the "claim," but of the "matter." He may have referred to the matter of a settlement, and not to the claim itself. In this respect it may have been ambiguous, standing alone. But the trial judge was warranted in placing the construction on it he did, because the question of settlement was not introduced until Willis went to Del Rio to see E. Tabet, and the latter had already placed the matter in his brother's charge, and the judge may have considered it probable, under these circumstances, that he had turned the entire claim over to his brother, instead of referring to him the mere settlement.

The sixth assignment is that the court erred in the following conclusion: "I conclude from the evidence that George Tabet had full power and authority to act for his said brother Elais Tabet as agent in all things pertaining to said claim, and had full power and authority to employ plaintiff, and to execute said contract with him. In arriving at this conclusion, I have considered the statements and declarations of agency and authority made by George Tabet to plaintiff, in connection with the other evidence of agency introduced, as before set out, and that said statements so made had an influence upon me in arriving at my judgment." The ground of objection stated in the assignment is that there was no evidence introduced "which proved or tended to prove agency in George Tabet to execute the contract for Elais sued on herein." That there was such evidence, we refer to what is said under the preceding assignment. But the proposition advanced by appellant goes further than this, and is the same point made under the fourth and third assignments, viz., that the trial judge had no right, in reaching this conclusion, to consider or be influenced by the declarations of agency by George Tabet. This contention we regard as sound. After *prima facie* evidence of agency is introduced, the admissions and declarations of the alleged agent within the scope of such agency may be shown, as the acts, admissions, etc., of the principal, and the whole case submitted to the jury. See *Mechem, Agency*, § 106. The rule, as we understand it, is that, in such state of *prima facie* proof of agency, the court will allow testimony of the acts, admissions, and declarations of the

alleged agent, as binding upon the principal, in order that the entire case may be submitted. It does not mean that, after some proof as to agency is given, that particular issue may be supplemented and re-enforced by the declarations, admissions, etc., of the person acting as agent. If this were the rule, then it might and would generally happen that the agency would, after all, be established by the act and declarations of the agent, which is never permitted. Of course, his acts and declarations would be competent upon that issue, if the principal should be connected with them, so as to make them his own, but not otherwise. *Mills v. Beria* (Tex. Civ. App.) 23 S. W. 910; *Latham v. Pledger*, 11 Tex. 445; *Gillett, Coll. Ev.* § 86. But for the judge's certificate, we might apply the rule that, there being sufficient competent testimony before him to prove agency, a reversal ought not to be ordered, because there was some incompetent evidence. *Smith v. Lee*, 82 Tex. 130, 17 S. W. 598. But here the judge states that he was influenced by such evidence on the very issue of agency. We do not know, and cannot tell, but that his construction of the conversation between Willis and Elais Tabet at Del Rio was arrived at in consequence of this other testimony. For this, we will be required to reverse the judgment.

As to the ninth assignment, which is that there was no proof of the reasonableness of the contract, we think that this issue ought to have been made and sustained by defendants. The agent would have power to make any contract that was sanctioned by law, and that was usual and customary in such cases.

As to the fourteenth assignment, in reference to the absence of power in George Tabet to assign a part of the claim for legal services, we agree with appellants that, if the proof establishes that he was authorized only to settle the claim, he had no power to make this contract at all. But if he was given full power concerning the claim, it was discretionary with him what course he would pursue, and, if he saw proper to bring an action for it, he could make a contract with attorneys in respect to it.

The court rendered judgment against Elais Tabet as principal, and George Tabet as surety. Appellee has a cross-assignment of error asking that we render judgment against the latter in the event of a reversal as to Elais. Plaintiff prayed for judgment against them jointly and severally. There is no dispute in the evidence as to George Tabet having employed Powell, and having made the contract by which he bound himself personally and primarily to pay Powell one-half what should be received by Elais Tabet from the railway company by reason of said claim for personal injuries, and the fact is undisputed that Elais had received \$3,768 from the company therefor. The court's finding with reference to Powell's performance up to the time

the settlement was effected was a finding in accordance with evidence. Likewise the court's finding that George Tabet himself carried on the negotiations, and made with the company the agreement for the settlement. Therefore we think judgment should have been rendered against him for one-half of the amount received, and such judgment will be rendered here.

Judgment reversed and rendered as to George Tabet. Judgment reversed and remanded as to Elais Tabet.

On Rehearing.

(Jan. 20, 1904.)

The motion of George Tabet for rehearing, by which he urges that the judgment should not only be reversed, as to him, but remanded, also, should be granted. He pleaded suretyship, and the trial judge found he was surety for his brother Elais. We reversed the judgment because it was shown by the judge's conclusions that he gave controlling effect to certain improper testimony of agency, upon which the plea of suretyship depended. If it be finally determined that George Tabet was authorized, as agent of his brother, to make the contract sued on, he will, by his plea of suretyship, be entitled to have a different judgment entered as to himself than the one we have undertaken to render. Until the issue of agency is determined, it cannot be said what judgment it is proper to render against George Tabet. His rights as to the judgment under his pleading depend in some degree on the judgment against his brother, and this makes it necessary to reverse and remand as to him also. *Hamilton v. Prescott*, 73 Tex. 565, 11 S. W. 548; *Elliott*, App. Proc. § 574, and notes. If his act was unauthorized, he would be solely liable to plaintiff. If authorized, his liability would be secondary, inasmuch as the contract itself informed plaintiff that he was representing his brother in making it. *Johnson v. Armstrong*, 83 Tex. 325, 18 S. W. 594, 29 Am. St. Rep. 648. The only argument that can be made in favor of rendering judgment here against George Tabet is that he stated on the trial that his brother did not authorize him to settle his claim against the railroad company, or to employ counsel therein. If all the evidence were to this effect, we might be warranted in rendering judgment against him, and also in discharging Elais. But notwithstanding his statement, there was evidence tending to show that Elais Tabet had invested him with full control of the matter. It is true, Elais also testified that George Tabet had no authority to make the contract. But as is fully explained in the original opinion, there was testimony to the contrary, and upon another trial the judgment may again be in favor of the agency. If so, George Tabet, under his pleading, would be entitled to a certain judgment, different in terms from an absolute

judgment rendered against him now by the court. He has not abandoned his plea of suretyship. There is nothing in his pleading that estops him. His testimony was not an abandonment of the plea. His rights in reference to the judgment to be entered against himself depend on the judgment concerning the issue of agency upon the whole of the evidence, and this court cannot assume to decide that question as to either of the defendants upon a part of the evidence only. The motion is granted.

FT. WORTH & D. C. RY. CO. v. ROBERTS.*
(Court of Civil Appeals of Texas. Feb. 6, 1904.)

APPEAL — STATEMENT OF FACTS — PREPARATION AFTER TERM—SHOWING —SUFFICIENCY.

1. Where it appears on appeal that the statement of facts was filed after adjournment of court for the term, and that at a subsequent term an order was entered nunc pro tunc allowing such filing, but on the recollection of the judge and other parol testimony, without any memorandum on the judge's docket or elsewhere showing that any such order had ever been applied for or granted, the statement of facts is not properly before the court.

Appeal from District Court, Childress County; Ira Webster, Judge.

Action by P. S. Roberts against the Ft. Worth & Denver City Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Stanley, Spoonst & Thompson, for appellant. E. E. Diggs, for appellee.

STEPHENS, J. This is the second appeal in this case. 69 S. W. 985. The assignments of error complain of the charge of the court, of the refusal to give requested charges, and of the refusal to grant a new trial. These assignments are all met with the counter proposition that we cannot consider the statement of facts found in the transcript, and without a statement of facts cannot determine the issues raised by these assignments. The original transcript failed to show an order allowing the statement of facts to be prepared and filed, as was done, after the adjournment of court for the term. At a subsequent term of the court such an order was entered nunc pro tunc, but on the recollection of the judge and other oral testimony, without any memoranda on the judge's docket or elsewhere showing that any such order had ever been applied for or granted, as appears from supplemental transcripts brought up by certiorari. In the case of *Blum v. Neilson*, 59 Tex. 378, a motion to strike out the statement of facts on a state of record precisely the same as that before us was overruled, but in the concluding paragraph of the opinion this language was used: "As this decision concerns a

*Rehearing denied February 27, 1904.

matter of practice, upon which distinct rules should be laid down for the guidance of the profession, we will state that in the future, when it becomes necessary that a statement of facts should be made up, signed, and filed after the adjournment of court, an order to that effect must be applied for by a written motion entered of record. If such motion is made, and the order granted, and from any cause it is not found in the minutes of the court, no entry of it at a subsequent term will be allowed, unless the fact of its having been granted shall be established by memoranda upon the judge's docket, or found among the files of the cause." The rule of practice so declared by the tribunal having power to make rules seems to have been followed ever since, and is binding on us.

We also agree with appellee that, apart from the issues determined on the former appeal, which will not be again considered, none of the rulings complained of in the assignments can be reviewed without a statement of facts, except the recovery of interest, as to which the judgment will be reversed, and here rendered for appellant, with costs of appeal taxed against appellee. We are therefore constrained to affirm the judgment except as to that item.

RUDOLPH v. SNEED.*

(Court of Civil Appeals of Texas. Jan. 30, 1904.)

PASTURAGE OF CATTLE — CONTRACT — CONSTRUCTION — ACTION FOR BREACH — PLEA IN RECONVENTION — SUBMISSION TO JURY.

1. Under a contract for pasturing and feeding plaintiff's cattle, by which he reserved the right, on defendant's failure to give them the best care and attention, to provide therefor at defendant's expense, plaintiff could recover for additional feed for the cattle made necessary by defendant's failure to supply the same.

2. Plaintiff sued defendant for damages on a contract for pasturing and feeding the former's cattle. The contract provided that, when they were sold, \$17 per head for 500 head, and \$12.50 per head for all over that number, should be retained from the proceeds, and the remaining profits equally divided. Defendant was not to be responsible for missing cattle, save for those dying "from natural causes, i. e., some disease, etc." For these he was to furnish the hides as evidence, and pay for the others at the same rate as that at which the survivors sold. Defendant pleaded that he was not at fault for those that died, and the facts showed that plaintiff sold the survivors, 354 head, at \$20 per head, and never accounted for any part of the proceeds. *Held*, that the contract did not authorize plaintiff to claim \$17 per head for 500 head, and \$12.50 for 10 head—this being the total number delivered—as this would make defendant responsible for all cattle delivered, irrespective of the cause of their loss.

Appeal from District Court, Sherman County; Ira Webster, Judge.

Action by J. B. Sneed against C. F. Rudolph. From a judgment for plaintiff, defendant appeals. Reversed.

S. T. Fagan and Simmons, Tankersley & Glendenen, for appellant. Turner & Boyce and Browning, Madden & Trulove, for appellee.

SPEER, J. The appellee, J. B. Sneed, sued the appellant, C. F. Rudolph, in the district court of Sherman county, to recover damages in the sum of \$3,862.50 for the alleged breach of the following contract:

"State of Texas, County of Sherman. Know all men by these presents: That we, J. B. Sneed, of Childress county, and C. F. Rudolph, of Sherman county, have entered into the following contract or agreement, to wit: Said C. F. Rudolph agrees to take for pasturage from the said Sneed about 510 yearling steers, all branded the letter V on the right hip, and marked crop off right ear. Said cattle are to be pastured by the said Rudolph for one year or longer, if the said Sneed may desire, or until the same can be sold for a reasonable or fair market price, during which time they are to be salted and fed by said Rudolph, and to this end the said Rudolph puts in or contributes all the hay and feed stuff or forage crop that has been raised or may be owned by him on his place save what may be fed to herd of stock cattle and horses now owned by the said Rudolph, and that which may not be consumed or needed for steers. Said Rudolph hereby agrees to give the best care and attention to said cattle at all times, and upon his failure to do so at any time for any cause, the said Sneed hereby reserves the right to provide such for said cattle at the expense of the said Rudolph, and to move said cattle, if necessary, without incurring any responsibility to the said Rudolph for pasturage, such necessity to be determined by the said Sneed.

"It is generally understood between the parties hereto, that the said cattle are to be sold in the Spring and Summer of 1903, but no sales shall be made except by the said Sneed. The said Sneed agrees, however, not to sell said cattle prior to the above-named time without the consent of the said Rudolph. The following division of the proceeds arising from the sale of said cattle shall be made to wit: There shall first be deducted and paid to the said Sneed, from the proceeds arising from the sale of said cattle, the sum of \$17.00 per head for five hundred head, and \$12.50 per head for all over five hundred head, that may be turned over to said Rudolph for pasturage by said Sneed.

"It is also agreed that if cattle are not sold before June the 1st next and paid for by buyer then there shall also be deducted from the proceeds of the sale of said cattle, the sum of 8 per cent. per annum on the above valuation of said cattle, from June 1st next, until cattle are sold. The profits then remaining shall be divided equally between the parties hereto. The said Rudolph agrees to deliver said cattle to any R. R. pens or shipping

*Rehearing denied February 27, 1904.

station to be designated by buyer of said cattle, within radius of twenty miles of ranch.

"The said Rudolph also agrees to be responsible for all cattle that may be missing when cattle are sold or taken out of his pasture, save those that may die from natural causes, i. e. some disease, etc., and he is to furnish the hides as evidence of such death. The amount to be paid for such missing cattle shall be the same as that for which cattle may be sold in the Spring. The said Rudolph further agrees to erect an additional first-class windmill on his place and to erect a wind-break for cattle, about three hundred feet long and eight feet high.

"J. B. Sneed,
"C. F. Rudolph."

The first assignment of error is overruled, because we are of the opinion that the court placed the proper construction upon the contract when he permitted appellee to recover the item of \$275 for additional feed for his cattle made necessary by the failure of appellant to supply such feed. Nor do we think the second assignment of error presents ground for reversal, but we are of opinion the judgment must be reversed because of the peremptory charge to find against the defendant on his plea in reconvention. The facts show that appellee on about March 30th sold all the cattle that were then alive, to wit, 354 head, at \$20 per head, and failed to account to appellant for any part of the proceeds of the same. Appellant pleaded, and here contends, that he was in no wise at fault in the matter of caring for and attending to said cattle under the contract, and that those that died were not chargeable to him, under the terms of the contract, and that he is entitled to recover his share of the excess above \$17 per head brought by the 354 head. In reply to the assignments presenting this question, the appellee suggests that, under the terms of the contract, he is entitled to retain out of the proceeds of the sale of said cattle the sum of \$17 per head for 500 head, and \$12.50 per head for 10 head; this being the total number delivered to appellant under the contract. This, it will be seen, would amount to \$8,625, while the cattle sold brought only the sum of \$7,080; thus, according to appellee's contention, leaving him short of his just deserts in the sum of more than \$1,500. But we cannot adopt this view of the contract. This would, of course, be making appellant responsible for all of the cattle delivered to him, irrespective of the question of the cause of their loss, while the contract, upon this feature, stipulates that he agrees to be responsible for all cattle that may be missing when cattle are sold or taken out of his pasture, save those that may die "from natural causes, i. e. some disease, etc.," and he is to furnish the hides as evidence of such death. This clearly indicates that he was not to be responsible for those cattle which died by reason of disease,

or other causes over which he had no control; and, considering the contract as a whole, it is evident to our minds that such was the purpose and intention of the parties to that instrument. So that it will be seen that the court erred in not submitting to the jury the question of whether or not, under all the circumstances, appellant was entitled to recover on his plea in reconvention against the appellee.

For this error, the judgment is reversed, and the cause remanded.

PEACOCK et ux. v. CUMMINGS.*

(Court of Civil Appeals of Texas. Feb. 6, 1904.)

MORTGAGES—SUBSTITUTE TRUSTEE—FOREIGN ADMINISTRATOR—POWER OF APPOINTMENT—LIMITATIONS.

1. A trust deed on property within the state, given to secure a note, provided that, if the trustee named therein should for any reason fail or refuse to act, the cestui que trust or the legal owner of the note might appoint a substitute, in writing. Thereafter both the trustee and the cestui que trust died in Kentucky, which was their domicile, and an administratrix was appointed by a Kentucky court to administer on their estates. *Held*, that the administratrix, as the legal holder of the note and deed of trust, had the right to designate a substitute trustee in Texas to sell the trust property, without having taken out letters of administration in the state.

2. Whether the statute of limitations has run against a note to secure the payment of which the deed of trust was executed is immaterial, where the trustee seeks to exercise the power conferred in the deed of trust by selling the property.

Appeal from District Court, Tarrant County; Irby Dunklin, Judge.

Suit by A. H. Peacock and wife against C. C. Cummings. Judgment for defendant, and plaintiffs appeal. Affirmed.

Morris & Crow, for appellants. C. C. Cummings, for appellee.

SPEER, J. On December 12, 1887, appellants, A. H. Peacock and M. B. Peacock, husband and wife, executed and delivered to H. C. Bohon, trustee, a certain deed of trust on a certain lot in the city of Ft. Worth, Tex., to secure V. A. Bohon in the payment of a note of that date for the sum of \$2,086.89, due one day after date, with interest at the rate of 8 per cent. per annum. Said trust deed authorized the sale of said premises in case said note should not be paid according to the terms of the trust set forth in said deed, and further provided, in case said note should not be paid, and H. C. Bohon should for any reason fail or refuse to act, that V. A. Bohon, or the legal owner and holder of said note, might appoint a substitute, in writing, with all the powers granted to said original trustee. H. C. Bohon and V. A. Bohon died, and Sallie Bohon was appoint-

*Rehearing denied February 27, 1904.

ed administratrix upon their estates by the probate court of Mercer county, Ky., where the Bohons lived. On October 25, 1902, the administratrix duly appointed C. C. Cummings substitute trustee, and he proceeded at once to advertise said lot for sale in the manner pointed out by such instrument. Appellants instituted this suit to enjoin the sale by the substitute trustee; the principal contention being that the property in controversy was their homestead, and that the foreign administratrix had no power to appoint the substitute trustee in this state, since no species of administration had been taken out in this state.

It may be, under the authorities, that such foreign administratrix could not maintain a suit in this state under these facts; but that she, as the legal holder of the note and deed of trust in question, has the right to designate a substitute trustee, according to the terms of the latter instrument, who will have the authority to sell the land mortgaged, we have no doubt. The appellee may exercise this power, not as assignee of the note, but as substitute trustee, according to the plain contract of the parties to the trust instrument. The trial court's judgment dissolving the writ of injunction and dismissing the appellee imports a finding that the note involved has not been paid off, and that the property in question was not the homestead of appellants at the time of the execution of the trust deed, and we therefore so find.

The question of limitation cannot be material, since the appellee only seeks to exercise the power conferred in the deed of trust by selling the mortgaged property, and this is in no sense a suit upon a barred note.

No error is assigned which calls for a reversal of the judgment, and it is therefore in all things affirmed.

PETTY v. ST. LOUIS & M. R. R. CO.

(Supreme Court of Missouri, Division No. 1.
Feb. 10, 1904.)

STREET RAILROADS—CROSSINGS—INJURIES— SPEED—CONTRIBUTORY NEGLIGENCE— AVOIDING INJURY—EVIDENCE.

1. In the absence of an ordinance limiting the rate of speed of street cars in a city, evidence that the car by which plaintiff was injured at a crossing ran down a slope in a thinly settled portion, at a speed of from 15 to 25 miles an hour, and slowed down to from 8 to 10 miles an hour when it approached the crossing, was insufficient to show negligence as a matter of law.

2. Plaintiff attempted to cross a street railway track at a crossing as the night was growing dark, and as she entered the street on which the car ran she had a plain view in the direction from which the car approached for 1,200 feet. The car was large, and lighted by electricity, and also had a headlight. Plaintiff's wagon was not lighted, and the headlight only lighted up the track for from 50 to 75 feet in front of the car. The car could have been stopped, at the rate of speed at which it was going, within about 75 feet. *Held*, that since plaintiff could have seen the car and avoided the injury much sooner than the motorman

could have seen plaintiff's wagon in a position of danger, plaintiff was not entitled to recover on the ground that by the exercise of ordinary care the motorman might have seen plaintiff's peril in time to have averted the injury.

3. Though the motorman of a street car could have seen plaintiff at the time she drove into the street from a side street when she was 22 feet from the track, and when he was 1,200 feet from the crossing, he was entitled to assume that plaintiff at that time and distance would also see the car, and stop before getting into a position of peril.

4. In an action for injuries at a street railroad crossing, evidence reviewed, and *held* to show that plaintiff was guilty of contributory negligence as a matter of law.

Appeal from St. Louis Circuit Court; Jno. W. McElhinney, Judge.

Action by Charlotte C. J. Petty against the St. Louis & Meramec River Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

McKelghan & Watts and Robt. A. Holland, Jr., for appellant. R. L. & John Johnston, for respondent.

MARSHALL, J. This is an action for \$20,000 damages for personal injuries sustained by the plaintiff on November 29, 1899, at the intersection of Longfellow and Plant avenues, in the town of Webster Groves, by reason of a collision between one of defendant's cars and an open wagon in which the plaintiff and her brother were riding. There was a judgment for the plaintiff for \$2,000, and defendant appealed.

The negligence charged in the petition is as follows: "Plaintiff alleges as the specific facts constituting the said negligence of defendant that at the time and place of said collision defendant's said electric car was being run by its said agents and employes at a rapid and dangerous rate of speed, on a descending grade; the night was growing dark, but said car carried no headlight; no bell was sounded and no warning of any kind given of the approach of said car until too late to enable plaintiff and her said brother to escape said collision; that defendant's agent and motoneer in charge of said car saw, or by the exercise of ordinary care would have seen, the danger and peril of the plaintiff in time to have stopped or so have checked the speed of said car as to avoid said collision, but failed to either stop or check the speed of said car."

The answer is a general denial and a special plea that the plaintiff and her brother were guilty of contributory negligence.

The case made is this: Longfellow avenue runs east and west, and Plant avenue runs north and south. The defendant has an electric street railroad on Longfellow avenue. The cars run west on the tracks on the north side of the street, and east on the tracks on the south side of the street. From the south track to the south side of Longfellow avenue at Plant avenue it is 22 feet. From Plant avenue, looking westwardly, Longfellow avenue is perfectly straight for

a distance of 1,200 feet, and the grade rises $3\frac{1}{2}$ feet to the 100. The plaintiff, her mother, two sisters, and her brother raised vegetables on a farm south of Webster Groves, and she and her brother sold the same to residents of Webster Groves, going into town two or three times a week. On the day of the accident the plaintiff, a woman 23 years of age, and her brother, 2 years younger, were driving north on Plant avenue, in an open wagon, in the evening between dusk and dark. When they reached Longfellow avenue, she and her brother say they stopped with the horse on Longfellow avenue and the wagon just south thereof. They say that while in that position they could see west on Longfellow avenue at least a block. There were no houses on that side of Longfellow avenue, and nothing to obstruct their view for at least 1,200 feet. They say they looked and listened, and could neither see nor hear any car approaching. They then started the horse forward, and when the horse and the fore wheels had gotten across the south track they saw a glimpse of light, and looked, and saw a car right upon them; that the brother grabbed the whip, but before the wagon could clear the track, the car struck the hind wheel of the wagon, and she was thrown out and injured. They say they saw no car, saw no headlight on the car, and heard no bell rung, and heard no noise of an approaching car.

George W. Leming testified for the plaintiff that he lived in Webster, and was engaged in the express business; that he was driving west on Lockwood avenue towards Plant avenue, and when he reached Plant and Lockwood he saw the headlight of the car coming eastwardly from the raise at the Congregational Church (which was 1,200 feet west of Plant avenue), and that he also saw the plaintiff's wagon was coming north on Plant avenue towards Lockwood avenue; that when he got to the culvert the motorman on the electric car was ringing his bell, and he wondered whether he was ringing for him or the other wagon; that "at that time the plaintiff's horse was close to the mouth of Plant avenue." Over the objection of the defendant that he had not shown himself qualified to speak, this witness was permitted to testify that the car was running at the rate of 25 miles an hour, but he said he could not say whether it was running faster or slower than the cars usually ran at that point. He further testified that he saw the headlight burning on the car, and that when he passed Plant avenue the plaintiff's wagon was 15 or 25 steps from Lockwood avenue, and that the car was in the neighborhood of from 50 to 75 feet west of the culvert; that anybody coming into Lockwood avenue could see a car for about 400 or 500 yards, and sometimes even farther than that; that he did not notice any slackening of the speed before the collision; that when the motorman began to ring the gong he kept ringing it. This was

all the evidence for the plaintiff outside of the testimony as to the nature and extent of her injuries, as to which the doctors disagreed as to whether they were simple, and not serious, or were grave, and probably permanent. The defendant demurred to the evidence, the court overruled the demurrer, and the defendant excepted.

Daniel R. Fauste testified for the defendant that he was the motorman of the car; that from the Congregational Church, at the top of the slope, until he got three-fourths of the way down the slope, the car ran at a speed of 15 miles an hour, but before the car reached Plant avenue it had slowed down to 8 or 10 miles an hour; that he had no power on going down the slope; that as he went down the slope he sounded the gong, and sounded it more as he approached Plant avenue; that there was a headlight burning on the front of the car; that he did not see the plaintiff's horse and wagon until his car got within about 15 or 20 feet of Plant avenue; that it was dark, and the horse was not over 3 or 4 feet from the track at the time; that he rang his bell loudly, and applied his brakes to stop, and at that time the wagon was driven right rapidly across the track in front of the car; that he applied the brake, and also reversed the current; and that the car ran just its own length, 35 to 40 feet, after it struck the wagon. On cross-examination he said that he commenced to take up the slack of his brake when about 200 yards west of Plant avenue; that the headlight on the car threw a light about 50 or 75 feet in front of it; that going downgrade at the rate of 10 miles an hour the car could not be stopped in less than about 75 feet.

H. O. Rockwell testified for the defendant that he is the assistant manager of the defendant, and is an electrical engineer; that it is 1,200 feet, by actual measurement, from the west line of Plant avenue to the top of the slope, at the Congregational Church, and that the grade is $3\frac{1}{2}$ feet to the 100; that it is 22 feet from the east-bound track to the south line of Longfellow avenue; that a person coming north on Plant avenue, when he reached the gutter on the south line of Longfellow avenue, could see to the top of the hill at the Congregational Church; that there was nothing to obstruct the view; that a car like the one in question would make considerable noise when coming down the slope.

Mr. Cheatham testified for the defendant that he was driving west on Lockwood avenue, and was about 150 feet east of Plant avenue when the collision occurred; that he saw the car coming down the slope, and saw the headlight; that the car stopped before it got to where he was, and he thinks it stopped 5 or 6 feet from where the accident happened.

T. L. Murrier testified for the defendant that he was the conductor of the car; that

constantly as the car went down the slope; that the sounding of the gong and the reversal of the current attracted his attention; that the headlight was burning on the car, and was broken by the collision; that the car did not run more than its own length after striking the wagon.

This was all the evidence in the case. The defendant again demurred to the evidence, the court overruled the demurrer, and the defendant excepted. The plaintiff's instructions predicated a right to recover upon a negligent rate of speed of the car, and upon the proposition that the defendant's servants saw or might have seen that the plaintiff was in a position of imminent peril in time to have stopped or checked the car, and to have averted the accident, and negligently failed to do so. There was a verdict for \$2,000. This court has jurisdiction because the constitutionality of the nine-jury law was called in question, but, as that question has been settled, it is not necessary to refer to it here.

1. The plaintiff bases a right to recover upon the rate of speed at which the car was run. No law or contract regulating the rate of speed of the defendant's cars was shown. The common law therefore applies. One witness for the plaintiff put the speed at 25 miles an hour, but, as he did not show himself qualified by training or experience to speak to that question, his testimony need not be further considered. The only evidence in the case is that the car ran down the slope at the rate of 15 miles an hour, and that when it approached Plant avenue it was slowed down to a speed of 8 to 10 miles an hour. On the face of the case, such a rate of speed at the time and place and under the circumstances of this case cannot be held, as a matter of law, to amount to negligence. There were no houses on the south side of the street for about 1,200 feet west of Plant avenue, and, so far as appears, there were no intersecting streets. The track was straight, and there was nothing to interfere with the view for that distance. Any one standing in the gutter at the intersection of Longfellow and Plant avenues, which was 22 feet south of the east-bound track, could see westwardly for 1,200 feet. The car was lighted by electricity, and had a headlight burning. The car made considerable noise running down the slope, and the gong was sounded. Any one who had looked could have seen and heard the car coming. Under such circumstances a rate of speed of 15 or even 25 miles an hour, does not per se constitute common-law negligence. There was therefore no basis for a recovery upon such a theory, and the plaintiff's first instruction, which authorized a verdict upon that theory, was clearly erroneous.

2. The second contention of the plaintiff is that the operator of the car saw, or by the

peril, in time to have stopped or checked the car, and to have averted the injury. The argument of the plaintiff is that the track was straight for 1,200 feet; that the headlight lit up the track for 50 to 75 feet in front of the car; that, therefore, the operator of the car could have seen that the plaintiff was crossing the track, and was in imminent danger, when the car was 75 feet distant from the wagon, and that the car could have been stopped, or at any rate its speed could have been checked, so as to avoid the collision. But if all this be conceded, it would not follow that the plaintiff was entitled to recover, for it is equally true that, if the operator of the car could have seen the plaintiff's wagon when 1,200 feet distant, the plaintiff could have seen the car at the same distance. The car was lighted by electricity, and had a headlight. The wagon was not lighted at all. The plaintiff could have seen the car much more easily and distinctly than the operator of the car could have seen the wagon. Yet the plaintiff and her brother swear that when they reached the intersection of Plant avenue and Longfellow avenue, and when their horse had gone onto Longfellow avenue and the wagon was still on Plant avenue, they stopped, looked, and listened, and that they neither saw nor heard a car coming. They were then within 22 feet of the track, and could see 1,200 feet up the track towards the west. If this is true, and if they could not see a well-lighted car with a headlight within 1,200 feet of them, by what manner of reason can it be said that the operator of the car could see them and their wagon that was not lighted? But if the operator of the car could have seen the plaintiff at that time and distance, he had a right to assume that the plaintiff could and would also see the car, and that the plaintiff would stop before getting into a position of peril; and certainly at that time the plaintiff was not in a position of peril, for her wagon was 22 feet south of the track.

The plaintiff says that, having thus stopped, looked, and listened, and neither seeing nor hearing a car coming, she proceeded to cross the track; that she was riding in an open wagon, and that she did not look again until the horse and front wheels of the wagon had cleared the north rail of the east-bound track, and while the rear wheels of her wagon were on the track, and then she saw "a glimpse of light," and looked towards the west, and saw the car right upon them, and in an instant the collision occurred. She also says she saw no headlight and heard no bell rung, although her own witness Leming, and four other witnesses for the defendant, testify that there was a headlight burning on the car, and that the gong was being loudly sounded. The plaintiff's contention is that, as the headlight lit up a space of 50 or 75 feet ahead of the car, the

feet distant from the wagon, and could have stopped or checked the speed of the car in time to avert the collision, and did not do so. Several conclusive answers to this contention are apparent. In the first place, there is no evidence at all that the motorman failed to stop the car or check its speed after he saw or might have seen the imminent peril of the plaintiff. On the contrary, all the testimony is that he applied the brakes, and reversed the current, and sounded the gong loudly and continuously, and did everything that could be done. It is true that the plaintiff's witness Leming said that he did not notice that the speed of the car was checked, but he also testified that when he got to the culvert, which was 25 feet west of Plant avenue, the car was 50 to 75 feet west of the culvert, and that the "plaintiff's horse was close to the mouth of Plant avenue." So that, if this witness' testimony is to control the case, the plaintiff was at least 20 feet distant from the track when the car was 75 or 100 feet west of Plant avenue, and therefore the plaintiff was not in a position of imminent peril at that time, and there was no obligation resting upon the motorman to stop or check the speed of the car; but this witness said he was ringing his bell, and he wondered whether he was ringing it for him or the other wagon. If absolute credence be given, therefore, to everything this witness said, it should be shown that the motorman did all he was obligated to do, and that the plaintiff was not in any danger whatever, and was not on the track at all when the car was within 75 or 100 feet of the place of collision. The testimony of this witness therefore completely disproves the plaintiff's contention that she was in a position of imminent peril, and that the motorman saw it, or might have seen it, in time to have averted the injury. And, on the contrary, the testimony of this witness corroborates the testimony of the motorman that when the car was within less than 75 feet of Plant avenue the plaintiff drove on the track, and, this being so, and under the uncontradicted testimony that the car could not have been stopped in less than 75 feet on that grade when running 8 or 10 miles an hour, this contention of the plaintiff utterly fails. Moreover, if the testimony of the plaintiff be true that she stopped and looked west when she reached the south side of Longfellow avenue, and did not see a car coming, it is incomprehensible how a collision could have occurred. For this involves the deduction that a car ran 1,200 feet while the plaintiff's wagon was going 22 feet from the south rail of the east-bound track to the south line of Longfellow avenue and the width of the track, say about 5 feet. In other words, that a car traveled 1,200 feet while the wagon was traveling 27 feet.

and the wagon was traveling only 1 mile an hour, the car would be traveling 15 or 25 times as fast as the wagon. And even assuming that the car was traveling 25 times as fast as the wagon, the car would only travel 675 feet while the wagon was traveling 27 feet. This extreme concession as to the rate of speed that the car and the wagon were respectively traveling shows that when the plaintiff's wagon reached the south line of Longfellow avenue, or at any rate when the wagon began to move from that point, the car was within 675 feet of the point of the collision. This being true, it cannot mathematically be true that the plaintiff could not see the car coming, for she had an unobstructed view towards the west of 1,200 feet, and the car was big, and lighted by electricity, and had a headlight, and, if she had looked, she could not have failed to see the car; and under these circumstances she cannot be heard to say she did not see the car in ample time to have stopped before she got into a position of peril, and it was contributory negligence on her part not to do so, which bars her recovery. *Guyer v. Railroad*, 174 Mo. 344, 73 S. W. 584; *Carroll v. Transit Co.*, 107 Mo. 653, 17 S. W. 889; *Boyd v. Railroad*, 105 Mo. 371, 16 S. W. 909; *Butts v. Railroad*, 98 Mo. 272, 11 S. W. 754; *Henze v. Railroad*, 71 Mo. 636; *Jennings v. Railroad*, 112 Mo. 268, 20 S. W. 490; *Maxey v. Railroad*, 113 Mo. 1, 20 S. W. 654; *Sullivan v. Railroad*, 117 Mo. 214, 23 S. W. 149; *Kelsay v. Railroad*, 129 Mo. 362, 30 S. W. 339; *Moberly v. Railroad*, 98 Mo. 183, 11 S. W. 569. The plaintiff made out no case, and the demurrers to the evidence should have been sustained.

The judgment is reversed. All concur.

MISSOURI REAL ESTATE SYNDICATE v. SIMS.

(Supreme Court of Missouri, Division No. 1.
Feb. 10, 1904.)

USURY—BONUS FOR FORBEARANCE—CHARACTER OF DEFENSE—AVAILABILITY TO CREDITOR—MORTGAGES—AGREEMENTS FOR EXTENSION—RIGHTS OF ASSIGNEE—REMEDIES—ELECTION.

1. Where an agreement for extension of a note secured by a deed of trust did not appear on the face of the record, but the holder of the note, who made the agreement for the extension, himself became the purchaser of the property, his title was subject to attack, and could be set aside in equity by the owner of the equity.

2. One whose property has been sold under deed of trust in violation of an agreement for extension is not limited to a suit in equity to set aside the title of the purchaser with knowledge of the agreement, but may bring an action at law against the maker of the agreement for damages for its breach.

3. A contract between the holder of a note and the owner of the property, subject to a deed of trust securing its payment, whereby an

extension of time of the note is secured, is a contract effecting an incumbrance on land, and, as such, passes to an assignee, who takes the property subject to the incumbrance before the expiration of the period for extension.

4. Where a petition states a contract by the plaintiff and defendant, and the payment of the full consideration by the former to the latter, and the breach of the contract by defendant, the statute of frauds, if available as a defense, must be pleaded by defendant.

5. Where a note, on its face, bore all the interest that the law allowed, an agreement for the payment of a bonus for forbearance was an agreement for the payment of usury; and, though the agreement should be complied with by the holder of the note, he could not recover the bonus.

6. Usury laws are solely for the protection of the debtor, and he and his privies alone can interpose the defense of usury, so that, if the debtor makes payments in accordance with the terms of the usurious contract, the creditor cannot retain the payment, and say, when sued for breach of the contract, that it was usurious and illegal.

Appeal from Circuit Court, Greene County; Jas. T. Neville, Judge.

Action by the Missouri Real Estate Syndicate against J. M. Sims. From a judgment for defendant, plaintiff appeals. Reversed.

Heffernan & Heffernan and Gideon & Gideon, for appellant. Benj. U. Massey, for respondent.

VALLIANT, J. This is an appeal from the judgment of the circuit court on sustaining a demurrer to the plaintiff's petition, the plaintiff declining to plead further. The cause stated in the petition is an action at law for damages for the breach of a contract to extend a mortgage note. The substantial averments in the petition are to the effect as follows: On December 12, 1894, one Geo. P. Miller, being then the owner of certain real estate in the city of Springfield, executed his note for \$4,000, due in two years, bearing 8 per cent. interest from date, payable to one George Lawrence, and a deed conveying the real estate to one James Bray, as trustee, to secure the note. That afterwards Miller conveyed the property to one Kerr, subject to the deed of trust, and Kerr conveyed it in like condition to a corporation called the Springfield Milling Company. That in 1895 the holder of the \$4,000 note sold it to the defendant, Sims. That while the defendant was the owner of the note, and the Springfield Milling Company the owner of the property subject to the deed of trust, the latter made a contract with the former to extend the note for a period of five years from the date of its face maturity (that is, from December 12, 1896, to December 12, 1901); the consideration for the extension being \$100, which the milling company then and thereupon paid the defendant. That afterwards the milling company sold the property to one Coombs, who assumed the payment of the

note, and Coombs sold it to other parties, who also assumed the payment of the note, and they on February 16, 1899, sold it to the plaintiff for \$8,000, subject to the deed of trust. That plaintiff bought with knowledge of the contract for the extension, and with the knowledge and consent of the defendant, and, after so purchasing, the plaintiff, with the knowledge, consent, and approval of the defendant, put extensive and valuable improvements specified on the property, and made a lease for a term of 10 years of the third floor of the building, with like knowledge and consent of the defendant; he in fact signing the lease, and agreeing that his deed of trust "should be subject to the terms and conditions of said lease." That afterwards, although the plaintiff had fully complied with all the other terms of the deed of trust, the defendant, in violation of his agreement to extend the note, did in July, 1900, instigate the trustee to sell the property under the terms of the deed of trust, and at the sale the defendant became the purchaser for \$1,000, received the trustee's deed therefor, entered into possession, and has so continued, collecting the rents, etc. That at the date of the sale the property was worth \$8,000, or \$4,000 over and above the deed of trust debt, and therefore by the defendant's act the plaintiff was damaged in the sum of \$4,000, for which judgment was prayed. There were three other counts in the petition, predicated on the same facts, and the breach of the agreement to extend the note. The court sustained the demurrer as to the first, second, and fourth counts, and overruled it as to the third, whereupon the plaintiff took a voluntary nonsuit as to the third count, and declined to plead further. The court then rendered final judgment for the defendant, from which judgment the plaintiff prosecutes this appeal.

If the agreement for the extension of the note was supported by a valid consideration, the petition stated a good cause of action, and the demurrer should have been overruled. The agreement for extension not appearing on the face of the record, a sale by the trustee at a date when the note, as appeared on its face, was due and unpaid, would have carried to an innocent purchaser without notice a good title. As, however, the defendant himself became the purchaser, the plaintiff could have successfully attacked his title by a suit in equity, and have set the same aside; assuming, of course, as we must, in the face of the demurrer, that the facts pleaded are true, and that there were no other facts to alter the case. But the plaintiff was not limited to that remedy in equity. If the defendant had violated his agreement, and sold the plaintiff's property when he had no right to do so, the plaintiff was entitled to his action at law for damages as for a breach of the contract. *Sherwood v. Saxton*, 63 Mo. 78. In the case cited the suit was against the trustee for misconduct

¶ 4. See *Frauds*, Statute of, vol. 23, Cent. Dig. § 363.

in the sale of the plaintiff's land under a deed of trust. The court, recognizing the right to equitable relief, said: "In many cases, even where the remedies are concurrent, the legal tribunal is more complete and satisfactory than the equitable one. This case is a good example. Should the plaintiff commence his suit in equity, he might set aside the second sale and redeem the land by paying up the indebtedness. But in the meantime the land may have greatly depreciated in value, so that it would be impossible to restore him to what he has lost by the defendant's breach of his trust. An action at law, then, for damages, is the most ample, complete, and simple remedy." The contract for extension was made between the owner of the land and the holder of the mortgage note. The only concern the owner of the land had with the note arose out of the fact that it was an incumbrance on his land. His contract for the extension was for the sole purpose of postponing the date at which his land could be sold to satisfy the note. It was therefore a contract affecting the incumbrance on the land, and the effect the contract had on that incumbrance was not limited to the period of the ownership of the then owner, but passed to the assignee, who took the property subject to the incumbrance. The contract was for an extension for a definite number of years, and it applied to the incumbrance, in whosoever hands the title to the land might go during that period. It applied to the incumbrance while the title was held by the plaintiff in this case. What would have been the effect if the note had been transferred before maturity to an innocent purchaser without notice, we need not consider, for such was not this case.

The petition does not state that the contract was in writing, but it is unnecessary for us to consider that point, because, even if the statute of frauds applied to such case, the point is not raised by the demurrer. The petition states that the contract was made, and that the whole consideration (\$100) was paid to the defendant. The defendant, by his demurrer, admits that to be the fact. If, under that condition, the defendant thinks that the statute of frauds has anything to do with the case, it is his privilege to plead it. *Maybee v. Moore*, 90 Mo. 340, 2 S. W. 471.

The question remaining is, was the contract for extension supported by a valid consideration? The note, on its face, bore all the interest that our law allows. The payment, therefore, of \$100 bonus for the forbearance, was the payment of usury. If the defendant, instead of receiving the \$100 in cash at the time of making the contract, had taken the promise of the Springfield Milling Company to pay that sum, and had, on the faith of that promise, actually forborne the

foreclosure until the expiration of five years, as agreed, and had then sued the milling company for the bonus promised, he could not have recovered it, because the amount of the bonus was that much more than the law allows the creditor to take for the forbearance of his debt. If, then, the defendant in such case, after he had wholly performed the contract on his part, could not recover the consideration upon which his contract was founded, because the consideration was illegal, how can he be required, in law, to perform his part of the contract, when he refuses to do so after having received the illegal consideration? If the consideration is so illegal that one party who has received the full benefit of the contract cannot be compelled to perform his part of it, how can the other party be compelled to perform his agreement, when the facts are that it is he who has received the full benefit, and yet refuses to perform his part? The answer to those questions is found in the peculiar character of the law governing the subject of usury. The law which forbids the taking of interest beyond a certain rate for the use or forbearance of money is made solely for the protection of the debtor. If he sees fit to pay more than the law allows, he may do so; and the person to whom it is paid cannot retain it, and at the same time say that it is illegal. No one but the debtor, or his privies in blood, contract, or representation, can interpose the defense of usury. *Coleman v. Cole*, 158 Mo. 253, 59 S. W. 106. In 27 Am. & Eng. Ency. L. 949, the law is thus stated: "It is settled by a multitude of decisions that the right to plead usury is a privilege personal to the debtor. The defense has been compared to that of infancy. The rule that parties in *pari delicto* are both equally precluded from assistance by the courts does not apply against a borrower or debtor who has paid or agreed to pay usury. It is deemed that his consent to the corrupt contract was obtained by moral duress, such as to take from him the character of *particeps criminis*. To hold otherwise would render usury laws nugatory. * * * Being an offender against the law, the usurer is not under any circumstances permitted to set up his own usury for the purpose of avoiding any of his undertakings or liabilities connected with the usurious transaction. What he has done or bound himself to do, he must stand by, as if no usury were involved."

We hold that the contract for the extension of the note was supported by a valid consideration. The petition stated facts which constituted a cause of action, and therefore the court erred in sustaining the demurrer. The judgment is reversed, and the cause remanded to be proceeded with according to the law as above expressed. All concur.

HESSELBACH v. CITY OF ST. LOUIS et al.

(Supreme Court of Missouri, Division No. 1.
Feb. 10, 1904.)

MUNICIPAL CORPORATIONS—OBSTRUCTIONS ON SIDEWALK—REPAIRS TO STREET—NEGLI- GENCE OF CONTRACTOR—NEGLIGENCE OF CITY—THEORY OF RECOVERY—RIGHT TO USE OF SIDEWALK—DANGEROUS OBSTRUCTIONS.

1. Where a contractor, under permission of the city, tears up a public street to construct a public improvement, its duty does not end when it properly piles up the paving stones or places guards around excavations; but it is its continuing duty to use reasonable care to keep such stones safely piled and such excavations properly guarded, although, if it sees that the street is in a safe condition at the close of business each day, and some third person scatters the stones or removes the guard during the night, neither the contractor nor the city is liable.

2. Where a sidewalk was 12 feet wide, a pile of stones placed thereon by a contractor, which occupied only from 3 to 5 feet of that width, and which were so piled that the outside of the pile was a perpendicular wall about 5 feet high—the loose stones being thrown in between the walls—was not necessarily a dangerous obstruction to persons traveling on the sidewalk.

3. A temporary use of a street for the purpose of building houses or making improvements, and for a reasonable time, is a lawful use, and what is a reasonable time is to be determined by the circumstances of the case.

4. In an action for negligence, where plaintiff failed to make out a case against defendant, a judgment rendered on a verdict in favor of defendant will be affirmed, notwithstanding errors in instructions given on defendant's behalf.

5. In an action against a city and a contractor for injury to a pedestrian caused by stones being piled or scattered on the sidewalk, where plaintiff, in her petition, and in instructions given in her behalf, predicated her right of recovery solely on the negligent obstruction of the sidewalk by the contractor, and the permission of the obstruction by the city, she was not entitled to a judgment against the city, where she failed to obtain, and did not show herself entitled to, a judgment against the contractor.

6. Where plaintiff predicated her right to recovery against a city solely on the city's negligence in permitting a contractor to pile stones in such manner as to necessarily and dangerously obstruct travel on the sidewalk, she could not recover on any other act of negligence, even if it were such that, if properly pleaded, it would have afforded a cause of action.

Appeal from St. Louis Circuit Court; Jno. W. McElhinney, Judge.

Action by Lena F. Hesselbach against the city of St. Louis, the Fruin-Bambrick Construction Company, and another. From a judgment in favor of plaintiff, defendant city of St. Louis appeals; and from a judgment in favor of defendant Fruin-Bambrick Construction Company, plaintiff appeals. Reversed on defendant city's appeal, and affirmed on plaintiff's appeal.

Chas. W. Bates and Benj. H. Charles, for appellant. A. R. Taylor, Morris Tucker, and Seddon & Holland, for respondents.

MARSHALL, J. This is an action for \$10,000 damages for personal injuries received by the plaintiff on October 1, 1900, on the

west side of Broadway, just south of Penrose street, in the city of St. Louis, in consequence, it is alleged, of tripping over some paving blocks that had been negligently placed and allowed to remain on the sidewalk by the defendants. The suit was originally against the St. Louis Transit Company, the Fruin-Bambrick Construction Company, and the city of St. Louis. But at the close of the plaintiff's case the plaintiff voluntarily dismissed the case as to the transit company, and the court sent the case to the jury against the other two defendants. The jury found a verdict in favor of the Fruin-Bambrick Construction Company, but returned a verdict against the city of St. Louis for \$1,000. The city appealed from the judgment against it, and the plaintiff appealed from the verdict and judgment in favor of the Fruin-Bambrick Construction Company.

The negligence charged in the petition is that prior to October 1, 1900, the St. Louis Transit Company and Fruin-Bambrick Construction Company "had caused to be placed on the sidewalk," at the place of the accident, "large stones, which were a dangerous obstruction to the use of said sidewalk by pedestrians lawfully passing thereon; and at the time of plaintiff's injuries there were no signal lights or other lights on or about said stones so placed upon said sidewalk, to warn persons of the presence of said stones, and the dangers therefrom, as required by the ordinance of the city of St. Louis in such cases, though it was after night and dark at the time of plaintiff's injuries as herein stated." It is then alleged that the said defendants were negligent in so placing, and in not lighting the place, and that such negligence directly contributed to cause the plaintiff's injuries. It is then alleged that while the plaintiff was passing along said sidewalk on October 1, 1900, after dark, "she came in contact with said stones so placed upon said sidewalk, and was thereby caused to fall upon said stones and the sidewalk," and was seriously injured. The negligence of the city is thus charged. "And plaintiff avers that the two first named defendants were so using said sidewalk to place said stones thereon with the knowledge and permission of the city of St. Louis, and that the defendant city of St. Louis, by the proper officers and agents in charge of keeping the streets in proper repair, well knew of said obstructions upon said sidewalk, yet negligently permitted the same to exist, and thereby directly contributed to cause the plaintiff's said injuries." The defendants pleaded separately, and their answers are general denials, coupled with a plea of contributory negligence.

The evidence adduced for the plaintiff showed that the St. Louis Transit Company had nothing to do with the matter, and so plaintiff voluntarily dismissed as to it. The evidence showed that for some time prior to October 1, 1900, the Fruin-Bambrick Construction Company, under a contract with

the St. Louis Railroad Company, had been engaged in the work of taking up the old cable road on Broadway, and in putting down a new electric street railroad. In doing this work, the construction company took up the granite paving blocks, which were about 6 inches long, about 4 inches wide, and about 4 inches thick, and piled them along the west side of the street, partly on the street and partly on the sidewalk. They were piled in "ricks"; that is, a perpendicular wall of paving blocks was built up about 3 feet high near the outside of the sidewalk, and a similar wall was built on the street, thus leaving a space of 4 or 5 feet between the two walls. Into this space the other paving blocks were loosely thrown. As thus built, a smooth, perpendicular, granite wall, about 3 feet high, was located near the outside of the sidewalk. At the place of the accident the sidewalk was 12 feet wide, so that there was a space of at least 8 feet between the granite wall so built and the buildings on the inside of the sidewalk. The sidewalk was made of brick, and was in good repair, as far as it appears from the evidence. This condition had existed for several weeks prior to the accident. The plaintiff had lived at 4036 North Broadway for a year before the accident, and her house was on the east side of Broadway, and on the opposite side of the street from that on which the accident occurred. On the evening in question she went to see Dr. Orth, who lived on Penrose street, which is the street north of the block on which the accident occurred. In going, she went along the east side of Broadway, which had no paving blocks piled on it, to Penrose street, and thence on that street to the doctor's office. On returning, she took the west side of Broadway. She knew the condition of the sidewalk, with reference to the pile of paving blocks, for she said she could see it from her window. She went south on the west side of Broadway until, she says, she was in front of Eckmeier's coalyard, when she says she fell over a stone that was lying on the sidewalk, and injured herself. No one was with her, except her little daughter, who was 11 years old. She says that there were a good many stones scattered pellmell on the sidewalk, and that she had seen them there for over 4 weeks before the accident, and that there were no lights or danger lights there. After she fell, she says, two young men offered to help her to rise, but she felt bashful, and raised herself up. On cross-examination she said: "Everything was full of stones. There were stones piled up, and stones lying loose on the sidewalk. At Eckmeier's coalyard it was full of stones, and all Broadway was full of stones on the west side"—and that she fell at Eckmeier's coalyard, and there was no light there, and "that she could not tell whether she tripped against a loose stone on the sidewalk, or a pile of stones." Later she said it was loose stones

she ran against. The plaintiff's daughter corroborated her testimony. Mrs. Henry Kueha testified that she passed along Broadway every day, and that there were stones on the sidewalk—some in piles, some spread out over the pavement; that there were more in some places than in others; and that in front of Eckmeier's was the worst place. James Mulhern testified for the plaintiff that he was an inspector for the street railroad. He testified to the piling of the granite blocks, and said the pile extended about 28 inches onto the sidewalk, and that the balance of the sidewalk was left clear and unobstructed. He also testified that there was a street car strike going on in St. Louis at that time, and that boys and other persons would throw stones on the sidewalk; that any one could see the pile of stones on the outer edge of the sidewalk, even at night; that lights were always put up every evening. Dr. Carl Orth testified, for the plaintiff, that he passed along Broadway several times a day, and also at night, about the time of the accident; that there were blocks piled up and blocks scattered loosely on the sidewalk on the west side of Broadway, and that in front of Eckmeier's coalyard there were loose stones lying on the sidewalk, and that such loose stones had been lying along the sidewalk at that place for about two or three weeks, and that there were no city lights there at the time. On cross-examination he testified that these piles of stones and loose stones on the sidewalk were not the same every day, but that they changed frequently, and that the abutting property owners frequently picked up the loose stones and threw them onto the piles. Alois Eckmeier testified, for the plaintiff, that he owned the coalyard; that the stones were built up in piles, "and somebody walks down there, carried them off, and threw them around loose," and that he had seen loose stones in front of his place for nearly a month; that there were lights put up, three in every block, but he did not know whether it was done on the night of the accident. Mrs. Annie Ahrens testified, for the plaintiff, that she and Miss Dora Moritz found the plaintiff, on the night of the accident, leaning up against the fence of the coalyard, and they took her home; that, in addition to the pile of stones, there were a good many loose stones lying on the sidewalk where she found the plaintiff. Miss Dora Moritz testified, for plaintiff, substantially the same, and said you could see the loose stones on the sidewalk when you got near to them. Peter Schelper testified, for plaintiff, that he lived at 4030 North Broadway, that there were loose rocks lying all over the sidewalk in front of Eckmeier's coalyard on the night of the accident, and that there had been loose rocks on the sidewalk at that place for nearly two months. Miss Lizzie Uppelman testified, for plaintiff, that she lived at 4036 North Broadway, and knew the condition of

there were no lights there; "that there were piles of rock in some instances, and there were some scattered; that this condition had existed a good many weeks." At the close of this testimony for the plaintiff, the defendants demurred to the evidence, the court overruled the demurrers, and the defendants excepted.

J. S. Rude testified, for the defendants, that for a month prior to the accident he was a night watchman for the Fruin-Bambrick Construction Company; that he put up from 69 to 74 red lights between 3900 and 4600 North Broadway every night, without missing a night, while the work was going on; that the paving stones were piled in ricks; that there was a street car strike going on at the time, and that boys and others would go out and throw down the piles of stones, and that "there were not men enough to keep them from doing it"; that he patrolled the street between the points stated every night; that every two or three days the foreman sent men over the line to pile up the loose stones that were thus thrown down; that he piled up the loose stones when he found them, and there was a day watchman who did the same thing; that through all the time the people in that neighborhood made hostile demonstrations. On objection of the plaintiff, the court would not permit the witness to tell the time or nature of such demonstrations. David Olman testified, for the defendant, that he was in charge of the construction of the street railroad for the Fruin-Bambrick Construction Company; that he never left work until a quarter to seven o'clock any evening between September 15 and October 2, 1900, and that he saw to it that from 40 to 60 danger lights were put up every night between 3900 and 4700 North Broadway; that the stones were placed in piles 5 feet high and five feet wide, and so as not to obstruct the sidewalk; that the sidewalk was 12 feet wide, which would leave a clear space of 7 feet; that a strike was in progress, and people of that neighborhood made hostile demonstrations (the court refused to let him state their character); and that the piles of stones were often knocked down, and he had them put back in piles repeatedly, but it seemed to do no good. Harry McGinley testified, for the defendants, that at the time of the accident he and Wayne Dunn, who owned the barber shop, No. 4015 North Broadway, and John R. Brady, were standing in front of the barber shop, and that the plaintiff and her daughter passed them, going south, and that when she got about 3 feet south of the barber-shop building, and when she was about 6 or 7 feet from where they were standing, "it seemed as if her ankle turned, and she set down"; that there were two large windows in the front of the barber shop, and two Welsbach

her up, but she got up and walked about 15 feet, and stopped in front of the blacksmith shop, which is in the same yard with the coalyard; that there were no loose stones on the sidewalk; that there "were stones piled in piles with the wall, along the outside," but no loose stones. Wayne Dunn testified, for the defendants, substantially the same as McGinley, and, in addition, said that a person passing along Broadway at that point could not fail to see that there was work going on there. John R. Brady testified, for the defendants, that he and McGinley and Dunn were standing in front of the barber shop when the plaintiff passed; that she fell about 8 feet south of the barber shop, and that there were no loose stones at the place where she fell; that he went over to help her up, and asked her if she was hurt, and she said she was not. August F. Henke, a policeman, testified that his beat began at 4100 North Broadway; that he was in the neighborhood of the barber shop and coalyard four times before supper, and four times after supper, his watch being from 11 o'clock a. m. to 11 o'clock p. m.; that on the west side of Broadway, south of Penrose street (4100), there was a pile of stones, and 50 feet south of that, near the alley, there was another pile, and south of the alley there was another pile, and another in front of the barber shop, and another on the north side of the telegraph post, then came Block's coalyard, then the wagon maker's shop, and then Eckmeier's coalyard; that it was a part of his duty to see that there were no loose stones on the sidewalk, and nothing dangerous on the sidewalk, and that he found none such on the sidewalk on the day of the accident, and that he would have seen them if there had been any; that he passed the place of the accident at 7 o'clock that evening, and there were no loose stones there, but that the stones "were lined up," and were "all right." George B. Tabb, a policeman, testified, for the defendants, that his beat was from 4100 to 4400 North Broadway, and from Broadway to Eleventh street; that he knew the location of the barber shop and the coalyards; that the granite blocks were "ricked up," but that there were no loose rocks on the sidewalk.

The plaintiff's first instruction, given, told the jury that if the Fruin-Bambrick Construction Company "removed stones from the street, and piled them on the west side of Broadway, on the sidewalk," and if the stones, "as so placed on said sidewalk, obstructed travel thereon, and rendered the passage over said sidewalk dangerous for the plaintiff to pass along said sidewalk," and if on October 1, 1900, "said stones were in such position on said sidewalk, and that said street and sidewalk were unlighted at said place, and that the plaintiff was passing south on said

evening, and that while so doing *she struck said stones* on said sidewalk with her foot, and fell and was injured," and that she was exercising ordinary care while walking along the sidewalk, then she was entitled to recover against the Fruin-Bambrick Construction Company, and if the "said stones *so placed* upon the sidewalk had been there in such condition a sufficient length of time to have enabled the city of St. Louis, by its agents having charge of keeping the streets and sidewalks reasonably secure, to have known thereof by the exercise of ordinary care, and by such care to have rendered said sidewalks reasonably secure, and neglected to do so, then the city of St. Louis is also liable, and the verdict should be against both of the defendants." The plaintiff's second instruction, given, told the jury that it was the duty of the city to keep the west sidewalk of Broadway in repair, and in a condition reasonably safe for the passage of persons thereon, "and the fact, if true, *that a part of said sidewalk*, at the places mentioned in the evidence, was in repair and safe to walk upon, will not, alone and of itself, be a defense to the city in this case," but that if the plaintiff, while walking along the sidewalk "struck a stone or stones on said sidewalk and fell and was injured," and if "said stone or stones so on said sidewalk was an obstruction to people walking on said sidewalk, and rendered such walking thereon dangerous," and if such condition had existed long enough for the city, by the exercise of ordinary care, to have known and corrected the same, the city is liable. The plaintiff's third instruction is as follows: "The court instructs the jury that if the city of St. Louis authorized Broadway and the sidewalks thereof, mentioned in the evidence to be *used to place* rocks or stones thereon by the St. Louis Railroad Company, and if said *piling* or *placing* of said stones on the sidewalk necessarily and naturally rendered said sidewalk dangerous; and if the jury find from the evidence in this case that the defendant Fruin-Bambrick Construction Company did *pile* stones upon the west sidewalk of Broadway at the places mentioned in the evidence; and if the jury find from the evidence that said stones, *as placed* upon said sidewalk by Fruin-Bambrick Construction Company, were an obstruction to said sidewalk, and rendered it unsafe for persons and the plaintiff to walk thereon; and if the jury further find from the evidence that the plaintiff, whilst walking along said sidewalk on October 1, 1900, stumbled and fell upon stones *so placed* upon said sidewalk, and fell and was injured; and if the jury further find from the evidence that the plaintiff was exercising ordinary care at the time of her injury—then the plaintiff is entitled to recover against the city of St. Louis, without further notice of the condition of said stones and said sidewalk." (The italics are added to mark the theory upon which the instruction is based.)

The court refused to instruct the jury, as requested by the city, that if the plaintiff was injured "by falling upon some *loose stones*" on the sidewalk, the city was not liable, unless the particular stones upon which she fell had been upon the sidewalk for a sufficient length of time to have imparted notice to the city, and to have enabled the city to remove them. The city also demurred to the evidence at the close of the whole case, but the court overruled the same.

At the request of the Fruin-Bambrick Construction Company, the court instructed the jury that, if the plaintiff stumbled over loose blocks on the sidewalk, the construction company is not liable, unless the jury found that such loose blocks were actually placed or caused to be placed on the sidewalk by the construction company, and that, if the jury were unable to find from the evidence whether such loose blocks were placed on the sidewalk by the construction company or by some other agency, the construction company is not liable, and that, if the jury found that the construction company used ordinary care in piling such blocks, it discharged its full duty toward the plaintiff with respect to such piles, and that it was not the duty of the construction company to keep the sidewalk in a safe condition, and that company was not liable if the plaintiff stumbled over loose blocks, unless the company actually placed or caused the loose blocks to be placed on the sidewalk.

The jury found in favor of the construction company and against the city, assessing the damages at \$1,000; and the city appealed, as did also the plaintiff as to the verdict against her and in favor of the construction company.

The petition predicates a right to recover upon the ground that the Fruin-Bambrick Construction Company negligently placed large stones upon the sidewalk, which necessarily rendered it dangerous for persons to walk along the sidewalk, and that the city knew that the construction company was so using the sidewalk, and "negligently permitted the same to exist, and thereby directly contributed to cause the plaintiff's said injuries." Or otherwise stated, that the construction company was the active, and the city was the passive, agent that caused the injury. Under the petition, therefore, the negligence of the construction company was the first link in the chain of causation, and the city's negligence was the second link. The plaintiff's instructions proceeded on the same lines, and pointed the true meaning and theory of the plaintiff's petition, by proceeding upon the basis that the act of negligence of the construction company consisted in piling the stones on the sidewalk, and that the plaintiff struck her foot against the stones "so placed," or while "in such position," and that the act of negligence of the city was in permitting the construction company to pile stones upon any part of the sidewalk, and

city to keep the whole of the sidewalk clear of obstructions, and that it was liable even if it was true that a part of the sidewalk was in repair, and safe for people to walk upon.

It will be observed that the petition does not expressly state whether the stones were piled up or scattered loosely upon the sidewalk, but that the plaintiff's instructions proceed entirely upon the theory that the stones were piled up, and that, as piled, they necessarily constituted a dangerous obstruction to travel on the sidewalk, and that it was the duty of the city to keep the whole sidewalk clear of obstructions, and that it was liable if there were any obstructions upon any part of the sidewalk, even though there remained enough of the sidewalk which was in good repair and free of obstruction for a person to safely travel along it by exercising reasonable care. This was the theory of the petition and of the plaintiff's instructions. The plaintiff herself testified on direct examination that the stones were scattered pellmell over the sidewalk. She never mentions there being a pile of stones on the sidewalk on her direct examination, so far as the abstract of the testimony shows. On cross-examination, however, she said there were big piles of stones heaped up on the sidewalk, and also that there were stones scattered all over the sidewalk. "Everything was full of stones." "At Eckmeier's coal-yard it was full of stones, and all Broadway was full of stones on the west side." Then she first said that she could not tell whether she tripped against a loose stone on the sidewalk, or a pile of stones, and later she said that it was loose stones that she ran against, and that she had seen them on Broadway every day before she fell; that during the day they were scattered, and sometimes loose; that these particular stones she had before seen in piles, and sometimes they were lying around.

The court refused to instruct the jury, at the instance of the city, that if the plaintiff tripped over loose stones the city was not liable, unless they had been thus loosely upon the sidewalk for a sufficient length of time to impart notice to the city, and to enable the city to have removed them; but, at the request of the construction company, the court instructed the jury that if it caused the stones to be piled up, and some other agency scattered them loosely on the sidewalk, and if the plaintiff tripped over a loose stone, the construction company was not liable. The result was a verdict in favor of the construction company and against the city, and, in view of the character of the instructions, such a verdict is not a matter of surprise.

Under the theory of the plaintiff's petition and of the plaintiff's instructions, the plaintiff is not entitled to a verdict against the city unless it also gets a verdict against the

company, the jury was authorized to find a verdict against the city even though it did not find a verdict against the construction company. The instructions so given are necessarily inconsistent, under the allegations of the petition. The instructions given for the construction company do not correctly state the law, so far as the duty of that company is concerned. They tell the jury that the duty of the construction company ended when it piled the stones in a safe manner, and that it was no part of its duty to see that they were kept so piled, and that company is not liable if some other agency scattered them. This is not the law. When any one, under permission of the city, tears up a public street for the purpose of constructing a public improvement or a public utility thereon, its duty does not end when it properly piles up the paving stones or places guards around excavations, but it is its continuing duty to use reasonable care to keep such stones safely piled, and to keep such excavations properly guarded. Of course, if it sees that it is in such safe condition at the close of business every day, and some third person scatters the piles or removes the guard during the night, the company is not liable, and neither is the city. *Ball v. Independence*, 41 Mo. App., loc. cit. 475, and cases cited.

But notwithstanding this error in the instructions given for the construction company, it does not necessarily follow that the judgment in favor of that company must be reversed, for the plaintiff wholly failed to make out a case against the construction company, and therefore the judgment is for the right party in this regard. The plaintiff not only failed to introduce any substantial evidence to warrant a recovery against the construction company, but she failed to introduce even a scintilla of evidence which would warrant such a recovery. The charge of the petition is that the construction company so placed large stones on the sidewalk as to constitute a necessarily dangerous obstruction to persons traveling along the sidewalk while exercising reasonable care. There is absolutely no evidence whatever to support this allegation. The plaintiff made no attempt to prove that the stones as piled up near the outer edge of the sidewalk necessarily constituted a dangerous obstruction on the sidewalk. And manifestly no one could so say. The sidewalk was 12 feet wide. The pile of stones took up from 3 to 5 feet in width. This left 7 or 9 feet of clear, unobstructed sidewalk for people to travel over. The stones were piled up so that the outside of the pile was a perpendicular wall about 5 feet high on the outside, and the loose stones were thrown in between the walls. Such a construction is not necessarily dangerous. It is true, sidewalks are intended for pedestrians. But it is also

true that in order to transact business, and to build houses, and to reconstruct streets, and to build public improvements or public utilities in the streets, the sidewalks must, of necessity, at times, be partly occupied by goods and materials to be used for such purposes. Without permitting such use, it would be impossible to carry on business, or to build houses, or to make improvements in a city. Such a temporary use of a street for such purposes, and for a reasonable time, is a lawful use. What is a reasonable time must be determined by the circumstances of each case. *Gerdes v. Foundry Co.*, 124 Mo., loc. cit. 354, 25 S. W. 557, and cases cited. In this case the use was not shown to be for an unreasonable or unnecessary length of time, and it is not even alleged that such was the fact. It is clear, therefore, that the plaintiff made out no case for the jury against the construction company, and hence the verdict is for the right party, and must be affirmed as to the plaintiff's appeal against the construction company, notwithstanding the errors in the instructions given on behalf of that company.

Inasmuch as the plaintiff predicated a right to recover against the city solely upon the proposition that the construction company had negligently obstructed the sidewalk, and the city had permitted this obstruction to exist, and inasmuch as the plaintiff failed to obtain a judgment against the construction company, and has not shown herself to be entitled to a judgment against the construction company, it follows that the plaintiff was not entitled to a judgment against the city, and the judgment in her favor against the city must be reversed. This is the logical result of the case as made by the petition and the plaintiff's instructions. The plaintiff did not predicate a right to recover against the city upon the theory that loose stones were allowed to remain on the sidewalk after the city was charged with notice thereof and had time to remove them. As pointed out, the right to recover was predicated solely upon the negligence of the city in permitting stones to be piled upon a part of the sidewalk by the construction company, and in such a manner as to necessarily constitute a dangerous obstruction to travel along the sidewalk. Having elected to stand upon this claim of negligence, the plaintiff cannot recover upon any other act of negligence, even if it be such that, if properly pleaded, it would have afforded a cause of action. *McCarty v. Rood Hotel Co.*, 144 Mo. 397, 46 S. W. 172; *Chitty v. Railroad*, 148 Mo. 64, 49 S. W. 868; *MacManamee v. Railroad*, 135 Mo. 440, 37 S. W. 119; *Cole v. Armour*, 154 Mo. 333, 55 S. W. 476. In view of this conclusion, it is unnecessary to consider the other errors assigned.

The judgment of the circuit court is affirmed upon the plaintiff's appeal against the *Fruin-Bambrick Construction Company*, and

reversed upon the appeal of the city of St. Louis from the judgment against it and in favor of the plaintiff. All concur.

SNOQUALMI REALTY CO. v. MOYNIHAN et al.

(Supreme Court of Missouri, Division No. 1.
Feb. 10, 1904.)

BUILDING CONTRACTS — ACCOUNTING — EVIDENCE — FAILURE TO COMPLY WITH CONTRACT — DELAYS — CONSTRUCTION OF CONTRACT — TRADE TERMS — SURETIES — CHANGE OF CONTRACT — RELEASE — APPEAL — JURISDICTION.

1. Where one of the parties properly appeals to a certain one of the appellate courts, a cross-appeal of the other party must also be taken to the same court.

2. Where, in an action against a building contractor by the owner for the value of work done by the owner, which had not been properly done by the contractor, it appeared that plaintiff had properly rejected some materials and improperly rejected others, but there was no sufficient data for a determination as to the respective amounts, defendant was not entitled to credit for any part of the value of the materials rejected.

3. Findings of fact by a referee and the trial court on conflicting evidence will not be disturbed on appeal.

4. In an action on a building contractor's bond by the owner it appeared that woodwork put in by the contractor was not according to the specifications, but that, instead of taking it out, the owner painted it, and defendant objected to an allowance in favor of plaintiff of the cost of the painting, claiming that, if the work was not done according to the specifications, plaintiff should have made it conform to the specifications, and held defendant liable for the cost of so doing. *Held* that, the court having ruled in accordance with the contention, and charged defendant with the amount of a bid which plaintiff had obtained for the work, defendant, on appeal, could not complain of the ruling.

5. Where a building contract required San Domingo mahogany to be used in certain portions of the building, evidence was admissible to show that the phrase "San Domingo mahogany" was a trade term in the locality, and that it meant not necessarily mahogany grown in San Domingo, but a good figured mahogany equal in density to the San Domingo variety.

6. A building contract required that San Domingo mahogany be used in a portion of the building, and in an action by the owner on the contractor's bond for failure to do the work as required it appeared that the subcontractor having charge of the mahogany work had found it impossible to secure in the locality mahogany grown in San Domingo, but that he showed a sample of Mexican mahogany to the architect, who approved of the same, and it was shown that the phrase "San Domingo mahogany" was a trade term in the locality, meaning a good figured mahogany of the same density as the San Domingo variety. *Held* that the contract meant by the phrase "San Domingo mahogany" any good figured mahogany of the density of that grown in San Domingo.

7. In an action on a building contractor's bond by the owner for failure of the contractor to properly perform his contract it appeared that plaintiff had caused a considerable amount of the work to be done over, but that he was not justified in such conduct as concerned the bulk of it, and he claimed damages for the cost of a watchman, and fuel for heating the build-

ing while the work of refinishing was in progress. *Held* that, the claim being in bulk, and there being no sufficient data for apportioning the claim between the part that plaintiff was entitled to and the part that he was not, there could be no recovery of such damages.

8. Where, in an action by the owner on a building contract, it clearly appears that the specifications under which the work was done were the specifications intended by the contract, the parties are bound thereby, notwithstanding that they did not identify the specifications as the contract required, but they were signed by the architect alone.

9. The fact that a building contractor put in a brick wall and certain additional supports not called for by the specifications, he making no claim for extra work therefor, could not operate to release the surety on the contractor's bond.

10. A building contract contemplated that alterations might be made in the plans and specifications, and that the architect should have power to add or omit work as might be deemed necessary, and that the contractor should be paid for additional work. The cellar of the building was not excavated to the depth contemplated, but the dimensions and amount of work were otherwise unchanged, and in an action on the contractor's bond the surety claimed that, if there had been any deviation from the specifications in other particulars, it was authorized by the architect, who had authority to do so. *Held*, that the surety was estopped to claim that the architect had not the power to order the omission of the excavation in question.

Appeal from St. Louis Circuit Court; Selden P. Spencer, Judge.

Action by the Snoqualmi Realty Company against Patrick J. Moynihan and others. From the judgment both parties appeal. Affirmed.

Geo. W. Lubke, for plaintiff. Johnson & Richards, Geo. H. Williams, Henry W. Allen, and Campbell & Thompson, for defendants.

MARSHALL, J. These two cases are cross-appeals from the judgment of the circuit court of St. Louis in the case of Snoqualmi Realty Company, plaintiff, against Patrick J. Moynihan and the American Surety Company, defendants. The case is a suit upon a builder's bond for \$10,000, Moynihan being the principal and the American Surety Company the surety on the bond, and the plaintiff the obligee in the bond. The plaintiff claimed \$9,154.16 damages for the breaches of the bond. The defendants denied any breaches and all liability, and the surety pleaded release by virtue of various acts of the parties. On motion of the plaintiff, and without objection or exception by the defendants, the cause was referred to El. T. Farish, Esq., as referee. After a long and thorough trial the referee made an exhaustive, learned, and detailed report, covering 73 printed pages, in which he recommended a judgment for the plaintiff for \$1,518.09, with interest at the rate of 6 per cent. from the commencement of the suit on September 28, 1898. Both parties filed extensive exceptions to the report. The trial court heard the exceptions, and in a forceful and

very convincing opinion covering 15 printed pages overruled the defendants' exceptions and sustained the plaintiff's exceptions so far as to increase the plaintiff's recovery from \$1,518.09, as recommended by the referee, to \$1,847.09, and allowed interest thereon from the institution of the suit, and entered judgment for the plaintiff for \$2,099.59. After proper steps, both parties appealed. Because the plaintiff's claim brought the case within the jurisdiction of this court, its appeal was allowed to this court. The defendants' appeal was allowed to the St. Louis Court of Appeals, and that court properly certified the case to this court, under the rulings of this court in *Ellis v. Harrison*, 104 Mo. 280, 16 S. W. 198, and *Douglas v. Kansas City*, 147 Mo. 428, 48 S. W. 851. Manifestly, the same case cannot be pending in two appellate courts at the same time, although upon cross-appeals, for incongruous results might ensue from inconsistent judgments rendered by the two courts. This case illustrates the rule. The defendant contractor claims that he owes the plaintiff nothing, and the defendant surety claims it was released from liability on the bond. The judgment against them was for \$2,099.59. On the other hand, the plaintiff got a judgment for \$2,099.59 upon a claim for \$9,154.16, and appealed because it was not allowed the difference. If the Court of Appeals on the defendants' appeal should reverse the judgment, and hold that the plaintiff was entitled to nothing against the principal in the bond, or that the surety was released, and if this court should affirm the judgment on the plaintiff's appeal, or should hold that the plaintiff was entitled to even more than the amount for which it recovered judgment, a manifest incongruity and inconsistency would be the result. Hence the wisdom of holding that in such cases the case cannot be split up, but that the whole case must go to the appellate court that has jurisdiction of the appeal by either party.

The controversy is this: The plaintiff contracted with the defendant Moynihan to build for it a certain house, upon lot No. 66 in Bell Place, in St. Louis, according to plans and specifications drawn therefor by architect J. B. Legg, at an agreed price of \$18,800. The contract was executed on November 7, 1896, and the work was to be completed by August 1, 1897. The work was not completed on October 31, 1897, and on that day the plaintiff took possession over the objection of the contractor. During the progress of the work the plaintiff paid the contractor the sum of \$13,000. After differences arose, and after the plaintiff took possession, and to avoid the expense of mechanics' liens, the plaintiff, under a tripartite agreement between the plaintiff, the contractor, and the surety, paid to the subcontractors and materialmen the further sum of \$6,590.69. The plaintiff concedes that the defendant contractor was entitled to \$235 for extra wain-

scoting, and to \$15 for extra partition wall in third story, in addition to the contract price of \$18,800; thus increasing the plaintiff's credit to \$19,050. And thus the plaintiff shows that it overpaid the contractor in the sum of \$540.69, for which it asks judgment. The plaintiff further claims that the contractor did not complete the work at the time agreed, and that by the terms of the contract it is entitled to recover \$5 a day as liquidated damages from August 1, 1897, to November 1, 1897, aggregating \$540, for the delay. The plaintiff further claims that the contractor failed to put into the house the kind and quality of the mahogany, cherry, bird's eye maple, and oak wood required by the specifications, and instead thereof the plaintiff was forced to have the work done over, at a cost to the plaintiff of \$5,822, for which it also asks judgment. The plaintiff also claims \$783.25 on account of improper stonework put in by the contractor; and further claims \$429.77 on account of defective granitoid walks and driveways put in by the contractor; and further claims \$91.50 for cost of repairs to the woodwork, made necessary by the reconstruction of the hardwood work aforesaid; and further claims \$408.81 on account of certain minor items of cost in completing the work contracted for; and also claims \$595 for cost of watchmen and of coal for heating the house while the work of completing and correcting the work contracted for was being done after the plaintiff got possession—thus making an aggregate claim of \$9,450.02, from which the plaintiff allows a deduction of \$100.60 on account of the sum realized by the plaintiff for the sale of the materials that were put in by the contractor and rejected by the plaintiff. On the other hand, the contractor denies any liability to the plaintiff, and says the work was done according to the contract and specifications and to the directions of the architect, and pleads that the delays were caused by the acts and interferences of the plaintiff. The surety denies that there is anything owing to the plaintiff, and pleads that it was released by force of various acts of the plaintiff, which are fully set out, and which will be stated and considered in the course of the opinion. The referee allowed the plaintiff \$440.09 for overpayment, and \$1,078 for reconstructing the woodwork in the parlor, the library, the bedroom over the parlor, and the painting in the room over the dining room, aggregating \$1,518.09, and found against the plaintiff on all of the other claims, and found against the defendants on their other claims and defenses. The circuit court approved all the findings of the referee except as to the painting in the bedroom over the dining room, for which the referee had allowed \$100, and in lieu thereof found that the plaintiff was entitled to \$329 for refinishing that room; and except as to \$100 realized by the plaintiff from the sale of the rejected materials, which the court disallowed; and en-

tered judgment for the plaintiff for \$1,847.69, with interest.

The facts necessary to be considered in the determination of the case will be stated in the opinion. For the sake of convenience the plaintiff's contentions will be considered first, and those of the defendants afterwards.

1. Overpayment. The trial court properly held that the plaintiff was entitled to recover \$540.69 for overpayments. The referee allowed \$440.09, and gave the defendants credit for \$100.60 which the plaintiff received from the sale of rejected materials. The referee and the court held that the plaintiff had properly rejected some and improperly rejected other materials, and the court held that, if there had been any way to separate or apportion the \$100.60 between the two, the defendants would have been entitled to credit for the portion representing the proceeds of the sale of the improperly rejected materials, but, inasmuch as there was no sufficient data furnished for such an apportionment, the defendants were not entitled to credit for any part of the \$100.60. The allowance to plaintiff of \$540.69 on account of overpayments was therefore correct, and the judgment therefor must be approved.

2. Defective Woodwork. The referee allowed the plaintiff \$326 each, aggregating \$978, for improper woodwork done in the parlor, the library, and the bedroom over the parlor, and also \$100, the sum that the plaintiff had paid for painting the improper woodwork in the room over the dining room, instead of making the necessary changes so as to bring the work up to the specifications. The court approved the finding of the referee in all respects except as to the \$100 for such painting, and held that, instead of allowing that sum for painting, the plaintiff should have been allowed \$329, the reasonable cost of making the woodwork in that room conform to the specifications. As to the allowance of \$978 for the three rooms first described, it need only be said that in this court the matter is not subject to review, for the reason that there was a sharp conflict in the evidence as to whether the work done and the materials furnished by the contractor did or did not meet the requirements of the specifications, and under such state of the record this court will not interfere with the findings of fact by the referee and the trial court. *Tufts v. Latshaw*, 172 Mo. 359, 72 S. W. 679; *Bank v. Donnell*, 172 Mo. 384, 72 S. W. 925; *Utey v. Hill*, 155 Mo. 232, 55 S. W. 1091, 49 L. R. A. 323, 78 Am. St. Rep. 569; *Howard v. Baker*, 119 Mo. 397, 24 S. W. 200; *Vogt v. Butler*, 105 Mo., loc. cit. 485, 16 S. W. 512; *Ferry Co. v. Railroad*, 73 Mo. 389, 39 Am. Rep. 519; *Hardware Co. v. Wolter*, 91 Mo. 484, 3 S. W. 865. As to the room over the dining room, it appeared that the woodwork was subject to nearly the same objections as in the three rooms aforesaid, but that, instead of having it taken out and new and proper woodwork put therein, the plaintiff had it

painted at an expense of \$100. The defendants objected to this, and claimed that they could not be made liable for the charge, and that, if the woodwork in this room did not conform to the specifications, the plaintiff had a right to have it made to conform, and that the defendants would be liable for the cost of so doing. The court sustained the contention, and charged the defendants with \$329 therefor, that being the amount for which the plaintiff had obtained a bid to do such work for. Having induced the court to so rule, the defendants cannot be heard in this court to object to the ruling, for the error, if it be error, was invited by the defendants. *Stewart v. Outhwaite*, 141 Mo. 562, 44 S. W. 326; *Sprague v. Sea*, 152 Mo. 827, 53 S. W. 1074; *State v. Manicke*, 139 Mo. 545, 41 S. W. 223; *Carlin v. Haynes*, 74 Mo. App. 34; *Guntley v. Staed*, 77 Mo. App. 155; *State v. Palmer*, 161 Mo. 152, 61 S. W. 651. The ruling of the trial court in this regard is therefore not open to review at the defendants' instance in this court. Thus it appears that the judgment for the plaintiff for \$1,847.09, with 6 per cent. interest from the institution of this suit on September 28, 1898, was proper, and without reviewable or reversible error, unless some of the special defenses of the defendants or some of the claims of the plaintiff for other items should be found to be tenable.

3. Delays. The plaintiff claims \$450 for delay. The contract provided that the work should be completed on August 1, 1897, provided the lines and levels of the building be furnished the contractor on or before November 12, 1898. The work was not, in fact, completed at the time the plaintiff took possession on October 31, 1897. It is not clear from the facts disclosed by the abstract of the record whether the lines or levels were furnished to the contractor before November 12th. The contract was signed on November 7th. The contractor began work on November 9th, and the testimony shows that the lines and levels were furnished a few days after the work began, but how many days is covered by the term "a few days" nowhere appears. The referee and trial court denied the plaintiff's right to recover for delays, basing the ruling upon the ground that the plaintiff had interfered with the contractor in his work, and that the effect of a letter written by the plaintiff to Legg, and by him forwarded to the contractor, and dated July 21, 1897, was to suspend the work, which at that time was about seven-eighths finished. In that letter the plaintiff objected to the oak wood and the mahogany that was used in the house. As the learned referee aptly states it, "the storm center of this controversy" is in respect to the hardwood used in the building. The trouble began in January, 1897, assumed form in July, and culminated in the plaintiff rejecting all the woodwork and having it done over again after it obtained possession on October 31st. In view

of the bitter feeling that grew up between the plaintiff and the contractor before August 1, 1897, and of the plaintiff's condemnatory letter of July 21st, and the uncertainty in which the whole matter was involved in consequence thereof, and in further view of the uncertainty in the evidence as to whether the condition precedent to the contractor's liability for delay was complied with, it cannot be fairly held by this court that the referee and trial court were in error in not allowing the plaintiff anything for delay, and the judgment in this regard will not be disturbed by this court.

4. Trade Terms. After the plaintiff got possession of the house on October 31, 1897, it condemned nearly all the hardwood work that the contractor had put in, and had it taken out, and the work done over again, at a cost of \$5,822; and this is the principal controversy between the parties. The trial court allowed \$1,307 on this account, being \$326 each for the parlor, library, and room over the parlor, and \$329 for the room over the dining room, and rejected the balance of the claim. The parlor was to be finished in maple, the ceiling of the dining room in oak, the library in cherry, the room over the parlor in cherry, the room over the library in maple, the room over the dining room in cherry, and the front vestibule door frames, the reception hall, the main stair hall, the archway in the first and second story of the main stair hall, the panel wainscoting and ceiling in the main stairway, the pilasters and beam under the ceiling in the second story, and the landing of the main stairs, were to be of selected San Domingo mahogany. As above stated, the trial court held that the work in the parlor, library, and the rooms over these two rooms was not up to the specifications. As to all the other rooms, except where mahogany was to be used, the court held that the work was fully up to the requirements of the specifications; and as there was substantial evidence upon which to base that holding this court will not interfere with the judgment in that regard. As to the work where mahogany was to be used, the evidence is uncontradicted that no San Domingo mahogany was used, but that in January, when the subcontractor was about to begin with the woodwork, he went to see the architect, and the architect showed him a sample of mahogany he had obtained from Seidel in St. Louis. The subcontractor took the sample, and afterwards reported to the architect that no San Domingo mahogany of the requisite sizes could be had in St. Louis, and he thereupon showed the architect a sample of Mexican mahogany, which he proposed to use, and said that he did not want to order the wood unless the architect would approve the work. The architect examined the sample, and approved it, and told the subcontractor to go ahead and use it. Before doing so, however, the contractor took the sample to the residence of the pres-

ident of the plaintiff company, and showed it to him and his two sisters, and he and the latter compared it with some mahogany furniture they had in the house, and declared that it was not San Domingo mahogany, and directed the contractor not to use it. He replied that the architect had approved it, and he intended to use it, and he proceeded to do so. Nothing further was said or done about it, however, until July 21st, when the plaintiff wrote to the architect, saying the mahogany used in the house was not San Domingo mahogany, and it insisted upon having that kind of mahogany. The architect forwarded the letter to the contractor, but the contractor proceeded with the work, after a short cessation in consequence of the letter, and substantially completed it before the plaintiff took possession October 31st. Thereafter the plaintiff had all the mahogany taken out, and mahogany obtained in Boston was put in, and this constitutes the chief contention in this case. The defendants contend that the call in the specifications for select San Domingo mahogany does not mean mahogany that was grown on the island of San Domingo, but that it is a trade term in St. Louis, and when employed in building specifications it means a good figured mahogany equal in density to that known as San Domingo. The architect testified: "Mahogany to satisfy the requirements of San Domingo need not be actually the product of the island of San Domingo. May be grown elsewhere, but is substantially to the eye of texture and color as if actually grown there. It is mahogany grown in that latitude. It is very seldom called for in specifications. Impossible to get it in St. Louis market. Is very expensive and rare. Most all mahogany grown in San Domingo goes east. Color and texture is what is required. Don't care whether it grows on island of San Domingo or in Central America or tropical America." Other witnesses testified to the same effect. In fact, there is no substantial testimony to the contrary in the case. It also appeared that the architect saw the mahogany when it was in the subcontractor's shop, being worked up for use in the house, and also while it was being put into the house, and that he approved it, and said he was pleased with it. In short, it clearly appears that what the contractor did in this regard was done with the knowledge, consent, and approval of the architect. The crucial question, therefore, is whether it was competent for the defendants to give to the term "San Domingo mahogany," used in the specifications, a technical meaning among the trade in St. Louis, and also whether the plaintiff is bound by the act of the architect in approving the mahogany that was used by the contractor. The rule of the law in this state bearing upon the first question is thus tersely and aptly stated by Black, J., in *Evans v. Western Brass Manufacturing Company*, 118 Mo., loc. cit.

553, 24 S. W. 175: "The general rule undoubtedly is that parol evidence cannot be admitted to contradict, add to, or vary a written contract; and it is the duty of the court to construe the writing. *Bunce, Adm'r, v. Beck, Ex'r*, 48 Mo. 286; *Black River Lumber Company v. Warner*, 93 Mo. 374, 6 S. W. 210; *State ex rel. Yeoman v. Hoshaw*, 98 Mo. 358, 11 S. W. 759. But it is equally well settled that proof of usage is often admitted to determine the meaning of the language used; for under many circumstances the parties may be supposed to contract with reference to a usage or custom, as they are presumed to use words in their ordinary signification. 1 *Greenleaf on Evidence*, § 292. 'The courts,' says Starkie, 'have long allowed mercantile instruments to be expounded according to the usage and custom of merchants, who have a style and language peculiar to themselves, of which usage and custom are the legitimate interpreters.' Starkie on *Evidence* (10th Ed.) p. 701. Hence it has been held by this court that it may be shown by way of a general and well-established custom that two packs of shingles of a certain size constitute a thousand. *Soutier v. Kellerman*, 18 Mo. 509. See, also, *Blair v. Corby*, 37 Mo. 314; *Kimball v. Brawner*, 47 Mo. 398; *Fruin v. Railroad*, 89 Mo. 402, 14 S. W. 557; *Wolff v. Campbell*, 110 Mo. 119, 19 S. W. 622; *Robinson v. United States*, 13 Wall. 365, 20 L. Ed. 653. It is true, as some of these cases just cited show, that usage cannot be permitted to control the terms of a special contract by introducing something which is repugnant to or inconsistent with the contract. But it does not follow that evidence of usage can only be received where the words of the contract are ambiguous. Such evidence is often received to show that words are used in a sense different from their ordinary meaning, as in *Soutier v. Kellerman*, supra. Such evidence is received on the theory that the parties knew of the usage or custom, and contracted in reference to it, and in such cases the evidence does not add to or contradict the language used, but simply interprets and explains its meaning." Applying this rule to the facts in the case at bar, there is no room left for doubt that the term "San Domingo mahogany," when used in specifications in St. Louis, is a trade term, and that it does not mean mahogany that was grown on the island of San Domingo, but means a good figured mahogany, equal in density to that known as San Domingo mahogany. In fact, there is some evidence in the record that of late years the government of San Domingo has prohibited the cutting of the mahogany trees on that island. There is also no substantial conflict in the evidence that the mahogany the plaintiff had put in after it got possession of the building was not San Domingo mahogany, but was practically the same kind of mahogany that the defendant contractor put in, and which the plaintiff had

removed. It cannot be doubted from the testimony of the architect in this case, and from his acts and conduct during the progress of the work throughout the whole controversy, that when he used the term "San Domingo mahogany" in the specifications he intended it in the trade sense, and not in the ordinary sense of the term, and therefore the parties must have intended that it should be so understood. So construed, the contractor complied with the specifications, and the action of the plaintiff in removing the mahogany that the contractor put in the house was without legal right or excuse, and therefore the plaintiff is not entitled to recover anything from the defendants on this account.

This conclusion makes it unnecessary to consider fully the power of the architect to bind the owner by accepting and approving the work. It is enough to say that the architect fully approved the acts of the contractor with respect to the mahogany at all stages of the work, and that the contract of the parties in this case clothed the architect with broad and almost plenary powers in this regard, and that there is no room to doubt the honesty or impartiality of the architect in this particular, or in any respect in this case. If owners do not desire to be bound by their architects with respect to their acts in accepting or rejecting the work or materials that go into their houses, they should be more careful in conferring such broad powers upon them, and should not attempt to hold the contractor bound by the decisions of the architect, while repudiating the power of the architect to bind them. On the other hand, architects should carefully avoid acting in fraud of the rights of either party to the contract while exercising the powers conferred, for, if they so do, their acts are not binding, and they are liable to the party injured by the fraud.

It follows that the judgment of the Circuit Court upon this branch of the case was without error in law or in fact. And this conclusion also disposes of the plaintiff's claim for \$91.50 for repairs on woodwork made necessary by the reconstruction of the cabinet work.

5. Stone Work and Granitoid Walks. The judgment of the trial court with respect to the claim of the plaintiff for \$783.25 for alleged improper stonework is not open to review in this court, because there was a sharp conflict in the evidence as to whether the contractor had failed in his duty in this respect. The rule also applies to the claim for \$429.77 on account of alleged defective granitoid walks and drives. There was also evidence to the effect that the defective condition of these walks and drives was attributable to the fact that they were not required to be of sufficient thickness, and the subcontractor called attention to this feature when he was doing the work, and said that a good job could not be expected. The rule also applies to the claim for \$408.81

for certain minor items. The evidence was conflicting, and this court will not interfere.

6. Watchmen and Heating. The plaintiff claims \$595 for the cost of watchmen and of coal for heating the house while the work of refinishing the house was in progress and after the plaintiff got possession. It has already been shown that the plaintiff was not justified in having the bulk of this work done, but was justified in having the work in the parlor, library, and the room over the same, done over again. As to this part of the cost, the plaintiff would be entitled to recover. But the trouble is that the claim is made in bulk, and there is no sufficient data given for apportioning the claim between the part the plaintiff is entitled to recover and the part it is not entitled to recover. Under these conditions this court cannot interfere.

This disposes of all the claims of the plaintiff, and leaves for consideration the special defenses of the defendants.

7. Release of Surety. The defenses of the contractor have been disposed of in the decision of the plaintiff's claims, and, as the contractor asks no affirmative relief, no further attention need be given to his defenses.

The surety claims to have been released by the following circumstances and acts of the plaintiff: First, that after the contract was executed it was changed by adding two pages to the specifications, by which the original specifications, which gave the contractor the option to use either Spanish or Ludovici tile on the roof of the house, was taken away, and instead he was required to use Spanish tile, and that the contractor had intended to use Ludovici tile, and the change caused a loss of \$280 to the contractor; second, that a brick wall was required to be put in under the library, at a cost of \$65 or \$70 to the contractor; third, that additional supports were required to be put in to stiffen the roof, at a cost of \$75 or \$100 to the contractor; fourth, that the excavation for the cellar was reduced, and the elevation of the house thereby increased; no extra cost to the contractor is charged therefor.

As to the first contention it appears that there were two pages added to the specifications, whereby the contractor was required, *inter alia*, to use Spanish tile on the roof, and was not given the option to use Spanish or Ludovici tile as the specifications first called for. But there is no substantial conflict in the evidence that this change was made before the contract was executed by the parties or signed by the surety. In fact, it is uncontradicted that in consequence of this change the contractor increased his bid from \$18,420 to \$18,800. There is no room for doubt that the specifications under which the work was done were the specifications intended by the contract, and hence the parties are bound thereby, notwithstanding the parties did not identify the specifications as

the contract seemed to require, but the architect alone signed them. The first claim to a release is therefore untenable.

As to the second and third contentions, it appears that the brick wall under the library and the additional supports under the roof were put in by the contractor voluntarily, in order, as he expressed it, to make a good job, and the contractor makes no affirmative claim for any such extra work in his pleadings. The whole matter is apparently an afterthought, and the referee and trial court properly held that the contention was untenable.

As to the fourth contention, the cellar was not excavated to the depth contemplated, and in consequence the house stood higher out of the ground. The only difference that was thereby made was to save the contractor the cost of 1 foot and $6\frac{1}{2}$ inches of excavation. The dimensions and amount of work upon the house were otherwise unchanged. Of this claim it is only necessary to say that the third and ninth clauses of the contract contemplate that alterations might be made in the plans and specifications, and that the architect should have power to add or omit work as might be deemed necessary, and that the contractor should be paid for all additional work. In view of this provision of the contract and of the contention of the surety with respect to the powers of the architect so far as they apply to the claim of the plaintiff, it does not lie in the mouth of the surety to claim that the architect had not the power to order the excavation aforesaid to be omitted.

This disposes of the questions of release urged by the surety, and leads to the conclusion that the judgment of the circuit court must be affirmed. It is so ordered. All concur.

SCHUBACH v. McDONALD, Judge, et al.
HIRT v. KINEALY, Judge, et al. **LEONARD v. FISHER**, Judge, et al. **SCHUBACH v. HOUGH**, Judge, et al. **STEINER v. WOOD**, Judge, et al. **WASSERMAN & CO. et al. v. HOUGH**, Judge, et al.

(Supreme Court of Missouri. Dec. 23, 1903.)

CARRIERS — LIMITED TICKETS — TRANSFERABILITY — SALE BY UNAUTHORIZED PERSONS — TICKET BROKERS — INJUNCTION.

1. Where a court has jurisdiction of the subject-matter, it has power to decide whether a petition states a cause of action, and failure to state a cause of action, or the defective statement of a good cause of action, does not affect the jurisdiction.

2. A petition by a railroad against a ticket broker alleged that on account of the World's Fair nontransferable excursion tickets would be issued, based on reduced rates, which, by their terms, would be good only in the hands of the original purchaser, and that it would be impossible or unbearably inconvenient for the original purchaser to be identified in St. Louis, and have the return ticket stamped, or for the train conductors to determine whether the person attempting to ride was the original purchaser;

that it would be a fraud on the railroads for any one except the original purchaser to ride on such a ticket, and a fraud for the original purchaser to sell the return tickets to brokers, and for the brokers to sell the tickets to third parties; that the railroad could not ascertain that the frauds were to be committed until the trains had left St. Louis and the tickets presented; that the ticket brokers were insolvent, and that the discovery of the frauds would involve a multiplicity of suits—the prayer was for an injunction to restrain defendants from buying, selling, or dealing in tickets issued by plaintiff which by their terms were nontransferable. *Held* that, if the bill was insufficient to invoke the jurisdiction of the court because failing to set out a concrete case and live subject-matter, it was made good by the broker's return to the rule to show cause, which alleged that the broker had a number of such tickets, which he had purchased in good faith, under the belief that they were transferable, and would be honored, by whomsoever presented; and that an injunction would render such tickets valueless, and destroy the broker's business; and therefore a writ of prohibition to restrain the issuance of the injunction would not lie.

3. It is competent for a railroad to issue special tickets, based on reduced rates, and to make them nontransferable, and valid only in the hands of the original purchaser; and that such tickets may be limited or unlimited as to time or occasion, and the original purchaser thereof cannot assign or transfer them, or any rights whatever thereunder, to any third person.

4. If any person buys a special nontransferable ticket, and sells it to a third person, to be used by him, the railroad can invoke the aid of equity to cancel the contract because of the fraud thus perpetrated; or, if the ticket is used by another, it can sue for damages for the breach of the contract.

5. Under Rev. St. 1899, § 3649, providing that injunction may issue to prevent the doing of any legal wrong whatever, where, in the opinion of the court, an adequate remedy cannot be afforded by an action for damages, injunction may issue in cases involving a threatened fraud where defendant is insolvent, and the threatened injury would be irreparable, or the redress of the injury would result in a multiplicity of suits.

6. There is an existent controversy concerning a legal subject-matter between live parties presented for adjudication to the court and within its jurisdiction where a petition for injunction, together with the return of the rule to show cause, show that the defendant ticket brokers have in their possession, and assert a property right to, nontransferable tickets issued by plaintiff railroad, and sold to defendant brokers by the original purchaser, and which the defendant brokers threaten to sell to others.

7. Ticket brokers who assert a right to buy and sell and deal in nontransferable railroad tickets notwithstanding their terms, and notwithstanding the fact that the original purchaser could confer no rights upon any one thereunder, thereby threaten to invade an existent property right of railroads, which, owing to the insolvency of the brokers and the nature of the business, will work irreparable injury, and which entitles the railroads to injunction restraining them from so doing.

8. The court, by granting an injunction restraining ticket brokers from buying and selling nontransferable railroad tickets, does not infringe on the powers of the Legislature.

Valliant and Gantt, JJ., dissenting.

In Banc. Separate applications for writs of prohibition by Herman Schubach, George L. Hirt, Charles J. Leonard, Max Schubach, Simon Steiner, and Wasserman & Co. and others against Jesse A. McDonald and others,

judges of the circuit court of the city of St. Louis, and the Chicago & Alton Railway Company and others. On rule to show cause. Rule discharged.

Judson & Green and Henry W. Bond, for plaintiffs. Johnson & Richards, Chas. C. Allen, Geo. P. B. Jackson, and E. S. Robert, for defendants.

MARSHALL, J. These are original proceedings against the defendant judges of the circuit court of the city of St. Louis to prohibit them from further entertaining jurisdiction in certain injunction suits, pending before them in said court, wherein the railroads that are joined as defendants are the plaintiffs and the plaintiffs herein are the defendants. A preliminary rule was issued by one of the judges of this court, the defendants made return thereto, and the plaintiffs moved for judgment upon the pleadings.

The controversy is this: The defendant railroads have systems extending over a large portion of the United States, and have termini in St. Louis. The plaintiffs herein are ticket brokers engaged in business in St. Louis. The railroads, each for themselves, instituted about 50 suits in the circuit court of St. Louis asking injunctions against the plaintiffs herein and other ticket brokers in that city. The petitions are practically alike. The substance of the averments of the petition is fairly stated by one of the counsel for the defendants to be as follows: "That in the year 1904 the Louisiana Purchase Exposition Company will hold a World's Fair at St. Louis, to which all of the nations of the world have been invited, to which 23,000 citizens have subscribed, and the federal government contributed \$5,000,000, the city of St. Louis \$5,000,000, the subscribers \$5,000,000, and the state of Missouri \$1,000,000 for a state exhibit. That various meetings and ceremonies will take place before and during the fair. That to enable the people to attend the fair and such meetings and ceremonies excursion tickets will be issued from time to time. That they will attend in such large numbers that it is impracticable to secure their signatures to the return parts of the tickets. That for the same reason identification is impracticable. That, in addition to these World's Fair tickets, said railroad, from time to time, issues nontransferable 'excursion' tickets, 'mileage' tickets, and 'commutation' tickets below the regular one-fare rate for various meetings, assemblages, and purposes. That such tickets are by their express terms, set forth therein, good for the transportation of the original purchaser alone, and void in the hands of others. That by virtue of the terms of said tickets, if presented by one other than the original purchaser, the conductor must lift the same. That the sale of such nontransferable tickets, where they are interstate, is forbidden by the interstate commerce law,

and where within the state is forbidden by the laws of the state of Missouri, because the purchaser would thereby get a lower rate than the general public. That the sale of the same is not only void for that reason, but because it is a fraud on the purchaser and on the railroad company, or a joint fraud on both. That where persons purchase such tickets innocently it frequently leads to their being ejected from trains because said scalpers have represented such tickets to be good; and that where the purchaser knows they are nontransferable, and void in the hands of persons other than the original purchaser, the buyer deceives the conductor and servants of the railroad; and that it is a fraud on the plaintiff. That some of the tickets so issued have a return coupon, which must be presented to the agent before presentation for the return trip. That the defendants are residents of the city of St. Louis and engaged in the business of ticket brokers or scalpers in the city of St. Louis, and that they have full knowledge of the character of such tickets, that they are issued at a special rate, and that they are null and void in the hands of any person other than the original purchaser. That they either deceive the buyer by representing them as good, or deceive the railroad by aiding the buyer in using them; and that Herman Schubach is engaged in the business of selling such tickets, and proposes to continue the sale of the same, and regularly deal in the sale of said nontransferable tickets, thus defrauding the railroad or the buyers of the ticket, or both. That by reason of the impossibility of detecting such frauds the plaintiff is subjected to recurring loss and injury, and the innocent buyer to pecuniary loss, annoyance, and humiliation. That the burden cast on the conductors of detecting such fraudulent tickets subjects the railroad company to constant danger from suits for damages for unavoidable errors, and subjects the railroad and public to interruption and delay in the operation of trains. That the railroad company has no way of discovering who the persons are who so defraud it, or who are thus defrauded, by the purchase of such nontransferable tickets, because of the impossibility of securing evidence of such frauds, and that, if such frauds were detected, it would lead to a multiplicity of suits. That the defendants are financially irresponsible, and no judgment at law could be collected. That in consequence there is no adequate remedy at law. That it is the constant practice of the plaintiff and its connecting lines to issue tickets at reduced rates to the traveling public, which by their terms are nontransferable, and constitute a special contract between the plaintiff and the original purchaser, whereby the original purchaser agrees that the ticket shall not be transferred by him to any other person. That the defendants are, and for a long time past have been, engaged in the business of buying, selling, and dealing

in such tickets and inducing the original purchasers to sell the same." The prayer of the petition is that the defendants therein (the ticket brokers) be enjoined from buying, selling, or dealing in tickets issued by the railroad, plaintiff therein, which, by the terms thereof, are nontransferable.

The judges severally issued rules upon the defendants therein to show cause on a day certain why injunction should not issue as prayed. Upon the return being made to the rule, the six circuit judges before whom such injunction cases were pending sat together, and the matter was fully argued before them, with the result that they determined that temporary injunctions should issue, and accordingly each of the judges separately issued injunctions in the following form: "Now at this day come the parties hereto, by their respective attorneys, under the order to show cause heretofore issued herein, and submit the application for a temporary injunction to the court upon the petition and the return of the defendant to the order to show cause, and the court, having duly considered the same, and being sufficiently advised in the premises, doth order that upon plaintiff giving bond in the sum of twenty-five hundred dollars (\$2,500) conditioned according to law, with good and sufficient surety or sureties to be approved by the court or judge or clerk thereof in vacation, the defendant, his agents, servants, and employes, and all other persons acting for him either directly or indirectly, be, and are hereby, enjoined and restrained until the further order of the court from buying, selling, dealing in, or soliciting the purchase or sale of any mileage passenger ticket, or any part thereof, or any excursion passenger ticket, or any part thereof, or the return coupon thereof, or any part thereof, or any commutation passenger ticket, or any part thereof, now being issued, or heretofore issued and sold, or which may hereafter be issued and sold by plaintiff for passage over its railroad, or issued by any other railroad for use over plaintiff's road, or any part thereof, where any of the above-described tickets were sold, and where it appears upon any such ticket, coupon, or return ticket that same was issued and sold below the regular schedule rate under contract with the original purchaser, entered upon such ticket, and signed by such original purchaser, that such ticket is nontransferable, and void in the hands of any other person other than the original purchaser; and from soliciting, advertising, encouraging, or procuring any person other than the original purchaser of such ticket to use or attempt to use the same for passage on any train or trains of the plaintiff: provided, however, this order shall not apply to the sale of any such afore mentioned and described tickets that were purchased by defendant from plaintiff or any of plaintiff's duly authorized agents, and not for defendant's use as a passenger over plaintiff's road."

Thereupon the defendants in such injunction suits applied to one of the judges of this court for writs of prohibition to prohibit the said judges from enforcing such injunctions, and from entertaining further jurisdiction of such injunction suits. The petitions for prohibitions are alike, and predicate a right of action upon a charge that the circuit judges had no jurisdiction, or acted in excess of their jurisdiction, in the premises, in the following respects: "Plaintiff states that in and by its aforesaid proceedings said court, and defendant, as judge thereof, transcended and exceeded its lawful jurisdiction in the following particulars: (1) Said petition for injunction stated no matter or thing upon which a court exercising equity powers could grant any injunction, or the particular writ awarded in this case. (2) Said petition for injunction is not based upon any specific property for the protection of which judicial protection is sought; but it is attempted by the injunction sought and granted in said cause to lay down a rule of civil conduct, so that the business of this plaintiff would be permanently destroyed by the exercise of the judicial power thus exercised without reference to any specific existing property. (3) Said petition for injunction and the temporary injunction thereon granted in prescribing a rule of civil conduct regardless of any existing property is an attempted usurpation of the legislative power of the state, which alone can prescribe a rule of civil conduct covering future transactions having no relation to existing properties and their judicial protection. (4) That the necessary effect of this attempted regulation of civil conduct by a blanket injunction covering property rights hereafter to be created and acquired will be the substitution of summary hearings in contempt for the orderly determination of controversies by court or jury when controversies as to existing property rights are presented for hearing. (5) Said injunction serves the purpose of taking the property of plaintiff without 'due process of law.' (6) Said injunction is against the law of the land, and thereby, if permitted to stand, destroys a lawful avocation and business of plaintiffs. (7) Plaintiff is remediless in this: that his business is interrupted and destroyed by the granting of the injunction herein, and that the remedy by motion to dissolve in the circuit court is wholly inadequate, as, even if said injunction should be dissolved, it may be maintained in force by an appeal, and, in any event, plaintiff's business would be wholly destroyed before the final determination of the same could be reached by this unwarranted and illegal procedure of said court, outside of its lawful jurisdiction."

The defendants made return to the preliminary rules, setting up the proceedings in the injunction cases in the circuit court, and justifying the action of the circuit judges, and maintaining the jurisdiction of that court. The plaintiffs, by way of replication, ask that

For the sake of brevity the plaintiffs herein will be hereinafter referred to as the "ticket brokers," and the defendant railroads as the "railroads."

1. Reduced to its essentials, and crystallized, the ticket brokers' position is that no "concrete case" is stated in the injunction suits which a court has power to deal with. Or, otherwise stated, that there is no existing controversy between the ticket brokers and the railroads which could constitute a cause of action upon which a court could act. Or, amplified, that a court of equity has jurisdiction to issue injunctions as a class, but it has no power to issue an injunction where only abstract rights are involved, or where the injury is merely apprehended or feared, and is not immediate, impending, and imminent, and that to authorize a court that has jurisdiction to act "there must be an existent basis of facts affording a present right which is directly threatened by the action sought to be enjoined. It has no power to enjoin unless the conditions have already arisen and come into being, which could be injured by the acts sought to be restrained"; and that courts cannot determine the rights of parties in advance of an actual, existing controversy concerning them. Or, as counsel happily expresses it: "The abstract right must assume a concrete form before it becomes property in the judicial sense, capable of judicial protection." These are fundamental essentials in the law, and it has always been true that there must be an actual live subject-matter, as well as actual live parties, to every suit. It is also true that courts of equity alone have power to issue injunctions, and that they never exercise this power to allay mere apprehensions of injury, but only when the injury is imminent and irreparable. *Business Men's League v. Waddill*, 143 Mo. 495, 45 S. W. 262, 40 L. R. A. 501; *Lester Real Estate Co. v. St. Louis*, 169 Mo., loc. cit. 234, 69 S. W. 300. The railroads and the circuit judges do not controvert these propositions. The matter therefore compresses itself into the question whether or not a basic subject-matter over which a court of equity has jurisdiction was presented to the circuit court for adjudication by the injunction suits; that is, whether a matter was presented which that court has power to deal with, and not whether such a matter was inartificially or defectively presented. In other words, the question is one of jurisdiction, and not of pleading; for, if the court had jurisdiction over the subject-matter, it had the power to decide whether the pleadings were or were not properly drawn, and also to decide whether or not the plaintiff was entitled to the relief sought. If a court has the power to act, its jurisdiction is in no wise impaired by the consideration whether it acted in accordance with the law or erroneously. Given the jurisdiction, all else is a mere matter of

the subject-matter, it has the power to decide whether the petition does or does not state a cause of action, and the mere failure of a petition to state a cause of action or the defective statement of a good cause of action, in no way affects the jurisdiction of the court. *State ex rel. v. Scarritt*, 1 Mo., loc. cit. 339, 340, 30 S. W. 1026.

The crucial question therefore is, do the petitions of the railroads for injunction against the ticket brokers present a concrete or an abstract case? In the solution of this question the decision of the Supreme Court of the United States in the case of *Mosher v. St. Louis, Iron Mountain & Southern Railroad Co.*, 127 U. S. 390, 8 Sup. Ct. 1324, 1 L. Ed. 249, establishes the first postulate of the proposition. It is true, as the ticket brokers claim, that that was not an injunction suit; but the form of the action is immaterial, for it is the legal principles deduced and the rules announced that are important and pertinent. That was a suit for damages being put off of a train. The plaintiff purchased from the defendant, at St. Louis, a ticket from St. Louis to Hot Springs and return. The ticket, by its terms, required that the original purchaser should identify himself to the satisfaction of the defendant's agent at Hot Springs, and that the return ticket should be officially signed and stamped by the agent at Hot Springs; all of which the original purchaser agreed to "in consideration of the reduced rate at which this ticket sold." The plaintiff failed to so identify himself, and failed to have the return ticket stamped, and in consequence was put off the train, and sued for damages. The lower court sustained a demurrer to the petition and the Supreme Court of the United States affirmed the judgment, holding that a railroad company has a right to make a contract with the purchaser of a reduced rate ticket that the original purchaser shall so identify himself, and that the return ticket shall be signed and stamped, and that the reduced rate at which the ticket is sold affords a consideration for such a contract. In other words, that for a valuable consideration a railroad may enter into a contract that a ticket sold to the passenger shall be non-transferable, and that the return portion shall not entitle even the original purchaser to a return trip unless he so identifies himself and has the return ticket so stamped. This is manifestly upon the principle that when persons *sui juris* enter into contracts that are not prohibited by law, based upon a valuable consideration, they must live up to them, and that each has a property right in the contract, which the law will protect. In addition to this, the laws of this state and the interstate commerce laws, while prohibiting discriminations, permit the railroads to issue excursion or commutation tickets at special rates. *Rev. St. Mo. 1899, § 1127*;

Supp. Rev. St. U. S. p. 690, § 22, and 2 Supp. Rev. St. U. S. p. 369, c. 61.

The second postulate in the case is that the petitions for injunctions recite that World's Fair excursion tickets, nontransferable excursion tickets, mileage tickets, and commutation tickets have been issued, or will be issued, from time to time, based upon a consideration of reduced rates, which, by their express terms, are to be good only in the hands of the original purchaser, and that it is or will be impossible, impracticable, or at any rate unbearably inconvenient, for the original purchasers to be identified in St. Louis, and have the return ticket stamped, or for the train conductors to determine whether the person attempting to ride on such return ticket is the original purchaser or not; that it would be a fraud upon the railroads for any one except the original purchaser to ride upon such return tickets, and a fraud for the original purchasers to sell such return tickets to the ticket brokers, and for the ticket brokers to sell such return tickets to any third party, to be by him so used, or upon the representation that they would entitle the buyer to so ride thereon; that, in the nature of things, the railroads could never ascertain that such frauds were about to be committed until after the trains had left St. Louis and such tickets were presented to the train conductors, and then it would be too late to ask for or receive injunctive relief against the perpetrators of such frauds; and that the ticket brokers are insolvent, so that no adequate remedy at law could be had against them; and, further, that, even if such frauds could be discovered in time to ask specific relief in each case, it would involve the prosecution of a multiplicity of suits to meet the exigencies. This postulate also includes the fact that the injunctions issued by the circuit court enjoined the ticket brokers from buying, selling, or dealing in any mileage tickets, and excursion tickets, or the return coupon thereof, or any commutation ticket, now issued or hereafter to be issued, "where it appears upon any such ticket, coupon, or return ticket that the same was issued and sold below the regular schedule rate under contract with the original purchaser, entered upon such ticket, and signed by such original purchaser, that such ticket is nontransferable and void in the hands of any other person other than the original purchaser." And bearing upon this proposition it is important to note in this connection that, while the return of the ticket brokers to the rule to show cause why an injunction should not issue denies the power of the court to issue an injunction on the ground that no concrete case is presented by the petition, it then very inconsistently sets up that it has been the common practice of the railroads to issue mileage tickets, excursion tickets, and commutation tickets which are stamped on their face "nontransferable," but that the practice and understanding of

the ticket brokers all over the United States is that such tickets may be transferred or sold, and that the name of the original purchaser may be signed by any one on the return ticket, and that the ticket brokers in the litigation have a number of such tickets, which they have purchased in good faith, and under the belief that they are transferable, and would be honored by whomsoever presented; and that the injunction asked would render such tickets valueless, and would destroy the business of the ticket brokers, and therefore they ask the protection of the court in that regard.

Upon the doctrine of "aider," therefore, the return of the ticket brokers helped out the insufficiency, if any, that existed in the petition, and unquestionably made a concrete case as to the tickets that are now held by the ticket brokers, and presented a live subject-matter between live parties, which the court had power and jurisdiction over. Therefore it cannot now be said that the circuit court had no jurisdiction, and, as that court had jurisdiction quoad such tickets, prohibition will not lie, for a writ of prohibition can never be made to perform the functions of an appeal or writ of error, and lies only where a court or tribunal clothed with judicial powers acts in relation to matters over which it has no jurisdiction, or, having jurisdiction over the subject-matter, acts in excess of its jurisdiction. *State ex rel. v. Aloe*, 152 Mo. 466, 54 S. W. 494, 47 L. R. A. 393; *Davidson v. Hough*, 165 Mo. 561, 65 S. W. 731; *State ex rel. v. Eby*, 170 Mo. 497, 71 S. W. 52.

The case might be allowed to rest here, but there are other cogent, decisive, and imperative propositions which must be adjudicated to make the case complete. It will be observed that reference is made in the petition for an injunction to the approaching World's Fair in St. Louis, and it is averred that, in order to make it possible for persons of ordinary means to attend it, the railroads have been induced by the officials of the fair to agree to issue excursion tickets at greatly reduced rates to all who desire to attend the fair or the various meetings, conventions, etc., that will be held in St. Louis at that time. And counsel for the railroads point out that the courts have issued injunctions against ticket brokers prohibiting them from dealing in nontransferable tickets that have been issued by the railroads on the occasions of the Nashville Centennial Exposition in 1897 (*Nashville R. R. Co. v. McConnell* [C. C.] 82 Fed. 66), the meeting of the Grand Army of the Republic in Cleveland (*Railroad v. Kinner*, 47 Ohio Law Bul. 204), the meeting of the Grand Army of the Republic in Washington (Penn. R. R. Co. v. Beekman, 30 Wash. Law Rep. 715), the meeting of the Confederate Veterans in New Orleans, in May, 1903 (*L. & N. R. R. v. Bitterman*, not yet reported), the meeting of the National Teachers' Association in Bos-

...not yet reported, and the Deca-
tory Exercises of the World's Fair at St.
Louis, in May, 1903 (*Wabash R. R. v. Was-
serman*, decided by Hon. H. D. Wood, of the
circuit court of the city of St. Louis, and
printed in the appendix to the briefs of coun-
sel herein). Counsel for the ticket brokers
meet this by saying, first, that all those cases
were decided by courts of inferior jurisdic-
tion; second, that in the case of *People ex
rel. Tyroler v. Warden of Prison*, 157 N. Y.
116, 51 N. E. 1006, 43 L. R. A. 264, 68 Am.
St. Rep. 763, the Court of Appeals of New
York held a statute that prohibited any one
except common carriers and their agents from
selling tickets for passage on railroads or
vessels to be unconstitutional; third, that in
the case of *Delaware, Lackawanna & West-
ern R. R. v. Frank* (C. C.) 110 Fed. 689, the
United States Circuit Court for the Western
District of New York denied an injunction
against ticket brokers as to special tickets
for the Pan-American Exposition at Buffalo
on the ground that the railroads had unlaw-
fully combined to fix rates for such expo-
sition; fourth, that in *New York Central &
Hudson River R. R. Co. v. Reeves*, decided
October 15, 1903, and reported in 85 N. Y.
Supp. 28, Judge Lambert, of the Supreme
Court of New York, denied an injunction
against the ticket brokers which sought to
prohibit them from dealing in tickets that
were nontransferable on their face, and held
that the purchaser of such a ticket had a
property interest in the ticket, which he
could sell, notwithstanding that by the terms
of his contract with the railroad the ticket
was on its face nontransferable, and that,
while the railroad could lawfully refuse to
transport the transferee or any other person
than the original purchaser on the ticket,
it was not entitled to an injunction to pre-
vent the ticket brokers from buying and sell-
ing such tickets; fifth, that in all the cases
cited by counsel for the railroads "a special
injunction issued under the special circum-
stances of the special ticket for the special
occasion." Or, otherwise stated, that upon
special occasions the railroads can lawfully
issue special tickets at reduced rates, which
are nontransferable, and which the ticket
brokers may be enjoined from dealing in,
but that when the railroads issue special
tickets, which upon their face show the con-
tract between the purchaser and the railroad
to be that they are issued at reduced rates,
and are not transferable, such tickets may be
dealt in by the ticket brokers, and the courts
cannot interfere, because they do not relate
to a special occasion, such as an exposition,
a meeting of the Grand Army of the Repub-
lic, or of the Confederate Veterans. In oth-
er words, that the jurisdiction of a court of
equity to issue an injunction in such cases
depends upon the occasion that gave use to
the issuance of such tickets, and that, if the
petition for an injunction recites that spe-

cial, which appear on their face to have
been issued at special rates, and to be used
by a specially named person, a concrete case
is presented wherein the court can enjoin the
ticket brokers from dealing in them; but, if
a special ticket is issued, which appears on
its face to have been issued at a special rate,
and to be used by a specially named person,
but which was issued generally, and not for
a special occasion, only an abstract right is
involved, and a court of equity has no jurisdic-
tion, and a writ of prohibition will lie
against it. Of course, it must be understood
that this is not the way the counsel for the
ticket brokers state the matter, but it is the
everyday meaning and result of their con-
tention. But, even if the contention of coun-
sel for the ticket brokers that such special
tickets must relate to a special occasion be
true, the writ of prohibition asked herein
would have to be denied as to all the rail-
roads except the Missouri Pacific, for all ex-
cept that road aver that they have issued, or
are about to issue, such special tickets for
the special occasion of the World's Fair in St.
Louis in 1904. True, they say they also in-
tend to issue such special tickets from time
to time, and the Missouri Pacific Railroad
does not refer to the World's Fair at all.
However, to allow this case to go off upon
any such consideration, or without squarely
meeting and deciding it in its entirety, would
not be subserving the ends of justice. Broad-
ly stated, therefore, the question for decision
is whether a petition by a railroad for an
injunction against a ticket broker to restrain
him from dealing in special tickets which re-
cite upon their face that they are issued at
reduced rates, and are nontransferable, but
which do not relate to any particular occa-
sion, states a concrete case, which a court of
equity has jurisdiction to hear and decide.
If it does, the writ of prohibition asked for
herein should be denied. If it does not, the
writ should go.

The power to contract concerning a legal
subject-matter carries with it the right to
make any kind of a contract in relation there-
to that the contracting parties may agree
upon. The power being unlimited, the nature
and character and terms of the contract to
be made and the occasion that gives rise and
the business necessities or exigencies that
prompt it are all matters of private conven-
tion between the parties. The power to limit
any kind of a contract in its operation to the
contracting parties, and to exclude from its
benefits any third persons, or to limit the
contract as to the time it shall continue, or
to leave it unlimited as to time, is recog-
nized in law. Thus a lease may prohibit the
lessee from assigning, transferring, or sub-
letting the premises, either for the whole or
any part of the term. A copartnership agree-
ment necessarily excludes the right of any
member to sell his interest, and thereby sub-
stitute the purchaser in his place as a mem-

ber of the firm, and such agreements may be limited or unlimited as to duration. A contract of hiring gives no right to either party to assign or transfer his interests or rights under the contract, and such contracts may be limited or unlimited as to duration. These illustrations are made not because they constitute similar cases to the case at bar, but because they show that when a right to contract at all concerning a particular subject-matter is conferred by the law, and the right so conferred is unlimited, or when the right to so contract arises out of the natural rights of man, it is purely a matter of agreement between the contracting parties what the terms, duration, character, or nature of the contract shall be. The Supreme Court of the United States, in *Mosher v. Railroad*, supra, and the statutes of the United States and of this state, recognize the right of a railroad to issue excursion or commutation tickets, based upon the consideration of a reduced rate. The right so conferred is not limited. There is no limitation that such tickets can be issued only upon special occasions. Neither is there any prohibition against the right to make such tickets non-transferable. Persons who do not wish to be so restricted and limited can purchase the usual unlimited, unrestricted ticket, and pay full price therefor, and then sell the unused portion thereof. But no one has any right to buy a special ticket at a reduced rate, which on its face recites that it is nontransferable, and that it is supported by the consideration of a reduced rate, and thereby agree to such limitations, and thereafter violate his agreement by transferring it to another, or to complain that he has not the right to transfer it. And no third person can acquire any right, or interest, or power, or claim in or to the ticket, or to the privileges conferred thereby, other than the original purchaser possessed or could confer under it; and, if the original purchaser had no power to transfer it, no assignee of such purchaser could acquire any rights under it, for the original purchaser could convey none. It is wholly illogical and sophistical to say the original purchaser had a property right in the ticket—the piece of paper on which the ticket or contract is printed—which he can sell and transfer, but that the assignee acquires thereby no rights against the railroad, and it can refuse to transport him. Such reasoning confuses the piece of paper upon which a contract is written with the agreement of the parties, and erroneously separates the evidence of the contract from the contract itself. Of course, any man can physically pass the piece of paper on which any kind of a contract is written to another, but that will give such other person no rights under the contract that is written on the piece of paper, if the contract itself is non-transferable. It follows, therefore, that under the law it is competent for a railroad to issue special tickets, based upon reduced

rates, and to make them nontransferable, and valid only in the hands of the original purchaser, and that such tickets may be limited as to time or as to occasion, or they may be unlimited as to time or occasion, and that the original purchaser of such tickets cannot assign or transfer such tickets or any rights whatever thereunder to any third person. It also follows that, if any person buys such a special ticket, and sells it to a third person, to be used by him or another, the railroad can invoke the aid of a court of equity to cancel the contract because of the fraud thus perpetrated; or, if the ticket is used by another, it can sue for damages for the breach of such contract. It also follows that, if such a case at law or such a suit in equity as to a single such ticket presents a concrete case over which a court has jurisdiction, a concrete case may likewise be presented if it relates to all such special tickets, whether they were all so purchased and so attempted to be transferred by the same person or not. To illustrate: If a railroad should issue a thousand such special tickets, and if one ticket broker should purchase the whole issue, and thereafter undertake to throw them on the market and sell them contrary to his agreement, or should actually sell them, and if the railroad company should invoke the aid of a court of equity or of a court of law in the one case or the other, there would be no room for doubt that a concrete case would be presented, which the court would have jurisdiction to decide.

But counsel for the ticket brokers inferentially say that, while such conditions might present a concrete case, the petitions for injunction in these cases and the injunctions issued by the court cover not only such tickets as have been issued and sold, and as to which there is therefore an existing contract, and hence a right of property in the contract, but that they also cover such special tickets as may hereafter be issued from time to time, and as to which there is no contract and no property right, and which have not been sold and may never be sold, and therefore no concrete case is presented, and that the injunctions issued are "blanket injunctions," as counsel call them, which undertake to prescribe a rule of civil conduct, which the Legislature alone has power to prescribe, and to punish any infraction of such rule by contempt proceedings, instead of by the usual remedies provided for a breach of such rules, and that it is therefore "government by injunction," instead of according to laws regularly enacted and enforced. If this contention is well founded, a writ of prohibition could not be too quickly issued by this court. But there is no proper foundation in this case for such well-known and generally accepted principles of law to apply to, and the injunction issued by the circuit court does not offend against these principles. The injunction applies to all such special tickets as have heretofore been issued,

and to such as are now being issued, and which have already been sold, and it applies also to all such special tickets as may hereafter be issued and sold. That is, the injunction applies only to such tickets after they have been sold, and after a contract has been entered into, and after property rights under the contract have arisen, and after a controversy in relation to such property rights has arisen, and after an injury to such property rights has been threatened by the ticket brokers, and after such injury has become imminent, and under circumstances and conditions set out in the petition which show *prima facie* that the damage resulting to such property rights by the threatened, but as yet unperformed, acts and conduct of the ticket brokers, would be irreparable, and such as the law affords no adequate remedy for. Such averments in a petition state a concrete case in equity, which the court has power to deal with. In fact, the original and primary office of a writ of injunction is to prevent a wrong—an injury—being done. Therefore, if the contention of counsel for the ticket brokers in this regard, that there can be no concrete case until the defendant has already acted, be well taken, it follows necessarily and logically that a preventive injunction can never issue, and the result of so holding would be to abolish preventive injunctions altogether.

It has already been made clear that the law affords no adequate remedy in cases of this kind, because of the insolvency of the ticket brokers, and because of the nature of the business and the frauds threatened upon the railroads, and upon innocent third persons who might be induced to purchase such tickets from the ticket brokers, and because of the hundreds and thousands of suits that would be necessary to redress the invasion of the rights of the railroads under such contracts by the ticket brokers, and because it would not be possible, in the nature of things, for the railroads to discover the frauds in time to ask preventive or injunctive relief. "An injunction is a judicial process issuing out of a court of chancery, whereby a party is required to do or to refrain from doing a particular thing. The most ordinary form of injunction is that which operates to prevent the performance of an act. The other form of injunction commands that an act shall be done." 16 Am. & Eng. Enc. Law (2d Ed.) p. 342. And section 3849, Rev. St. 1899, provides that the remedy by writ of injunction shall exist "to prevent the doing of any legal wrong whatever, wherever in the opinion of the court an adequate remedy cannot be afforded by an action for damages." By this, of course, is meant in any case that falls within the class of cases that are properly cognizable in a court of equity. Cases involving threatened frauds, where the defendant is insolvent and the threatened injury would be irreparable, or where the redress of the injury would re-

sult in a multiplicity of suits, fall within the class of cases properly cognizable in courts of equity. *Sylvester Coal Co. v. St. Louis*, 130 Mo. 323, 32 S. W. 649, 51 Am. St. Rep. 566; *Michael v. St. Louis*, 112 Mo. 610, 20 S. W. 686; *High on Injunctions* (3d Ed.) p. 12. The last-named author says, "The prevention of vexatious litigation and of a multiplicity of suits constitutes a favorite ground for the exercise of the jurisdiction of equity by way of injunction."

Originally injunctions were preventive only, and it is only within recent years that a mandatory injunction has sprung into existence. Preventive injunctions necessarily operate upon an unperformed and unexecuted act, and prevent a threatened, but non-existent, injury. A concrete case is presented whenever a right of the plaintiff is threatened by the defendant, and the damage would be irreparable, and where protection of that right belongs to the class of cases that are cognizable in equity. Of course, criminal cases do not fall within such a class.

Measured by these standards, the petitions for injunction asked the preventive aid of a court of equity in respect to rights of the railroad which a court of equity has power to protect against invasion and injury by the ticket brokers, which injury, it is alleged, is imminent, impending, and irreparable; and that this is so is the more clearly shown by the character of the return to the order to show cause, wherein the ticket brokers say they have invaded such rights of the railroads in the past as to such special tickets, and have money now invested in tickets of that character, which will be lost if the injunction is granted, and assert an intention and right to continue to deal in such tickets. Therefore, as to the tickets that have been issued and sold by the railroads, and are now held by the ticket brokers, both parties assert a property right therein; and hence there is an existent controversy, concerning a legal subject-matter, between live parties, and consequently there is a concrete case presented for adjudication to the circuit court, which it has jurisdiction to decide. It cannot, therefore, be said that the circuit court had no jurisdiction as to those matters. As to the tickets to be issued and sold hereafter, the railroads have a right to issue and sell tickets of such character as shall express on their face that they have been issued at a reduced rate and are nontransferable; and the ticket brokers assert a right to buy and sell and deal in them notwithstanding the terms thereof, and notwithstanding the original purchaser could confer no rights upon any one thereunder. There is therefore an existent property right of the railroads, which the ticket brokers say they intend to invade, the danger is imminent, and, under the allegations of the petition, the injury will be irreparable; and, in the very nature of the business, the injury cannot be adequately redressed by an action at law, or in any

other manner than by a preventive injunction. A proper case for the exercise of the powers of a court of equity by a preventive injunction was therefore also presented for the determination of the court, as to this branch of the case. And in granting such preventive injunctions the court of equity does not prescribe a rule of civil conduct, nor invade the province of the legislative branch of the government, nor does it establish a "government by injunction." It only does what has already been done by courts of equity since their adoption into the body of our institutions. It enforces the rules of civil conduct prescribed by the organic law or the statute law, or that arise naturally and regulate all men, by guarding the rights of one citizen against illegal invasion and irreparable injury by another citizen, and which the citizen, of his own force, is unable to guard for himself. And in the doing thereof, courts of equity recognize no forms, no technicalities, no delays, and no shadows, but act according to the dictates of good conscience, good morals, good conduct, and good government; and they compel every man to act right, and to respect the rights of others, whether his conscience is quick enough to appreciate the difference between right and wrong or not.

There is no merit in the contention that, by granting the injunctions in question in this case, the court has infringed upon the powers of the legislative branch of the government. The court has created no right in any one. The court has enacted no law or rule of conduct. The court has simply protected rights that are natural or were created by the Legislature. The right asserted by the railroads, and denied and threatened by the ticket brokers, is a right that is natural to mankind. It is a right that the Legislature of this state and the Congress of the United States have expressly conferred upon the corporation railroads, and which the Supreme Court of the United States has expressly declared they possess. It is a right that is guaranteed to every man by the organic law of the land—a right to contract concerning a legal subject-matter. Such a right is property, within the meaning of the law. The ticket brokers deny the existence of that right, and threaten to invade it. The law affords no adequate remedy for such an infringement of such a right. The damage will necessarily and obviously be irreparable. This being true, a concrete case for injunctive relief is presented, and, in the granting of such relief, it cannot justly or fairly be said that the courts invade the prerogatives of the lawmaking power in the manner whatever. That power has already created the identical right claimed, and it is the duty of the courts to protect that right in the same manner and to the same extent that they protect any other property rights that are possessed by any citizen. The railroads are not entitled to and are not accorded any right

in this regard that is not as fully possessed by any citizen, and that would not be protected in the same manner if such protection was invoked by the humblest citizen.

These considerations and conclusions result in holding that the circuit court had jurisdiction to hear and determine the injunction cases, and that it did not exceed its jurisdiction, and therefore the preliminary rule in prohibition must be discharged, at the costs of the plaintiff.

ROBINSON, C. J., and BRACE, BURGESS, and FOX, JJ., concur. VALLIANT and GANTT, JJ., dissent.

VALLIANT, J. Being unable to concur in the opinion of the majority of the court in these cases, and regarding the principle involved as one of much importance, I feel constrained to state as briefly as I can the reasons for my dissent.

I do not question that a railroad company may, under a valid contract, issue a ticket limited to be used only by the purchaser, or that it may lawfully refuse to honor such ticket for the transportation of anyone except the original purchaser. And possibly a case might arise under such circumstances as would justify a court of equity in interfering to prevent the transfer or sale of such a ticket. No such case occurs to me now. No one doubts that the circuit court, as a court of equity, has jurisdiction to issue injunctions, and no one doubts that to prevent irreparable injury or a multitude of suits is ground for equitable relief. I am also ready to concede that if the railroad company were required to wait until a case should actually arise, before calling on the court for an injunction, the remedy would not be so convenient, far-reaching, or so absolutely destructive of the business of the ticket broker, as it is in the form given. But conceding all those propositions, I hold that no court has jurisdiction to render a judgment or decree that in effect is but the enactment of a law, or to lay down a rule of conduct to take effect on a cause of action not yet arisen, or to render a judgment in advance, to be applied when the cause of action arises.

The cases made in the petitions on which the railroad companies obtained these injunctions are, in effect, that the railroad companies, in consideration of the World's Fair and other important public events that may occur in the future in St. Louis, are contemplating issuing round-trip tickets for the transportation of persons from any given point in the United States to St. Louis and return, the tickets to be nontransferable and good going and returning only for the passage of the persons to whom they are respectively issued; that each ticket is to recite on its face that it is sold at a reduced rate, and in consideration thereof the purchaser agrees not to transfer it, but that the defendants are engaged in the business of

buying and selling secondhand railroad tickets, and that, in spite of the recitals on the face of the tickets, these ticket brokers are liable to buy them and sell them to persons other than the original purchasers, who will use them in payment of their railroad fares, to the irreparable injury of the railroad companies; that if the railroad companies wait until the tickets are issued, and the brokers buy them and sell them, it will be too late to obtain equitable relief, because, in the very nature of the transaction, the deed would be done before the process of the court could be obtained. On the filing of those petitions, and on a joint preliminary hearing, the court issued injunctions enjoining the defendants, until the further order of the court, from buying or selling tickets that the railroad companies might thereafter issue of the character specified. At the preliminary hearing the defendants urged the proposition that there was no concrete case stated on the face of the petition, nothing to bring the judicial power of the court into action, nothing to give the court jurisdiction. But the court ruled to the contrary.

When a petition is filed in the circuit court which the defendant thinks does not state a case that gives the court jurisdiction, he has no right in the first instance to a writ of prohibition to prevent that court taking cognizance of it, because that court has the first right to decide whether or not the petition states a case within its jurisdiction, and the presumption is that, if the court has no jurisdiction of the case stated, it will so decide. And even if the court should erroneously decide that it has jurisdiction, the writ of prohibition will not ordinarily issue, if the rights of the parties can be adequately protected by appeal. But when the court at the very outset not only erroneously decides that the petition is sufficient to give jurisdiction, but renders an interlocutory decree of such effect that it is destructive of the defendants' rights, beyond redress by appeal, then the writ of prohibition ought to go. That is just what the court in these cases has done. The temporary injunctions are as effective for the destruction of the rights of the defendants as would be perpetual injunctions on final decree, because, in the very nature of the proceedings, the causes would not reach the appellate court until after the public occasions mentioned in the petitions had passed. The defendants have nothing to hope for in the final hearing, because there are no facts in issue to which evidence could be addressed to change the mind of the chancellor. When the cases come on for final hearing, what issue is there to try? Will the court hear evidence to prove at the time of filing the suits the railroad companies really intended to issue the kind of tickets specified, and that they had cause to apprehend that, if they should conclude to issue them, the ticket brokers would buy and sell them? There are no issues of fact. There is nothing

in the cases to try on final hearing. It is said that these injunctions can injure no one, because they are not to take effect until a concrete case arises—until one of the defendants does an act forbidden—then the injunctions cease to be mere abstract fulminations, and become concrete judgments. That is so, but the vice of it is that it is a prejudgment of the case before it has arisen. Suppose next year a railroad company issues a ticket in the form suggested, and a broker buys and sells it, and he is arraigned before the court on a charge of contempt. He comes into court and says, "I am advised that I had a legal right to buy and sell that particular ticket, and I ask for a trial on that issue." But the court will look at the ticket, and see printed on its face that it was sold at a reduced rate and is nontransferable, and will say to the defendant: "There is nothing to try. That was settled by a judgment rendered a year ago. The only question before the court now is as to the character and degree of punishment to be inflicted." Then, if the defendant should say, "But this ticket was not issued until a year after that judgment was rendered," the answer would be: "This judgment is prospective in its character, affecting not only what has been but what may be. It establishes a rule of conduct for all time, and confers the character of *res adjudicata* upon every transaction involving the buying and selling of a round-trip railroad ticket upon which the railroad company may have taken the care to have printed on its face that it was sold at a reduced rate, and is nontransferable." Suppose a railroad company should issue a ticket of the kind in question, and then, in order to ascertain if any one is violating the injunction, should send a detective to a broker to sell him the ticket, and send another to buy it, and the broker, so induced, buys and sells; could he not, when arraigned in court on a charge of contempt, well say, "I bought that particular ticket from an agent of the railroad company especially authorized to sell it to me, and I sold it to one in like manner authorized to buy it"? Doubtless, if he should be allowed to get that far in his defense, the court would not inflict the penalty for contempt upon him; but, giving to the decree its natural effect, the act suggested would be *res adjudicata* as well as to that transaction as to any other defense he might desire to make. It is no answer to this position to say that the court could be relied on to use its discretion to allow the defendant, when arraigned, to be heard concerning any particular defense he might have. If the court should hear him at all, it would only be *ex gratia*. If the judgment is right, he has no legal right to be heard, because it has already been prejudged that his handling of the ticket was unlawful. The only questions the judgment leaves open are, did the ticket bear those marks? and did the broker buy and sell it? If so, he is guilty. When a man

defendant was a comparative stranger in the state, only having been a resident of it for a few months before the trade. Kolb was his neighbor and acquaintance, to whom he looked for advice, and by whose opinions and judgment he seems to have been greatly influenced. He not only relied on him in his capacity as agent to find some one who would trade lands for his store, but on his judgment as to the quantity and value of such lands. His relation to the defendant was such that he was entitled to his "best judgment as to the contingencies of the bargain." No case can be found whose facts afford a better illustration of the wisdom of the rule than this. It is plain to us that the duties and functions of Kolb far exceeded those of a mere middleman, and the exception to the rule invoked by plaintiff is without application. Certainly this is not a case where a broker has simply brought the parties together, and has had no hand in the negotiations between them, they making their own bargain without his aid or interference, as in the case cited and relied on by plaintiff. In all the middlemen cases which we have seen, we find they concur in stating that, where the middleman has done anything to influence either party to make the sale, the contract will not be enforced. The undisputed facts of this case show that the contract sued on is one that must be condemned by considerations of public policy, and cannot be upheld. No finding and judgment upholding the contract in the face of the facts pleaded and proved would be permitted to stand.

We do not think the plaintiff was prejudiced by the giving of the defendant's third instruction, in which the term "agent" is used without a definition of it. It is an English word in common use, the meaning of which is as well understood by any jury of average intelligence as that of "bargain" in plaintiff's second. Such words do not ordinarily require a definition in order to be understood by a jury composed of men of usual intelligence.

The issue of dual agency having been submitted to the jury on ample evidence to justify it, and under an instruction unexceptionable in expression, the finding in favor of defendant is conclusive as to the entire case.

If the other issues tendered by the answer had not been sustained by the evidence, or if the instructions for the defendant submitting the same had been erroneous, the verdict would still have to stand, because no action to enforce the contract could be maintained. But, however this may be, we do not think the court erred in submitting the issue of the rescission of the contract. There was, as we think, evidence justifying the giving of the defendant's second instruction submitting that issue. And the same remark is applicable to the defendant's first instruc-

his fourth, which declared that the third defense set up by defendant, to the effect that the contract sued on was rescinded by mutual consent, and also the fourth defense, to the effect that Kolb, while acting as defendant's agent, was secretly acting as agent for plaintiff in making the trade, were both eliminated from the case by the admission of the defendant. If the defenses pleaded in the answer were inconsistent—if the proof of one would disprove the other—the plaintiff should have moved to strike them out; but, failing in that, we do not see that this objection could be raised by an instruction. Even if the defendant did testify at the trial that the reason why he did not carry out the contract was that he "had been fooled," "that the land had been falsely represented," surely the admission so made did not have the effect to preclude him from the benefit of the other defenses pleaded and proved. We know of no rule of practice that would justify a court on any principle of waiver or estoppel to so instruct a jury.

We think that the judgment was for the right party, and accordingly it is hereby ordered to be affirmed. All concur.

TENNENT SHOE CO. et al. v. BIRDSEYE et al.

(Court of Appeals at Kansas City, Mo. Feb. 15, 1904.)

DEED OF TRUST — FORECLOSURE — ACTS OF TRUSTEE — JUNIOR LIENORS — RIGHTS — PARTNERSHIP — PARTNER'S LIABILITY — ACTIONS — PARTIES — MISJOINDER — WITNESS — IMPEACHMENT — INSTRUCTIONS — APPEAL — HARMLESS ERROR.

1. A trustee under a deed of trust which was a second lien on certain real estate was a member of a law firm which held the note secured for collection, and, after acquiring knowledge that the property was about to be sold, foreclosed such second deed, and sold the property for a nominal consideration of \$1,500, for the purpose, ostensibly, of cutting out a deed of trust which was a third lien; but before delivering the trustee's deed to the purchaser the trustee collected the full amount of the purchase price of the property previously agreed on, which was sufficient to have paid all liens, and retained the balance after paying the first two liens for the benefit of the law firm with which such trustee was connected, or paid the same over to the debtor, who was insolvent. Held that, since the firm owed no duty to the cestui que trust under the third trust deed, neither the firm nor the trustee's partner was liable for the trustee's acts.

2. A petition alleging such facts, however, stated a sufficient cause of action against the trustee.

3. Under Rev. St. 1899, § 672, providing that a judgment shall not be reversed for certain specified imperfections, a judgment in favor of plaintiff could not be reversed for a misjoinder of parties plaintiff.

4. Where a member of a law firm is individually acting as trustee under a deed of trust, knowledge acquired by his copartner in relation to the trust cannot be imputed to the trustee.

5. Where, in a prior action, defendant had refused to answer in a proceeding to take his

therefore obvious that the contract thus executed is one whose obligations may be enforced by either party to it.

No good reason is seen why the restrictive contract pleaded by defendant should not have been received in evidence. The exclusion of it necessarily precluded the defendant from the further development of the several defenses pleaded by its answer, and in that way it was prejudicial.

The judgment must accordingly be reversed, and the cause remanded. All concur.

HYATT v. VAN RIPER et al.

(Court of Appeals at Kansas City, Mo. Feb. 15, 1904.)

CORPORATIONS — INSOLVENCY — FAILURE TO PAY STOCK SUBSCRIPTIONS—LIABILITY OF MEMBERS AS PARTNERS—PETITION—SUFFICIENCY.

1. An incorporation was procured without payment of stock subscriptions, and the so-called directors never met thereafter, and whatever money was used in transacting business was furnished by a moneyed partner of the concern, and everything that transpired was as in the usual course as between partners. *Held*, that the organization and transaction of business under such circumstances was a fraud on third persons dealing with it in good faith, and all the members were liable as partners, though the charter had not been regularly annulled.

2. A petition against the members of an insolvent corporation, the stock in which had never been paid for, sought to recover against them as partners, and alleged, among other things, that plaintiff contracted on the faith of the company being what its articles of association warranted, viz., solvent. *Held*, that the petition in that respect stated a cause of action supporting the judgment for plaintiff.

Appeal from Circuit Court, Pettis County; Geo. F. Longan, Judge.

Action by John Hyatt against John C. Van Riper and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Sangree & Lamm and Montgomery & Montgomery, for appellants. Cashman & Bohling, for respondent.

BROADDUS J. The allegations of plaintiff's petition are substantially as follows: That defendants on the 9th day of June, 1899, filed certain articles of association, of what was known as the Sedalla Electric & Heating Company, showing a capital stock of \$100,000, divided into 1,000 shares of \$100 each, purporting to be all subscribed for by defendants, and that the full amount of such capital stock had been paid, whereas no part thereof had then or since been paid; that afterwards, on the 18th day of July, 1899, the defendants falsely and fraudulently represented to plaintiff that the entire capital stock was paid up, and that the corporation was duly organized, solvent, and ready to meet any and all liabilities; that plaintiff, be-

duced to enter into a certain contract with said company, with which he has fully complied; and that under said contract said company became indebted to him in the sum of \$4,103.18, of which \$628.18 is still due and owing to him. The petition further avers that the said company never had any legal existence, and no authority to enter into said contract, for the reason that the said articles of incorporation were procured by false and fraudulent representations made by defendants, and that said company had no assets to pay plaintiff's claim.

The court, upon request of the parties, made a finding of facts which is as follows: "That the 996 shares of stock subscribed by Stewart and the 1 subscribed by Zimmerman were not paid into the treasury of the corporation; that there were no false representations made by Mr. Van Riper to Mr. Hyatt as to the capital being fully paid up which were relied upon by Mr. Hyatt as an inducement to enter into the contract. The evidence showed that the payment credited upon plaintiff's claim did not come out of the company's treasury, but was realized upon a sale of its property on a judgment in favor of a company supplying materials for the erection of the plant. The defendant Van Riper testified that what money he used in the company's business was furnished by Stewart, who lived in the state of New York, and who was reputed to be wealthy. The defendants were all stockholders and directors of the company. The so-called directors never met after the incorporation. The court found for the plaintiff on the theory that defendants were liable as partners. Having already found that the contract was not entered into by plaintiff by reason of any representations of defendants as to the solvency of the company, there was nothing else upon which to base its finding. If, as contended by plaintiff, the said company had no legal existence, there can be no question of the correctness of the court's finding and judgment. In *Loverin v. McLaughlin*, 161 Ill. 417, 44 N. E. 99, it was held that "the directors and officers of a corporation are, under the statute, liable for its debts contracted by them in the name of the corporation before the certificate of its complete organization has been recorded in the county where its principal office is located. Most certainly, if defendants set up to do business under the style of a corporation which had no existence, they would be liable as partners, as the mere name under which they were doing business would not relieve them from liability as such." "A charter to conduct an exposition at St. Joseph, Missouri, was obtained from the state of Colorado, with a capital stock of \$1,000,000, when in fact there was only \$43,000 stock subscribed. The whole business of said corporation was to

laws of both states, and only colorable, and absolutely void, and the incorporators were partners, and liable as such for the debts of the alleged corporation." *Cleaton v. Emery*, 49 Mo. App. 345. Judge Gill, who rendered the opinion of the court, in speaking of the law of comity, quoted and approved the following from Morawetz on Private Corporations: "This law of comity was not established for the purpose of giving any state an unlimited power to dispose of the franchise of acting in a corporate capacity in other states. To obtain a charter for the purpose of evading the laws of a foreign state, under cover of the rule of comity, would be a fraud upon the state granting the charter, and to attempt to act under such charter in the foreign state would be a fraud upon the latter." In *Davidson v. Hobson*, 59 Mo. App. 130, the defendants had represented that they were acting for a corporation called the Steel Bar Company, when in fact it had no corporate existence. The court held defendants liable as partners. Individuals composing an incorporated company may render themselves personally liable to its creditors by their acts, defaults, and representations—such, for example, as representing the company to be solvent when they have knowledge to the contrary, permitting their assets to be wasted, or using their corporate existence as a cloak for the prosecution of an illegal business. *Beach on Private Corp.* § 163. And where there has been no legal incorporation, the members are individually liable as partners for all the obligations of the organization. And when the conduct of the parties operates as a fraud or deceit upon third parties, whatever their private intentions may be, the relation of partnership may be said to exist between them with respect to such third persons. *Id.* § 163; *Story on Partnership*, § 49. The authorities cited all go to the principle that under certain circumstances the members of a corporation may be held liable to third persons as partners. There can be no doubt but what such liability would exist where the members of a corporation falsely represent their corporation to be solvent, when in fact it is not. But as the finding of the court was that plaintiff was not induced to contract upon such representations, the judgment cannot be upheld on that ground.

The theory of the court, as has been stated, was that the defendants, under the evidence, were liable as partners, which involves a more serious question. And the finding and judgment must be sustained, if at all, upon the ground of fraud. The defendants, in procuring the incorporation without having paid any part of their subscriptions to the stock of the corporation, no doubt, committed a fraud upon the state, for which, upon the hearing of a writ of quo warranto, its char-

under the circumstances, was a fraud upon the state, it was likewise a fraud upon third persons having dealings with it. And to so hold would in no sense be challenging its corporate existence. It is not a party to the suit, and, notwithstanding plaintiff says it has no corporate existence, we think differently. Said company so organized was a fraud as to all the world having dealings with it, of which the defendants must be held, as a matter of law, with full knowledge. And it is not sufficient to assert that liability cannot attach to the directors who were participes criminis until the charter of the company had been regularly annulled by a decree of court, for such may never happen, in which event plaintiff would be without remedy. Surely, it cannot be that directors of said company, insolvent at its inception, are exempt from liability to third persons who contracted with it in good faith, believing it to be what it purported as solvent, and as so held out by defendants to the world under the certificate and seal of the state, fraudulently procured by them. It would be legalizing fraud. And besides, the defendants and the other directors of the association did not adopt the usual methods of a corporate body in the transaction of business. Whenever any money was to be used, it was furnished by Stewart, as the moneyed partner of the concern. It did not go into the treasury of the company. Not a dollar ever went into or out of it. No meetings of the directors were ever held at any time. Everything that transpired was as in the usual course as between partners. Partners in fact the defendants were, and we so hold.

As the petition alleges, among other things, that plaintiff contracted upon the faith of the company being what its articles of association warranted, viz., solvency, the petition in that respect stated a cause of action which supports the judgment. Other allegations of said petition are treated as surplusage.

For the reasons given, the judgment is affirmed. All concur.

WESTON v. LACKAWANNA MIN. CO.
(Court of Appeals at Kansas City, Mo. Feb. 15, 1904.)

MASTER AND SERVANT—PERSONAL INJURIES—SAFE PLACE TO WORK—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS—CONFLICT.

1. If the instructions given for both parties together fairly state the law applicable, and if the omissions in those given for plaintiff are fully supplied in those given for defendant, the instructions are not subject to objections.

2. The servant's knowledge of the master's neglect to furnish a safe place to work does not convert the danger arising therefrom into an assumed risk, but the servant's knowledge is to be considered under the plea of contributory

language to read and write the same, and to understand thoroughly the proceedings ordinarily had in courts of justice. * * * The only evidence we have that the juror complained of could not write is that he made his signature to the verdict by making his mark, as above stated. We do not regard that as sufficient to establish his disqualification. It does not follow but that he may have been a scholar and in every way qualified, but, with a disabled hand, he adopted the method stated as the best means he had of giving his consent to the verdict. We are satisfied that the mere signing by mark was not, alone, sufficient to overcome the presumption of qualification which arose when he was accepted on the panel by the court and the parties as competent. This view makes it unnecessary to discuss the point as to when defendant should have made known its objection.

The remaining objection to the judgment is error claimed in an instruction for plaintiff, by reason of its generality. The instruction, in general terms, informed the jury that there might be allowed damages in such sum as would justly and fairly compensate her for the injury she received, if any, and for the pain and suffering occasioned thereby. The instruction was general, but was correct as far as it went; and, if desired to be more specific, defendant should have framed one with that end in view, which would have made it as perfect as it is now claimed it should have been. *Browning v. Ry. Co.*, 124 Mo. 55, 27 S. W. 644; *Barth v. Ry. Co.*, 142 Mo. 535, 44 S. W. 778; *Matthews v. Ry. Co.*, 142 Mo. 645, 44 S. W. 802; *Robertson v. Ry. Co.*, 152 Mo. 382, 53 S. W. 1082; *Harmon v. Donohoe*, 153 Mo. 263, 54 S. W. 453; *K. O. & N. Ry. Co. v. Shoemaker*, 160 Mo. 425, 61 S. W. 205; *Wheeler v. Bowles*, 163 Mo. 396, 409, 63 S. W. 675; *Haymaker v. Adams*, 61 Mo. App. 581, 585. In the two last cases will be found a statement of cases formerly holding a different view which have been overruled by those here cited.

It follows from the foregoing that the judgment should be affirmed. All concur.

KYLE v. GAFF et al.

(Court of Appeals at Kansas City, Mo. Feb. 15, 1904.)

REVIEW—TRIAL BY COURT—FINDINGS ON CONFLICTING EVIDENCE—KNOWLEDGE OF AGENT—IMPUTATION TO PRINCIPAL.

1. The findings on conflicting evidence on an issue raised in a cause tried by the court is conclusive on appeal.

2. An agency to sell land is not general, and knowledge of the agent which may be imputed to the principal is only that which he obtains in the course of his own employment, and not with reference to what others are doing in effecting a sale.

principal.

Appeal from Circuit Court, Henry County; W. W. Graves, Judge.

Action by J. H. Kyle against Thomas T. Gaff and others to recover compensation for effecting a sale of real estate. From a judgment for defendants, plaintiff appeals. Affirmed.

Peyton A. Parks, for appellant. O. C. Dickinson and Lindsay & Hinkle, for respondents.

BROADDUS, J. Prior to her death, Rachel S. Gaff was the owner of a farm containing 660 acres in Henry county, Mo., which she was desirous of selling. Mrs. Gaff did not transact business herself, but always acted through her agent, James D. Parker, who had power to act as fully as she could herself. Mrs. Gaff died on the 29th day of March, 1901. Prior thereto, by her agent, she had placed the said land in the hands of plaintiff for sale. Upon her death the lands passed to defendants by will or descent. After her death said Parker became the agent of defendants, with the same authority he had while agent of Mrs. Gaff. The plaintiff introduced evidence tending to show that after the death of Mrs. Gaff his agency to sell the land was renewed by Parker; that he procured a purchaser at defendants' price; that the defendants consummated the sale so made by him, accepting the purchaser and conveying the land; and that defendants had notice through one Chisman, who had authority from Parker to sell, that he (plaintiff) had procured said purchaser. The evidence of defendants was contradictory to that of plaintiff, except as to that part relating to notice to said Chisman that plaintiff had procured a purchaser for the land. Chisman was not introduced to either confirm or contradict that part of plaintiff's testimony. The respective parties have discussed the evidence in detail, but, as there was a conflict in the particulars mentioned, which was a matter for the court to weigh and determine which side preponderated on the issue raised, it will only become necessary to pass upon the questions of law presented for our consideration. A jury was waived, the cause was tried by the court, and finding and judgment were for the defendants.

The court tried the case on the theory that the authority of plaintiff to sell the land derived from Mrs. Gaff terminated upon her death. There can be no doubt that the court was right in so holding, as it is elementary law that the authority of the agent terminates upon the death of his principal, unless it be specified that such authority is to continue longer. The declarations of law given by the court are to the effect that after the

¶ 1. See *Principal and Agent*, vol. 46, Cent. Dig. § 636.

in order for him to recover, he must show that after her death such agency was continued by Parker in behalf of defendants, and that under such agency he procured the sale of the land in question; or that plaintiff must show that he procured the sale with the knowledge of defendants; or that defendants knew at the time of the sale that plaintiff had procured the purchaser. The finding of the court was against plaintiff on each of these theories, which is conclusive upon him, except it be upon that relative to defendants having notice of plaintiff being the procuring cause of the sale made, of which there was no evidence save that which related to the knowledge of said Chisman as the agent of defendants. Knowledge of an agent is not always to be attributed to the principal. If Chisman was an agent, he was in no sense a general one. The defendants were only bound by such knowledge as he obtained within the scope of his employment. *Hickman v. Green*, 123 Mo. 165, 22 S. W. 455, 27 S. W. 440, 29 L. R. A. 39. It would not do to say that knowledge obtained by Chisman that plaintiff, who had no authority as an agent (and it must be conceded he had none, for the court so found), was engaged in procuring purchasers, must be imputed to defendants. To do so would be, in effect, clothing him with the power of an agent with full authority over the whole business. The knowledge he obtained in the course of his own employment, and not with reference to what others were doing, alone can be imputed to his principal. It follows, therefore, that plaintiff's participation in the sale of the land had no probative legal force, and the finding of the court that defendants had no notice of plaintiff's agency as the procuring cause of the sale was justified under the law governing the case. And it also follows that the information that Parker had while he was the agent of Mrs. Gaff cannot be imputed to defendants, because he was not then their agent. *Anderson v. Volmer*, 83 Mo. 403; *Wheeler v. Stock Yards Co.*, 66 Mo. App. 260; *Richardson v. Palmer*, 24 Mo. App. 480.

It does not appear that there was any error whatever in the trial of the cause, and it is therefore affirmed. All concur.

FAST v. GRAY et al.

(Court of Appeals at Kansas City, Mo. Feb. 15, 1904.)

APPEAL—RECORD—NEW TRIAL—DENIAL—BILL OF EXCEPTIONS—FILING.

1. Where the abstract of the record entries made by the clerk contained in an appeal record failed to show the filing and overruling of a motion for a new trial, only errors apparent on the face of the record proper could be reviewed,

2. Where there was no entry or minute of the clerk of the trial court showing that the bill of exceptions was ever filed, such bill could not be considered on appeal.

Appeal from Circuit Court, Pettis County; Geo. F. Longan, Judge.

Action by Jennie B. Fast, as administratrix, etc., against Ira O. Gray and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

John Cashman, for appellants. Barnett & Barnett and Bruce Barnett, for respondent.

SMITH, P. J. This is an action that was begun before a justice of the peace, and from there it was removed by appeal to the circuit court, where the plaintiff had judgment, and the defendants appealed here. The plaintiff has raised the objection that the record before us does not show that a motion for a new trial was filed in the trial court within the time required by the statute, nor overruled by that court. The case was brought here by what is commonly known as the "short method," authorized by section 813, Rev. St. 1899. It is true that that which purports to be a bill of exceptions does recite the filing and overruling of the motion, but the abstract of the record entries made by the clerk fails to show the filing and subsequent overruling of such motion. This omission is not supplied by any epitome contained in any part of the abstract or the statement. It is well settled in this state that, unless the record proper affirmatively shows that the motion was filed within the time required by the statute, no matter of exception can be reviewed, but only such errors as are apparent upon the face of the record proper. *Hill v. Combs*, 92 Mo. App. 242; *McCormick v. Crawford*, 98 Mo. App. 323, 72 S. W. 491; *Bates v. Ruth*, 88 Mo. App. 550; *St. Louis v. Boyce*, 130 Mo. 572, 31 S. W. 594; *Danforth v. Ry. Co.*, 123 Mo. 198, 27 S. W. 715, and cases there cited. Besides this, there is another objection equally fatal to that just noticed, which is that there is nothing outside of the recitals in the bill of exceptions—no entry or minute of the clerk—which shows that it (the bill of exceptions) was ever filed. Therefore, under the repeated rulings of all the revisory courts of this state, we are precluded from considering it. *State v. St. Louis*, 174 Mo., loc. cit. 124, 125, 73 S. W. 623, 61 L. R. A. 593; *Wilson v. Ry. Co.*, 167 Mo. 324, 66 S. W. 928; *Roush v. Cunningham*, 163 Mo. 173, 63 S. W. 877; *Bates v. Ruth*, 88 Mo. App. 552.

The restrictions operating upon our power to review preclude us from looking for errors beyond the face of the record proper, and, finding no error there, we are obliged to affirm the judgment. All concur.

(Court of Appeals at Kansas City, Mo. Feb. 15, 1904.)

PARTNERSHIP—INDIVIDUAL CREDITORS—PRIOR ATTACHMENT—INTEREST IN FIRM—LIEN FOR PURCHASE MONEY—CLAIMS—PRIORITY.

1. A prior attachment levied by a creditor of one of the members of a firm on the firm assets does not entitle such attaching creditor to priority of payment from the proceeds of the attached property, as against subsequent attaching firm creditors.

2. Where a bank loaned money to a borrower with which to pay for an interest in a firm, on such payment the money became assets of the firm, subject to the demands of firm creditors, and hence the bank acquired no lien or prior equity on the firm assets, for the repayment of the loan, as against partnership creditors.

Appeal from Circuit Court, Moniteau County; James E. Hazell, Judge.

Action by the Hargadine-McKittrick Dry Goods Company and others against Henry B. Sappington and others. From a judgment sustaining the priority of an attachment of defendant's goods by the Moniteau National Bank, plaintiffs appeal. Reversed.

Moorc & Williams, for appellants. R. M. Embry, for respondents.

ELLISON, J. The mercantile partnership of Sappington & Renshaw became insolvent, and they committed acts which caused several of their creditors to attach the partnership property. One of these partnership creditors was plaintiff Hargadine-McKittrick Dry Goods Company. The defendant Moniteau National Bank was an individual creditor of Renshaw. The bank levied an attachment, for Renshaw's individual debt, on the partnership property, prior to the levy made by either of the partnership creditors. The attachments were all confessed. The partnership had given a chattel mortgage on the property before any of these proceedings, and it was about to be foreclosed at a great sacrifice and to the injury of creditors. The partnership attaching creditors then filed an application with the judge of the circuit court in vacation, asking the appointment of a receiver, in which the defendant Moniteau National Bank was made a party. A receiver was appointed, who took charge of the property and sold it. This contest is over the proceeds of that sale, and involves a question of priority; that is, whether the defendant bank, as individual creditor with prior attachment, can be preferred to a partnership creditor with subsequent attachment. The plaintiff Hargadine-McKittrick Dry Goods Company were the last in point of time to levy their attachment, and if the claim of defendant bank is to be preferred there will be nothing left for them, and hence the contest here is chiefly between them as partnership creditors and the bank as an individual creditor. The bank claimed that the greater part of the debt owing to it was used

for this purchase money. The trial court, as near as we can gather from a somewhat imperfect record, took that view, and ordered that the bank, under its prior attachment, be first paid. Plaintiffs appealed.

The bank makes a double claim: First, that having the prior attachment, which passed into judgment, it is entitled to preference. This we reject as unsound. *Nat. Bank v. Brenneisen*, 97 Mo. 145, 10 S. W. 884. And, second, that, its claim being for money borrowed by the individual partner which he used in purchasing his interest in the partnership, it had a lien or prior equity over a partnership creditor. We feel constrained to rule this point also against the defendant. The law is not now disputed that a partnership creditor is preferred in his claim against the partnership property over an individual creditor of one of the partners, and that an individual creditor is preferred in his claim against the individual property of one of the partners over the claim of a partnership creditor on such property. *Hundley v. Farris*, 103 Mo. 78, 15 S. W. 312, 12 L. R. A. 254, 23 Am. St. Rep. 863; *Goddard-Peck Co. v. McCune*, 122 Mo. 426, 25 S. W. 904, 29 L. R. A. 681; *Level v. Farris*, 24 Mo. App. 445. And an attachment against one partner alone, levied on partnership property, only binds the interest of that partner. *Hill v. Bell*, 111 Mo. 35, 19 S. W. 959. A prior attachment of the partnership property by an individual creditor cannot give him prior rights over the partnership creditor when all proceedings are pending at the same time, and the partnership creditors have set up their claim of priority, as in this case, by their proceeding for a receiver. The result of the view taken for defendant would be to nullify the general provision of law giving priority to partnership creditors. For, if mere priority of attachment determined priority of claim, such law could rarely find practical effect, since if the partnership creditor was prior in attachment he would not need the law, and if he was subsequent in attachment he could not assert the law.

2. Defendants' claim of a lien for the money borrowed by the individual partner, and that, too, before he was a partner, cannot be upheld. It is sometimes permitted to be shown that what appears to be an individual debt is really a partnership debt, by some means, in the individual's name. But here the debt owing to the bank was for money borrowed for the individual purpose of buying his interest in the partnership. And, when he made such purchase, the property immediately became partnership property. It became the property of his copartners in common with himself. It became impressed with the rights of the other partners, prominent among which is that of having it first applied to the discharge of the partnership's debts, a right which the credit-

revoked, and himself appointed as such administrator. It was alleged that the petitioner was the brother and the only next of kin of the deceased, that he resided in Buffalo, N. Y., that Fitzgerald had procured himself appointed administrator for the purpose of circumventing petitioner as the next of kin, that the deceased left a large amount of personal property and large interests in certain railroad construction contracts, that Fitzgerald had refused to deliver to petitioner the effects of his deceased brother, and that the bond given by the said Fitzgerald was insufficient. The prayer of petition was for the removal of Fitzgerald and the appointment of petitioner as administrator, or, if this could not be done, that the Nashville Trust Company be appointed.

Within three days after the filing of the petition the defendant, Fitzgerald, filed his answer thereto. A full history of the life and the business connections of the deceased was given from the time of his arrival in Nashville, some years previously, up to the date of his death. The condition of affairs that existed at his death, and respondent's relation thereto, were set forth in detail. Many personal disqualifications were alleged against the petitioner as administrator, and many reasons given why the respondent should be retained in the office. It was said that the petitioner was a nonresident of the state; that he was possessed of little property, and, if not actually insolvent, was so near thereto as not to be a proper person to administer on the estate; that he had been in Nashville previously under assumed names, and aroused grave suspicions among the creditors. It is alleged that the only assets left by him was his interest in the railroad construction firm of Smith & Brady, then engaged in work on the Tennessee Central Road; that the assets of this firm were furnished by Brady, and that Smith had put nothing into it, but had drawn out considerable sums for his personal expenses; that there were certain unfinished contracts, which, if not completed, would result in the forfeiture of large retained percentages; and that the firm was involved in considerable litigation. It is further averred that the firm had no working capital, and that they were being furnished money and supplies by Fitzgerald & Litchford; that John Smith, at the time he died, was owing that firm about \$4,000, and was indebted to Fitzgerald individually about \$375; that, if everything did not result successfully to the administration, decedent's estate would be insolvent; that all the creditors, as well as Brady, surviving partner, desired respondent to be retained as administrator, and that deceased a short time before his death had requested the respondent to act as such; that the best interests of the estate required his retention; and that, if the petitioner was disqualified or

Upon the issues presented the county judge made the following order: "Upon the petition and answer thereto, proof and argument of counsel, the court is of opinion that the rights and the equities are with the defendant, and that the petition should be and is dismissed."

Petitioner appealed to the circuit court, and pending the appeal he applied to the county court for the appointment of an administrator pendente lite, which was denied.

The cause was heard before the judge in the court below, when the following occurred, as appears from the bill of exceptions: "This case was called for trial on May 23, 1903, and the witnesses on both sides were called to the clerk's desk and sworn, and directed to retire to the anteroom. Thereupon counsel for the petitioner began the reading of the petition filed in the cause, when he was interrupted by the court, and asked to state the pleadings and the issues presented thereby, which was accordingly done by counsel for both sides, and during the presentation counsel for petitioner criticised the appointment of Mr. Fitzgerald as administrator, when the court remarked that that was unnecessary, and that, if the court was of the opinion that any discretion was allowed the county judge under the statute for the appointment, he would not disturb that discretion, as he was convinced not only of the wisdom of the county judge, but as to the character of the man appointed, but that it appeared to him that the question was one of law—that is, under the statute, could any other be appointed administrator, except the next of kin, where such person applied therefor? To this suggestion of the court counsel on both sides assented, and thereupon it was admitted that James B. Smith was the brother and only next of kin of the deceased, that he was a nonresident of the state of Tennessee, and that he was demanding his own appointment as the administrator of his deceased brother. The court was of the opinion that the statute was mandatory in its provisions, and that the county court should have granted the petition of James B. Smith to appoint him such administrator, and should have revoked the appointment of Fitzgerald, and a decree was accordingly entered upon the minutes of the court."

Respondent, Fitzgerald, moved the court for a new trial, and to vacate the judgment which had been entered.

The grounds of the motion were: The error of the court in holding the statute mandatory in its character and giving preference to the next of kin, and in holding that this included also nonresidents. Second. That the defendant was prevented from making his proper defense by the ruling of the court at the beginning of the case that he would not disturb the discretion of the county court

in certain cases, but that there must be affirmative proof to sustain it. This inconsistent rule of the court prevented the introduction of proof which defendant would otherwise have offered. Third. That the judgment entered on May 25, 1903, should be vacated and annulled, because it recites that the cause was heard upon the pleadings, proof, argument, and admissions of counsel, whereas no proof was introduced, and there was no agreement of counsel, except that the petitioner was the brother of the deceased, John Smith.

This motion for a new trial and to vacate the former order was heard by the court on June 15, 1903, and disposed of in the following entry:

"On May 23, 1903, the same being a former day of the term of the court, an order was entered determining the questions involved in this suit, and remanding the case to the county court for an execution of the decree therein.

"Said entry is hereby amended so as to show the fact that upon the trial of said cause his honor was of the opinion, and so held, that the statute being determined was mandatory, and that James B. Smith, being the next of kin, was entitled as a matter of law to qualify as the administrator of John Smith. And from the ruling and opinion the defendant excepted," etc.

It is assigned as error that the circuit court held the statute to be mandatory as to the preference to be followed in the appointment of an administrator, and that he also erred in refusing to grant the motion for a new trial.

The statute upon which the court based this construction is section 3939 of Shannon's Compilation, which provides as follows: "When any person shall die intestate in this state, administration shall be granted to the widow of such person, if she make application for the same. For the want of such application on the part of the widow, the administration shall be granted to the next of kin, if such next of kin apply therefor. If neither the widow nor the next of kin make application for administration, then the same shall be granted to the largest creditor, proving his debt on oath before the county court or county judge."

We are of opinion that the practice and proceeding of the trial judge in this case was erroneous, and prevented a hearing of the matter on its merits. The statute prescribing who may administer is mandatory in a certain sense of that term; that is, as between parties who are fit and suitable for the office, the preference given by the statute should be maintained, and not departed from by the county court. But if the next of kin should be an infant, an idiot, an ex-convict, such person would not be entitled, and should not be appointed. So illiteracy or poverty,

incompetent, and will be considered by the court in selecting between persons of the same degree of kindred to the deceased, and may be of sufficient importance to justify the court in appointing one more remotely related, and having less claim to the office.

The error committed by the court was in attempting to decide the questions involved upon a mere construction of the statute without considering the personal qualifications of the petitioner.

If nothing should appear against the right of the petitioner to disqualify him or make it improper or unwise to appoint him, he would be entitled, as next of kin, to the appointment; but the facts may show that he is totally incapacitated and disqualified from holding the office and executing the trust, and upon this point the trial judge should have heard evidence.

The cause was for hearing before the trial judge upon its merits and de novo, so that no matter what may have been the opinion and finding of the county judge, the circuit judge should have heard the facts, and should have for himself determined whether the petitioner was disqualified from holding the office and executing the trust or not.

The proof that had been taken in the county court was not a part of the record in the circuit court, and could not be looked to to determine the disqualification of the petitioner. The record, as presented to the circuit judge, showed the petitioner to be the next of kin, and therefore entitled to administer, unless his unfitness should be made to appear. The judgment of the county court, being appealed from, was set aside, and of no probative or presumptive effect. The case as presented to the trial judge was therefore a moot court case on the literal construction of the statute, and the facts necessary to determine the merits were not properly before the court, and it cannot avail that both court and counsel agreed or submitted to this proceeding. The judgment of the court below is reversed at cost of appellee, and the cause is remanded for further proceedings.

NASHVILLE, C. & ST. L. R. CO. v. WITHERSPOON.

(Supreme Court of Tennessee. Jan. 18, 1904.)

RAILROAD—INJURY AT CROSSING—USE OF RIGHT OF WAY—INSTRUCTION.

1. A railroad company may use its right of way in any lawful manner, though the view of travelers is thereby obstructed, but is required to adopt all precautions necessary to prevent such obstructions from becoming dangerous.

2. In an action for personal injuries, an instruction is erroneous in telling the jury that they may estimate the amount of damages the

¶ 1. See Railroads, vol. 41, Cent. Dig. §§ 965, 975, 1001.

the injury sustained.

Appeal from Circuit Court, Rutherford County; W. C. Houston, Judge.

Action by Fannie E. Witherspoon against the Nashville, Chattanooga & St. Louis Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Claude Waller and Palmer & Ridley, for appellant. Richardson & Richardson and Whitaker & Lyttle, for appellee.

WILKES, J. This is an action for damages for personal injuries. There was a trial before a jury, and a verdict and judgment for \$5,500, and the railroad company has appealed and assigned errors.

The facts, so far as necessary to be stated, are that the plaintiff, a young lady, was returning from Murfreesboro to her home, in the country. Her route was along one of the streets of the city which lead into a turnpike road. This route crossed a number of switch tracks of defendant company. Plaintiff was in a buggy, and was driving a horse which was considered safe, gentle, and road-worthy, and was accustomed to trains. In crossing these tracks, the horse became frightened, as is alleged, at an unusual puffing of steam by an engine near the crossing, but concealed from her view. The horse ran away, the buggy was overturned, the plaintiff was thrown out, was rendered temporarily unconscious, and was quite painfully and seriously injured. It is alleged in the declaration that the company was negligent in permitting obstructions in the shape of piles of lumber upon its right of way, and near to and upon its tracks, which so obstructed the view of plaintiff that she could not see the switch engine and cars as they were being moved upon the track; that the crossing was unprotected by any gate, guard, or watchman, and that at the time of the injury the engine and cars were being operated negligently and unlawfully, without regard to the safety of the plaintiff or other persons who might be on the highway, and without any proper watch or lookout upon the engine; that the engine negligently emitted and discharged steam, and made unusual noises, calculated to frighten horses; and that in consequence the plaintiff's horse, otherwise gentle, was frightened and caused to run away. The plaintiff's version of the accident, which, under the finding of the jury, must be taken as correct, states that, as the plaintiff approached the crossing, a switch train passed, going south, and that when it had nearly cleared the road it turned across it to the north, and passed behind some piles of lumber very near the track, and out of her sight. At this crossing there were three tracks which were in use for passing, and one not used, called a "dead track," for holding cars. Plaintiff stopped her horse when about two or three yards from the first track, and wait-

ed behind the piles of lumber between the tracks, until lost to sight. She waited until she deemed they had gone a reasonably safe distance, when she started to cross the tracks. When she reached the third track, on which the train was being operated, the engine gave loud, short, unusual puffs, causing her horse to run down a declivity into a dangerous place, where the buggy was overturned and she was thrown out. There is a discrepancy between the plaintiff and defendant as to the number of cars in the train, the distance the train went after it crossed the road, the length of time consumed before it returned, and other details of less importance. But we adopt the version of plaintiff, inasmuch as the jury have found in her favor. She says that the puffs given by the engine were not the ordinary puffs, but were shorter and louder. The witnesses of the company controvert this statement, but in this matter, which is an important feature of the case, we must likewise adopt the plaintiff's version. It is shown that there was nothing in the grade of the track, or in its condition, or in the make-up of the train, which made it necessary for it to emit any unusual noises. There was no heavily loaded train, there was no steep grade, the track was not slippery, there was nothing to cause a sliding of the wheels, or the emission of any large amount of steam, or the making of any unusual noises. The charge in the declaration is that the engine was negligent in emitting and discharging steam, making an unusual noise calculated to frighten horses, and that it was hidden from view, was very near the crossing, and was managed in such a negligent manner that the plaintiff's horse took fright and ran off. It is charged that the negligence of the defendant was aggravated by the surroundings at the crossing; that there were several tracks to be crossed consecutively; that great piles of lumber were heaped up along or very near the road or street upon the road's right of way, which obstructed the view of persons attempting to cross; that the unusual noises, coming from a hidden source, were calculated to frighten animals; that the outlook or view of the engineers was necessarily obstructed.

Without passing upon the assignments of error seriatim, we consider the eighth assignment of error, which raises the question whether and to what extent a railroad company can place or permit obstructions upon its right of way which cut off the view, and render the running of trains more dangerous than if such obstructions did not exist. Upon this feature of the case the court charged the jury that it was the duty of the railroad company to use such means as were under its authority and control to prevent any obstruction from being placed at or near its switch tracks that would prevent persons traveling upon the streets or roads from see-

engine. In the same connection, the court told the jury that this duty applied to obstructions upon the right of way of the company, or territory that belonged to it or was under its control. We think a railroad company may use its right of way for any legitimate railroad purpose, and may place or pile lumber or other material upon it; but, when it does so, it must adopt all precautions necessary to prevent such obstructions from becoming dangerous. We think the trial judge went too far in his instruction, and the proper charge would have been that, if a railroad did obstruct a view, or permit it to be obstructed, with piles of lumber near its track, it must, under such conditions, use such increased care and caution as the circumstances would require to prevent accidents. As we understand the charge of the court, the court instructed the jury that the railroad must keep all obstructions off of its right of way which would prevent persons from seeing or discovering dangers that would naturally arise from coming suddenly in too close proximity to the engine and cars. From this charge we think the jury might have inferred that the railroad company had no right to put or permit any obstructions on its right of way that would shut off the view of passers, whereas the company had the right to use its right of way for the storage of freight or lumber, or for the standing of cars, or for the erection of sheds, station houses, or buildings necessary for its purposes, or in any other legitimate way to forward or accommodate its own business; and the law in such case would impose upon the company increased care as the surroundings and conditions would make necessary. In *Sherman & Redfield on Negligence* (5th Ed.) § 478, it is said: "The traveler's view of a railroad track is often obstructed by the natural formation of the land, by the growth of trees, by the erection of buildings, by trains standing on side tracks, or by other hindrances, natural or artificial, so that in many cases they cannot see an approaching train in time to avoid it. If such an obstruction is caused by the act of the railroad company, that is not, of itself, independent evidence of negligence, so as to make it liable to one who is injured by its trains, so long as such obstruction consists in the lawful use of the company's own premises, as by piling materials upon its lands, or standing cars upon its side track. An obstruction of view, however caused, may impose upon the company the duty of increased care and watchfulness in running its trains at that point, and of giving more warning signals than are prescribed by statute, and it will often excuse any traveler's conduct which otherwise might be deemed negligent." In *Cordell, Administratrix, v. N. Y. C. & H. R. R. Co.*, 70 N. Y. 119, 26 Am. Rep. 550, it is

ness. Such a use cannot be said to be unlawful or negligent, although it may obstruct to some extent the view of those who cross the track. A railroad corporation has in this respect the same right as individuals. They are under no legal obligations to refrain from using their property because such use may hinder the view of travelers." The maxim that one is bound to so use his own property as not to hinder others is not applicable. The injury is remote and incidental, and not within the contemplation of the rule. If it was, the erection of depots, tanks, sheds, and other structures might render them liable to an action, if the jury should find that it was negligent to erect them. I am not aware that any case holds that negligence could be predicated upon the lawful use of the company's property. The obstructions may, and perhaps should, have a material bearing upon two questions: First, as to the contributory negligence of the plaintiff, if they prevented his seeing the approaching train until he arrived at the track, he would not be negligent for not seeing it before; second, the facts and circumstances of these obstructions, with the other surrounding circumstances, were proper to be considered upon the question of the proper degree of care and vigilance which the defendant was bound to exercise in the running and management of its trains, and in giving warnings of its approach. It cannot be an independent ground of recovery. No such principle has ever been adjudicated. In *Dillingham et al. v. Parker (Tex.)* 16 S. W. 335, the court said: "There was also evidence to show that there were cars standing upon a side track, near the crossing, in such position as to obstruct not only the view, but also the noise, of the approaching train." It was held that the court improperly charged the jury that it was the duty of those operating railroad locomotives and cars to use reasonable care to not permit the view of the track to become obstructed with cars standing upon the side track, so that persons passing along public roads or streets could conveniently hear a passing train or engine as they approached the crossing track, and receivers so operating such railways are liable in damages for injury to any one passing along the road or street by reason of any negligence on the part of their employees in failing to use such reasonable care. The headnote in *Guggenheim v. Lakeshore R. Co.*, 33 N. W. 161, is as follows: "While a railroad company is not guilty of negligence in leaving its freight cars standing upon a side track near a street crossing, yet when they are so placed as to cut off the view of approaching trains, and make it more difficult for persons going over the tracks to see the approach of trains, such placing of cars imposes upon it the additional duty of giving such additional warning as the danger thus

material near its tracks and on its right of way, and keep them there as long as its business may require." Wabash R. Co. v. Hicks, 13 Ill. App. 407; Chicago R. Co. v. Nelson, 59 Ill. App. 308. This view we do not understand to be in accord with the view and holding of the learned trial judge, and in his holding we think there is error.

The ninth assignment of error is based upon the following part of the charge of the court: "If you find from the evidence that the plaintiff did receive injury and damage, as claimed, by the reckless and unnecessary fault of the defendant, as explained to you in these instructions, then you estimate from the proof the amount of damages she is entitled to recover, taking into consideration the character and extent of the injury and its probable consequences, the expense of medical attention occasioned by the alleged injury, also the mental pain and physical suffering undergone by her, and from these you will assess the amount of damages she is entitled to; and you will fix the amount of the damages according to these instructions, as you believe, from the evidence and the law, she is entitled to, and at a sum you think right and proper, from the facts of the case, not exceeding the amount claimed in the declaration." The learned trial judge here directs the jury that they must estimate from the proof the amount of damages that plaintiff is entitled to recover. Again, "You will assess the amount of damages she is entitled to;" and again, "You will fix the amount according to these instructions, as you believe, from the evidence and the law, she is entitled to, and at a sum you think right and proper, from the facts of the case, not exceeding the amount claimed in the declaration." The real basis of damages in a case like this is compensation for the injury sustained, but the trial judge does not state this principle, but tells the jury more than once that they are to give the plaintiff what, in their opinion, she is entitled to, or what they, in their opinion, think right and proper in the case. He should have explained to the jury what was right and proper, and that what she was entitled to was compensation for the injuries she had sustained. The jury should have been told that they could give to the plaintiff compensation for her injuries, and not what the plaintiff was entitled to, nor what the jury may think right and proper. What the jury may think the plaintiff entitled to may not be what the law says she is entitled to, and what the jury may think right and proper is not necessarily what the law says is the real damages. The learned trial judge nowhere states that the amount or limit to which the plaintiff was entitled to recover was compensation for the injuries received, which is the proper measure of damages. It

been sufficient to indicate that compensation should be given; but used does not properly compensate, but, rather, a jury might give what they are entitled to, and what they are entitled to proper from the facts of the case, and the amount alleged in the complaint, but without any other limit.

We are of the opinion that the action of the trial judge in the features referred to, and the features in the case, and therefore be reversed and a new trial. Appellee will pay appeal.

NASHVILLE, C. & ST. L. LILLIE

(Supreme Court of Tennessee.)

CARRIERS—BAGGAGE—HAND SINGER IN SLEEPING CAR—CARRIER'S LIABILITY

1. A railroad company is liable for baggage and hand luggage taken into a day coach.

2. Where a passenger carries a sleeping car, and deposited it afterwards, on retiring, place berth, the valise was, in effect, of the railroad company, and insurer thereof.

Appeal from Circuit Court, Teno. W. Childress, Judge.

Action by J. B. Lillie against Chattanooga & St. Louis Railroad and another. From a judgment for plaintiff, defendants appeal.

Vertrees & Vertrees, for appellants; Cent. R. Co. Slemons & Ballant, Nashville, C. & St. L. Nolan, for appellee.

WILKES, J. This suit was brought before a justice of the peace. It was tried before the judge of the circuit without the intervention of a jury. There was a judgment for \$750 in favor of the plaintiff against the defendant. The defendants have appealed. The question is whether the railroad is liable for the loss of a valise and its contents.

A request was made of the court to reduce to writing his findings of fact. It is as follows:

"This is a suit brought against the Nashville, Chattanooga & St. Louis Railway and the Illinois Central Railroad for the loss of a valise, and its contents. A request was made in regard to the regularity of the proceedings, by which it was

¶ 1. See Carriers, vol. 2, Cent. 1

waived the question, and, for the purposes of the suit, conceded it was properly before the court; and therefore in these findings I have considered the case as properly brought against both of the defendants.

"Full stenographic notes were taken of all the proof produced upon the trial, which is heretofore attached, and, from said report of the evidence so filed, this court finds as follows:

"That on the night of January 18, 1902, the plaintiff took passage at St. Louis upon a train made up of several day coaches, and the usual sleeper of the Pullman Car Company, for Nashville. The train was composed of cars of the Illinois Central, of the Nashville, Chattanooga & St. Louis, and of the Pullman Car Company, and the engine hauling it from St. Louis to Fulton, Ky., was the engine of the Illinois Central, and manned by the officers and crew of said railway. From Fulton, Ky., to Nashville, the engine was one of the Nashville, Chattanooga & St. Louis, and the officers and crew manning said engine and train from there to Nashville was of said company.

"That he (the plaintiff) entered the Nashville sleeper at the depot in St. Louis, and carried his own luggage with him into the car, where the same was put down by the seat of the berth to be occupied by him. That the luggage remained in that position until he came to retire, between twelve and one o'clock at night, when the plaintiff last remembered to have seen the dress-suit case in question, when he placed the case under his berth, in the space between the two seats constituting a section, the lower berth of which he occupied. That when nearing Nashville, the next morning, and shortly before arriving at the station, his attention was called by a fellow passenger to the fact of the loss of his grip, whereupon he made search for his own suit case, and failed to find it in his berth, or under the same, where he had placed it. He then called upon the porter of the sleeper, who, after search, failed to find the same. He then reported the fact to the Pullman Car Company conductor, and later to said company's head office, at Chicago.

"The court further finds that there was no actual possession given by the plaintiff of his suit case to either the porter or conductor of the sleeper, but it was carried by the plaintiff into the car, and set down, in the usual, ordinary way, by the berth or section he was to occupy.

"I further find that, as is usual, there was one car in this train, known as the baggage car, in which is carried the baggage of any and all passengers who desire it to be carried therein. Said car was in charge of an agent or employé of the defendant railroad companies, who assumed to take entire control and custody of all baggage to be carried in

desiring his baggage to be carried in that car, which facts were known to the plaintiff before and at the time he boarded the train in St. Louis for Nashville.

"The court further finds from the proof that it was the custom, and, as a fact, was the case on the night in question, that the rear door of the sleeper was locked from the outside, while standing in the depot, and that the front door of the sleeper was open to permit passengers to enter it at St. Louis; that the conductor of said car was up and awake until three or four o'clock in the morning; and that the porter was awake and on duty (watch) the whole night, or from the time the train left St. Louis until it arrived at Nashville. There were three sleepers in the train on the night in question, there was a porter on each sleeper, and each porter could pass through to each sleeper.

"I further find that the sleeping car in which the plaintiff rode was owned by a corporation known as the Pullman Palace Car Company, which company employs and discharges its own employes and operators. It is engaged in the business of furnishing sleeping accommodations to such passengers as pay the usual and customary charges therefor; and plaintiff procured from it a ticket entitling him to ride in said car, and to occupy a berth therein, from St. Louis to Nashville.

"I further find, by contract between the defendant railroad companies and the Pullman Palace Car Company, the sleeper in which the plaintiff was riding was drawn by the engines of the defendant railroad companies, and constituted a part of the train running from St. Louis to Nashville over the lines of road of the defendant companies, and under the control of the train conductor, the sleeping car being one of the cars that made up the train; and, under the state of facts, the court is to determine whether these defendant companies are liable for the loss of this suit case and its contents, sued for by the plaintiff in this case. The court further finds that no passenger or other person came on board or left the car in question between St. Louis and Nashville on the night in question.

"The court further finds that the porter of the sleeper waked the plaintiff up on the morning in question.

"If it was an open question as to the liability of the defendant, under the authorities in this state, the court would be in grave doubt as to the defendant's liability; but, under the principles announced in the case of the Railroad v. Katzenberger, reported in 16 Lea, 380, 1 S. W. 44, 57 Am. Rep. 232, the court is of the opinion, and so holds, that the railroad companies are liable for the loss of suit case and its contents, and therefore renders judgment against the defendant com-

tents (\$69.50), and interest thereon since January 30, 1902, to this date, of \$3.50, making a total of \$73."

It will be observed that the trial judge does not find how the case was lost.

It is assigned as error that there is no evidence to support the finding of the trial judge, and that his finding of facts does not show any liability upon the part of the railroad company.

It is claimed that there is a marked distinction between the present case and the case of *Railroad v. Katzenberger*, 16 Lea, 380, 1 S. W. 44, 57 Am. Rep. 232, which the trial judge was of opinion was conclusive of the controversy in the present case. These distinctions are thus pointed out: That in the present case the defendant roads provided a special car, known as a baggage car, in which the plaintiff might have deposited his luggage, received a check for the same, and had it carried at the risk of the railroads, without any additional cost to him; that the railroad companies had agents or employes in charge of such cars, intrusted with the special duty of looking after the baggage of passengers, and charged with the duty of safely delivering it at the point of destination upon surrender of the check given therefor; that the plaintiff knew of these facts when he purchased his ticket and when he boarded the train; and that none of these facts appear in the *Katzenberger Case*. It is further stated that the plaintiff in this case did not give the custody of his valise to any employe of the railroad company, nor to any agent or employe of the sleeping car company; that he made no offer to so deliver it, but kept the entire control of his valise himself, and continued to keep it throughout the entire time he was a passenger; that in the *Katzenberger Case* the court found that there had been a delivery of the valise to the train porter, who assumed to take control of it, and carried it into the car, and placed it upon a seat by the side of the conductor, near the middle of the car; that in the *Katzenberger Case* the main ground of defense was that the railroad company was entitled to the benefit of limitations upon the ticket of the sleeping car company, and that these limitations and conditions inured to the benefit of the railroad company.

These distinctions appear to exist, and the real question in the present case is whether they are material to the merits of the present controversy.

It is well settled that, in the carriage of a passenger's baggage, the carrier assumes the full responsibility of a common carrier of goods, and becomes an insurer of its safety against any accident which is not the act of God or of the public enemy, or the fault of the owner or passenger himself. *Hutchinson on Carriers*, § 678.

78 S.W.—67

tody and control of any agent or employe of the railroad company, nor even into the custody and control of any agent or employe of the sleeping car company, but was retained by the plaintiff in his own custody, possession, and control; and it is said that the liability of the carrier depends upon whether the passenger has given over the custody and care of his luggage to the control of the carrier, and into his possession, or keeps the entire control over it himself. In the former case, it is said, there may be a liability; in the latter case, there cannot be. *Citing Hutchinson on Carriers*, § 593.

Mr. Thompson, in his work on Negligence, says: "The idea that lies at the foundation of the extraordinary liability of the carrier is that the baggage is in his custody and under his control during the transportation. Hence, in order to hold him responsible if it is lost, it is material to show that it came into his possession." *Thompson on Negligence*, vol. 3, § 3428.

Ray, in his work on *Imposed Duties of Carriers of Passengers*, says that there must be delivery of the baggage to the carrier, before it can ever be held responsible, under any circumstances, for its loss. Section 155.

Van Zile on Bailments and Carriers, § 681, says: "It may be said generally that, for baggage of a passenger that is under the exclusive control of the carrier, the liability of a carrier is that of an insurer."

In section 682 he says: "With regard to the liability of hand baggage, the question of the duty and liability of the carrier seems to depend upon who has the custody or control of the baggage. If the passenger has the entire control and custody of the baggage, to the exclusion of the carrier—if, as has been said, there exists the *animo custodiendi* upon the part of the passenger, to the exclusion of the carrier—then the carrier cannot be held as an insurer, as in the case of baggage in the entire control and custody of the carrier, and will not be liable at all, unless guilty of negligence which results in its loss or damage in the absence of contributory negligence on the part of the passenger." See, also, Ray on *Imposed Duties*, §§ 558, 559.

We think that in the case of passengers on day coaches who prefer to keep their baggage, and especially their hand luggage in their own possession, and on the seat with them in the day coach, instead of placing it in the baggage car, the railroad company should not be held liable as an insurer.

There are large numbers of day passengers, and they almost invariably carry hand grips and parcels in their hands, retaining control and custody of them during the entire trip. In such a case the carrier should not be held as an insurer of the safety of the baggage. But does the same rule apply in regard to the baggage of passengers riding in sleeping cars? These passengers, as a general rule,

and, among them, to be relieved from the care and custody of their luggage, except so far as they may desire to use it for their daily purposes.

It has been held that the employes of the sleeping car company are the employes of the railroad company, and the railroad company is responsible for the conduct of the sleeping car's employes. *Railroad v. Ray*, 101 Tenn. 10, 46 S. W. 554, and cases there cited; *Mann Boudoir Car Co. v. Dupre*, 21 L. R. A. 289, note.

The contention we have is not between the railroad company and the sleeping car company, nor between the sleeping car company and the passenger, but between the railroad company and its passenger riding in the sleeping car. The question is not one bearing upon the safety of the passenger, but upon the liability of the railroad company for his luggage; and we are of opinion that this case turns upon the question whether or not the luggage must, under the findings of the trial judge, be considered as retained in the exclusive custody of the passenger, or as under the control and in the custody of the employes of the sleeping car company, who are also, under the law, employes of the railroad company, as to the custody and safety of luggage.

We think it does not matter who brings the luggage upon the car—whether the passenger or the porter—nor is it very material where in the car the luggage is deposited after it is brought in. Unless the passenger shall assume and retain the exclusive possession and control of the baggage, and either directly or impliedly deny any right of possession or custody to the employes of the road, the baggage must be considered as being in the possession of the employes of the sleeping car company, who are at the same time employes of the railroad company. Especially is this true of luggage and hand baggage that the passenger does not keep about his person or in his hand, nor take with him when he retires to his berth. If the baggage is deposited under the berth, or over it, or at any other convenient place, when the passenger retires for sleep, it must be considered as in the custody of the employes of the road, and the railroad company must be treated as insuring its safety.

The contract to carry is with the railroad company, and not with the sleeping car company, and the sleeping car company is not a common carrier in the sense that the railroad company is, nor is the sleeping car company responsible as an innkeeper; but the railroad company is liable for the negligent acts of its servants. The porter of a sleeping car is a servant of the railroad company. *Pennsylvania R. Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141; *Thorpe v. N. Y. Central & Hudson R. R. Co.*, 76 N. Y. 406, m. Rep. 325; *Dwinelle v. N. Y. C. &*

23 S. W. 70, 21 L. R. A. 298, 42 Am. St. Rep. 902; *Railroad v. Ray*, 101 Tenn. 10, 46 S. W. 554.

We are not able to distinguish the case at bar, in principle, from the case of *R. Co. v. Katzenberger*, 16 Lea, 380, 1 S. W. 44, 57 Am. Rep. 232.

It is said that there is no statement in the opinion of the court in the *Katzenberger* Case that there was a baggage car attached to the train. But it is a matter of common information that all passenger trains carry baggage cars, and the failure to mention one in that case was either an omission, or considered unimportant.

We think that the facts in the *Katzenberger* Case show that the baggage was in the custody of the employes of the road, and the same fact appears in this case.

In the former case the court says: "There appears no special custody of the baggage in this case, more than the fact of taking it into the Pullman car and delivering it to the porter, who placed it on a seat opposite the owner."

In each case the facts constitute a delivery to the railroad, and not an exclusive custody by the plaintiff. The article lost, being a suit case, was not easily susceptible of exclusive custody by the passenger, as might be the case with a small hand grip; and the facts show that it was put in the usual place, under the berth, when the passenger retired for sleep.

It is shown that other passengers were on the train. Some of them may have inadvertently or purposely taken the luggage.

Three parties had access to the train and there was an opportunity for the baggage to be taken. That it was taken and lost or destroyed must, under the findings, be conceded. No explanation can be given. There could have been no loss except through negligence or theft. "*Res ipsa loquitur*."

But even if no negligence is shown or can be inferred, the railroad company, under the facts and the law, must be held an insurer of the baggage, and responsible for its loss.

The judgment of the court below is affirmed, with costs.

CITY OF TYLER v. L. L. JESTER & CO.

(Supreme Court of Texas. Feb. 25, 1904.)

MUNICIPAL CORPORATIONS—INDEBTEDNESS—CURRENT EXPENSES—EXTINGUISHMENT OF OLD DEBT—PROVISION FOR SINKING FUND—LIMITATIONS.

1. Under Rev. St. 1895, art. 465, giving cities power to fund their debt by issuing either notes or bonds, where an ordinance directed the execution of notes to be delivered in lieu of outstanding indebtedness, and the instruments made recited that they were notes and had many of the characteristics thereof, they would be construed as notes, and not bonds.

2. Granting that a contract for a city water supply was void as creating a monopoly, the city is nevertheless liable for what it received under the contract.

3. Where notes executed by a city were issued to replace, and did replace and extinguish, old notes, they did not increase the city's indebtedness or create a debt, so as to require the levy of taxes to provide for the interest and sinking fund.

4. The making of a contract by a city for water for a number of years, to be delivered in the future, does not create a debt against the city, but its liability thereunder arises on the use of the water by the city during each year.

5. Where the debts for which recovery was allowed were found by the Court of Civil Appeals to have been contracted to meet the current expenses of a city, it would be presumed that the current revenue for each year was sufficient, if it had been collected and properly applied, to have liquidated such expenses.

6. A contract to provide a city with water during a given year, though not paid off during the year for which it was made, remains a valid debt against the city, which it should discharge out of the revenue for future years in excess of current expenses, as Rev. St. 1895, art. 465, authorizes city councils to provide for funding the whole or any part of the existing debt of a city, and article 466 authorizes the appropriation of city revenues for the purpose of retiring and discharging accrued indebtedness.

7. A city need not enact an ordinance in order to enable its officers to execute contracts for current charges of administration, but it is sufficient if authority for the contraction of debts be found in the minutes of the council.

8. In a suit on municipal evidences of indebtedness, limitations on the original debts funded thereby is to be computed up to the date that they were funded.

Error to Court of Civil Appeals of First Supreme Judicial District.

Action by L. L. Jester & Co. against the city of Tyler. There was judgment for plaintiffs, affirmed by the Court of Civil Appeals (74 S. W. 359), and defendant brings error. Affirmed.

Duncan & Jones, for plaintiff in error.
Cain & Knox, for defendants in error.

BROWN, J. Defendants in error sued the city of Tyler to recover upon seven notes, being numbers 2, 3, 4, 5, 6, 7, and 8, of a series of ten notes, each dated on the 20th day of August, 1897, payable to the Tyler National Bank or bearer at respectively one to ten years from date, according to the number of the note. Each of the notes bore 6 per cent. interest, payable semiannually on the 20th days of February and August of each year until the maturity thereof, and was for the sum of \$1,700, aggregating \$17,000. Coupons were attached representing each installment of interest which might become due to the time of the maturity of the note. Each note contained the following paragraph: "This note is number Two and is one of a series of ten notes of like tenor and date numbered from one to ten respectively, all of which ten notes are issued in lieu

current debts of said city, a list of which is embodied in an ordinance, passed by the City Council of the City of Tyler, Texas, on the 20th day of August, 1897, and this note is authorized by said ordinance. If the City of Tyler should fail to pay as many as two of said coupons as they become due successively, that is, if any two of said coupons should remain unpaid at any one time, then this note shall at the option of the holder become due and payable, the maturity date hereinbefore provided, to the contrary notwithstanding, and should this not be placed in the hands of an attorney for collection because of failure to pay same when due then the City of Tyler agrees to pay all cost of collection including ten per cent. on the principal and interest then due for collection fees."

From the conclusions of fact found by the Court of Civil Appeals we copy as follows:

"The city of Tyler is a municipal corporation organized and acting under the general laws of the state. Said city did not at the time of the execution of the notes sued on nor did it ever at any time, contain as many as ten thousand inhabitants. On April 28, 1887, the appellant city, for a cash consideration of \$12,500, sold its waterworks system to L. B. Fish and associates, and granted to said vendees and their assigns the exclusive privilege of establishing and maintaining a system of waterworks for the purpose of supplying water to said city and its inhabitants. The ordinance authorizing this sale and granting this franchise provided for the extension and enlargement of the waterworks plant; regulates the manner in which the streets are to be used by the water company; reserves the right in the city to require additional extension; fixes the rate to be charged the city for rental of fire hydrants at \$50 a year for each hydrant, payable in quarterly installments on the 1st day, of February, May, August, and November of each year; and agrees that the city shall rent such a number of fire hydrants to each mile of extension as the city council may designate for 30 years, and that it will pay legal interest on all sums that may become due the company if same are not paid at maturity. The Tyler Water Company became the assignee of the property and franchise granted to Fish, and on June 12, 1889, made a contract with the city, which was approved by the city council, to furnish 100 fire hydrants for the use of the city, to be paid for under the terms of the ordinance granting the original franchise except that the payments accruing for the first year were not to be collected before December 31, 1890. This contract was to continue during the life of said franchise. The notes and warrants in extension of which the notes sued on were given are thus described in the ordinance authorizing

§ 4. See Municipal Corporations, vol. 36, Cent. Dig. § 1224.

Several items of indebtedness evidenced by these notes and warrants are shown to have originated as follows: The six notes for \$500 and the note for \$560 were given in lieu and in extension of a note for \$3,000 executed by appellant in favor of the Tyler Water Company in January, 1893, and payable on May 1, 1894, as shown by the following entry in the minutes of the city council: 'On motion the finance committee, mayor, and secretary were authorized to take up and cancel a note for \$3,000 given Tyler Water Company in January, 1893, for one year's water, and due May 1, 1894, and issue therefor six notes of \$500 each, and one for interest at the rate of 8 per cent. per annum.' These notes all bear date May 4, 1895, and are payable to the Tyler Water Company on or before May 4, 1896, with interest from date at the rate of 8 per cent. per annum, and recite that they were authorized by an order of the city council entered of record May 3, 1895. No ordinance or resolution of the city council is shown authorizing the issuance of the \$3,000 note.

"The debt represented by the notes of \$1,299.60 and \$585 respectively originated as follows: On January 8, 1894, the city issued to the Tyler Water Company four warrants for water furnished in 1893, numbered and in the following amounts: [Here follows a description of four warrants, aggregating \$1884.60.] The following is the only entry on the minute book covering these warrants: 'The bills and salaries were read and ordered paid.' This entry appears in the minute book of the first meeting of the city council in January, 1894. The two constituent notes substituted for these warrants were executed October 11, 1894, and payable October 11, 1895, with 6 per cent. interest from date, and each recited that it was executed under an order of the city council passed on October 5, 1894. The minutes of the city council of date October 5, 1894, contain the following entry: 'H. H. Rowland came before the city council asking that the city give him a new note in lieu of one given January 1, 1893, for \$2,762.50, for water for 1892. On motion it was ordered that the note be renewed for one year, at 8 per cent. interest, and ordered that the secretary issue 6 per cent. notes for amounts held by the members of the water company in the settlement for 1893.'

"The notes No. 1,360 for \$500, No. 1,316 for \$500, and No. 1,315 for \$548.48, were given in lieu of the following warrants issued by the appellant: [The detailed statement is omitted.] The remaining indebtedness, of \$345.10, which went to make up the \$1,548.48 covered by these notes, was evidenced by warrants the origin and amounts of which are not shown. These notes were each executed March 10, 1894, and were payable

and each taken to the treasurer, and recite that it is one of a series of three notes given in satisfaction of an aggregate existing indebtedness of \$1,548.48, evidenced by scrip or warrants theretofore issued by the city of Tyler, the number of said warrants being set out in each note. No ordinance, resolution, or order of the city council authorizing the execution of these notes is shown.

"The note for \$3,410.42 was executed October 11, 1894, and was given in substitution of a note for \$2,762.50 given by the city to the water company for water furnished in 1892. The minutes of the city council of date October 5, 1894, contain the following entry: 'H. H. Rowland came before the council asking that the city give him a new note in lieu of one given on January 1, 1893, for \$2,762.50, for water for 1892. On motion it was ordered that note be renewed for one year at 8 per cent. interest, and ordered that the secretary issue 6 per cent. notes for amounts held by the members of the water company in the settlement for 1893.' This note recites that its execution was authorized by order of the city council entered on October 5, 1894, and the amount for which it is executed was evidently obtained by adding 8 per cent. interest to the \$2,762.50 from January 1, 1893, and upon the sum thus obtained adding an additional 8 per cent. from the date of the note to October 11, 1895, the date of its maturity, as it only bears interest from maturity.

"The note for \$1,500 was executed July 1, 1894, and is payable to the Tyler Water Company or bearer one day after date, and was given in settlement of amount due by the city for hydrant rental from January 1 to July 1, 1894. This note was authorized by an ordinance of the city council, which appears in the minute book, but is not shown to have been copied into the ordinance book. The minutes of the meeting of the city council at which this ordinance was passed are not signed by the mayor, and are not shown to have been approved at any subsequent meeting of the council.

"The two notes for \$775 each were executed on the 7th day of April, 1894, and payable on the 7th day of April, 1895 and 1896, respectively, and were given in part payment of the purchase money for a tract of 101 acres of land purchased by the city for cemetery purposes. This land was sold to the city by C. L. Caspary and W. G. Human on December 10, 1888. The deed recites a consideration of \$3,300, for which amount the city issued five warrants for \$660, payable on the 1st day of February, 1890, 1891, 1892, 1893, and 1894, respectively, with 8 per cent. interest. These drafts were payable out of the cemetery fund. At the time these warrants were issued, the city was maintaining a cemetery fund by the levy of a tax of .03 on the \$100 valuation of property in the city. Cas

the city council, when he went to deliver the deed, that the city did not want a lien retained on the land, as it desired to sell a portion of same, and a lien would prevent such sale. He further testified that he was assured by the council that the cemetery fund would be maintained by special taxation, and he understood same would be sufficient to pay the warrants at maturity. These warrants were all paid except the last two, for which the notes above mentioned were substituted. These notes recite that their execution was authorized by an order of the city council entered of record on April 6, 1894, but no such order is shown on the minute book nor on the ordinance record. No provision was made for the payment of the warrants nor of the notes at the time they were executed. All of the remaining warrants mentioned in the ordinance authorizing the notes sued on are either shown to have been barred by limitation at the date of the ordinance, or are not shown to have been issued for current debts of the city legally incurred, except the two items of \$3 each, which were shown to have been for salary due H. T. Dorough as alderman, and for which warrants were issued in February, 1894. At the time of the execution of the notes sued on, and at the time of the execution of the several notes and warrants before described, in satisfaction of which the notes sued on were executed, the appellant had exhausted its power to levy special taxes to provide for the payment of interest and the creation of a sinking fund to pay the indebtedness thereby created, the 25 cents on the \$100 valuation of property within the city which it was authorized to levy having been previously levied to provide for the payment of outstanding bonds.

"On December 10, 1894, the city council of appellant city passed a resolution directing the mayor to take the necessary steps to secure a special charter for the city at the next session of the Legislature, and to that end he was authorized to employ some suitable person to take the census of the city. In pursuance of this resolution the mayor appointed the city secretary, John M. Adams, census enumerator, and directed him to proceed to take a census of the inhabitants of the city. No report of such census is found in the records of the city, and the minute book of the city council contains no further mention of same. Adams testified that he took a census of the city and made a written report to the council, which was adopted by resolution of the council, and that this report shows that the city had 10,119 inhabitants. He further testified that he filed a copy of this report in the office of the comptroller, and attaches to his deposition a copy of the report so filed. He also attaches a copy of the resolutions of the city council adopting his report, which he says he made at the time the resolutions were passed, and which is as follows:

...sus of the city and to ascertain the number of inhabitants of this city, has made his report to the city council; and whereas, said report shows that on March 1, 1895, the city of Tyler contained 10,119 inhabitants and over, the said report being duly verified, and the council, having heard the evidence to support the said report, finds the same true and correct, and finds that the city of Tyler has now over ten thousand inhabitants: Therefore, be it resolved by the city council of the city of Tyler, Texas, that said city of Tyler has over ten thousand inhabitants, and that said city do hereafter operate as a city of over ten thousand inhabitants.' He does not know what became of the original resolutions. In an ordinance passed by the city on September 26, 1896, providing for the issuance of \$35,000 funding bonds, the city of Tyler is declared to be a city of over ten thousand inhabitants.

"Bonds were issued in pursuance of this ordinance for the purpose of compromising and funding the outstanding indebtedness of the city, including the original warrants and the notes evidencing the indebtedness claimed in this suit. The Tyler National Bank, in anticipation of the payment of said indebtedness out of the proceeds of the sale of said bonds, bought up said notes and warrants. The bonds issued as provided for in said ordinance were sold by the city, but, before the notes and warrants were taken up, the bank in which the money derived from the sale of the bonds was deposited failed, and a large portion of the money was lost, and the city was thereby rendered unable to pay said indebtedness. The appellee was the cashier of the Tyler National Bank, and acted for it in the purchase of the notes and warrants. He knew of the issuance of the funding bonds, and that the ordinance providing for their issuance recited that the city contained over 10,000 inhabitants, and testified that before buying the notes and warrants he had an investigation made as to the financial condition of the city, and satisfied himself that the papers were legal, and had been passed upon by the Attorney General and approved by him in his approval of the \$35,000 funding bonds, and that if he had not been advised of the proceedings taken by the city council to issue the funding bonds he would not have purchased the paper. After the loss of the money realized from the sale of the funding bonds, appellee, as cashier of the Tyler National Bank, went before the finance committee of the city council, which committee approved \$17,000 of the notes and warrants held by said bank as valid claims against the city, and council thereafter passed the ordinance authorizing the issuance of the notes sued on. On the 31st of December, 1898, the Tyler National Bank went out of business, and appellee became its successor and took its assets, including

prior to acquisition by appellee of the bank assets.

"The court below instructed the jury that the notes and warrants issued for hydrant rental were valid obligations at the time they were merged into the notes sued on, and that plaintiff was entitled to recover seven-tenths of the amount of same, being the sum of \$9,162.58, with 6 per cent. interest thereon from January 20, 1899. The jury were further instructed to return a verdict for the defendant as to the two notes of \$775 each, executed for the purchase of the cemetery property. As to the remaining indebtedness set out in the ordinance authorizing the execution of the notes sued on, the question of its validity and the liability of appellant therefor was submitted to the jury."

The application presents 21 grounds of error, which embody the following propositions: (1) That the obligations sued upon are bonds, within the meaning of the laws of the state. (2) That the contract under which the constituent debts accrued was void, because it created a monopoly. (3) That the making of the several obligations sued upon created a debt, within the meaning of the Constitution, and, no provision being made to pay the interest and sinking fund, they are void. (4) That the funded debts were for current expenses of the city for different years, and, there being no fund out of which they are entitled to be satisfied, the courts cannot enforce them. (5) That no officer of the city could execute contracts for the city, except by authority of an ordinance, and the execution of the original notes were not so authorized, and they are void. (6) That this suit was instituted upon the obligations issued by the city of Tyler on the 20th day of August, 1897, and not upon the debts for which they were given; therefore the Court of Civil Appeals erred in rendering judgment for the constituent debts. (7) That the constituent debts were barred by the statute of limitation.

Article 465 of the Revised Statutes of 1895 confers power upon the city council "to pass all necessary ordinances to provide for funding the whole or any part of the existing debt of the city, or of any future debt, by canceling the evidences thereof, and issuing to the holders or creditors notes, bonds or treasury warrants, with or without coupons, bearing interest at any annual rate not to exceed ten per cent." This statute authorizes the city council to issue either notes or bonds for the purpose of funding its outstanding indebtedness, and the council in this case, by its ordinance, directed that notes should be made and delivered in lieu of the said outstanding indebtedness. The obligations made in pursuance of that ordinance recited that they were notes. The obligations in suit have some of the characteristics

ing power to do so, their intention must be given effect. The instruments are not bonds, within the meaning of statutes regulating the issuing of bonds.

The obligations sued upon were executed by the city for the purpose of funding its outstanding indebtedness. Granting that the water contract was void, as charged, nevertheless the city must be held liable for what it received under that contract. *Brenham v. Water Co.*, 67 Tex. 566, 4 S. W. 143. The parties agreed on the value of the water furnished, so the right to recover does not depend upon that instrument. The execution of these notes did not increase the indebtedness of the city, because when they were delivered the old debts were taken up and extinguished, and the new notes did not create a debt against the city, which required the levy of taxes to provide for the interest and sinking fund. *Doon Township v. Cummins*, 142 U. S. 372, 12 Sup. Ct. 220. 35 L. Ed. 1044; *City of Val Paraiso v. Gardner*, 97 Ind. 8, 49 Am. Rep. 416; *McNeal v. Waco*, 89 Tex. 83, 33 S. W. 322; *Corpus Christi v. Woessner*, 58 Tex. 462. The character of the debt was the same after the new notes were given as before.

The Court of Civil Appeals found that the current expenses of the city of Tyler for the year 1889 exceeded its revenue, and plaintiff in error, under the thirteenth assignment in the application, makes a statement showing that the revenue for 1889 was not sufficient to discharge the current expenses for that year; but under no one of the assignments does the plaintiff in error raise the question that for the years in which the water was used by the city of Tyler the current expenses were greater than the current revenue. The making of a contract for water for a number of years to be delivered in the future did not create a debt against the city, but the liability of the city arose upon the use by it of the water during each year. *Val Paraiso v. Gardner*, before cited. It is therefore immaterial that the current expenses for 1889 were greater than the current revenue of the city of Tyler, and we shall not further discuss that phase of the question.

It appears from the findings of fact made by the Court of Civil Appeals that the debts upon which recovery was allowed were contracted for the current expenses of the city of Tyler for the several years mentioned in the said statement, and the presumption will be indulged that the current revenue for each year was sufficient, if it had been collected and properly applied, to have liquidated the current expenses. *McNeal v. Waco*, before cited. It appears that the parties to the contract intended that the sum should be paid out of the current revenue for the year, and there is nothing to indicate that they did not

89 Tex. 88, 33 S. W. 322. The water contract provided that the payments should be made quarterly during each year, and we see no reason to believe that the parties intended that it should be other than a contract payable during the year for which it was contracted. If it were held that a city could not make a binding contract unless at the time it had revenue sufficient to discharge all of its current expenses, and that every person who should deal with it must do so at his peril, taking the chance of a deficit in revenue, it would be absolutely destructive of the power of every city in the state to carry on its ordinary governmental affairs, for it is well known that the business of a city is conducted upon the basis of credit, and depends entirely upon the collection of taxes from time to time, with the claims for current expenses running over from one month to another. We believe that such a contract, though not paid off during the year for which it was made, remains a valid debt against the city, which it may and should discharge out of the revenues for future years in excess of its current expenses. *Corpus Christi v. Woessner*, before cited; article 465, before quoted. In the case of *Corpus Christi v. Woessner*, debts contracted for several different years, not being paid, had gone over to succeeding years, and the city had diverted its fund from the payment of its debts to other purposes. In order to defeat the enforcement of the claims against the surplus of current revenue for subsequent years the city passed an ordinance practically refusing to pay any claim which was contracted prior to a given date, including the claim sued upon, and our Supreme Court sustained a general judgment against the city. The terms of article 465 of the Revised Statutes of 1895 confers authority upon the city council "to provide for funding the whole or any part of the existing debt of the city, or of any future debt," showing that it was contemplated by the Legislature that the indebtedness of cities might not be liquidated by the revenues for each year, but would accumulate against such corporations, and, to enable them to fully liquidate their debts, the power was given to fund all such indebtedness. Article 466 of the Revised Statutes of 1895 confers upon cities organized under the general laws authority "to appropriate so much of the revenues of the city, emanating from whatever source, for the purpose of retiring and discharging the accrued indebtedness of the city." This is direct and positive authority for the city to use its revenues, both from its ordinary sources of taxation and any other source of income that it might have, for the purpose of liquidating and discharging accrued indebtedness, which must mean debts of previous years and not of the current year; hence it cannot be true that

current expenses, lawful at the time that they were contracted, continued to be lawful after the expiration of the year for which they were made, and afforded sufficient basis for rendering judgment against the city, which might be enforced if it should become possessed of property or funds subject to the payment of such debts.

There is no provision of law which requires a city to enact an ordinance to enable its officers to execute contracts for current charges of the administration of its affairs. The Court of Civil Appeals excluded all debts for which authority was not found in the minutes of the council, which was the proper test to be applied.

This suit was based upon the notes executed by the city, with the alternative prayer that, in case recovery could not be had upon the notes, then the plaintiff might recover upon the constituent indebtedness; but the Court of Civil Appeals entered judgment upon the notes executed under the ordinance of the 20th day of August, 1897, and not upon the debts for which those notes were given. The court entered into an examination of the consideration upon which the notes sued on were issued, and determined that a number of the claims which were embraced were illegal, giving to the defendant a credit for all such claims as were barred by limitation or improperly embraced for any other reason. The court properly computed limitation upon the original debts up to August 20, 1897, when they were funded.

We find no error in the judgment of the Court of Civil Appeals, which is affirmed.

MUMFORD v. STATE.

(Court of Criminal Appeals of Texas. Feb. 17, 1904.)

CRIMINAL LAW—CARRYING PISTOL—EVIDENCE—
—MATERIALITY—RES GESTÆ—RE-
MARK OF COURT.

1. On a trial for carrying a pistol, evidence of conversations and of the acts of third parties preceding the discovery that the accused was carrying a pistol is immaterial.

2. On a trial for carrying a pistol, evidence that the accused took a pistol from another, and attempted to put it in his hip pocket, when the witnesses saw another pistol in the pocket, was admissible as a part of the transaction.

3. On a trial for carrying a pistol, the court's remark in the presence of the jury that he admitted evidence of the acts of another person to enable the jury to determine the punishment, in case they should find defendant guilty, was erroneous, as being a comment on the evidence.

Appeal from Palo Pinto County Court; W. E. McConnell, Judge.

Frank Mumford was convicted of carrying a pistol in violation of the statute, and appeals. Reversed.

Crudgington & Penix, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

evening of the alleged offense, Feazell, with his wife, had gone out west of the town of Strawn on a fishing excursion. While fishing they observed Sol Pace at their buggy. He came from the buggy to them, and engaged in conversation. The conversation is not stated. The three went to the buggy. Bill of exceptions was reserved to the introduction of this testimony, and the further fact that while at the buggy Mrs. Feazell saw appellant and a man named Oiler some 50 or 60 yards away, and called them to come; that they came, and she asked defendant who Pace was (it seems that up to this time they had not ascertained his name), and what he was doing there, and what right he had to insult Mrs. Feazell. Mrs. Feazell also asked defendant if he was a friend of Pace's, and would he take Pace away, and not let him kill her husband. Exception was reserved to this evidence, because it was immaterial and prejudicial, and had a tendency to inflame the minds of the jury against defendant on account of the acts of Pace, with which defendant is not shown to have had any connection, and that in no way tended to determine the fact that appellant was carrying a pistol. With reference to the occurrences prior to the time that Pace and Feazell and his wife returned to the buggy, perhaps they had no connection with the case; but there is nothing shown, except the mere fact that Pace went from the buggy to where Feazell and his wife were, and returned with them to the buggy. We do not see what effect this testimony could have had one way or the other. What occurred at the buggy while defendant was there, and the fact that Mrs. Feazell asked the questions she did, perhaps really had little to do with the case, so far as the mere fact of appellant having the pistol was concerned. However, it was during this conversation, or about at its termination, that defendant took a pistol from Pace, and undertook to put it in his right-hand hip pocket. While undertaking to put the pistol in his pocket, witnesses Feazell saw another pistol in the same pocket of appellant. The fact that appellant had taken the pistol from Pace, and was trying to put it in his pocket, is so connected with the main fact in the case, to wit, that these witnesses saw appellant's pistol in his pocket, that it was a part of the transaction, and was admissible to explain why it was that the two witnesses saw appellant's pistol. Upon another trial this portion of the testimony should be confined to the immediate facts which led to these witnesses seeing appellant's pistol, and the prior acts should be excluded.

Upon the objection of appellant to the introduction of this testimony, the court remarked, in the presence and hearing of the jury: "I admit in evidence all that was said in the presence and hearing of defendant by,

degree of punishment to inflict in this case, should they find defendant guilty of carrying a pistol." This remark of the court should not have been indulged. It is directly forbidden by the statute. This clearly conveyed to the minds of the jury that the court thought this should enhance the punishment above the minimum. The punishment assessed was a fine of \$50, \$25 being the minimum punishment. In ruling upon objections to testimony, in regard to its rejection or admission, the court should refrain from expressing any opinion in regard to it. This is provided by statute.

On account of this error, the judgment is reversed, and the cause remanded.

HOWE v. STATE.

(Court of Criminal Appeals of Texas. Feb. 17, 1904.)

LICENSE TAX — TRAVELING MEDICAL SPECIALIST — FAILURE TO PAY — PROSECUTION — EVIDENCE — SUFFICIENCY — MATERIALITY — ARGUMENT OF COUNSEL.

1. Where a prosecution for pursuing the occupation of a traveling medical specialist without having paid the required tax was based on the fact that defendant had pursued the occupation in a certain year, it was error to admit the records of the commissioners' court, showing the levy of the tax on the occupation in question for a previous year.

2. On a prosecution for pursuing the occupation of a traveling medical specialist without having paid the required tax, it was error for the county attorney to declare to the jury that they were trying a man who had been indicted all over the country, and that they could guess it was for violating the law he was then being prosecuted for, and to inquire of the jury if they were going to turn a man of that kind loose, there being nothing in the evidence to warrant such remarks.

3. On a prosecution for pursuing the occupation of a traveling medical specialist without having paid the required tax, some of the state's witnesses testified that defendant had stated to them that he was a traveling specialist, but defendant denied that he was a traveling specialist, and the only facts shown relative to the question was that after taking up his residence at a certain place in the county, and filing his certificate there, he removed to another place, where he kept an office and practiced medicine. Held, that the evidence was insufficient to sustain a conviction.

Appeal from Clay County Court; Jas. F. Carter, Judge.

George M. Howe was convicted of pursuing the occupation of a traveling medical specialist without having paid the license tax, and he appeals. Reversed.

Denny & Taylor, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of pursuing the occupation of a medical specialist, traveling from place to place and practicing his profession, without having paid the license tax therefor.

missioners' court in evidence, showing the levy of the occupation tax upon the occupation in question for the year 1902. The information and complaint charge the commission of the offense "on or about the 10th of February, 1903." The affidavit was made on February 16, 1903, and the information was filed on that date. As far as we are able to discover, the prosecution was based against appellant for pursuing the occupation in 1903. Appellant filed his certificate as a medical practitioner on November 26, 1902, when he first came to Bellevue, in Clay county. The prosecution does not appear to have proceeded on any act done by appellant until he came to Henrietta, which was some time in February, 1903. The bill of exceptions shows that the commissioners' court levied a tax for the year 1903 on the 10th of February, and it would appear that this was the tax for which appellant was amenable, and not the tax for 1902. Of course, if the prosecution was predicated on appellant being an itinerant physician in Clay county for the year 1902, the record would have been admissible, otherwise we fail to see its pertinency.

We do not believe it was proper for the witness Brown to have testified that appellant had been previously convicted for the same offense. However, the court explains this by stating how the testimony came to be adduced, and perhaps the instruction of the court on this subject may have cured this error.

It was also improper for the county attorney in his argument to declare to the jury that they were trying a man who had been indicted all over the country, and that they could guess it was for violating the law he was now being prosecuted for, and "are you going to turn that kind of a man loose?" These remarks were not called for by anything in the evidence, and were calculated to prejudice appellant's rights.

We have examined the record carefully, and we do not believe the evidence is sufficient to sustain this conviction. Some of the state's witnesses show that appellant stated to them that he was a traveling specialist, but the state did not supplement this alleged statement of appellant with any evidence showing the truth thereof. In effect, all that was shown in connection with appellant's practicing was his first location at Bellevue, in Clay county, the filing of his medical certificate at the time, and his subsequent removal, in February, 1903, to Henrietta, and his practicing there. He kept an office at Henrietta, and practiced his profession of medicine there, as other physicians. There was no evidence of his traveling over the country as an itinerant physician. Appellant himself denied the statement, attributed to him, that he was a traveling specialist, and testified to facts which

the state. It occurs to us that the testimony falls far short of establishing beyond a reasonable doubt that appellant was in the practice of medicine as a specialist, and was going from place to place, traveling over the state, pursuing his occupation. The facts stated bring him clearly within the rule laid down in *Hairston v. State*, 36 Tex. Cr. R. 470, 37 S. W. 858, and *Brolles v. State*, 68 S. W. 685, 5 Tex. Ct. Rep. 231.

It is not necessary to discuss other assignments, but for those pointed out the judgment is reversed, and the cause remanded.

ALLISON v. STATE.

(Court of Criminal Appeals of Texas. Feb. 17, 1904.)

BRIBERY—SUFFICIENCY OF INDICTMENT—NAME OF OFFICE.

1. Under Const. U. S. art. 1, § 2, designating membership in Congress as the office of "representative," an indictment for bribery at a primary election to nominate a candidate therefor, which alleges that a certain named person was a candidate "for the office of congress," is fatally defective.

Appeal from Limestone County Court; A. J. Harper, Judge.

A. A. Allison was convicted of bribery, and appeals. Reversed.

Howard Martin Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was fined \$20 upon conviction under indictment charging substantially as follows: That on or about the 14th day of June, 1902, A. A. Allison "did then and there unlawfully and corruptly offer to bribe and did bribe John Shipp, who was then and there a qualified voter at a primary election, and did then and there unlawfully, willfully, and corruptly offer to give and did give to said John Shipp the sum of three dollars, in money (lawful and current money of the United States of America), for the purpose of influencing the said John Shipp at such election to vote and cast his vote at such election for R. F. Prince, who was then and there a candidate for the office of congress; the said primary election being authorized by law, and being a primary election held by authority of the Democratic party on the 14th day of June, 1902, in all election precincts in Limestone county, for the purpose of nominating a candidate for Congress," etc. Appellant made a motion to quash the indictment on the ground that there is no such office as "congress" known to the law. In ordinary parlance, where a candidate is elected as the representative of the people of a district of a state to Congress, he is known and designated as "congressman," or "a candidate for Congress" while running. But in law there is no such office as "congress." Nor can an election be held to elect

jurors were not in the habit of attending court, or even though he might believe his method of selecting jurors would be a better method, in that better material for jury service might thereby be selected. The right of trial by jury stands upon a higher plane than expediency; and fair trial by jury means a jury selected according to the law regulating their selection and impanelment. We therefore hold that appellant was denied, by the intentional action of the judge, of the right of trial by a legal jury.

In view of another trial, if the evidence presents itself in the same condition as that now before us, we hold it would be competent for the state to introduce evidence of other sales, in order to illustrate appellant's method of selling wine. He claims to have sold the wine in question for sacramental purposes. Defendant might claim, as it appears he did, that he was deceived in this one instance; but when it was shown that he was in the habit of selling wine to boys for sacramental purposes, and taking a certificate from them to that effect, his defense of good faith would suffer serious impairment.

It is not necessary to notice other assignments. On account of the refusal of the court to quash the jury, which was selected in violation of law, the judgment is reversed, and the cause remanded.

GLASS v. STATE.

(Court of Criminal Appeals of Texas. Feb. 17, 1904.)

PASSING COUNTERFEIT COIN.

1. Under Pen. Code 1901, art. 557, declaring one guilty of counterfeiting, who, with intent that the coin be passed, alters a coin of lower value so as to make it resemble a coin of higher value; article 559, providing that the resemblance between the true and the false coin need not be perfect, to constitute counterfeiting; and article 561, declaring a punishment for passing as true, with intent to pass as true, any counterfeit coin, knowing it to be counterfeit—one who passes as a dime a cent merely covered with a wash, giving it the color of a dime, may be convicted of passing a counterfeit coin.

Appeal from District Court, Hill County; W. Poindexter, Judge.

John Glass appeals from a conviction. Affirmed.

Douglass & Shurtliff and Bounds & Hart, for appellant. C. F. Greenwood, Co. Atty., B. Y. Cummings, Asst. Co. Atty., and Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of knowingly passing as true a counterfeit coin, the penalty assessed being two years in the penitentiary. The proof shows that it was a copper cent, changed by some chemical process to resemble a 10-cent piece; that

together. Defendant went into the store of Forrester in the early part of that night, stated he wanted change for a dime, and handed Forrester what he took to be a dime. He gave him two nickels in exchange for the dime. Forrester turned to place the money in the drawer, and noticed as he did so that defendant went out of the house in a run. He immediately looked at the money defendant had given him, and saw it was a copper cent, the color of it being changed so as to look like a dime. Defendant called it a dime, and asked for change for a dime. Immediately upon discovering the cheat, Forrester went to the sidewalk, and hallooed to defendant two or three times to stop. He finally did so, and came back, meeting Forrester. Forrester told him that the dime he had given him was a copper cent, and wanted him to return his money. Appellant immediately returned the two nickels, and Forrester gave appellant the copper. Appellant looked at the copper and said, "I am a son of a bitch!" The copper he gave Forrester "was colored like silver, and looked like a dime." The sheriff went in pursuit of defendant and Johnson, and finally arrested them, and found some copper cents on them. "The coppers were bright, like silver," but the bright appearance had partially rubbed off. They resembled dimes, and did not look as much like them as they had before they had been rubbed off. "I got a bottle of stuff that Mr. Treadwell turned over to us, and turned it over to the county attorney. I had some experience with the liquid in the bottle Mr. Treadwell had, in applying it to copper cents. I put it on them, and then rubbed the copper with a piece of paper, and it turned them the color of a dime, and made the coppers look like a new silver dime. I treated the coppers with the stuff several times, and it had the same effect every time. Don't know what the stuff was, but it looked like quicksilver." On cross-examination this witness says: "There is a difference in color between a dime and one-cent piece. A copper is yellow, and a little larger than a dime. There is a difference between the edge of a copper and a dime. A dime is milled on the edges, and has a woman's head on one side, and reads, 'One Dime' on the other side; and a copper cent has an Indian's head on it. The reading matter on the copper was not changed. When the fluid was applied to the coppers, it made them look like dimes. After that stuff was applied to the coppers, it is a fact that you could detect they were not dimes if you examined them closely." It is contended this evidence is not sufficient to support the judgment of conviction. Article 557, Pen. Code 1901, provides: "He is guilty of counterfeiting who makes, in the semblance of true gold or silver coin, any coin of whatever denomination, having in its com-

such true coin, with intent, that the same should be passed in this state or elsewhere." Article 558: "He is also guilty of counterfeiting who, with like intent, alters any coin of lower value so as to make it resemble coin of higher value." Article 559: "The resemblance between the true and the false coin need not be perfect to constitute the offense of counterfeiting." Article 561 provides the punishment against those who shall pass or offer to pass as true, or bring into this state with intent to pass as true, any counterfeit coin, knowing the same to be counterfeit, etc. We believe the evidence is sufficient to bring it within the provisions of the statutes cited. If the imitation or resemblance is such as is capable of imposing on persons of ordinary observation, this would be sufficient; and it is further sufficient if the alleged counterfeit coin bears such resemblance or likeness to the genuine as to be calculated to deceive an honest, sensible, and unsuspecting man of ordinary observation and care, dealing with men supposed to be honest. This resemblance of the counterfeit coin to the genuine must be sufficiently strong to deceive persons exercising ordinary care. 7 Amer. & Eng. Ency. of Law (2d Ed.) 877; U. S. v. Morrow, 4 Wash. C. C. 733, Fed. Cas. No. 15,819; United States v. Mitchell Baldw. U. S. 366, Fed. Cas. No. 15,787; U. S. v. Abrams (C. C.) 18 Fed. 823, 21 Blatchf. 553; Dement v. State, 2 Head (Tenn.) 505, 75 Am. Dec. 747; United States v. Sprague (D. C.) 48 Fed. 828; United States v. Hopkins (D. C.) 26 Fed. 443. It is not necessary that the counterfeit be exact in its similitude. It is enough that the similarity in the likeness is sufficient to deceive a man of ordinary observation. See, also, U. S. v. Otey (C. C.) 31 Fed. 68, 12 Sawy. 416. The intent of appellant to defraud is placed beyond any question. The coin was passed at night, and under circumstances that led the witness Forrester to believe it was a dime. It had the appearance of a dime, and was passed by appellant as a dime. Under these circumstances, it was sufficient to deceive any honest, unsuspecting man of ordinary observation, dealing with another supposed to be honest. Under the circumstances detailed in the testimony, it had the effect and purpose intended by appellant. Our statute has expressly provided that the resemblance between the true and the false need not be perfect, to constitute the offense of counterfeiting. So, under that statute, we believe the evidence is sufficient. While it was not a true representation of a dime, it was sufficient to impose upon any ordinary man in ordinary transactions, and the evidence brings it within the rule set out in our statute.

No error appearing in the record, the judgment is affirmed.

(Court of Criminal Appeals of Texas. Feb. 17, 1904.)

MURDER—MANNER OF KILLING—EVIDENCE—
CONFESSION—SUFFICIENCY—SEVERANCE
—TRIAL OF ACCOMPLICE.

1. In a prosecution for murder, a motion for a severance in order that a person indicted as accomplice for encouraging the act to be done, though not present at the killing, should be tried first, should have been granted.

2. Under an indictment charging murder by striking with an ax or stabbing with a knife, the mere confession of defendant is insufficient to prove that deceased was killed in the manner charged in the indictment.

Appeal from District Court, Henderson County; John Y. Gooch, Judge.

Jim D. Follis was convicted of murder, and appeals. Reversed.

Richardson & Watkins and Guy Green, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is a conviction of murder in the first degree, with the life sentence assessed as the punishment. The indictment contains two counts: First, that the homicide occurred by striking deceased with an ax; and, second, by striking with an ax and stabbing and cutting him with a knife. When the case was called for trial, a motion for severance was made on the ground that appellant desired Dock Brunson, who had been indicted as an accomplice, should be first placed upon trial. When this application was filed, the district attorney, by permission of the court, dismissed the case against Brunson. The bill is further explained by stating that appellant was indicted for killing Hamp McDonald, and Brunson was indicted for encouraging the act to be done, but was not present at the killing, so far as alleged or proved. Appellant then asked for a postponement or continuance of the case on account of the absence of Brunson, who was sick and unable to attend the trial. This was contested on the ground that the witness Brunson was an unpardoned convict, and appellant demurred to this contest on the ground that the court did not have the best evidence of said witness' conviction. This is qualified by the statement that the witness Brunson was within 100 yards of the courthouse, and, upon oath before the court, stated he had been sick, but was able to be brought into court to testify, and the court offered to have him brought before the jury and on the trial, and it was for this reason that the motion for postponement was overruled; and the court did not hold or rule that he was incompetent or disqualified from testifying, nor that the evidence offered by the state was sufficient to show this. In fact, he had been granted a pardon. Taking the case as it is presented, it may be stated that

¶ 1. See Criminal Law, vol. 14, Cent. Dig. § 1384.

had formed no such opinions as would affect their verdict, and that the opinion they had formed was only such as every man would form, based merely on rumor, challenges for cause were properly overruled.

2. In a prosecution for murder, the prosecuting attorney told the jury that, if they acquitted, it would cause more murder; and, though defendant's counsel's objection and request that the language be withdrawn, and the jury be instructed not to consider the same, were overruled, no special charge was requested, requiring the jury to disregard the argument. *Held* not to be sufficiently prejudicial to authorize reversal.

3. In a prosecution for murder, an instruction that defendant was a competent witness, and that the jury were the sole judges of his testimony, and should weigh it as they would that of any other witness, was properly refused, because singling out defendant's testimony.

4. In a prosecution for murder, a charge that "the testimony relating to former indictments against the defendant was admitted for the sole purpose of affecting the defendant's credibility as a witness" did not constitute reversible error, on the ground that it failed to inform the jury that they should consider such testimony for no other purpose than as affecting defendant's credibility.

5. Mere intent and purpose to provoke a difficulty as a pretext for killing a person do not deprive the slayer of the right of self-defense, if he does not act at the time of the difficulty which provokes it.

6. In a prosecution for murder, a charge, in relation to self-defense, that, if the purpose of defendant in arming himself was to protect himself against another, with no purpose to attack deceased or provoke a difficulty with him for the purpose of killing him, defendant would be justified if deceased did attack him in such a manner as to produce a reasonable apprehension of danger "of his life or serious bodily injury." Actual attack was made by deceased on defendant. *Held*, that defendant could not complain of the charge on the ground that it limited his right of self-defense to an attack, and not to apparent danger.

7. Where it appeared on application for a change of venue in a homicide case that there was local prejudice in the town where the killing occurred, but that outside the town there was no prejudice precluding a fair trial in that county, the court was not authorized on appeal to interfere with the discretion of the trial court in refusing to change the venue.

Appeal from District Court, Caldwell County.

J. D. Tardy was convicted of murder, and appeals. Reversed.

W. K. Baylor and Moore, Hearrell & Moore, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of five years.

Bill of exceptions No. 1 complains that, during the selection of the jury, Lee Bear and Jim Taylor were duly and legally summoned talesmen after the exhaustion of the special venire, and were each asked the following question by appellant's counsel: "Whether he had formed an opinion as to the guilt or

what he had heard of the case, and each juror answered in the affirmative—that he had formed an opinion. And each juror was further asked if it would require other and different evidence to change his opinion. Each answered it would." Whereupon defendant's counsel challenged each of said jurors for cause, and the court overruled the challenge, and compelled defendant to peremptorily challenge said two jurors. And defendant took two other jurors, to wit, Jim Richburg and Dick Winfrey, whom he would have challenged peremptorily but for his challenges having been exhausted by the action of the court in declaring the two jurors Bear and Taylor qualified jurors. The court approved this bill, with the following explanation: "The court had already asked the two jurors the statutory question, and in answer to which they said they had formed no such opinions as would in any way affect their verdict, and such opinion as they had formed was only such as every man would form, based merely upon rumor. And the court further asked each of said jurors if there was established in their minds such an opinion, from hearsay or otherwise, as would influence their verdict, and each answered they had not. Each of said jurors answered that nothing that they had heard would influence them in their verdict. And the court, being of opinion that each of said jurors was impartial, and had no such opinion as would influence their verdict, ruled they were qualified to serve as jurors." The explanation of the court shows there was no error in the ruling.

Bill of exceptions No. 4 complains of the following language used by the district attorney in closing his argument to the jury: "Gentlemen of the jury, you acquit this defendant on these facts, and it will cause more murders to follow." To which statement of counsel, defendant objected by his attorney, and asked that said language be withdrawn from the jury, and that the jury be instructed not to consider the same, which objection was overruled, and defendant excepted. No special charge was requested by appellant, requiring the jury to disregard this argument. We cannot say it is of such a character as would necessarily prejudice appellant to such an extent as would authorize a reversal.

Appellant asked the court to give the following charge: "You are further instructed in this cause that defendant is a competent witness in his own behalf, and you are the sole judges of his testimony, and you should judge and weigh it as you would the testimony of any other witness." This charge was refused. In this there was no error. It is never proper for the court to single out the testimony of any witness, and give a charge similar to the one asked. Defendant's testimony, under the law, stands as any other

¶ 5. See *Homicide*, vol. 26, Cent. Dig. § 149.

In motion for new trial, appellant complains of the following portion of the court's charge: "The testimony relating to former indictments against the defendant was admitted for the sole purpose as it relates to the credibility of the defendant as a witness." The objection to said charge being that the same failed to instruct the jury that such evidence was introduced and admitted for the sole purpose of affecting defendant's credibility as a witness, and should be considered by them for that purpose alone. The record shows that defendant had been previously tried in Arkansas for murder and acquitted, and had also been previously charged with various thefts and acquitted. The court in the above charge tells the jury that the testimony can be considered for the sole purpose of affecting his credibility. We take it that this cannot be construed otherwise than as a statement that it can be considered for no other purpose. However, it is better and proper to so state, as appellant insists. If the jury can consider it but for one purpose, it necessarily limits it to that purpose. We do not think there is such error in the charge complained of authorizing a reversal.

Appellant also objects to the following portion of the court's charge: "Upon the subject of self-defense, you are further charged that if you believe from the evidence, beyond a reasonable doubt, that defendant armed himself, with the intent and purpose to provoke a difficulty with the deceased, as a pretext for killing him; and if you further believe from the evidence beyond a reasonable * * * that defendant, with malice express, as before defined, did shoot and kill D. L. Thompson, though his own life or serious bodily injury was threatened in such difficulty, then defendant would not be entitled to the plea of self-defense, but such killing would be murder in the first degree." This charge is erroneous, and, under all the authorities, it is laid down that bare intent and purpose to provoke a difficulty does not deprive defendant of the perfect right of self-defense. He must do some act, or something at the time of the difficulty that does provoke the same. For a discussion of this question, see *Matthews v. State* (Tex. Cr. App.) 58 S. W. 87.

Appellant also complains of the following charge: "But if the purpose of defendant in arming himself, if such be the fact, was to protect himself against another, with no purpose to attack the deceased or to provoke a difficulty with him for the purpose of killing him, then defendant would be justified, if the deceased did attack him in such a manner as to produce in his mind a reasonable apprehension of his life or serious bodily injury, as before defined and instructed." Appellant's objection to this charge is because the same limits appellant's right of self-defense to an attack by deceased, and not to apparent

defendant's testimony as to his (defendant's) purpose in arming himself. The evidence on the part of appellant shows an actual attack was made by deceased upon appellant, and hence this portion of the charge is pertinent to the evidence introduced. As stated above, the purpose of defendant in arming himself is not an incriminative fact per se, where the issue of provoking the difficulty is in question. But he must do some act at the time to provoke the difficulty, before the bare fact of preparation would in any sense forfeit his right of self-defense. However, the court tells the jury here that if he did arm himself without any such purpose, and deceased attacked him, he would have the perfect right of self-defense. We cannot see how appellant can justly complain of this charge.

The only other error assigned which we deem necessary to pass upon is the failure of the court to change the venue. The bill presenting this matter is quite voluminous. A careful reading thereof does not convince us that the court committed any error in refusing to change the venue. It shows local prejudice, as we understand, in the town of Lockhart, where the killing occurred; but, outside of that, it does not appear that such a degree of prejudice existed as precluded a fair and impartial trial of defendant in that county, and does not present such a state of facts as would authorize us to interfere with the discretion of the trial court in these matters.

For the error pointed out, the judgment is reversed and the cause remanded.

CLARK v. STATE

(Court of Criminal Appeals of Texas. Feb. 17, 1904.)

DISTURBING RELIGIOUS WORSHIP—INSTRUCTION—NATURE OF OFFENSE—PUNISHMENT—HARMLESS ERROR.

1. To constitute the offense of disturbing religious worship, it is not necessary that every one in the house be disturbed, but the disturbance of a considerable part of the congregation by a noise audible all over the house is a violation of the statute.

2. In a prosecution for disturbing religious worship, in which the evidence showed that the disturbance occurred in the house, defendant was not prejudiced by a charge that he would be guilty if he disturbed the congregation in or out of the house.

3. In a prosecution for disturbing religious worship, error in charging as to punishment under Pen. Code 1896, art. 193, which allowed fine and imprisonment, instead of under Acts 25th Leg. p. 102, c. 78, allowing a fine only, did not prejudice defendant, where the jury assessed only the lowest punishment by fine.

Appeal from Eastland County Court; S. A. Bryant, Judge.

John Clark was convicted of disturbing religious worship, and appeals. Affirmed.

¶ 1. See *Disturbance of Public Assemblage*, vol. 12, Cent. Dig. § 4.

RENDERSON, J. Appellant was convicted of disturbing religious worship, and his punishment assessed at a fine of \$25; hence this appeal.

Appellant assigns as error the charge of the court to the effect that if they believed appellant willfully disturbed the congregation, or any part of said congregation; insisting that the indictment charges a disturbance of the whole congregation, and appellant could not be convicted for disturbing only a part of the congregation. We do not understand this contention to be sound. If it was, then proof would have to be made that he disturbed every one in the house, before he could be convicted. A disturbance of at least a considerable part of the congregation by making a noise that could be heard all over the house would certainly be a disturbance contemplated by the statute. *McVea v. State*, 35 Tex. Cr. R. 1, 26 S. W. 834, 28 S. W. 469.

Appellant also contends that the court erred in charging the jury that appellant would be guilty if he disturbed the congregation in or out of the house; his contention being that the proof showed that the disturbance, if any, occurred in the house, and not out of the house. We understand the proof to be as stated. The jury could not have been misled by this charge, and we fail to see how it injured appellant.

Appellant contends that the court erred in charging the wrong punishment; that is, he gave the former punishment under Pen. Code 1895, art. 193, including, besides the fine, imprisonment in the county jail not exceeding 30 days. The Acts of the Twenty-Fifth Legislature (page 102, c. 78) amended this, and eliminated the punishment of imprisonment, leaving only the fine. The court charged the old law as to the punishment, but the jury only gave him the lowest punishment by fine, and it does not occur to us that the misdirection of the court in this respect prejudiced appellant. The offense was fully made out, if the jury believed the state's witnesses.

No error appearing in the record, the judgment is affirmed.

NOWLIN v. HALL.*

(Court of Civil Appeals of Texas. Feb. 17, 1904.)

Appeal from District Court, San Saba County; Clarence Martin, Judge.

Motion to file findings of fact. Granted.

For former opinion, see 77 S. W. 419.

Chas. L. Lauderdale, for appellant. G. A. Walters and W. M. Allison, for appellee.

KEY, J. Appellant has filed a motion asking this court to file findings of fact in this

*Writ of error denied by Supreme Court.

granted and complied with to this extent, which we deem sufficient: The court's charge submitted to the jury the material issues of fact; and, on the several issues so submitted, as shown by the charge, we now here find for the plaintiff, Hall.

NEWBOLD v. INTERNATIONAL & G. N. R. CO.

(Court of Civil Appeals of Texas. Feb. 17, 1904.)

RAILROADS—CONSTRUCTION IN STREET—DAMAGES TO ABUTTING OWNER—EVIDENCE—ADMISSIBILITY—DAMAGES TO OTHER LOTS.

1. In an action against a railroad for damages sustained by an abutting owner, occasioned by the construction of its road in a street, it appeared that the most available street frontage of plaintiff's lot was destroyed. *Held*, that it was error to permit a witness for defendant to state on his direct examination the price for which a lot on the opposite side of the street had been sold after the construction of the railroad, to show no damage done, when the road was not as near such lot as it was to plaintiff's, and its situation as to the road was different.

Error from Falls County Court; W. E. Hunnicutt, Judge.

Action by C. D. Newbold against the International & Great Northern Railroad Company. Judgment in favor of defendant, and plaintiff brings error. Reversed.

Wm. Shelton and Z. I. Harlan, for plaintiff in error. N. A. Stedman, Martin & Eddins, and W. S. Baker, for defendant in error.

STREETMAN, J. Plaintiff in error was the owner of certain lots on Falls street, in Marlin, Tex. About November 1, 1900, the Calvert, Waco & Brazos Valley Railway Company, under authority of a city ordinance, built its railroad along said street. Plaintiff in error brought this suit against the International & Great Northern Railroad Company, which had assumed the liabilities of the former company, for damages occasioned to said lots by the construction and operation of said road.

We sustain the fourth assignment of error. Upon direct examination of defendant's witness L. E. Oltorf, defendant was permitted to prove by him that about September 11, 1901, shortly after the railroad came to Marlin, witness and a Mr. Emerson bought a piece of property just across the street from the Newbold property, and about twice as large as the Newbold property, paying \$1,500 for it, and that, in his judgment, that piece of property was worth more after the road came than it was before. There is much conflict in authority as to whether, on direct examination, a witness may be asked as to sales of other property similarly situated. Many authorities hold that such evidence is admissible; others, that its admissi-

of knowledge of witnesses who have testified to market value upon direct examination. In Elliott on Railroads, vol. 3, § 1036, many authorities are collated, and the author expresses the opinion that the weight of authority favors the view last stated. In Am. & Eng. Ency. of Law (2d Ed.) vol. 10, p. 1155, the contrary opinion is expressed. In this state we are not aware that the precise question has been decided. However, in Chaney v. Coleman, 77 Tex. 103, 13 S. W. 851, where similar evidence had been excluded, it is said: "We think the evidence was properly excluded. The question was as to the value of the farm conveyed to plaintiff by defendant. It is not readily seen how its value can be correctly shown by comparing it with others, as was proposed to be done by the defendant in this case. * * * Before a value can be given to it by proving the average value of farms in that vicinity, it should be proved that the improvements and other things to be considered in estimating its value corresponded with like things on the farm with which it is classed. That was not done in this case, and it is not probable that it can be done, or that a proper predicate can be laid for the adoption of such a method of establishing its value, instead of proving it directly." So, in this case, while the Oltorf lot was just across the street from the lot in question, it was not situated in the same way with reference to the railroad; the east front of the Newbold lot being taken by the railroad, and the west front of the other. Neither is it shown that the railroad was constructed in the same manner on the side next to the Oltorf lot as next to the Newbold lot. On the contrary, the evidence indicates that, while the road and embankment ran very close to the Newbold lot, there may have been room for a sidewalk on the other side of the street. Neither is the situation of the two lots with reference to other streets shown to be similar. The evidence tends to show that the most available street frontage of the Newbold lot was destroyed by the railroad, and that it became necessary to front upon an alley or narrow street to the north. The Oltorf lot is also shown to have been two or three times as large as the lot in question, and for that reason might have been adapted to purposes for which the lot in question could not have been used. These circumstances, and others which might be enumerated, serve to show how the Oltorf lot was so dissimilar to that in question that its value might have been increased by the building of the road, while the Newbold lot was decreased in value. Of course, two lots could never be found precisely alike, nor would this be required; but if it is admissible in any case, on direct examination, to prove value by comparison with other property, it should first be shown that such other

property should have been given a special instruction requested by the plaintiff. The instruction requested was a copy of that given and approved by our Supreme Court in the case of Railway Company v. Fuller, 63 Tex. 473; and while we are not prepared to say, in view of the charge given by the court, that its refusal would be reversible error, yet, in view of another trial, we suggest that it would have been proper to have given it, and would, perhaps, have presented the case from plaintiff's standpoint a little more clearly than the charge given by the court. The cases of Ry. Co. v. Scurlock, 78 S. W. 490, 9 Tex. Cr. R. 162, and Boyer v. Ry. Co., 76 S. W. 441, contain the most recent expressions of our Supreme Court as to the measure of damages and method of proof in such cases.

The assignments relating to the weight and sufficiency of the evidence need not be considered. We find no error shown by the other assignments.

The judgment is reversed, and the cause remanded.

GULF, C. & S. F. RY. CO. et al. v. DUNN.
(Court of Civil Appeals of Texas. Feb. 17, 1904.)

CARRIERS—INJURIES TO STOCK—FAILURE TO FEED AND WATER—EVIDENCE—APPEAL—ASSIGNMENTS OF ERROR—PROPOSITIONS.

1. In an action against a railroad company for injuries to a shipment of horses by rough handling and failure to feed and water, the exclusion of a portion of the contract which required the shipper to feed and water the stock was not error, where the evidence showed that no opportunity was afforded him to do so.

2. In an action against a railroad company for injuries to a shipment of horses by failure to feed and water, the admission of evidence that the stock were injured by drinking too much water at a certain station was proper, there being other evidence that this was caused by failure to properly feed and water before arrival at this place.

3. An assignment of error which is not a proposition in itself, not followed by propositions, and upon which, in argument, at least two propositions are based, cannot be considered.

Appeal from Tom Green County Court; Milton Mays, Judge.

Action by H. C. Dunn against the Gulf, Colorado & Santa Fé Railway Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

J. W. Terry and H. D. McDonald, for appellants. Dubois & Allen, for appellee.

STREETMAN, J. Appellee made a shipment of horses from San Angelo, Tex., to East St. Louis, Ill., over the lines of railway of the three appellants, and in this suit recovered damages against each of them on account of delay, rough handling, and failure to feed and water.

the contract which required the shipper to feed and water the stock during the shipment. There is no evidence to show that a reasonable opportunity was afforded him to feed and water the horses, but the evidence of appellee shows that such opportunity was not afforded. There was therefore no error in refusing to charge upon this issue. *Ry. Co. v. Daggett*, 87 Tex. 322, 28 S. W. 525.

The second assignment complains of the admission of evidence that the horses drank too much water at Cleburne, and were injured thereby, because there was no pleading as a basis for this character of injury. This, however, is shown by the evidence to have been caused by the failure to properly feed and water the animals prior to their arrival at Cleburne, and, we think, was admissible, under the allegations of the petition.

The fifth assignment relates to the charge of the court on the measure of damages. It is attempted to be submitted as a proposition, but is clearly not a proposition in itself, and is not followed by propositions; but, in an argument, at least two legal propositions are urged as based on said assignment. In this condition, the assignment is not entitled to be considered.

The remaining assignments complain that the evidence was insufficient to sustain the verdict. A careful examination of the record convinces us that there is no merit in these assignments.

The judgment is therefore affirmed.

EL PASO ELECTRIC RY. CO. v. KENDALL.

(Court of Civil Appeals of Texas. Feb. 17, 1904.)

STREET RAILWAY—COLLISION WITH TEAM—CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF.

1. Plaintiff's boy, 12 years old, while driving a closed milk wagon having a window in front and a door on each side, was injured by an electric car running on E. street striking the wagon at a street crossing. Plaintiff's evidence was that the car was going with unusual speed. The boy testified that when on E. street he looked out of the front and sides, and saw and heard no car, and did not know of its presence till it struck. He also stated that there was nothing to obstruct his view, and that if he had been keeping a lookout he would have seen the car. *Held*, that plaintiff's evidence did not present contributory negligence as a matter of law, which was necessary to make improper a charge that the burden of proof on the issue of contributory negligence was on defendant.

Appeal from El Paso County Court; Joseph U. Sweeney, Judge.

Action by W. E. Kendall against the El Paso Electric Railway Company. Judgment for plaintiff. Defendant appeals. **Affirmed.**

JAMES, C. J. Appellee brought this action for his damages on account of injuries to his minor son in a collision. The son was 12 years of age at the time of the accident. He was driving a milk wagon along Second street, and when crossing El Paso street, in the city of El Paso, at the intersection of the streets, appellant's car struck the wagon and injured him. The verdict was in favor of plaintiff for \$250.

There are two assignments of error. The first contends that plaintiff's evidence tended to show that the boy was guilty of contributory negligence, and therefore it was error for the court to charge the jury that the burden of proof on the issue was upon the defendant. The testimony introduced by plaintiff did not present contributory negligence as a matter of law. This was necessary in order to make the charge given improper. *Ry. v. Schleder*, 88 Tex. 163, 30 S. W. 902, 28 L. R. A. 538. In the first place, we do not believe a child 12 years of age, in any ordinary case, can be held guilty of contributory negligence as a matter of law. *Ry. v. Shiflet*, 94 Tex. 139, 58 S. W. 945; *City of Owensboro v. York's Adm'r* (Ky.) 77 S. W. 1130. In the next place, the mere failure of a person to look and listen is not negligence per se, and cannot be treated as such by the court, but may be declared such by a jury under the circumstances of the case. The testimony introduced on behalf of the plaintiff was that the wagon was a closed one, having a window in the front and doors on each side. The boy testified that when on El Paso street he looked out of the front and sides and saw no car, heard no signals, and did not know of the presence of the car until it struck the wagon. Plaintiff's other witnesses testified that the car was going with unusual speed. It is true the boy stated also that there was nothing to obstruct his view, and that if he had been keeping a lookout he would have seen the car. But this could be taken, in connection with his entire testimony, to mean that he could have looked up the street, and could have seen this car approaching if he had done so, but, looking out from his position in the wagon, there was no car as far up the street as he could see. But if he had in fact seen the car approaching some distance off, it would not necessarily follow that he was negligent in proceeding to cross over, and for reasons for this view we refer to the opinion of this court in *Traction Co. v. Upson*, 71 S. W. 565, 6 Tex. Ct. Rep. 447.

The second assignment cannot be sustained, in view of the charges that were given.

Affirmed.

CERTIORARI—APPLICATION—CAUSE—SUFFICIENCY OF SHOWING.

1. Under Sayles' Ann. Civ. St. 1897, arts. 344, 345, providing that certiorari shall not be granted unless the applicant shall make affidavit setting forth cause entitling him thereto, and that, to constitute cause, the facts must show want of jurisdiction in the justice of the peace, or injustice done to the applicant, it is not necessary that the application show good cause why the applicant did not appeal.

Appeal from Lamar County Court; John W. Love, Judge.

Action by the Parlin & Orendorff Company against J. V. Keel. There was a judgment in justice's court for defendant, and plaintiff applied to the county court for a certiorari. From a judgment dismissing the certiorari, plaintiff appeals. Reversed.

Fagan & Hathaway, for appellant. W. B. Latimer, for appellee.

TALBOT, J. Appellant brought suit in the justice's court of Precinct No. 1 of Lamar county against appellee on several promissory notes, and at the same time sued out a writ of attachment. The attachment was levied upon a horse and mule as the property of appellee. Mrs. Louisa Moore claimed to be the owner of the mule, and, joined by her husband, filed affidavit and claim bond for the trial of the right of property to the same. On the day this suit was called for trial in the justice's court the appellee filed a plea in reconvention for damages, alleging that the horse and mule upon which the attachment had been levied was exempt property; that the attachment had been wrongfully and maliciously sued out—and prayed for both actual and exemplary damages. Upon the filing of this plea the appellant pleaded in writing that the mule alleged to be appellee's exempt property had been claimed by the Moores; that they had filed affidavit and bond under the statute for the trial of the right of property to said mule, which suit was then pending in said justice's court—and prayed that said claimants be made parties to this suit. The justice of the peace overruled this motion, and upon a trial appellee recovered a judgment against appellant for the value of the horse and mule in the sum of \$105 as actual damages, and \$80 as exemplary damages. Appellant applied for a writ of certiorari to remove the cause to the county court, upon the ground that injustice had been done it in the failure of the justice of the peace to make the Moores parties to the suit, as prayed for by them. In the county court appellee moved to dismiss the writ of certiorari because no reason was given why appellant had not appealed. This motion was sustained, and the certiorari dismissed at appellant's costs. From this judgment appellant appeals, and

in said motion?

We find no statutory warrant for this action of the court. Our statute provides "that the writ [certiorari] shall not be granted unless the party applying for the same, or some person for him having knowledge of the facts, shall make affidavit in writing setting forth sufficient cause to entitle him thereto"; and further provides that "in order to constitute a sufficient cause the facts stated must show that either the justice of the peace had not jurisdiction or that injustice was done to the applicant by the final determination of the suit or proceeding and that such injustice was not caused by his own inexcusable neglect." Sayles' Ann. Civ. St. 1897, arts. 344, 345.

Finding no provision in the statute requiring that the application should show good cause why the applicant did not appeal, we hold that a petition complying with the statutes above quoted is sufficient. It seems clear that the remedy by certiorari is independent of the one by appeal, and that it is not obligatory upon the applicant, in resorting to the former, to assign any reason or excuse for not adopting the latter. The case of *Cotton v. Gammon*, 4 Tex. 83, cited by appellee, has been overruled, and the ruling here made is sustained by the following authorities: *Ray v. Parsons*, 14 Tex. 371; *Poag v. Rowe*, 16 Tex. 591; *Hall v. Magale*, 1 App. C. 332; *Quinn & Bowser v. Elam*, 1 App. C. 1108.

We are of opinion that the court below erred in dismissing the writ of certiorari, and the judgment is reversed and the cause remanded.

KEACHELE et al. v. HENDERSON et al.
(Court of Civil Appeals of Texas. Feb. 13, 1904.)

TRESPASS TO TRY TITLE—JUNIOR PURCHASER—NOTICE OF PRIOR TITLE—EVIDENCE—SUFFICIENCY.

1. To entitle a junior purchaser of real property to recover against the holder of a prior legal title thereto, the evidence must show that the prior deed or patent was not registered, and that the junior purchaser was without notice of the prior title.

2. Evidence in an action of trespass to try title examined, and held insufficient to show that plaintiff's ancestor was without notice of a prior appropriation of the land in controversy at the time it was patented to him.

Appeal from District Court, Freestone County; T. B. Cobb, Judge.

Action by F. A. Keachele and others against Jim Henderson and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Anderson & Anderson, for appellants. W. B. Moses, for appellees.

BOOKHOUT, J. This suit was filed in the district court of Freestone county, Tex., on

ant has not repaid plaintiff, and found also that plaintiff's claim was barred by limitations, unless the letter, which was written by Ellis to plaintiff in answer to a letter written him by plaintiff, removed the bar of the statute. The letter to Ellis was written in the latter part of 1902, asking him to send plaintiff the money which the latter had paid out for him to Sullivan, and on November 24th the reply was, in substance, that the letter had been received; that he (Ellis) was going to Mexico; and that on his way, during the Christmas holidays, he was going to stop over in San Antonio, and while there would make a settlement with plaintiff in full, principal and interest; and thanked the latter for courtesies, etc. The judgment was for defendant upon said facts upon the ground that said letter did not take the debt out of the statute.

The letter was sufficient for that purpose. When read in connection with the letter to which it purported to be an answer, which is proper in construing it, it was a clear acknowledgment of the debt for the full amount thereof, and a distinct promise to pay it, with interest. The undisputed evidence is that plaintiff paid the note prior to March 2, 1892, and upon this and the other facts as found the judgment is reversed, and judgment here rendered in favor of appellant for the \$112, with interest from the date claimed—that is, from March 2, 1892—at 6 per cent. per annum, and costs.

GHIO et al. v. STEPHENS.*

(Court of Civil Appeals of Texas. Feb. 6, 1904.)

INTOXICATING LIQUORS—LIABILITY ON RETAILER'S BOND—ALLOWING MINOR IN SALOON—EVIDENCE—SUFFICIENCY.

1. Evidence that a minor only remained in a saloon long enough to purchase and pay for a bucket of beer does not show an entering and remaining therein, within the meaning of the statute prescribing the conditions of a liquor dealer's bond.

Appeal from District Court, Bowie County; J. M. Talbot, Judge.

Action by W. A. Stephens against Guido Ghio and others. From a judgment for plaintiff, defendants appeal. Reversed.

H. W. Vaughan and Crawford & Crawford, for appellants. Hart & Mahaffey, for appellee.

BOOKHOUT, J. This was a suit by appellee, W. A. Stephens, against Guido Ghio, and the sureties on his bond as retail liquor dealer, to recover damages for selling beer to appellee's minor son, Jesse. The petition contains two counts: (1) That the defendant

Jesse Stephens purchased from said Ghio, his agents and servants, beer, a liquor capable of producing intoxication. A want of consent was alleged in both counts, and the sum of \$500 damages demanded for each alleged breach of the bond. The jury found for plaintiff in the sum of \$500 for the breach of the bond in allowing the minor to enter and remain in Ghio's place of business. Judgment followed accordingly, and the sureties appeal.

Various errors are assigned by appellants, but under our view of the case we deem it only necessary to consider the question raised in the fourth assignment. This assignment challenges the sufficiency of the evidence to support the verdict and judgment. The testimony, we think, was sufficient to show that Guido Ghio was engaged in the sale of beer and other intoxicating liquors to be drunk on the premises at No. 216 Front street, in the city of Texarkana, Bowie county, Tex., on June 12, 1901. That on that day Jesse Stephens, a boy 16 years of age, and son of appellee, entered the saloon with a bucket to buy some beer. He entered the front door, and walked halfway into the building and up to the bar. He spoke to Bill Teague, the man behind the bar, and told him that he wanted 10 cents worth of beer, and handed him the bucket. Teague said, "All right," and took the bucket and drew a quart of beer, and handed Stephens the bucket with the beer in it, and Stephens paid the 10 cents and walked out of the saloon. It was further shown that appellee did not know of such purchase until after it had been made and the beer drunk by the employes of the laundry where appellee and his son were at work. The charge of the court authorized a recovery upon both or either of the causes of action set out in the petition. The verdict is based upon the cause of action that the defendant, Ghio, his agents and servants, permitted the plaintiff's son to enter and remain in Ghio's place of business. The effect of the verdict is a finding for defendants as to the second cause of action set up in the petition. The question presented is, Does the evidence show an entering and remaining by appellee's son in Ghio's saloon? Since the trial of this cause in the lower court this question came before this court, on a state of facts similar to those shown by this record, in the case of Tinkle v. Sweeney, from Grayson county. We certified that case to the Supreme Court for its determination, and that court, in an able opinion, held that the facts did not show an entering and remaining within the meaning of the statute. 77 S. W. 609. It was there held that the word "remain" used in the statute, and in the condition in a liquor dealer's bond, must be given the meaning of "tarrying" or "loitering" in the place where liquors are sold, and a mere

*Rehearing denied February 27, 1904.

ing a lawful purpose for which he enters, is not within the meaning of the statute. In the instant case the evidence shows that the minor only remained in the saloon long enough to purchase and pay for the beer. In accordance with the ruling of the Supreme Court, he hold that the facts do not show an entering and remaining by appellee's son in the saloon of Guido Gbilo within the meaning of the statute, and for this reason the judgment of the trial court is reversed and here rendered for appellants.

Reversed and rendered.

DALLAS RAPID TRANSIT RY. CO. v. PAYNE.*

(Court of Civil Appeals of Texas. Feb. 6, 1904.)

CARRIERS—ALIGHTING PASSENGERS—NEGLIGENCE—INSTRUCTIONS—ASSUMPTION OF FACTS.

1. In an action for injuries to a street railway passenger, it was not error for the court to assume in its charge that plaintiff was a passenger, although he had not paid his fare when he sought to alight, where the evidence was uncontroverted that plaintiff boarded the car intending to pay his fare, and had the money with him to do so.

2. In an action for injuries to a street railway passenger while alighting, it was not error to assume in the charge that defendant was guilty of negligence in not stopping the car, where the uncontradicted evidence showed that the signal to stop was given, and the speed of the car was first lessened, and then began to increase.

Appeal from District Court, Dallas County; Richard Morgan, Judge.

Action by R. L. Payne against the Dallas Rapid Transit Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Holloway & Holloway, for appellant. Cockrell & Gray, for appellee.

RAINEY, C. J. Suit by appellee to recover for personal injuries.

Conclusions of Fact.

Appellee being a passenger on one of appellant's street cars, going at the rate of six miles per hour, he, at the proper place, gave the signal to stop, when the car slowed up a little as if to stop, then began to increase its speed as if it would not stop, when plaintiff alighted and was injured. Plaintiff thought he could alight with safety. Plaintiff was about 14 years of age, and lived 6 or 7 miles in the country. It was late in the evening, and plaintiff was going home with friends in a wagon, and alighted there to meet them. When plaintiff reached his destination the conductor had not reached him to collect his fare, and for that reason plaintiff had not

ing a lawful purpose for which he enters, is not within the meaning of the statute. In the instant case the evidence shows that the minor only remained in the saloon long enough to purchase and pay for the beer. In accordance with the ruling of the Supreme Court, he hold that the facts do not show an entering and remaining by appellee's son in the saloon of Guido Gbilo within the meaning of the statute, and for this reason the judgment of the trial court is reversed and here rendered for appellants.

Conclusions of Law.

1. The court did not err in assuming its charge that plaintiff was a passenger, that the proper signal to stop was given. The evidence is uncontroverted that plaintiff boarded the car intending to pay his fare, and had the money with which to do so, also that the signal to stop was given to him.

2. The court did not err in assuming its charge that the defendant was guilty of negligence in not stopping the car. The uncontradicted evidence is that the signal to stop was given, and the speed of the car lessened, and then began to get faster. The evidence shows negligence on the part of the railway company, and, there being no conflict, the court had the right to assume its existence. Ry. Co. v. Mallon, 65 Tex. 431, 38 S. W. 2d 431.

3. The only controverted issue under the evidence is that of contributory negligence on the part of plaintiff. The court charged on this issue; at least, no complaint is made thereof. The evidence is sufficient to support the verdict of the jury to the effect that plaintiff was not guilty of contributory negligence.

4. All assignments of error have been considered, none of which point out reversible error. The judgment is therefore affirmed.

MILLER et al. v. MILLER et al.*

(Court of Civil Appeals of Texas. Jan. 1904.)

LIMITATIONS—PROPERTY OF DECEDENT—RIGHT TO POSSESSION.

1. After the death of a wife the husband is entitled to the custody and control of the community property only for a reasonable time necessary to pay all the community debts. Thereafter an action may be brought by the heirs for their interest, and limitations begin to run without his having expressly repudiated his claim.

Error from District Court, McLennan County; Marshall Surratt, Judge.

Action by Julia L. Miller and others against J. C. Miller and others. From a judgment, plaintiffs bring error. Affirmed.

A. C. Prendergast, for plaintiffs in error. H. N. Atkinson and Taylor & Gallagher, for defendants in error.

KEY, J. On November 5, 1900, appellee instituted this suit against appellees. The petition was in two counts. The first

*Rehearing denied February 27, 1904.

*Rehearing denied March 2, 1904, and writ of error denied by Supreme Court.

prayed for both legal and equitable relief, including partition. By amended answer filed November 23, 1901, the defendants admitted that the plaintiffs were entitled to a part of one of the tracts of land, and to all other matters pleaded general denial, not guilty, and the statutes of two, three, four, five, and ten years' limitation. After hearing all the testimony, the trial court refused to submit any issues to the jury, and gave a peremptory charge to find for the plaintiffs an undivided interest of $\frac{560}{1792}$ in the 200-acre tract of land and \$41.40 rent thereon. Such verdict was returned, and judgment accordingly rendered, and the plaintiffs have appealed.

The undisputed testimony shows that Jesse W. Miller and Priscilla Miller were married in March, 1851, and that Priscilla died in April, 1877. The plaintiffs claim as the heirs of Priscilla Miller. The 200 acres of land, in which the defendants and the court recognized the plaintiffs' interest, were acquired by Jesse W. Miller during the lifetime of his wife, Priscilla. The plaintiffs attempted to show that the other tracts of land which were subsequently acquired by him were paid for in whole or in part with community funds on hand at the death of Priscilla Miller, but the testimony on that subject was too meager and uncertain to authorize the submission of any such issue to the jury. There was testimony tending to show that at the time of Mrs. Miller's death there was a considerable sum of money and other personal property on hand and in possession of Jesse W. Miller, which within a few years after the death of his wife he converted to his own use; and the plaintiffs would be entitled to recover for their mother's half interest therein were they not barred by the statute of limitations. The contention that after the death of his wife Jesse W. Miller held a half interest in the property in trust for her heirs, and that limitation would not begin to run until he repudiated the trust, is not believed to be correct. For whatever reasonable time was necessary to pay off the community debts, Jesse W. Miller was entitled to the custody and control of all the community property, but he was not entitled to such custody and control for any greater length of time. This being the case, and there being no express trust, the plaintiffs could have brought their suit as soon as a reasonable time for the discharge of community debts had elapsed. The testimony shows that the amount of the community debts was small, and, while it does not show exactly when they were paid, it seems reasonably certain that they were paid or barred within a few years after the death of Mrs. Miller, and that the plaintiffs could have brought their suit 20 years before they did. Such being the facts, we think the court ruled correctly in refusing to submit to

(Tex. Civ. App.) 35 S. W. 1076; Cochran v. Sonnen (Tex. Civ. App.) 26 S. W. 521; Tinnen v. Mebane, 10 Tex. 246, 60 Am. Dec. 205; Wingate v. Wingate, 11 Tex. 430; Kennedy v. Baker, 59 Tex. 150. It is true that some of the plaintiffs were laboring under disabilities which exempted them from the operation of the statutes of limitation for several years, but such disabilities had ceased, and the statute been in operation against them for more than four years before this suit was brought.

No error has been pointed out, and the judgment is affirmed. Affirmed.

SAN ANTONIO & A. P. RY. CO. v. TURNHAM.*

(Court of Civil Appeals of Texas. Jan. 20, 1904.)

TRIAL—INSTRUCTIONS—RESPONSE TO QUESTION OF JURY.

1. In an action for damages occasioned by construction of an embankment across a creek bottom, a response of the court to a question of the jury as to whether they should assess damages according to their own judgment, or on the basis of plaintiff's testimony, that they should assess such damages as they believed, from the evidence in the case, that plaintiff had sustained, was not objectionable, as telling the jury that they should accept the theory of plaintiff and his witnesses, although their judgment did not approve of such estimate.

Appeal from District Court, Milam County; J. C. Scott, Judge.

Action by R. C. Turnham against the San Antonio & Aransas Pass Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Duncan, Walters & Lane, for appellant. Moore & Moore, for appellee.

STREETMAN, J. Appellee recovered a judgment against appellant for damages occasioned by the construction of an embankment across a certain creek bottom through appellee's land, which caused the water in an overflow to accumulate above said embankment, destroying certain hay, grass, and turf on the land situated above said embankment, and finally washing said embankment away, and causing a portion of the lands below said embankment to be planted in Johnson grass, which was growing upon said embankment and right of way, and also causing a portion of said lands to be badly injured by washing.

Appellant urges that the evidence was insufficient, in a number of respects, to sustain the judgment. A careful examination of the record, however, convinces us that the verdict of the jury was supported by the evidence, and that there was evidence which

*Rehearing denied March 2, 1904, and writ of error denied by Supreme Court.

said items of damage.

The charge of the court was a full and correct presentation of the law, and, in addition, a number of special charges were given at the request of the defendant; and, upon the whole, we cannot see that appellant has any just complaint against the manner in which the case was submitted to the jury.

After the jury had been charged by the court, and had been for some time in retirement, they submitted to the court the following question: "Is it within the power of the jury to assess damages according to its own judgment, or shall the testimony of the plaintiff's witnesses be the basis of such damages?" The court gave the following response to this question: "In answer to the above question, you are instructed that, if you find for the plaintiff, you will assess such damages as you believe from the evidence in the case that plaintiff has sustained." Appellant complains of this answer, and insists that it amounted to an instruction that the jury was bound to accept the theory of plaintiff and his witnesses with reference to the damages sustained, although their judgment did not approve of the estimate of damages stated by said witnesses. We do not think that the instruction given by the court is subject to this objection. It was somewhat general in its terms, but it was a correct statement of the law, and did not misdirect the jury in any particular, nor do we see how they could have been misled by it.

We have carefully considered all of the assignments, and, finding no error, the judgment is therefore affirmed. Affirmed.

TRAVELERS' PROTECTIVE ASS'N OF AMERICA v. DEWEY et al.*

(Court of Civil Appeals of Texas. Feb. 3, 1904.)

BENEFICIAL ASSOCIATION—CANCELLATION OF MEMBERSHIP—CONSTITUTION—STATUTES.

1. The constitution of a beneficial association, organized under the laws of Missouri, authorized the directors to cancel any membership if deemed advisable by them, and there were other provisions of the constitution of the order as well as of the laws of Missouri which authorized expulsion of a member for the commission of any felonious offense, habitual drunkenness, or violation of any agreement of his membership. *Held*, that the board of directors had authority to cancel a membership owing to insured having lost an eye, which rendered him a more hazardous risk, the provision authorizing the directors to cancel a membership as deemed advisable not being in conflict with the other provisions relative to expulsion.

Appeal from District Court, McLennan County; Marshall Surratt, Judge.

Action by A. O. Dewey and others against the Travelers' Protective Association of

Clark & Bolinger and Coke & Coke, for appellant. L. C. Penry and Boynton & Boynton, for appellees.

FISHER, C. J. A. O. Dewey, being formerly a member of appellant's order, there was issued a benefit certificate, payable to his daughter, Lillian A. Dewey, the other appellee in this case. Prior to September 5, 1902, the membership of Dewey was canceled by the appellant. Thereafter this suit was brought by him in the nature of a mandamus to reinstate said Dewey and recognize his membership. Judgment in favor of Dewey and daughter was rendered in the court below, reinstating him as a member in appellant's order.

On the point upon which the case is decided there is no dispute as to the facts. It appears that the appellant is a fraternal and benevolent organization, one of its principal objects being to provide insurance and benefit funds to its members. Dewey, in becoming a member of the association, subscribed to its constitution, the terms of which became a part of his contract of membership. After the certificate of membership was issued to him, he suffered the loss of an eye, which rendered him a more hazardous risk. Thereafter the board of directors, in the manner prescribed by the constitution of the order, canceled Dewey's certificate of membership for the reason that he had become, from the loss of his eye, a more hazardous risk. The constitution of the order authorized the directors to cancel any membership, if deemed advisable by them. It was in pursuance of this provision of the constitution of the order that the certificate of membership of Dewey was canceled. There are other provisions of the constitution, as well as the laws of the state of Missouri, which authorize the expulsion of a member when he is guilty of any felonious or indictable offense or gross misdemeanor, habitual drunkenness, or violations of any of the conditions of agreements which he may accept as a member of the association, or conduct unbecoming a gentleman and member of the association. The trial court evidently concluded that the method here provided for expulsion was exclusive, and that, once a member, the certificate could not be canceled except as that result could be reached from expelling a member under the provisions of the constitution and laws of Missouri, as quoted. We are not prepared to agree with the trial court to this extent, for, in our opinion, the other provisions of the constitution that authorize cancellation of membership or certificate of membership when deemed advisable for the interest of the order do not conflict with that provision of the constitution and laws of Missouri that provides for expulsion. The clause in the constitution that permits cancellation of

*Rehearing denied March 2, 1904.

(Court of Civil Appeals of Texas. Feb. 1, 1904.)
MUNICIPAL TAXES—NEW CHARTER—EFFECT—ACTION FOR TAXES—STATE AND COUNTY AS PARTIES—PLEA IN ABATEMENT—SUFFICIENCY.

1. A city's right to taxes levied under a former charter is not impaired by a subsequent charter repealing all former charters, without a saving clause as to rights accruing thereunder.

2. A plea in abatement to a city's action for taxes that the state and county are necessary parties, in order that their respective tax liens may be marshaled, is properly overruled where it does not appear that the state and county taxes are unpaid.

Error from District Court, Galveston County; Wm. H. Stewart, Judge.

Action by the city of Galveston against John and Mary Bennison. Judgment for plaintiff, and defendants bring error. **Affirmed.**

L. E. Trezevant, for plaintiffs in error. J. Z. H. Scott and P. A. Drouilhet, for defendant in error.

GILL, J. On January 31, 1890, the city of Galveston, a municipal corporation operating under special charter, filed this suit against plaintiffs in error to recover municipal and school taxes due by them for the years 1897 and 1898 on property situated in Galveston, and owned by them. Poll tax was sought to be recovered against John Bennison for the years named. The power of the city to levy and collect the taxes sued for is not questioned, nor do plaintiffs in error complain that it was not shown upon the trial that a lawful levy was made. The questions presented relate to the power of the city to maintain the suit at the time of the filing of the amended petition upon which the trial was had, and the sufficiency of the pleading as to the ordinances under which the right to recover is claimed.

The taxes were levied under the charter in force up to the passage of the commission charter granted by the Legislature in 1901. The amended pleading was filed under the charter of 1901. The point made is that, as the charter of 1901 repealed all former charters, and as this was done without a saving clause as to rights accruing under former charters, the city had no right to maintain this suit, and the court no jurisdiction to try it. The contention is that the right to sue for its taxes rested in the provision of the former charter, and that the right was not preserved upon its repeal. We regard the contention as without merit. It is well settled that the city has the general right to become a litigant in enforcing the collection of its taxes, and this irrespective of its charter provisions. *Galveston Western Ry. Co. v. City of Galveston*, 74 S. W. 537; *City of Henrietta v. Eustis*, 87 Tex. 14, 26 S. W. 619.

*Rehearing denied.

¶ 1. See *Municipal Corporations*, vol. 36, Cent. Dig. § 137.

78 S.W.—69

claimed are also without merit. The petition is unusually full, and sets out specifically the fact of their passage and their substance.

Plaintiffs in error pleaded in abatement that the state and county were necessary parties to the suit, in order that their respective liens for taxes might be marshaled, and complain of the action of the court in overruling the plea. The plea was rightly overruled, if for no other reason, because it is not made to appear that the state and county taxes are unpaid.

Other points are made, but we deem it unnecessary to notice them, further than to say that, in our judgment, they present no reversible error.

We think the judgment should be affirmed. **Affirmed.**

MOORMAN v. ATCHISON, T. & S. F. RY. CO.

(Court of Appeals at Kansas City, Mo. Feb. 15, 1904.)

PASSENGER CARRIERS—STOP AT STATION—SUDDEN JERKING OF TRAIN—INJURY TO PASSENGER—EVIDENCE—SUFFICIENCY.

1. Where a railroad train has almost stopped at a station, a sudden jerk injuring a passenger is negligence.

2. In an action by a passenger against a railroad for injuries alleged to have been caused by defendant's negligence in jerking the train as plaintiff had arisen from his seat to alight, evidence considered, and held to justify submission to the jury of the issue as to whether the jerk was the proximate cause of the injury.

Appeal from Circuit Court, Linn County; John P. Butler, Judge.

Action by L. A. Moorman against the Atchison, Topeka & Santa Fé Railway Company. From a judgment for plaintiff, defendant appeals. **Affirmed.**

Gardiner Lathrop, Saml. W. Moore, T. P. Burns, and J. P. Gilmore, for appellant. West & Bresnahan, for respondent.

SMITH, P. J. Action to recover damages for personal injuries.

The defendant's railway line extends from Marceline to Bucklin, and over which it runs and operates its various kinds of trains. The plaintiff, desiring to go from the former to the latter place, for that purpose entered a car of one of the defendant's passenger trains at such former place, where he was accepted as a passenger. The petition alleges: "That, after said train upon which plaintiff was so being carried as aforesaid had reached the said town of Bucklin, and when said train was within a short distance of defendant's said depot at Bucklin, and while said train was still in motion, and while said train was being slowed up for the purpose of stopping at defendant's said depot at Bucklin, the defendant's serv-

it was standing still? Q. If it was not still, how fast was it going? A. Well, it was moving very slowly. Q. Now, tell the jury just where the point of the umbrella struck your body? A. Well, I can show the jury better standing. As I raised the umbrella, just as I raised with the umbrella, then the train moved forward, and the umbrella— I fell forward, like this, and that end of the umbrella struck the end of the seat, and the point struck me right there (indicating), and as I doubled over it punched down like that, and there is where the injury is. Q. What caused you to be thrown forward? A. The sudden movement of the train. Q. When you speak of being thrown forward, you mean you were thrown which direction? A. South, toward the rear of the car. Q. Tell the jury what it was that the other end of the umbrella struck against. A. Against the back of the seat on which I had been sitting. Q. At the time you stepped out in the aisle, as I understand you, before you got out in the aisle you took up your dress-suit case? A. Yes, sir. Q. And after you got out in the aisle, you reached over and took up your umbrella? A. Yes, sir. Q. And during all this time the train was slowly moving toward the station? A. The train had stopped at the time I picked up my dress-suit case. Q. Look and see if you answered the top question. Read it? A. 'Now, when you got up and stepped out in the aisle, and turned around and picked up your umbrella, during some of that time the train was moving; in other words, the train was moving while you did that; it took you some little time.' Q. Is that correct? A. Yes, sir, it took some little time; but I think the train was not moving at that time. Q. Now, wasn't this question asked by Mr. Burns: 'Now, Professor, you are not sure whether the train stopped or not before you got hurt? A. Not absolutely certain that it stopped still.' Is that correct? A. Yes, sir. Q. Was this question asked you: 'You are sure it slowed up? A. Yes, sir.' A. Yes, sir. Q. Was this question asked you: 'But don't know whether it came to a full stop or not? A. No, sir; I do not.' Is that correct? A. That is correct. Q. Was this question asked you in your deposition: 'Now, the distance from where it slowed up, and where you supposed it had stopped, to where it finally did stop and the passengers got off, was about the length of one car? A. About that.' Now, is that correct? A. Yes, sir. Q. The brakeman had called this station at Bucklin when the train was within about one hundred yards of the station? A. About that. Q. And the train began to slow down, and when you got up in the aisle and gathered up your suit case and your umbrella, the north end of the car, the end of the car where you were, was about the south end

depot? A. It was."

The plaintiff occupied a seat near the hind end of the car. If, after the trainman had called out "Bucklin!" and the train had come to a stop, or so nearly so that its movement was barely perceptible, and the plaintiff had left his seat and was standing in the aisle of the car with his suit case in hand, just preparatory to making his departure, and had reached down and grasped his umbrella, and was raising it, the train suddenly lurched forward, whereby plaintiff was thrown toward the hind end of the car, and the handle end of his umbrella faced against the back of the seat (then in front of him) and the other end (the point) against his abdomen, as the plaintiff testified, then the defendant was guilty of actionable negligence.

It sufficiently appears from the plaintiff's evidence that after the train had stopped it was given a lurch, the suddenness and violence of which was sufficient to throw plaintiff forward, one end of his umbrella striking the back of a seat and he the other, and this, it was proved, caused the injury of which complaint is made. The sudden lurching of the train forward was a negligent act, and if, as the evidence of the plaintiff tends to prove was the fact, it was the direct and proximate cause of the injury, there was liability. The plaintiff having been accepted as a passenger on its train, it was bound to exercise the highest degree of care of a prudent person under similar circumstances for his safety, and to be held to a strict responsibility therefor. In *Barth v. Ry. Co.*, 142 Mo., loc. cit. 550, 44 S. W. 778, it was said that "a railway passenger carrier is bound to allow its passengers reasonable time to enter and leave its cars, and, while it may start before a passenger has been seated, it must exercise the highest degree of care that a prudent and cautious person would use and exercise under similar circumstances in starting its cars, so as not to suddenly jerk or jar him, and thereby injure him." *Dougherty v. Ry. Co.*, 9 Mo. App. 478. And of course the same rule is applicable where a train has stopped and a passenger is in the act of leaving one of its coaches.

The contention of the defendant is that it is shown by the evidence that the lurch was occasioned by the release of the air brakes, and that it is usual and ordinary, and cannot be avoided by the most careful management of its passenger trains. But we do not so understand the evidence. The testimony of the defendant's conductor was that the lurch or quiver of a passenger train which is caused by the release of the air brakes has a tendency to throw a person toward the front instead of the rear of the train. Ramsdell, the defendant's car inspector, testified that when the air brakes are released the cars settle back from the engine just as they stop.

There is nothing in the evidence to authorize the inference that the sudden forward lurch of the train to the length of a car was caused by the release of the air brakes, or, if so, that the lurch was such as was usual and ordinary, and could not be avoided by the most careful management of passenger trains. As has been already said, the usual and ordinary lurch resulting from the release of the air brakes is to impart to the cars a backward movement from the engine, which would tend to throw a standing passenger forwards towards the engine. It therefore becomes at once obvious that the forward lurch which occasioned the plaintiff's injury did not result from the release of the air brakes, but from some other cause, probably that of moving the train by the negligent use of the motive power. The evidence that the release of the air brakes of a train usually and ordinarily imparts a backward lurch or settling of the cars does not tend to show that the accident did not arise for want of care on the part of the defendant. In *Dougherty v. Ry. Co.*, 81 Mo. 325, 51 Am. Rep. 239, it was said that: "Where the vehicle or conveyance is shown to be under the control or management of the carrier or his servants, and the accident is such as under an ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by defendant, that the accident arose for want of care." And no good reason is seen why the application of this rule may not be invoked in resolving the question now before us.

We are unable to discover anything in the evidence to warrant the defendant's assumption that the forward movement of the car, which the plaintiff testified as causing his injury, was necessary and incident to the usual and proper operation and management of defendant's train, and therefore we think the numerous authorities cited and relied on by it are without application.

Nor do we think we are authorized to hold, as a matter of law, that because the plaintiff picked up his umbrella by taking hold of it near the middle instead of by the handle, so that in that way he brought the point around in front of his body, he was thereby guilty of contributory negligence. When this was done, the train was either standing still or was moving so slowly as not to be noticeable. It was at the station platform, and the plaintiff had arisen from his seat and was standing in the aisle preparatory to leaving the car, when, without any warning, the car suddenly started forward. The plaintiff had a right to presume that it would remain stationary, or nearly so, until after a reasonable time for him to leave the car had elapsed. The case was, we think, one for the jury.

The court gave 21 instructions, 5 for plain-

not contended that there was any error in the action of the court in that regard.

The verdict is therefore conclusive on us, and the judgment must be affirmed. All concur.

BANK OF SENECA v. FIRST NAT. BANK OF CARTHAGE.

(Court of Appeals at Kansas City, Mo. Feb. 15, 1904.)

BANKS—LETTERS OF CREDIT—BENEFIT—PERSONS ENTITLED—PRESUMPTIONS.

1. Where a bank executed a general letter of credit, addressed "To Whom It may Concern," obligating itself to pay checks of the bearer to the amount of \$1,000—checks paid to be indorsed on the back of the letter—checks drawn by the bearer of the letter, and cashed by a bank which had no notice of the letter, and therefore did not cash the same on the faith thereof, or indorse them on the back of the letter, could not be applied in extinguishment of the amount named in the letter, as against another bank subsequently cashing the bearer's checks, on the faith of the letter, to an amount apparently remaining undrawn thereunder, as disclosed by the indorsements.

2. The fact that the bank issuing the letter of credit may have thought and assumed that the previous checks cashed by the bank without notice of the letter had been cashed on the faith thereof was immaterial.

Appeal from Circuit Court, Jasper County; J. D. Perkins, Judge.

Action by the Bank of Seneca against the First National Bank of Carthage. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Geo. Hubbert, for appellant. E. O. Brown, Geo. W. Crowder, and Howard Gray, for respondent.

ELLISON, J. The defendant bank issued to H. G. Tangner, and delivered to his agent, George W. Hawk, the following letter of credit:

"Letter of Credit. First National Bank. Capital Stock \$100,000.00. Carthage, Mo., July 8th, 1901. To Whom It may Concern: We will pay checks signed H. G. Tangner by the bearer, Geo. W. Hawk, to the amount of One Thousand Dollars, any checks paid endorse on back of this letter. Mr. Hawk's signature is below. V. A. Wallace, Vice-Pres.

"Geo. W. Hawk."

Said letter was indorsed on the back as follows:

7-17. 10 checks	\$ 500 25	
7-25. 1 check, J. G. Johnson....	235 00,	Seneca, Mo.
7-25. 1 check, J. D. Gallimore...	240 00	" "
7-25. 1 check, G. W. Hawk.....	24 75	" "
	\$1,000 00	

Hawk was engaged in going over the country buying mules for Tangner, and he was given the letter of credit to facilitate that business. After receiving the letter on July 8th, he went into the adjoining county of Newton, and on July 17th he drew and nego-

and paid by defendant. Then, on July 25th, he presented the letter to the plaintiff bank, and, on the faith thereof, plaintiff allowed him to draw and negotiate to it three checks on defendant—one for \$235, one for \$240, and one for \$24.75, aggregating \$499.75—being balance of the amount limited in the letter. These were separately indorsed on the back of the letter. The smallest of these was for expense money, and the other two were for mules purchased. The defendant bank refused payment of these checks on the ground that, before they were negotiated to plaintiff, Hawk had exhausted the sum limited in the letter by checks to other parties, which had been duly paid by defendant. It appears that, before negotiating these checks, Hawk, leaving the letter behind, went into another county, and there bought mules, and on July 10th and 18th negotiated checks to a bank at Pineville, in that county, aggregating \$389.80. These checks were negotiated to that bank without Hawk exhibiting the letter of credit, and with no knowledge on the part of that bank that there was a letter of credit. It was these last checks which defendant bank paid; and these, with the \$500.25 which it had before paid, made a total payment of \$890.05, and lacked \$109.95 of being the amount named in the letter.

On these facts, the trial court took the view that the checks negotiated to the bank at Pineville and paid by defendant went to the discharge of the letter of credit, and rendered judgment for the plaintiff for its smallest check, of \$24.75. The reason, as we gather it, for rendering judgment for only \$24.75, when the letter, after allowing for the checks at Pineville, lacked \$109.95 of being exhausted, was that that sum would not pay either of the other of plaintiff's checks in full.

The parties have discussed at length the question whether a person who has advanced money on the faith of a letter of credit, the limit of which the holder had already exhausted by negotiations with others without that person's knowledge, can recover of the writer. Putting aside considerations of equity which sometimes arise, and looking upon it as a legal question, there is strong authority for saying that he cannot (*Ranger v. Sargent*, 36 Tex. 28; *Roman v. Serna*, 40 Tex. 306) though we need not say; for any such question is excluded from this case by the facts preserved in the record. The letter, being addressed to "Whom It may Concern," and being intended for use with different persons at different times and at various places, was a general letter of credit; and it was what has been aptly termed a circulating promise to pay Tangner's checks, signed by Hawk, up to the amount of \$1,000. But it is a fundamental rule governing this sort of commercial paper that no one has any claim, because of it, against the writer, un-

Means, 4 Ohio, 196; *Pollock v. Helm*, 5 Miss. 1, 28 Am. Rep. 342; *Grant v. Naylor*, 4 Cranch, 224, 2 L. Ed. 222; *Sherwin v. Brigham*, 39 Ohio St. 137; *Breckhead v. Brown*, 5 Hill, 643; *Russell v. Wigglin*, 1 Story, 235-241, Fed. Cas. No. 12,105; *Union Bank v. Coster's Ex'rs*, 3 N. Y. 203, 53 Am. Dec. 280; *Bleeker v. Hyde*, 3 McLean, 279 Fed. Cas. No. 1,537. That the party making claim of reimbursement against the writer must show that he acted on the faith of the letter, is a requisite that appears in all writing upon this and kindred subjects. It so appears in adjudicated cases, and is accepted, as of course, by text-writers. See 2 Daniel on Neg. Inst. §§ 1790-1798; *Coolidge v. Payson*, 2 Wheat. 66, 4 L. Ed. 185; *Schlimmelpennick v. Bayard*, 1 Pet. 264, 7 L. Ed. 138; *Boyce v. Edwards*, 4 Pet. 111, 7 L. Ed. 799. The liability of a writer of a letter of credit is founded on the simple law of contracts, where the minds of the parties must meet in the common purpose. The act of the writer is an offer or request or proposition, and the act of him who furnishes the money is an acceptance. So it is understood that a general letter of credit is considered as addressed to whomsoever will act upon it, and, when acted upon, the contract is made up, upon which the writer may be held liable. Necessarily, where one furnishes another money without knowledge that such other has a letter of credit, he is a stranger to the letter; and, when he comes to set it up as the foundation upon which to recover against the writer, he should be regarded as an interloper, without a shadow of right.

By these remarks we aim to demonstrate that when the bank at Pineville, without sight or knowledge of the defendant's letter paid Tangner's checks drawn on the defendant bank, that act necessarily was not based on the letter, and, in consequence, no contractual relation arose between it and the defendant bank. And when the defendant bank paid the checks to the Pineville bank, it was merely the consummation of an ordinary transaction, wholly disconnected and apart from the letter. The sum thus paid could not be applied towards extinguishing the amount named in the letter. The sum so paid only became a debt owing from Tangner to the defendant, and had no more to do with the letter than any other debt he might have owed to it. That the payment of the Pineville checks could have no connection with the letter is apparent by the suggestion that if the defendant bank had not paid those checks, and had asked that the Pineville bank and this plaintiff interplead for the money, which would have prevailed—the plaintiff, who relied upon the letter and complied with it, or the Pineville bank, who knew nothing of its existence? It can make no difference that the defendant may have thought and assumed that the Pineville

authority in dealing with the Pineville bank, such act ought not to be allowed to injure the plaintiff bank, where his act was regular and within authority. If Hawk's act must harm one of two innocent parties, it should fall on the one who put him in position to do the harm.

From these considerations, it follows that the defense wholly failed, and that plaintiff should have had judgment in the trial court for the whole sum it advanced. The judgment is therefore reversed, and the cause remanded, with directions to so enter it. All concur.

WISHART v. GERHART.*

(Court of Appeals at Kansas City, Mo. Feb. 15, 1904.)

DEEDS—CONSIDERATION—ESTOPPEL—UNLAWFUL DETAINER—COMPLAINT—SUFFICIENCY.

1. Rev. St. 1899, § 645, provides that whenever a written contract for the payment of money or delivery of property shall be the foundation of an action, the proper party may prove the want or failure of consideration. *Held*, that in unlawful detainer by a purchaser under a trust deed it was proper to refuse to admit evidence that the trust deed was without consideration, since the grantor was estopped from defeating its operative effect.

2. Rev. St. 1899, § 3323, declares that unlawful detainers shall be cognizable before any justice of the peace of the county in which they are committed. *Held*, that it was not necessary that a complaint in unlawful detainer should allege the property to have been in the city ward of the justice before whom the complaint was filed.

3. The purchaser under a deed of trust may maintain unlawful detainer under the statute.

Appeal from Circuit Court, Jackson County; A. F. Evans, Judge.

Action by D. Wishart against Susan M. Gerhart. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Kenneth McC. De Weese, for appellant. J. C. Rosenberger, for respondent.

ELLISON, J. This is an action of unlawful detainer. The judgment in the trial court was for the plaintiff. Plaintiff's right to the property is founded upon a deed of trust in the usual form, executed by defendant to plaintiff to secure to him the payment of \$3,000, and which plaintiff had foreclosed. The deed recited that it was executed "in consideration of the debt and trust herein-after mentioned and created and the sum of one dollar." At the trial defendant offered to prove that the deed was in fact without consideration. Plaintiff's counsel objected to the evidence, and the trial court thereupon refused defendant's offer. The defendant bases his case on section 645, Rev. St. 1899, which reads as follows: "Whenever a spe-

cial performance of a duty, or the foundation of an action or defense in whole or in part, or shall be given in evidence in any court without being pleaded, the proper party may prove the want or failure of the consideration, in whole or in part, of such specialty or other written contract." We are of the opinion that this statute does not support defendant's position in a case of this nature. Where a deed recites a consideration, it, when not contractual, may be shown to be different, yet a party is estopped by such deed from defeating its operative effect as a conveyance. *Henderson v. Henderson's Ex'rs*, 13 Mo. 151; *Bobb v. Bobb*, 89 Mo. 411, 419, 4 S. W. 511; *Dobyns v. Association*, 144 Mo. 95, 109, 45 S. W. 1107. This court has recognized and applied those authorities in a variety of cases. *Jackson v. Ry. Co.*, 54 Mo. App. 636; *Davis v. Gann*, 63 Mo. App. 425. That statute manifestly does not affect the law of estoppel, or the inviolability of written contracts. If a grantor should sue his grantee for the sum stated as the consideration in the deed, the statute permits the grantee to show that there was no consideration, and there could be no recovery. So, if the grantee, claiming a breach of warranty, should sue the grantor for all or a part of the consideration stated in the deed, the grantor, by the terms of the statute, could show there was no consideration, and thus escape payment on the warranty; but he could not, in the absence of fraud, avoid the deed itself, for even a voluntary deed is binding as a conveyance between the parties. No rule of law is more firmly established than that, in the absence of fraud, accident, or mistake, oral evidence cannot be received to vary or contradict a written contract. A deed of conveyance is a contract of conveyance, and the grantor will not be permitted to say that it is not; and the statute does not say that he may. The statute says that he may show that there was no consideration for it, but that is not saying he may show it was not a deed; for showing there was no consideration for a deed does not, in fact, destroy its operative effect between the parties. The law, without regard to the statute, is that you may show the recited consideration in a deed to be different, "but wherever a right is vested, or created, or extinguished by contract or otherwise, and a writing is employed for that purpose, parol testimony is inadmissible to alter or contradict the legal construction of the instrument. * * * Thus a will, a deed, or a covenant in writing, so far as they transfer or are intended to be the evidences of rights, cannot be contradicted or opposed in their legal construction by facts aliunde." *Davis v. Gann*, 63 Mo. App. 425. That quotation is taken from *Gully v. Grubbs*, 1 J. J. Marsh. 387, as it had been quoted and adopted in *McCrea v. Purmort*, 16 Wend. 460,

*Rehearing denied March 7, 1904.

period covered by the dividend, and was therefore in violation of the express provisions of the statute (section 1293, Rev. St. 1899), which reads as follows: "The board of directors of any bank institution in this state, when it shall declare a dividend, shall first set apart to the surplus fund ten per cent. of the net profits of the bank for the period covered by the dividend, until the same shall amount to 20 per cent. of its capital stock, and said surplus shall not be diminished except for the payment of any losses which may occur; provided, if there are undivided profits, these shall first be used in payment of such losses." Plaintiff claims this statute to be merely directory, and that a compliance therewith is not necessary to enable him to recover the dividend declared in the order. We are clearly of the opinion that plaintiff's claim is not the proper construction of the statute. The statute in positive terms declares that 10 per cent. of the net profits shall be first set apart to the surplus fund until that fund shall amount to 20 per cent. of the capital stock. The evident object and purpose of the statute was to create a fund, in addition to the capital stock, for the security of depositors and others doing business with the bank. Current history shows an unmistakable demand on the part of the people, and a corresponding effort on the part of the lawmakers, to provide safe banking methods. And undoubtedly the statute in question, which is recently enacted, was to secure that end in whatever degree it would be secured by a strict compliance therewith. "Where the whole aim and object of the Legislature would be plainly defeated if the command to do the thing in a particular manner did not imply a prohibition to do it in any other, no doubt can be entertained as to the intention." *Endlich on Statutes*, § 431. As just stated, it is manifest that the "aim and object" of the statute in question is to compel the accumulation of a surplus fund out of net profits, and it is equally manifest that the result may not be secured if dividends are permitted to be declared and paid out of such profits in preference to the surplus. Whenever third persons or the public have an interest in having done that which is prescribed by the Legislature, then the act is mandatory, even though words permissive, as "may," are used, instead of words mandatory, as "shall." *Potter's Dwarrris on Statutes*, 220. Before there can be a dividend which the law would recognize in a suit to recover it, there must be a net profit, and then the dividend can only be declared on that portion of the profit remaining after 10 per cent. has been set aside to the surplus fund. Such process for the allowance of dividends continues, under the terms of the statute, until the surplus shall have equaled 20 per cent. of the capital stock. It is, how-

ever, the answer with the allegations of the petition that the board of directors declared the dividend and that "said board had competent authority so to do," it stated enough to let in such defense. The answer, besides being a general denial, alleged that the dividend was illegally declared. It alleged that the reason the dividend had not been paid was "because the payment thereof would have been unlawful." It furthermore denied that "any such dividend as stated in plaintiff's petition was in law or fact ever declared." No objection by way or motion or demurrer was made that the answer was incomplete, or otherwise indefinite or uncertain.

Passing to plaintiff's claim for salary as set up in the second count of the petition, we are of the opinion that error was committed in refusing defendant's instructions Nos. 9 and 10. It does not appear upon what possible theory they could have been refused, since they were amply supported by evidence. If plaintiff failed to comply with his contract, he surely ought not to recover on it.

The judgment will be reversed, and the cause remanded with directions to enter judgment for defendant on the first count, and for a new trial on the second.

BROADDUS, J., concurs. SMITH, P. J., not sitting.

Opinion on Motion for Rehearing.

(March 7, 1904.)

ELLISON, J. Plaintiff seeks a rehearing of this and the case of Edwards against this defendant (argued and submitted together), on several grounds—one, that the statute construed is directory, and not mandatory. This is but a reassertion of the principal point in the case as originally presented, and which we have disposed of in the opinion. We see no reason for departing from what was there said. We do not regard *McClintock v. Bank*, 120 Mo. 127, 24 S. W. 1052, as applicable to the question.

It is next insisted that defendant is precluded by its answer from using the statute as a defense, in that such defense was not specially pleaded. We are of the opinion that the answer, while not as specific as it should have been, is unquestionably broad enough to admit such evidence. But, if we should concede that it was not, plaintiff's point would still be untenable, from the fact that evidence was admitted on that head without objection from him. The rule is that, though it be necessary to plead a matter by answer, yet if it be not pleaded, and evidence is admitted without objection on that account, the failure to plead is considered as waived. Judge Gantt likens such failure to object to instances where a failure to file a reply was not allowed to be raised by the defendant after he had gone through

was directly affirmed in an opinion by Judge Burgess in *McDonnell v. De Soto Saving Ass'n*, 175 Mo. 250, 275, 75 S. W. 438. The reason of the rule is apparent when it is considered that, if objection had been made to the evidence, the defendant could have elected to amend the answer. Plaintiff relies on *Weaver v. Hendrick*, 30 Mo. 302, and some other cases, but we consider none of them in point.

It is next urged that we overlooked the points made in the briefs that defendant's abstract is not sufficient to permit us to examine more than the record proper; that matters of error in the trial are not properly before us for review. The ground of objection stated by plaintiff is that the abstract fails to show the overruling of the motion for new trial and in arrest by entry of the record proper. The overruling of the motion for new trial and exception thereto is fully set out in the bill of exceptions. It has, however, been held by the Supreme Court, and this court, that the filing of a motion for new trial should be shown by the record proper. *City of St. Charles ex rel. v. Deemar*, 174 Mo. 122, 73 S. W. 469; *Western Storage Co. v. Glesner*, 150 Mo. 427, 52 S. W. 237; *Lawson v. Mills*, 150 Mo. 428, 51 S. W. 678; *Crossland v. Admire*, 149 Mo. 650, 51 S. W. 463; *Hill v. Combs*, 92 Mo. App. 242; *Turney v. Ewins*, 97 Mo. App. 620, 71 S. W. 543; *McCormick v. Crawford*, 98 Mo. App. 319, 72 S. W. 491. But allowing that plaintiff intended to include in his objection to the abstract that it also failed to show the motion for new trial was filed, we must still rule the point against plaintiff. Plaintiff himself has relieved the case of that defect or objection. He filed, as under the statute he may, an additional abstract and a statement. In the latter he gives a full abstract of the petition, answer, and replication. He then states in detail what was shown in evidence by each party—the finding and judgment, and the amount thereof, and the filing and overruling of the motion for new trial. A motion for new trial, of course, should be filed, and it should be made to appear by the abstract. But when the appellant fails to make it appear, and the respondent concedes, by an affirmative statement, that it was filed, it is all that is necessary. It is not necessary to set out copies of the record entry of filing. The abstract may state the fact in narrative form (*State ex rel. v. Smith*, 172 Mo. 446, 458, 72 S. W. 692), and we can see no reason why the admission by the respondent is not sufficient to supply the omission by appellant. Jurisdiction of the appeal is not based on the abstract. The certificate of the judgment of the trial court certified, as provided by statute, in the basis of the proceedings in the appellate court (*State ex rel. v. Smith*, 172 Mo. 618, 73 S. W. 134), and it seems to us to be entirely competent for the respondent to supply some necessary statement in

The motion in each case should be overruled.

BROADDUS, J., concurs. SMITH, P. J., not sitting.

PHIPPS et al. v. MALLORY COMMISSION CO.*

(Court of Appeals at Kansas City, Mo. Feb. 1, 1904.)

PRINCIPAL AND AGENT—THIRD PARTIES—LIABILITY OF PRINCIPAL—AUTHORITY OF AGENT.

1. Where defendant induced plaintiff to purchase cattle through its agent, it is liable for the agent's fraud in the transaction, though it did not authorize the fraud.

2. A principal's liability for the acts of his agent is not affected by restrictions of authority where the principal represented that the agent had a wider authority.

3. Where defendant induced plaintiff to purchase cattle through its agent, and the agent misrepresented the price for which he could procure the cattle, it does not affect the defendant's liability that the agent had bought the cattle on his own account before he knew that the plaintiff wanted to buy.

4. Though one dealing with an agent is bound by a written authority of which he has knowledge; yet, where the principal informs him what the agent's authority is, he may rely upon such information, as against the principal.

Appeal from Circuit Court, Jackson County; S. C. Douglas, Judge.

Action by W. J. Phipps and another against the Mallory Commission Company. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

Eaton & Loomis, for appellant. Boyle, Guthrie, Hurt & Davison, for respondents.

ELLISON, J. This action arises on account of certain fraudulent conduct charged against defendant's agent in selling to plaintiffs a lot of cattle, whereby defendant received from plaintiffs \$494.50 more than they should have, and more than they would have, had the transaction been fairly conducted by such agent. The judgment in the trial court was for the plaintiffs.

Since the verdict was for plaintiffs, we will state the facts substantially as the evidence in their behalf tends to show: It appears that plaintiffs were in Kansas City, where defendant does business as a live stock commission merchant; that they applied to defendant for a lot of cattle of certain named description; that defendant advised them there was nothing suitable in market, that the market was high in Kansas City at that time, and that they could do better if they would buy through its agent (Walker) in Oklahoma; that defendant notified Walker by letter of plaintiffs' wants, and that he put himself in communication with plaintiffs,

*Rehearing denied March 7, 1904.

named Denmark) at a certain price, aggregating \$4,664. Following this information, he brought plaintiffs and the man whom he represented to be the owner of the cattle together, when they (including the agent) looked them over. Plaintiffs complained to Walker that the price was too high, but he repeatedly assured them that it was the least money with which the purchase could be made; that he had tried Denmark in every way for a less price, and was refused, but that the cattle were really cheap enough, and that the price offered was the very best he knew of in that country. Plaintiffs finally bought the cattle, giving defendant their note and mortgage for the purchase price aforesaid. In truth, Walker had at this time already purchased the cattle of Denmark, and, when he was making these representations to plaintiffs, and pretending that he was, as defendant's agent, looking out for plaintiffs' interest, and doing the best he could for them with Denmark, he had the cattle bought at the price of \$4,169.50. In order to make sure of obtaining the advance price, he colluded with Denmark, of whom he had bought them, that he (Denmark) should pretend to plaintiffs that he was yet the owner, and that he (Walker) should not be "known in the deal at all." In this manner plaintiffs were induced to buy at the advanced price, as has just been stated. Plaintiffs paid their note and mortgage, and afterwards discovered the fraud as herein set out. They thereupon brought this suit.

It is not claimed that defendant's managing officers knew of or authorized the fraud practiced upon plaintiffs, and the sole ground relied upon to charge defendant is its responsibility for the acts of its agent. The trial court was fully as liberal as could be asked in the range of testimony in behalf of defendant, and in the instructions given at its instance. The argument advanced here to defeat the judgment rendered covers much more in hypothesis than defendant's case justifies. The only proper contest between the parties was whether defendant informed plaintiffs that Walker was its agent in Oklahoma, who would buy, or assist them in buying, the cattle which plaintiffs were seeking. And whether Walker thereafter opened communication with plaintiffs, by informing them that he had found cattle belonging to Denmark which were what they wanted, and thereafter selling the cattle, or inducing plaintiffs to buy the cattle, in the fraudulent manner above stated. It does not make the slightest difference in defendant's liability that it never authorized its agent to practice the fraud. If it authorized him (or, if it had not given such authority, if it told plaintiffs he had authority) to purchase, or assist in purchasing, the cattle which plaintiffs were looking for, then it is responsible

ant's manager told them that he would write to its agent about plaintiffs' desiring to purchase the cattle. There was one letter of that nature shown in evidence which tended to show that the agent was merely to inspect any cattle plaintiffs might themselves buy, and see if they were such as that defendant could safely loan the purchase price to plaintiffs, taking a chattel mortgage on them therefor. But it is of no consequence how narrowly defendant may have restricted its agent's authority, if it, in point of fact, represented to plaintiffs that he had the wider authority. Nor are we able to understand how it could help defendant if it should be conceded that Walker had bought the cattle of Denmark on his own account prior to the time he first learned that plaintiffs wanted to buy, and that therefore he could not have bought of Denmark with the view and purpose of selling to plaintiffs at an advance. Indeed, we cannot discover anything in defendant's entire statement made in this court which in any manner exculpates it, if it made the representations of Walker's agency, and he thereafter defrauded plaintiffs in the manner shown.

We discover no substantial error in the action of the court on the instructions. No. 2, for defendant, was much more than it should have asked. Although when one dealing with an agent knows that such agent's authority has been committed to writing by the principal, one ought to seek the writing, and ascertain the extent of the authority, yet if the principal himself informs such person what that authority is, he may safely rely upon it, as against such principal, without looking to see whether he had been told the truth.

We have gone over the brief and argument made in behalf of defendant, and found nothing which would justify us in overturning the judgment. If the evidence in plaintiffs' behalf is to be believed, it was manifestly for the right party, and it is therefore affirmed. All concur.

NASHVILLE R. R. v. HOWARD.

(Supreme Court of Tennessee. Feb. 2, 1904.)

STREET RAILWAYS—NEGLIGENCE—DEFECTIVE CONSTRUCTION OF TRACKS—EVIDENCE—PRIOR INJURIES—IMPUTED NEGLIGENCE.

1. In an action against a street railway company for injuries sustained by a passenger by being thrown from his seat in the car owing to a sudden jolting of the car caused by a defective frog in the track, it appearing that for several months the track at that point had been in the same condition as at the time of the accident, it was proper to admit the testimony of witnesses that they had nearly been thrown from the car at that point on previous occasions, and the testimony of a witness that he had seen cars derailed at that point and helped to put them back on the track.

quences of the parent's failure to discharge the assumed obligations and duties. ; O. & M. Ry. v. Stratton, 78 Ill. 88; o & W. Ry. v. Grable, 88 Ill. 441; G. H. Ry. v. Moore, 59 Tex. 64, 46 Am. 265; East Saginaw St. Ry. v. Bohn, 27 504; Pittsburg, etc., Ry. v. Caldwell, 421; Stillson v. Hannibal, 67 Mo. 671; v. N. E. Ry. Co., El. Bl. & El. 719.

leading English case on this subject is v. Northeastern Railway Co., El. Bl. 719-728. It appeared in that case that d, five years old, was in charge of its mother, who procured tickets for both railway station, with the intention of the train at that place. In crossing ack, for the purpose of reaching a platform on the opposite side, they were run

by a train, under circumstances of rrent negligence on the part of the mother and the servants of the defendant. The grandmother was killed, and child sustained personal injuries for suit was brought. In the Court of s's Bench, Lord Campbell, Chief Justice, held that the infant was so identified the grandmother that the action could be maintained. This view was sustained e Court of Exchequer Chamber. The s generally based their opinions upon ound that the action was for a breach ty arising out of a contract made by defendant with the person having the

in charge. Lord Crowder, J., said: e case is the same as if the child had n the mother's arms;" therefore what- ights the plaintiff had must be pred- upon the contract of conveyance. contract of conveyance," said Cock- Chief Justice, "is in the implied con- that the child is to be conveyed sub- due and proper care on the part of the having it in charge."

this case it was the negligence of the in actual custody of the child at the of the injury that was imputed to it. rule of imputed negligence enunciated e English courts is limited to cases e the parent or guardian is actually it and exercising control over the move- of the child. 2 Thompson on Negligence, p. 1182.

East Saginaw Ry. Co. v. Bohn, 27 Mich. he plaintiff, a child four years old, by thrown from the platform of a street was run over, injuring his left leg in a manner that amputation was neces-

Suit was brought on behalf of the e to recover damages sustained by him. eared that at the time of the accident aintiff was in charge of his 12½ year rother. The judge charged the jury he railway company was required to wards the plaintiff in the situation he was; that is, considering his age and ity, and the fact that he was there with

and said that might have been required had he been alone. They received him as he was, attended by his older brother, and were required to act toward him just as he was situated; and he further instructed them that if the brother was of an age to have exercised reasonable discretion, and plaintiff was seated where, with the exercise of such discretion in his behalf, he could ride in safety, plaintiff could not recover, unless the injury resulted wholly from the negligence of the company.

Judge Cooley said: "This charge appears to me all the defendant had a right to demand."

In Stillson v. Hannibal, 67 Mo. 671, the court said:

"The first question which naturally presents itself, in view of the facts, is whether the responsibility of the defendant in this case is varied from that which is ordinarily exacted from it towards persons of mature years, by reason of the tender years of the plaintiff. There are cases in which it is determined that the same degree of care is not to be expected or required from a person of immature age as would be required of one who had reached years of discretion; and, therefore, that what would be contributory negligence in the one case would not be so considered in the other. The distinction was recognized by this court in Koons v. Iron Mountain Railroad Co., 65 Mo. 592. These are, however, cases in which the father, guardian, or other protector of the party injured is not present when the injury occurs. In the present case the father and child were together, and it was not simply a permission on his part that his little daughter should cross the railroad at the point she attempted, but the exact place was pointed out to her by her father, and she was proceeding within his view to follow his directions when the injury happened. If, under such circumstances, the father was guilty of negligence, that negligence must be imputable to the child in a suit by the child for damages. As was observed by the Supreme Court of Massachusetts in a similar action (Holly v. Boston G. L. Co., 8 Gray, 132 [69 Am. Dec. 233]): 'She was under the care of her father, who had the custody of her person and was responsible for her safety. It was his duty to watch over her, guard her from danger, and provide for her welfare; and it was hers to submit to his government and control. She was entitled to the benefit of his superintendence and protection, and was consequently subject to any disadvantages resulting from the exercise of that parental authority which it was both his right and duty to exert. Any want of ordinary care on his part is attributable to her in the same degree as if she was wholly acting for herself.' In Waite v. N. E. Railway Co., 96 Eng. C. L. 728, s. c., El. Bl. & E.

set up by way of defense that the negligence of the person in charge of the infant contributed to the accident. The Court of Queen's Bench held that it could, and in this opinion the Court of Exchequer Chamber concurred. Williams, J., said: "There was here, as it seems to me, from the particular circumstances of the case, an identification of the plaintiff with the grandmother, whose negligence is therefore an answer to the action. The person who has charge of the child is identified with the child. If a father drives a carriage, in which his infant child is, in such a way that he incurs an accident, which by the exercise of reasonable care he might have avoided, it would be strange to say that, though himself could not maintain an action, the child could." In *Ohio & Mississippi Railroad v. Stratton*, 78 Ill. 88, s. c., 8 Cent. L. J. 415, the Supreme Court of Illinois held that the negligence of the parent or guardian having in charge a child of tender years, where it is the proximate cause of the injury by unnecessarily and imprudently exposing it to danger, prevents any recovery from the carrier corporation. In the present case the inquiry should have been whether the father was guilty of any contributory negligence, and whether such negligence, if any there was, was the proximate cause of the injury."

Grethen v. Chicago R. R. (C. C.) 22 Fed. 609; 19 Am. & Eng. R. R. Cases, 342; *The Burgundia (D. C.)* 29 Fed. 464; *Chicago R. R. v. Logue*, 158 Ill. 621, 42 N. E. 53; *Carter v. Towne*, 98 Mass. 567, 98 Am. Dec. 682; *Id.*, 103 Mass. 507; *Morrison v. Erie R. R. Co.*, 56 N. Y. 302; *Lannen v. Albany Gas Light Co.*, 46 Barb. 264; *Id.*, 44 N. Y. 459; *Bellefontaine R. R. Co. v. Snyder*, 18 Ohio St. 400, 98 Am. Dec. 175; *Kay v. Penn. R. R. Co.*, 65 Pa. 276, 3 Am. Rep. 628; *North Penn. R. R. v. Mahoney*, 57 Pa. 187; *Pittsburg R. R. v. Caldwell*, 74 Pa. 421.

The circuit judge on the trial of this cause did instruct the jury that the contributory negligence of the mother, who was in actual custody of the child at the time of the injury, was imputable to the child. The court said:

"It further appearing that the child was brought upon the car by its mother, and was in her care and custody, the same degree of care and protection of the child was thus imposed on its mother as would have been imposed upon an ordinary passenger of intelligence and experience, * * * that degree of care and precaution that an ordinarily prudent person would have exercised under like circumstances and conditions; and in arriving at that you can look to the age of the child, the kind of car they were riding on, the fact that the cars in their ordinary travel necessarily cross switches and frogs and use curves upon the track; and if the proof shows that in crossing these frogs,

exercise that degree of care and precaution for the safety and protection of the child incumbent on her as explained to you above, and such failure on the part of the mother was the proximate and controlling cause of its injuries, then the child could not recover in this action."

And further on in the charge, his honor charged as follows:

"Again, should you find that the mother of the plaintiff failed to exercise the ordinary care and caution for the protection of a child that has been explained to you above as incumbent upon her, and such failure upon her part was the proximate and controlling cause of his fall and injuries, then, and in that event, you should find for the defendant. So, also, should you find that the negligence of the plaintiff's mother and the negligence of the defendant company equally contributed towards the accident and injury, in such event you should find for the defendant.

"Should, however, you find that the negligence of the mother contributed materially to the accident and injury to the child, but was not its proximate and controlling cause, that would not deprive the plaintiff of a right to recover, but should be taken by you in mitigation of the damages you would otherwise allow."

It will thus be seen that the doctrine of imputed negligence was distinctly charged by the circuit judge. But the precise proposition presented by the assignment of error is that the court failed and refused to charge that, if the negligence of the mother contributed proximately to bring about the accident, plaintiff could not recover. It will be observed that in the general charge already quoted the jury were told there could be no recovery if the negligence of the mother was the proximate and controlling cause of the injury, or if the mother and defendant equally contributed in producing the accident; but the court refused to charge that if the negligence of the mother proximately contributed in any degree to produce the injury the defendant company would not be liable. Ordinarily, such failure and refusal to charge would constitute prejudicial error for which there should be a reversal. *Nashville Railway v. Norman*, 108 Tenn. 334, 67 S. W. 479. But unless there are facts in the record showing heedlessness on the part of the child, and negligence on the part of the mother in failing to prevent the incautious act of the child, there would be no basis for imputing to the child any negligence on the part of the mother that proximately contributed to the injury.

It seems that even in jurisdictions where the doctrine of *Hartfield v. Roper* has been recognized, it is now held the rule is not applicable when it appears that the injured child, although non sui juris, has exercised

care there is no imputability. See cases cited in 7 Am. & Eng. Law, 451.

Says Mr. Thompson, a sensible interpretation of the rule is that if a child, though non sui juris, has not committed or omitted any act which would constitute negligence in a person of full discretion, an injury by the negligence of another cannot be defended on the ground of contributory negligence of the parent or custodian in not restraining the child. In such a case the child, being in a lawful place, and exercising what would be regarded as ordinary care in an adult, is entitled to recovery for an injury occasioned by the wrongful act of another, irrespective of the conduct of the parents. *McGarry v. Loomis*, 63 N. Y. 104, 20 Am. Rep. 510.

A sententious statement of this rule is made by Hogeboom, J., in *Lennan v. Albany Gas Lt. Co.*, 44 N. Y. 459, viz.: "I know of no just or legal principle which, when the infant himself is free from negligence, imputes to him the negligence of the parent, when if he were an adult he would escape it. This would be, I think, visiting the sins of the fathers upon the children to an extent not contemplated in the Decalogue, or in the more imperfect digests of human law."

The uncontradicted proof in this record is that at the time of the accident the child was seated in a place provided for passengers, with his right hand holding to the guard attached to the seat. He was not leaning out, or standing on the seat or floor, or committing any other negligent or incautious act, even if negligence might be ascribed to one so immature in years. While the child was thus in the exercise of as much care as an adult could be under similar circumstances, there was a plunging of the car into the depression caused by the defective track, and he was jostled off, just as an adult might have been under like conditions. If the child was in no fault, how is the negligence of the mother to be imputed to it? There was no negligent act of the child that should have been prevented by the mother.

posite, where she could see all the movements of the child, and readily restrain a imprudent act on its part. So that, upon an uncontradicted proof, we fail to perceive a negligence either on the part of the mother or child. Hence the failure and refusal of the Circuit Judge to charge that any proximate contribution of negligence on the part of the mother would defeat the child's right of recovery was innocuous, and not reversible error.

It is assigned as error that the court refused to charge, viz.:

"When it is said that a carrier of passengers must provide for their safety, as far as human skill and foresight will go, it is meant that he shall exercise all that care and diligence of which the human mind can conceive, or all the skill and ingenuity of which he is capable. The law only requires of all those things necessary for the safety of the passenger that are reasonable and consistent with the business of the carrier, as proper to the means of conveyance employed by him to be provided, and that the highest degree of practical care and diligence and skill shall be adopted that is consistent with the mode of conveyance used, and that it will not render its use impractical and inefficient for its intended purposes."

It suffices to say, in answer to this assignment of error, that the court did not charge that a carrier of passengers must provide for their safety as far as human skill and foresight will go, and hence there was no occasion to explain what was meant by the terms. The circuit judge might properly have charged that rule as applied to the liability of a carrier to his passengers, but as a matter of fact he only charged that "It is incumbent upon the defendant to keep track, cars and appliances, * * * switches and frogs, * * * in reasonable safe order and condition." Surely there can be no reasonable ground on the part of the company to complain of this charge.

It results there is no error in the record and the judgment will be affirmed.

1. Where it is doubtful as to whether an alleged dying declaration was made in extremis, the Court of Appeals will not interfere with the ruling of the trial court admitting it in evidence.

2. An instruction in a prosecution for homicide, being the only one given that had any application to a definition of murder or manslaughter, that if the jury believed beyond reasonable doubt that defendant unlawfully, feloniously, willfully—"that is, intentionally"—either with or without malice aforethought, and not in self-defense, shot and killed decedent, to find defendant "guilty of murder if the shooting was done with malice aforethought; guilty of manslaughter if done without such malice," is erroneous, as excluding certain elements of manslaughter.

3. The danger to one's life or great bodily harm to his person which authorizes a person to act in his defense may be real danger or only apparent danger.

4. Where defendant in a prosecution for homicide, to impeach the credit and lessen the effect of the dying declaration of deceased, introduced, among other evidence, court records showing that deceased had been convicted of the crime of grand larceny, and had been sent to the penitentiary, it was error to permit the prosecution to introduce in evidence a pardon to deceased for the crime.

5. The rule that a witness cannot be impeached by evidence that he had been guilty of misdemeanors applies to an attempt to impeach the dying declarations of deceased in a prosecution for homicide.

Appeal from Circuit Court, Whitley County.

"Not to be officially reported."

Len Martin was convicted of voluntary manslaughter, and appeals. Reversed.

O. W. Lester, for appellant. N. B. Hays and Loraine Mix, for appellee.

NUNN, J. The appellant was indicted by the grand jury of Whitley county in the month of August, 1903, charged with the offense of murder of one Wesley Woods by shooting him with a pistol. A trial was had at the January term, 1904, which resulted in the conviction of appellant for the crime of voluntary manslaughter, and he was sentenced to a term of 10 years in the penitentiary, from which judgment this appeal is prosecuted.

The appellant relies upon several errors committed by the lower court to his prejudice. He claims, first, that the lower court erred in permitting a statement to be read to the jury purporting to be the dying declaration of the deceased, Wesley Woods; second, that the court erred to his prejudice in giving instructions to the jury; third, it erred in permitting, on behalf of the commonwealth, incompetent testimony, and rejecting competent testimony offered by him.

As to the first error, the appellant claims that the proof did not show that the professed dying declaration was made under a sol-

stomach produced his death within five days. In his dying declaration the deceased used this language: "He says that he believes that he is going to die from the effects of said wounds, and desires to make a statement as to how and why he was shot;" and then proceeded with his statement, and closed with the following words: "I do not believe that there is any chance for me to get well, and I make all the aforesaid statements believing that I am going to die from the effects of said wounds." His mother made the following statement: "Before he made his dying declaration, he said he believed he was going to die, and never said anything else, but said all the time that he was going to die."

While the question is a close one, and doubtful as to whether the declaration was made in extremis, we do not feel inclined to decide that it was incompetent as evidence. This court, in the case of *Baker v. Commonwealth* (Ky.) 50 S. W. 57, used this language: "It may be possible that we should have reached a different conclusion from the trial court as to the admissibility of these statements of the deceased as dying declarations, but it was necessary for the judge of that court to first determine the question of fact, viz., whether at the time the declarations were made they were made under a sense of impending dissolution, and when all hope of this world was gone, before he could decide the legal question of their admissibility. The question of fact is bound up in and is a part of the question of law. We should therefore give some weight to the finding of the trial judge upon this question, as he heard the witnesses testify, and was perhaps in a better position to estimate the value of their testimony than this court can be from the bald record of the words they used; and, as the question in the case at bar seems to us to be a close one, we are not inclined to disturb his ruling upon this point." In the case of *Green v. Commonwealth* (Ky.) 18 S. W. 515, the court said: "The character of the wound and the attending circumstances may be sufficient to show that the declarant had no hope of recovery."

We are of the opinion that the court erred in its instructions to the jury. The first instruction given by the court is as follows: "If you believe from the evidence beyond a reasonable doubt that the defendant, Len Martin, in Whitley county, Ky., before the 28th day of August, 1903, unlawfully, feloniously, willfully—that is, intentionally—either with or without his malice aforethought, and not in his necessary or apparently necessary self-defense, discharged a pistol loaded with powder, leaden balls, or other explosive and hard substance, against the body of Wesley Woods, thereby inflicting a wound from which the said Woods died within a year and a day thereafter, you will find him guilty of

the only instruction given which had any application to the definition of murder or manslaughter, and was calculated to mislead the jury. It would have been better to have given an instruction on the question of murder, and another instruction on the question of voluntary manslaughter. The words, "that is, intentionally," interpolated in this instruction, were improper and calculated to mislead the jury, and the only definition of manslaughter as used in this instruction was given in the last sentence, namely, "manslaughter, if done without such malice." The elements of "affray," "sudden heat and passion," and "provocation ordinarily calculated to excite passion beyond control," necessary to make it a proper instruction, were entirely omitted.

Instruction No. 2, on self-defense, was also prejudicial. It was erroneous in this: "Defendant believed, and had reasonable grounds to believe, that he was in danger," etc. The court should have used, in substance, these words: Defendant had reasonable grounds to believe, either real or apparent, and did believe, that he was then in imminent danger of losing his life or suffering great bodily harm at the hands of Woods, and shot to protect himself from such danger, then in such case, you will find him not guilty. The danger to one's life or great bodily harm to his person which authorizes a person to act in his defense may be real danger or only apparent danger.

As to the third error—in permitting incompetent evidence on behalf of the commonwealth, and rejecting competent evidence offered by appellant—the facts as they appear of record are as follows: The appellant, to impeach the credit and lessen the effect of the dying declaration of the deceased, introduced, among other evidence, the records of the Whitley circuit court showing that the deceased had been convicted of the crime of grand larceny, and had been sent to the penitentiary. The commonwealth then introduced and had read a pardon to the deceased for this crime. The court should not have permitted this pardon to have been introduced as evidence. The appellant offered to prove from the records, by the circuit clerk of Whitley county and the police judge of Williamsburg, that the deceased was guilty of committing many breaches of the peace and much disorderly conduct, for which he had been tried and fined in the two courts. The court refused to permit appellant to introduce this proof. In this the court was right. The Code of Practice permits a witness to be impeached, but not by evidence of particular wrongful acts, except that it may be shown by the examination of a witness, or record, or judgment that he has been convicted of a felony, but not of misdemeanors.

MARKS & STIX v. HARDY'S ADM'R.

(Court of Appeals of Kentucky. March 8, 1904.)

"To be officially reported."

Extension of opinion. For prior opinion, see 78 S. W. 864.

BARKER, J. Our attention has been called by counsel for appellants to the use of the following language in the opinion: "William Hardy was an old man, and lived from fifty to seventy-five miles from Willard. There is no evidence in the record to show that he knew his son was carrying on a general merchandise store under his name, or that he ever heard any of the rumors that he was a member of the firm." And it is suggested that this might be construed, when the case comes on for trial, into meaning that the admissions of Hardy that he was a member of the firm were incompetent evidence. We think the context shows that the language of the opinion is confined to the want of knowledge on the part of William Hardy as to the evidence upon which the general reputation that he was a member of the firm was based, and had no reference to any other evidence in the case. However, in deference to the apprehension of counsel, the opinion is extended as indicated.

COMMONWEALTH v. MOREHEAD.

(Court of Appeals of Kentucky. March 4, 1904.)

TAXATION—OMITTED PROPERTY—ACTION TO COMPEL LISTING—JUDGMENT—SUFFICIENCY—STATUTE—APPEAL—JURISDICTION.

1. Under Ky. St. 1903, § 4241, limiting appeals in actions to compel the listing of omitted property for taxation to cases where the county court has decided whether the property is liable to assessment, a judgment of the county court, which does not in terms decide whether appellee was or was not the owner of any property of the nature set out in the statement which he had omitted to list for taxation, but simply adjudges that the proceeding be dismissed, is insufficient to support an appeal.

2. Under Ky. St. 1903, § 4241, limiting appeals in actions to compel the listing of omitted property for taxation to cases where the county court has decided whether the property is liable to assessment, the circuit court has no original jurisdiction on appeal to assess or value omitted property.

Appeal from Circuit Court, Daviess County.

"Not to be officially reported."

Proceeding by the commonwealth against C. L. Morehead. From a judgment of the circuit court dismissing an appeal from the county court, plaintiff appeals. Affirmed.

James B. Clark, M. R. Todd, and C. J. Pratt, for the Commonwealth. Miller & Todd, for appellee.

county court charging that the appellee, Morehead, had failed to list for taxation for the years 1897, 1898, 1899, 1900, and 1901 notes, bonds, judgments, cash, and other choses in action of the aggregate value of \$80,000, of which he was the owner on the 15th day of September of each of said years. The defendant, Morehead, filed an answer, in which he denied that he was the owner of personal property of the character described in the statement of the auditor's agent of the value of \$80,000, which he had failed to list for taxation for the years named, and alleged that he had regularly listed for taxation all the personal property owned by him with the assessor of Daviess county for the years named, and denied that he had omitted any property owned by him for either of the years named, except certain worthless judgments against the county of Muhlenberg in the year 1901. At the June term of the Daviess county court the proceeding instituted by James B. Clark, auditor's agent, against Morehead, and a similar proceeding instituted by the sheriff of Daviess county against the same defendant, were heard together, and the following judgment was entered in the county court: "By consent of parties the two foregoing proceedings are to be heard together. Same coming on to be heard, on motion of plaintiff, R. E. Berry is ordered to make report of proceedings as stenographer. And the court having heard the evidence, and being sufficiently advised, it is adjudged by the court that the two foregoing proceedings be, and the same are hereby, dismissed." From this judgment an appeal was prosecuted to the Daviess circuit court by James B. Clark, auditor's agent, and on the 26th of June, 1903, the following judgment was entered in the proceeding: "This action coming on for trial, the defendant moved the court to dismiss the appeal herein, to which the plaintiff objects. Argument of counsel was heard on said motion, and the court, being advised, sustained the motion, and it is adjudged that the appeal herein be, and it is now, dismissed." From this judgment Clark has appealed to this court.

The statement filed by appellant in the county court was under the provisions of section 4241 of the Kentucky Statutes of 1903, which provides: "If it shall appear to the court that the property is liable for taxation and has not been assessed, the court shall enter an order fixing the value thereof at its fair cash value, estimated as required by law; if not liable, he shall make an order to that effect. From so much of the order of the court deciding whether or not the property is liable to assessment, either party may appeal, as in other civil cases." The judgment rendered in the county court is not in conformity with the statute, as it does not in terms decide whether appellee, Morehead,

tion for the years named. The record does not contain any transcript of the evidence heard by the county court upon the trial of the motion, and the inference from the judgment is that the county court found that the appellee did not omit to assess any property owned by him in the years mentioned in the statement. By the express provision of the statute the appeal from the judgment of the county court to the circuit court is limited to cases where the county court has decided whether or not the property set out in the statement of the auditor's agent is liable to assessment. The circuit court simply passes upon the legal question as to whether the county court has erred in its decision as to whether certain definite property was liable to taxation or not. It has no original jurisdiction to assess or value omitted property. On the case presented by the appeal, we think the circuit judge properly dismissed the proceeding.

Judgment affirmed.

MONEHAN v. SOUTH COVINGTON & C. ST. RY. CO.

(Court of Appeals of Kentucky. March 3, 1904.)

STREET RAILWAYS—TRESPASSERS ON CARS—CHILDREN—DUTY TO DISCOVER—EVIDENCE.

1. A child, though non sui juris, riding on the step of the rear platform of a street car, on the side which is not in use, and across which is a closed gate, is a trespasser, to whom the street railroad and those in charge of the car owe no duty of discovering his peril.

2. In an action to recover for injury to a child trespassing on the rear step of a street railway car, testimony that the point where plaintiff got on the car was in a thickly settled portion of the city, and that many children congregated thereabouts, and had often trespassed on defendant's cars theretofore with the knowledge of the employes, was properly excluded.

Appeal from Circuit Court, Campbell County.

"To be officially reported."

Action by June Monehan, by his next friend, against the South Covington & Cincinnati Street Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

C. L. Raison, Jr., Geo. H. Ahling, and A. M. Caldwell, for appellant. L. J. Crawford, for appellee.

BARKER, J. The appellee is a corporation operating an electric railway over the streets of the city of Newport, Ky. The appellant, at the time of the injury of which he complains, was between six and seven years of age. At the intersection of Eleventh and Patterson streets, in the city named, one of appellee's cars had stopped for the purpose

¶ 1. See Street Railroads, vol. 44, Cent. Dig. § 173.

arranged that passengers could get on or off from either side; but appellee only permitted this to be done on one side at a time, and, for the purpose of preventing ingress and egress to and from the car on more than one side, it had a small iron wicket gate across the side not in use. This was movable, so that it could be transferred from one side to the other, as the necessities of the case required. Appellant, and a companion about the same age, while the car was standing at the intersection mentioned, got upon the lower step of the side of the rear platform which was not being used for the purpose of taking on or letting off passengers, and, taking hold of the iron gate with their hands, stood on the step until the car started. The car seems to have soon attained a rapid rate of speed, and appellant was jolted off, falling into the street, and receiving injuries about the head, to recover damages for which this action was instituted. Upon the trial of the case, after the close of appellant's (plaintiff's) testimony, the court, on motion, awarded appellee (defendant) a peremptory instruction to the jury to find for it, which was done; and of this, appellant is here complaining.

The question involved is whether or not, under appellant's own testimony, appellee owed him any duty other than to avoid injuring him, if that could have been done, by the exercise of ordinary care, after his danger was discovered. It is not pretended that appellant was a passenger upon the car, nor can it be denied that he was a trespasser. The evidence does not show that the conductor, who was appellee's agent in charge of the car, saw him; but it is contended that the officer, by the exercise of ordinary diligence, could and should have seen him before he received his injury, and have prevented it, and this question, he claims, should have been submitted to the jury. Upon this claim arises the crucial question of this case—whether or not appellee owed appellant any active duty in order to discover his peril. If so, then the peremptory instruction should not have been granted. In favor of this proposition, appellant's counsel cites two cases: *L. & N. R. Co. v. Thornton* (Ky.) 58 S. W. 796, and *Vanarsdall's Adm'r v. L. & N. R. Co.* (Ky.) 65 S. W. 858. In the first of these, the court said: "The theory upon which this case is based, and the recovery had—for it is carried into the instruction given supra—is that appellant owed to appellee a duty to prevent him getting off the moving train after those agents knew or had reasonable grounds to believe he was about to jump from the moving train. We are of opinion that the instruction, supra, given, is erroneous. There can be no negligence in failing to do unless there was a duty to do. Appellee, a boy seventeen years of age, and of reasonable intelligence, as shown by his

or the defendant, is not a passenger. Appellant owed him no contract duty. The train is not engaged in carrying passengers. Under these circumstances, it is clear that appellee was a mere licensee, if not a trespasser, and appellant owed him no duty, unless his danger was discovered in time to have prevented an injury by some agent of appellant. *Dalton's Adm'r v. L. & N. R. Co.* (Ky.) 56 S. W. 657, and cases cited." In the second of these cases, the facts were these: The decedent, Mary Vanarsdall, was a little girl, 12 years of age. At the time of the accident she was walking over one of appellee's railroad bridges. Before she could get off, she was run over and killed. In the opinion this court said: "It must be conceded that the intestate was a technical trespasser, or, in other words, she had no lawful right to use the bridge as a passway, and that appellee was under no obligations to look out to see if she was upon the bridge. But it is also a well-settled rule of law that if the defendant, its agents or employes in charge of the train, discovered the peril or danger of the intestate, it was its duty to use all reasonable efforts to avoid injuring her, and, if they failed so to do, the plaintiff would be entitled to recovery. If, however, the defendant used all reasonable efforts to avoid injury after discovering her peril, the verdict should have been for the defendant." We are not able to recall any opinion of this court wherein the opposite principle to that contended for by appellant has been more clearly or definitely decided than in these two cases.

The question of appellant's infancy is immaterial, until it has been established that appellee owed him an active duty, as opposed to the passive duty of not injuring him after his peril was discovered. An infant of tender years may not be able to be guilty of contributory negligence, and in that respect his position is superior to that of one who has reached years of discretion. But contributory negligence presupposes the existence of negligence, and never becomes a factor in the problem until the defendant's duty, and his breach of it, have been established. If the defendant owed the appellant no duty, then the question of his infancy is immaterial. Appellant was a mere trespasser upon the rear steps of appellee's car, and those in charge of it did not owe him any duty of discovering his peril. In the case of *Jackson's Adm'r v. L. & N. R. Co.* (Ky.) 46 S. W. 5, the decedent was a boy seven years of age, who was trespassing in the yard of the railroad corporation, where he was run over and killed. It was held that the corporation owed the decedent no active duty, and the judgment of the lower court, awarding the peremptory instruction, was affirmed. In the case of *Brown's Adm'r v. L. & N. R. Co.*, 97 Ky. 228, 30 S. W. 639, the doctrine that the corporation owed a trespasser upon its tracks

v. Cincinnati Railroad Co., 89 Ky. 402, 12 S. W. 764; McDermott v. Kentucky Central Railroad Co., 93 Ky. 408, 20 S. W. 380; and L. & N. R. R. Co. v. Hunt (Ky.) 13 S. W. 275.

We do not think the court erred in excluding the proffered testimony that the intersection of Eleventh and Patterson streets was in a thickly settled portion of the city of Newport; that many children congregated thereabouts, and theretofore they had often trespassed upon appellee's cars, with the knowledge of the employes in charge thereof; and the cases of Shelby's Adm'r v. Cincinnati, New Orleans & Texas Pacific Railroad Co., 85 Ky. 224, 3 S. W. 157, and Louisville & Nashville Railroad Co. v. Popp, 96 Ky. 99, 27 S. W. 992, do not support this proposition. In the first of these cases, the infant decedent was killed by a backing car while he was on the defendant's switch, where he had the right to be; and the court found, as a matter of fact, that he was not a trespasser, but, on the contrary, said: "In our opinion, therefore, he had a lawful right to go upon the track at that place, and the company owed to him a duty of active vigilance." In the second case there is some general language which seems to give color to appellant's position with reference to the admissibility of this evidence, but an analysis of the opinion shows that the servants of the defendant corporation knew the appellee and his companions were in its switchyard and about its cars; and the case, after all, was made to turn upon the knowledge that the injured boy and his companions were in and about the cars, by the backing of which without notice the plaintiff was injured. In the action of Louisville & Nashville Railroad Co. v. Webb, 99 Ky. 335, 35 S. W. 1120, on the subject of testimony of this character it was said: "Over the objections of the counsel for appellant, testimony was admitted to prove what was said by the conductor to the boys, including the infant appellee, about helping to take freight from the train and riding from the tank on days previous to the day on which the accident happened. This testimony ought to have been rejected. The case was between the infant appellee and appellant, and the subject of the investigation was what occurred on the day the injury was inflicted, and what occurred on previous days had no necessary connection with, and was in no sense a part of, the transactions of that day. For this reason, also, the court properly refused to allow proof to be made in behalf of the appellee of what it was alleged the conductor and trainmen said to the boys on the occasion before that day about swinging on the ladders attached to the side of the car, and telling them to do this in order to learn to be 'hoppers,' and the like, and that the boys were in the habit of practicing in that way on previous occasions when they

rier of passengers, owed the infant appellant no different duty than was owed him by the owner of any other vehicle plying the streets of Newport. As he had a right, in common with the general public, to use the public highways, appellee, in common with all other owners of vehicles, owed him the active duty of exercising ordinary diligence not to run over him; but neither it nor they were under any duty of anticipating his trespassing on the rear end of the vehicles while they were being driven or propelled along the streets. Suppose a private carriage is being driven along the street; must the driver maintain a lookout to see that small boys are not stealing a ride by climbing up in the rear of the vehicle, and thereby placing themselves in positions of danger? Surely not, and yet it will be difficult to draw a distinction between the case at bar and that supposed. The fact that there was a conductor on appellee's car would not alter the case. The conductor's duty is primarily to attend to his passengers, not to look out for trespassers; and, while the presence of the conductor would necessarily increase the chances of the actual discovery of the infantile trespasser, it would not add the duty of an active vigilance to make the discovery of his presence and danger.

Judgment affirmed.

ROBINSON et al. v. TALBOT et al. (two cases).

(Court of Appeals of Kentucky. March 3, 1904.)

MINORS—ACTIONS—NEXT FRIEND—RIGHT TO SUE—BENEFIT TO INFANTS—EQUITY—JURISDICTION—APPEAL—DISMISSAL.

1. A chancellor, in the exercise of his duty to see that infants are not prejudiced by any act or omission of their next friend, may revoke the authority of such next friend to sue, or dismiss suits instituted by him for the ostensible, but not for the real, interest of the infants.

2. Where a person other than the statutory guardian of certain infants brought suits for them for the ostensible purpose of protecting their interest, but against the advice and wishes of such statutory guardian, and apparently for the sole purpose of earning a fee for himself, it was a proper exercise of the chancellor's discretion to dismiss such actions.

3. Where the next friend of certain minors had no authority to sue for them, and the court properly dismissed the suits as not for the best interest of the minors, an appeal from such orders of dismissal by such next friend will be dismissed.

Appeal from Circuit Court, Bourbon County.

Appeal from Circuit Court, Harrison County.

"Not to be officially reported."

Actions by Otto Robinson and others, by Winfield Buckley as next friend, against Charles Talbot and others. Motions of the

¶ 1. See *Infants*, vol. 27, Cent. Dig. § 186.

appeals. On motions to dismiss such appeals. Granted.

W. Buckler and S. Holmes, for appellant.
W. S. Cason, for appellees.

BURNAM, O. J. These actions are submitted upon a motion by the statutory guardian of the infant appellants to dismiss the appeals prosecuted in the name of Winfield Buckley, as next friend, on the ground that he has no authority to prosecute them. It appears from the pleadings that George H. Talbot died a resident of Harrison county in the fall of 1896, the owner of a considerable personal and landed estate, a part of the latter being in Bourbon county. By his will, which was duly probated in the Harrison county court, he devised all of his estate to his surviving widow during her natural life, with the provision that at her death her brothers and sisters were to have \$3,000 out of the estate, and that the balance was to be divided equally among the brothers and sisters of the testator, seven in number, or their descendants. The interest of one of these brothers, Daniel by name, was represented at the death of testator by his granddaughter, Mrs. Mollie Robinson, who died after George H. Talbot, leaving as her heirs the infant appellants, whom Buckley assumed to represent in both of these suits as next friend. Mary F. Talbot, the wife of George H. Talbot and the life tenant, died on the 15th day of April, 1903. Two days thereafter the appellant, Buckley, volunteered to institute the suit in the Harrison circuit court as next friend of the infant children of Mollie Robinson, who were at that time residing with their brother Harry in Maysville, Ky., for a sale of all the landed estate devised by George H. Talbot, and for a distribution of the proceeds among the devisees of George Talbot or their descendants, one-seventh of which he alleges belonged to the descendants of Mollie Robinson, making the descendants of the other devisees defendants, who he alleged resided in various counties of this state and in various states of the Union. On the 27th of April, 1903, Harry Robinson, the brother of the infant plaintiffs, filed his affidavit in this suit in the Harrison circuit court, in which he stated that Winfield Buckley, who assumed to sue as next friend for the infants, was not their guardian, had no interest in any of them, and had instituted the action without authority, and asked that it be dismissed. He subsequently qualified as the statutory guardian of all of the infant plaintiffs, and filed their affidavits to the same effect, and asked that a rule issue against Buckley to show cause why the suit instituted by him in the Harrison circuit court should not be dismissed for want of authority on his part to institute the action. Buckley in his response to this rule admitted

from either the infants or their brothers, who were of full age, but claimed that, as they were without statutory guardians at the date of the institution of the suit, he had the right to do so. The response was held insufficient, and the suit dismissed. Shortly after the institution of the suit in the Harrison circuit court, he instituted a similar suit in the Bourbon circuit court. The same proceedings were had in the Bourbon court, and the case dismissed; and he prosecutes an appeal from the judgment entered in both cases, and the statutory guardian of the infant appellants has entered a motion in this court to dismiss the appeals in both cases on the ground of lack of authority in Buckley to prosecute them.

Subsection 1 of section 35 of the Civil Code provides that an action of an infant must be brought primarily by his statutory guardian, if he has one residing in the state. Section 37 provides that: "No person shall sue as next friend unless he reside in this state and be free from disability. Nor unless he file his own affidavit showing his right to sue as next friend according to the provisions of this chapter." It does not appear from the record that Mr. Buckley complied with this section of the Code at the institution of the suits. He is not related to them by blood or marriage, he does not reside in the same county, and the record entirely fails to disclose any special reason why he should have so hastily, without consultation with them or their natural friends, have assumed the duties which the law primarily imposed upon their statutory guardian. It certainly cannot be assumed that he has their interest more at heart than their brother and statutory guardian, with whom they reside. The only apparent explanation of his diligence and zeal in the matter was the desire to earn a good fee for himself, while ostensibly protecting their interest. It is the duty of the chancellor to protect the infants, and to see that they are not prejudiced by any act or omission of the next friend, and to this end he may, if he deem it necessary, revoke the authority of the next friend and substitute another, or dismiss suits instituted for the ostensible, but not real, interest of the infants. See *Longnecker v. Greenwade*, 35 Ky. 516; 14 En. of Pl. & Pr. 1041. After a careful consideration of the records we have reached the conclusion that the lower courts did not abuse their discretion in the dismissal of these actions, and that the best interest of the infant appellants required that the motion to dismiss the appeals prosecuted by the "prochein ami" should be sustained by this court, as they seem to have been prosecuted wholly without authority and against the advice and wishes of the statutory guardian; and it is so ordered.

OFFICERS DE FACTO—PAYMENT OF SALARY—RIGHTS OF SUCCESSFUL CONTESTANT—LIABILITY OF STATE—CONSTITUTIONAL LAW—DIMINUTION OF OFFICIAL COMPENSATION.

1. The canvassing board, whose duty it was to count, but not determine the legality of votes, declared a candidate for a state office elected, and he assumed the office, and received the salary until on contest his opponent was declared elected. *Held*, that the successful contestant could not recover from the state the salary paid contestee during his incumbency, contestant's remedy being by suit against contestee.

2. Const. § 235, declaring that the salaries of public officers shall not be changed during their terms, and that the General Assembly shall regulate by general law what deductions shall be made for neglect of official duty, does not entitle a successful contestant for a state office to recover from the state salary paid contestee during his incumbency, there being no change of or deduction from contestant's salary merely by being remitted to his remedy against contestee.

Appeal from Circuit Court, Franklin County.

"To be officially reported."

Action by I. B. Nall against Gus G. Coulter, as State Auditor. From a judgment for defendant, plaintiff appeals. Affirmed.

Hazelrigg, Chenault & Hazelrigg, for appellant. Atty. Gen. Hays, for appellee.

NUNN, J. In the election of state officers in the month of November, 1899, the appellant, Nall, was a candidate for the office of Commissioner of Agriculture, one Throckmorton being the opposing candidate. On the face of the returns Throckmorton was declared elected by the canvassing board, a board duly created by and under the laws of the commonwealth, whose duty it was to count the votes and determine for whom the greater number of votes were cast. It was not the duty of this board to pass upon the legality of the votes cast. On January 1, 1900, Throckmorton took the oath of office, and entered upon the duties thereof. But after the canvassing board had declared Throckmorton duly elected on the face of the returns, the appellant, Nall, instituted a contest, claiming that because of irregular acts done, whereby the votes counted for Throckmorton were procured, and by reason of illegal votes cast at the election, he was entitled to the office. The contest board decided that Nall was the person elected. Upon this finding Nall instituted a proceeding to oust Throckmorton, who refused to give up the office. After this court decided that Nall was entitled to the office, Throckmorton vacated, and appellant entered and assumed the duties of the office. It appears that the then auditor, Sweeney, paid Throckmorton his salary for the months of January and February. The present suit was

Treasurer of the Commonwealth for the sum of \$382.25, the amount of the salary due him from the 1st day of January to the 25th of February, 1900, the date when the contest board declared appellant entitled to the office. In other words, appellant claims that by reason of his being entitled to the office on the 25th of February he is entitled to the salary due from the state beginning January 1, 1900. The appellee claims that the state paid this salary to Throckmorton, who was in the office, attending to the duties thereof, and who had been duly declared elected by the board of election commissioners, and held the apparent legal title to the office; that if the appellant is entitled to this salary, he must look to Throckmorton for it, who received it, and contested with him the right to the office.

We are of the opinion that appellee's contention is the correct one. We have not been referred to, nor have we been able to find, any case decided by this court directly in point; but the courts of many states, as well as the English courts, have passed upon the question. The decided weight of authority, both in numbers and reason, uphold the principles contended for by appellee. We have been referred to many cases apparently holding the opposite rule, but upon a close examination of them it appears that many are not in conflict; some few of them apply to usurpers, having no color of right or title to the office; some few have reference to cases where the appointment or election of the person who held the office and performed its duties was void. The cases of *Stone v. Caulfield* (Ky.) 55 S. W. 924, *Gorley v. City of Louisville* (Ky.) 55 S. W. 886, also same case reported on first appeal, 47 S. W. 255, are cited by appellant. The right of Caulfield to compel the auditor to issue to him a warrant for his salary as clerk of the penitentiary was upon the idea that his removal from office by the acts of the state's officials was a nullity. This precise principle was involved in the *Gorley* Case, *supra*. In these cases the state and city officials professing to act for and on account of the state and city committed illegal and void acts in the removal of Caulfield and Gorley. At least it appears that it was upon these principles that they might be permitted to recover their salaries from the state and city. The case at bar is different. Throckmorton was at least a *de facto* officer, and not a usurper, and it is not charged that the state board of canvassers committed any illegal or void act with reference to granting Throckmorton a certificate. In *Am. & Eng. Enc. of Law* (2d Ed.) vol. 8, p. 783, it is said: "To constitute a person an officer *de facto*, there must be some facts, circumstances, or conditions which would reasonably lead persons who have relations or business with the office to recognize and treat him as the lawful incum-

¶ 1. See *Officers*, vol. 37, Cent. Dig. § 159.

denied to be "that which in appearance is title, but which in reality is no title." It is this color of title, or, it has been said, color of authority, which distinguishes the de facto officer from a mere intruder or usurper, whose acts are absolutely void." It cannot be said that Throckmorton was a mere intruder or usurper, but, on the contrary, he assumed the duties of the office with the legal certificate of the board of canvassers, and so remained in office until February 25, 1900, when the board of contest declared appellant elected and entitled to the office. The then auditor, Sweeney, had the right to believe that Throckmorton was then the legal officer. Upon what principle of reasoning can it be required of the auditor to investigate and determine at his peril whether or not a person has been legally elected to an office before he draws his warrant upon the treasurer for his salary? To require the auditor to pay at his peril, or withhold salaries until all contests were finally settled, would in many cases leave the state without officials to perform its service. In the same volume of the Am. & Eng. Enc. of Law, p. 813, it is said: "The general rule is that a state, county, or municipality which, before judgment of ouster against a de facto officer, has paid him the salary of the office due at the time of payment, is protected against any liability to the de jure officer for such salary." In the case of *Dolan v. New York*, 68 N. Y. 274, 23 Am. Rep. 168, the court said: "If fiscal officers, upon whom the duty is imposed to pay official salaries, are only justified in paying them to the officer de jure, they must act at the peril of being held accountable in case it turns out that the de facto officer has not the true title; or, if they are not made responsible, the department of the government they represent is exposed to the danger of being compelled to pay the salary a second time. It would be unreasonable, we think, to require them, before making payment, to go behind the commission, and investigate and ascertain the real right and title. This in many cases, as we have said, would be impracticable. Disbursing officers, charged with the payment of salaries, have, we think, a right to rely upon the apparent title, and treat the officer who is clothed with it as the officer de jure, without inquiring whether another has the better right. Public policy accords with this view. Public offices are created in the interest and for the benefit of the public. Such, at least, is the theory upon which statutes creating them are enacted and justified. Public and individual rights are, to a great extent, protected and enforced through official agencies, and the state and individual citizens are interested in having official functions regularly and continuously discharged. The services of persons clothed with an offi-

acts affecting the public and individuals. It is important that the public offices should be filled, and that at all times persons may be found ready and competent to exercise official powers and duties. If, on a controversy arising as to the right of an officer in possession, and upon notice that another claims the office, the public authorities could not pay the salary and compensation of the office to the de facto officer, except at the peril of paying it a second time if the title of the contestant should subsequently be established, it is easy to see that the public service would be greatly embarrassed, and its efficiency impaired. Disbursing officers would not pay the salary until the contest was determined, and this, in many cases, would interfere with the discharge of official functions." A case very similar to the one before us is found in *Michel v. The City of New Orleans*, 32 La. Ann. 1097. The court in that case said: "Sound public policy dictates the wisdom and the necessity of paying the salary of the officer in the possession of the office and performing functions required for the protection of society and the maintenance of peace and order; and after this duty is performed both law and equity forbid that the city or state be compelled to account for the same salary to any other party who may subsequently be decreed as the proper officer. * * * We are clear that under our laws the right of a de jure officer in such a case must be exercised against the intruder for the recovery of fees or of the salary of the office, and no recourse exists against the state or city for such salary as was paid to the de facto officer." The case of *County Commissioners, etc., v. Anderson*, 20 Kan. 298, 27 Am. Rep. 171, was a case which arose over a contest for the county clerk's office. Anderson and one Wildman were opposing candidates. The board of canvassers gave Anderson a certificate of election, and he took the oath and possession of the office. Wildman contested his election. The contest court decided in favor of Wildman, awarding to him the certificate previously issued to Anderson. Wildman immediately qualified, and took possession of the office. Anderson then took the case to the district court on appeal, and that court reversed the judgment of the contest court, and awarded the office to Anderson. Wildman then appealed to the Supreme Court, and that court affirmed the district court. Wildman in the meantime held the office, and received the salary and fees from January to October. The county commissioners had during all this time full knowledge of all this proceeding, but nevertheless paid the salary to Wildman. Anderson sued the board of county commissioners for \$900, the amount of salary they paid Wildman for the time he held the office while the contest was pro-

er, who had it in his possession when the killing occurred. Evidence that deceased had lent witness knife, and that witness had it at the time he killing, was not prejudicial to defendant though his evidence was that deceased cut with a knife in his possession, where the evidence showed that defendant was himself he wrong in pursuing and killing deceased time when he had no reason to apprehend her to his life or person.

A ruling of the trial court that witness did tell all about the transaction before being interrupted by the attorneys, made under the Prac. § 593, providing that the court shall exercise a reasonable control over the mode of interrogation, was not prejudicial to defendant's interests where it appeared that the witness was equitably fully interrogated by defendant's counsel touching all matters about which information could have been given by him.

Testimony as to the reputation of deceased properly excluded where witness' acquaintance with deceased's reputation was based more on personal knowledge of his escapades and peculiar acts of wrongdoing than upon what he generally said about him.

Under Cr. Code, § 113, providing that members of the grand jury may be required to use the testimony of a witness examined before them for the purpose of ascertaining its consistency with the testimony given by such witness on the trial, where the testimony given by a witness on the trial contradicted her statements to the grand jury, it was proper for the state, after laying a foundation by opposing her denial of the statement made before the grand jury, to introduce a member of the grand jury to contradict her, and in so doing it was proper to ask leading questions as on re-examination.

A motion for a continuance addresses itself to the sound discretion of the court, and such a motion will not be interfered with on appeal unless it is made manifest that the substantial rights of accused have been prejudiced by its abuse.

The discretion of the court in refusing a continuance was not abused where defendant's caveat as to what he expected to prove by absent witness was read to the jury, as in the latter's deposition and the material matter introduced on was merely cumulative of other evidence introduced by defendant.

The court properly refused to permit an caveat for continuance to be read as evidence where no subpoena had been issued for the witnesses, and as to the others it did not appear when the subpoena was placed in the sheriff's hands for service.

Facts showing diligence must be made to appear affirmatively in order to entitle one to a continuance, or to the right to read as a part of the evidence statements that may be put into an caveat as the testimony of an absent witness.

Appeal from Circuit Court, Franklin County.

Not to be officially reported."

George Dean was convicted of voluntary manslaughter, and appeals. Affirmed.

Counsel: Andrew Scott, for appellant. N. B. Smith and Lorraine Mix, for the Commonwealth.

MYRTLE, J. The appellant, George Dean, was indicted and tried in the Franklin County court for the murder of Ed Adams. Withstanding his plea of not guilty, he was convicted of voluntary manslaughter,

and he has appealed.

The difficulty which culminated in the homicide began in a bawdy house situated on Gas House alley, in the city of Frankfort. The house was kept by a woman called Jessie Douglass. According to the evidence of the commonwealth, appellant and Adams met at the house of the Douglass woman on the night of December 25, 1902. Jessie Douglass was making eggnog in the kitchen. There were present, besides Jessie, appellant, and Adams, her daughter, known as Cecil Howard, Myrtle McQueen, and in the front room, at the time the difficulty began, were Ape Willis and Wade Morse. The women were all of loose morals; appellant being the apparent favorite of Jessie Douglass, and Adams that of her daughter, Cecil Howard. Jessie Douglass began to complain at her daughter for having attempted to go that morning to Lexington, and claimed that Adams was to blame for it. The latter said, "Jessie, you needn't to blame me about it, because I smacked her for wanting to go." Appellant then interfered by saying to Adams, "If you want to chew the rag, chew it with me," and further remarked that he had had it in for Adams a long time, and now he was going to take it out, and thereupon struck Adams on the head, which was bandaged on account of wounds received in a previous fight with another. Adams said to him: "I have always been a friend of yours, and always want to be. You see I am in no condition to fight." But, unmindful of his protestations, appellant struck him again, and was told by Adams, in substance, if he wanted to fight to lay aside his pistol, and go out in the alley, and he would fight him a fair fight. Appellant then threw his pistol on the bed, saying he would go with Adams anywhere, and again struck him, knocking or forcing him into the front room. They started out of that room toward the alley, when appellant knocked Adams over a washstand in the room, and as he stood over him with a knife in his hand, Adams, in knocking off the stroke that appellant seemed about to make with the knife, struck the hand that held it, and caused it to enter appellant's neck, thereby inflicting upon him a dangerous wound. Adams then said, "Take him off, he is killing me," whereupon Myrtle McQueen opened the door, and told Adams to leave, which he did. Down to this time appellant's pistol had remained on the bed, but when Adams left the house, appellant regained possession of the pistol, and, following in the direction taken by Adams, caught up with him near the corner of Washington and Clinton streets, just after the latter encountered one Wm. Hayden, of whom he attempted to borrow a pistol, but, as Hayden had no pistol, he could not comply with the request. Hayden testified that Adams was running as he ap-

them with his pistol in hand. Adams jumped behind Hayden, caught him by the arms, and held him between his own body and appellant, who was still advancing upon him with his pistol presented as if to shoot. Adams kept pushing the body of Hayden first one way and then another in the effort to shield himself from the pistol of appellant, and Hayden repeatedly asked the appellant not to shoot, telling him that he did not wish to be shot himself. Appellant replied that Adams had cut him, and he intended to kill him. As appellant got near enough to attempt to reach around Hayden's body to shoot Adams, Hayden succeeded in breaking away from Adams, and appellant immediately shot the latter, who exclaimed, "Oh, Lord!" and ran toward Graffy's saloon, pursued by appellant, who snapped the pistol at him in the effort to shoot him before he entered the saloon, and then, following him into the saloon, shot him again as he fell or crouched near the counter. Adams died immediately after the last shot was fired by appellant. Two wounds were found upon his body, one ball having entered the arm, the other the back, just below one of the shoulder blades, the wound in the back evidently causing Adams' death; but it does not appear from the evidence whether it was from the shot fired by appellant on the street or the one fired by him in the saloon. In addition to the facts immediately connected with and surrounding the homicide which were testified to in the main by the two women Cecil Howard and Myrtle McQueen, and by Wm. Hayden, the commonwealth introduced evidence of threats made by appellant against Adams shortly before the killing, in the presence of divers witnesses, who testified with great particularity as to the times and places of such threats. Upon the other hand, the appellant and Jessie Douglass, who were the only other persons, besides Adams, Cecil Howard, and Myrtle McQueen, in the room when and where the difficulty that led to the killing began, gave a widely different version of the facts to that testified to by the witnesses for the commonwealth. The appellant testified in regard to the difficulty and subsequent homicide, in substance, as follows: "Ed Adams came back in there, and he walked over to me, and said: 'That day me and Chism had that fight, you wouldn't let me have your pistol.' I said, 'Go on, I don't want to have any trouble; I have got a crippled arm;' and he says, 'You come out here, and I will whip hell out of you.' I said, 'Go ahead, I don't want any trouble.' He said, 'Lay down your pistol, and come out here, and I will whip hell out of you.' When I started for the door, he hit me with a knife. One-arm Kelly and I clutched him with one hand, we both fell over the washstand, and he said, 'You son of a bitch, you, I will go and get a gun, and come back and finish you!'

and he asked him for a gun, and he started down towards me, and I shot him. The pistol snapped as he went into Graffy's saloon, and I shot another in there." Appellant further testified that after he was cut by Adams he started for a doctor, and that Adams turned back on him, and he shot him. He was corroborated in the main by Jessie Douglass as to the difficulty in the house, and in some measure by Ape Willis, who, being in the front room when the difficulty began, failed to hear some of the quarrel preceding the fight. The same is true of the testimony of Morse and Kelly, each of whom saw only the latter part of the fight, and neither of whom saw or heard what led to it. Appellant was also corroborated by one other witness as to Adams asking Innis Clark for a pistol, and several witnesses testified that threats were made against his life by Adams shortly before the homicide. But appellant's statements as to what occurred at the time of the killing of Adams were not only not corroborated, but were flatly contradicted and disproved by Hayden and persons in the saloon. Much of the evidence introduced by the commonwealth in rebuttal tended to contradict many of the material statements of appellant's witnesses, and, taking the evidence as a whole, we are unable to say that it did not authorize the verdict of the jury.

Whatever may be said of the conduct of Adams as a contributing cause to the difficulty in the house, it is apparent that appellant was equally, if not more, at fault; and in respect to the subsequent killing of Adams, it is apparent from the evidence that it was wholly without justification, for, according to the testimony of Hayden, who saw Adams shot in the street, and of those who saw him shot in the saloon of Graffy, where he was pursued by appellant, he was then not only without the means or apparent inclination to harm appellant, but was actually fleeing for his life. We can understand how the jury might have found something in what led to the fight in the house that, in their judgment, justified them in reducing the homicide from murder to manslaughter, although they were not authorized by the evidence to say that the killing of Adams was, under the circumstances, excusable. It is, however, insisted for appellant that the trial court erred in allowing the commonwealth to prove that the deceased, just before his death, lent Taylor Kinkead his knife, and that the latter had it in his possession when deceased was shot. One of the issues made by the appellant was that he was cut in the fight in the house by a knife in the hands of Adams. Appellant testified that he had no knife, but was cut by Adams. One other witness introduced for the defense—Jessie Douglas—testified that she saw Adams' hands in his pockets when and before the fight began, and that she saw a knife in his

that the knife with which appellant was cut was in his own hand, and that the cutting was done by Adams knocking the hand of appellant so that the knife was thrust into his neck by his own hand. A knife was found by this witness, or Jessie Douglass, behind the door, and given to an officer of the court, by whom it was lost. No knife or other weapon was found on the person of Adams after his death. We are of opinion that the evidence of Kinkead, though by no means conclusive, was competent as tending to corroborate Myrtle McQueen as to the manner of the cutting, and to contradict the appellant and Jessie Douglass, both of whom testified that appellant was cut by a knife in the hands of Adams. In any event, the evidence complained of could not have been prejudicial to appellant, for, though Adams may have unlawfully cut him with a knife in his possession, under the evidence appellant was himself in the wrong in pursuing and killing Adams at a time when he had no reason to apprehend danger to his life or person at his hands.

It is also complained by counsel for appellant that the lower court erred in not permitting him to conduct the examination of the witness Wade Morse without unnecessary interference from the court. An examination of the testimony of the witness in question found in the bill of evidence will show that after certain questions, mainly preliminary, had been asked the witness, the court, interrupting the examination, ruled that "the witness should tell all about it before being interrupted by the attorneys with questions. After making a full statement, he could then be interrogated." Section 593, Code of Practice, provides that "the court shall exercise a reasonable control over the mode of interrogation, so as to make it rapid, distinct, and as little annoying to the witness and as effective for the extraction of the truth as may be." It must be confessed that no particular reason appears from the record for the ruling complained of, yet many reasons not apparent to one not present at the trial may have existed therefor. The discretion of the trial court in such matters is broad, and in this case it is not perceived that any injury could have resulted to the rights of the appellant, for it appears from the bill of evidence that the witness was subsequently fully interrogated by appellant's counsel touching all matters about which information could have been given by him in regard to the case.

Complaint is also made that the court refused to permit Charles Kelly to testify as to the reputation of the deceased. We are of the opinion that the court did not err in excluding the testimony of the witness on the point indicated. As a whole, it shows that his acquaintance with the reputation of the

people generally in the community in he had lived said about him. Moreover, other witnesses testified as to the reputation of the deceased, and at most the testimony of Kelly would have been cumulative.

Another alleged error complained of by appellant is that the lower court refused to permit Ben Conway to testify regarding the threat made in his hearing by the deceased shortly before his death. The testimony of this witness as to the threat in question is as follows: "I went down the street (deceased) walked up behind me, and I said, 'Which way are you going?' and I said, 'I am going home,' and he walked on down the street. He started to go across the street, and I said, 'Which way are you going?' and I said, 'I am going home.' He said, 'I am going down here and kill some God damned bitch,' but he didn't call who it was. The witness subsequently stated that after making the threat, started toward the "alley." The record shows that the objection of the commonwealth's attorney, expressed the opinion that the testimony of the witness was incompetent because the statements of the witness were too general to be pertinent; but they were not excluded by the court from the consideration of the jury. Indeed, the bill of evidence shows that the witness subsequently testified to the jury the threat made by the deceased, all its details, without objection from the commonwealth or counsel; consequently the entire testimony of the witness, including the threat, and was obviously considered by the court without qualification or restriction.

It is further contended for the appellant that the court erred in permitting questions to be asked Thomas Rogan, a member of the grand jury. Cr. Code, § 11 provides that "a member of the grand jury, however, be required by a court to give the testimony of a witness examined by the grand jury for the purpose of ascertaining its consistency with the testimony of a witness given on the trial." It appears from the record that Jessie Douglass testified as a witness before the grand jury touching the indictment against appellant. It appears that her testimony before the grand jury was reduced to writing by the foreman and was read to and signed by her. Therefore, her testimony given on the trial in regard to the difficulty testified to in the death of Adams was consistent with, or inconsistent with, her statement made to the grand jury. The commonwealth had the right, after its foundation therefor by obtaining the testimony of any material statement made by the witness before the grand jury, to introduce the testimony of the witness or other member of the grand jury.

the commonwealth to ask him leading questions in the same general form used in the cross-examination, on the same points, of the witness thereby sought to be contradicted. We understand this to have been the course followed by the commonwealth's attorney on the trial in the court below in the examination of both the Douglass woman and Rogers; therefore it was not error for the court to permit the asking of Rogers the leading questions complained of.

We do not regard as error the action of the lower court in refusing on appellant's motion to set aside the swearing of the jury and continue the case on account of the absence of the witness Brawner, who was taken sick after the trial began. The affidavit of appellant as to what he expected to prove by Brawner was read to the jury as the latter's deposition. The material matter therein relied on was only an uncommunicated threat alleged to have been made by Adams against appellant. The evidence was only cumulative, as other witnesses introduced for appellant testified as to diverse threats of similar import claimed to have been made by Adams; and, besides, it does not appear from the record that Brawner, if personally present, would have testified any more strongly or intelligently in appellant's behalf than he was made to do in the affidavit setting forth his statements. As a motion for a continuance is a matter that addresses itself to the sound discretion of the court, such discretion will not be interfered with by this court unless it is made manifest that the appellant's substantial rights have been prejudiced by its abuse; which we are unable to say has been done in this case.

We are likewise unable to sustain the further contention of appellant's counsel that the trial court erred in refusing to permit so much of the first affidavit for continuance as contained the statement attributed to Innis Clark, George Oliver, and Andrew Dougherty to be read to the jury as evidence. No subpoena was issued for George Oliver, nor had he been recognized. No diligence was therefore shown as to him. It is true that a subpoena was issued for Innis Clark and Andrew Dougherty in common with other witnesses of appellant, August 7, 1903, and was executed on all the witnesses named therein except Clark, Dougherty, and two others, on September 15, 1903, which was only two days before the trial of appellant began in the lower court. The state of facts presented by the record fails to show diligence upon the part of the appellant in the effort to procure the attendance of the witnesses named. Though the subpoena seems to have been issued on August 7, 1903, it does not show, nor does it appear from the appellant's affidavit, when it was placed in the sheriff's hands for service. Probably it was not placed in the sheriff's hands until

why did he delay its service until almost the calling of the case for trial. It may be that the subpoena was not executed upon Clark and Dougherty for the very reason that the placing of it in the sheriff's hands was delayed too long. Its service upon them would perhaps have been effected by the prompt placing of the subpoena into the officer's hands. Who can tell from the record the reason of the delay? Facts showing diligence must be made to appear affirmatively in order to entitle one to a continuance, or the right to read as a deposition statements that may be put into an affidavit as the testimony of an absent witness. We are further of opinion that the statements attributed to the witnesses Clark and Dougherty, if read to the jury, would have been in a large measure cumulative, as the same facts were, in effect, testified to on the trial by other witnesses of appellant.

No complaint is made of the instructions given on the trial.

A careful consideration of the record convinces us that no error was committed by the lower court that can be said to have operated to the prejudice of the substantial rights of the appellant; wherefore the judgment is affirmed.

ILLINOIS CENT. R. CO. v. HIBBS.

(Court of Appeals of Kentucky. March 2, 1904.)

REMOVAL OF CAUSES—FOREIGN CORPORATIONS—DOMESTICATION—EFFECT.

1. A motion for removal of a cause against a foreign railway corporation should have been sustained where at the time it was made there was nothing in the record showing that the corporation had complied with Ky. St. 1903, § 841, providing that no foreign corporation shall operate a railroad within the state until it shall have become a citizen thereof.

2. A foreign railway company does not, because of a compliance with Ky. St. 1903, § 841, providing that no foreign railway shall operate its road in the state until it shall have become a citizen thereof, become a domestic corporation, so as to prevent it from securing the removal of a cause against it to the federal court.

Appeal from Circuit Court, Carlisle County.

"Not to be officially reported."

Action by Albert Hibbs against the Illinois Central Railroad. From a judgment for plaintiff, defendant appeals. Reversed.

Robins & Thomas, Pirtle & Trabue, J. M. Dickinson, and J. E. Budgwater, for appellant. J. M. Nichols & Son, for appellee.

SETTLE, J. By this action in the Carlisle circuit court, appellee sought to recover of the appellant \$10,000 in damages for personal injuries sustained by collision with one of its trains, resulting from the alleged negligence of those in charge of the train. The answer denied the negligence complained of, and, in the usual form, averred that the injuries re-

in a verdict for appellee for \$1,000. At the appearance term of the court, and before answering the petition, appellant filed a petition in due form, accompanied by an approved bond, and entered motion to transfer the cause to the Circuit Court of the United States for the Western District of Kentucky, which petition and motion were overruled and refused by the lower court, to which the appellant excepted, and the case is now before this court by appeal.

It is insisted that the lower court erred in refusing appellant a new trial, and also in overruling the petition and motion for the transfer of the cause to the federal court. If the last contention is sustained, the consideration of the other questions raised by the appeal will be unnecessary. The grounds upon which the motion to transfer was overruled were the same upon which this court, in an opinion by Judge White, in *Davis' Adm'r v. C. & O. R. Co.* (Ky.) 70 S. W. 857, decided that when a foreign railroad company, such as the appellant, had complied with section 841, Ky. St. 1903, such compliance, ipso facto, made it a domestic corporation, and it could not, therefore, remove a cause from a state to a federal court on the ground of diverse citizenship. We are of opinion, however, that the action of the lower court in refusing to transfer this case to the federal court cannot be justified on the grounds upon which Judge White bottomed his opinion in the case *supra*, for, when the petition of appellant was filed, and its motion to transfer the case was entered, there was nothing in the record showing that it had complied with section 841 of the Statutes, thereby placing itself upon the footing of a domestic corporation; hence the motion for removal should have been sustained, notwithstanding the opinion in the *Davis* case, *supra*. But since the decision of the *Davis* Case, the petition for a rehearing therein, which was pending at the time appellant's motion for a transfer of the case at bar was overruled by the lower court, was sustained by this court, and the former opinion withdrawn; and in lieu thereof it was held by this court, in an opinion by Judge Paynter, that a railroad company incorporated under the laws of a foreign state did not, because of a compliance with section 841, Ky. St., become a domestic corporation, so as to prevent it from having the right to remove a cause to the federal court. *Davis v. C. & O. R. Co.*, 75 S. W. 275. The doctrine announced in the last opinion in the case of *Davis v. C. & O. R. Co.*, 75 S. W. 275, has since been reaffirmed by this court in *Swices' Adm'r v. Maysville & Big Sandy R. Co.*, 75 S. W. 278.

The lower court erred, therefore, in overruling appellant's petition and motion for the transfer. Wherefore the judgment is reversed, and cause remanded, with directions to

and to sustain its motion to transfer the case to the federal court, to the end that such new trial may take place there.

CARROLL'S ADM'R v. CITY OF LOUISVILLE et al.

(Court of Appeals of Kentucky. March 2, 1904.)

RAILROAD CROSSINGS — CITY STREETS — DEFECTIVE CONSTRUCTION — NOTICE — CONTRIBUTORY NEGLIGENCE — PEREMPTORY INSTRUCTION FOR DEFENDANTS.

1. Where city authorities prescribe, and a railroad company follows, a plan of constructing a street crossing claimed to be defective, both are chargeable with knowledge of the plan, and the question of notice is immaterial.

2. Ky. St. 1903, § 2825, vests in the board of public works of the city of Louisville exclusive control over the construction of its streets. This board adopted a plan for the construction of a railroad crossing by which the space between the tracks intersecting the street and those between the rails was to be filled by placing parallel therewith iron or steel rails about three inches apart, between which was to be placed cement or some concrete substance, and this plan was followed by the railroad company. Plaintiff's intestate, while riding horseback, about 9 o'clock at night, at a rapid pace, was thrown by his horse slipping on the crossing, and sustained fatal injuries. There was testimony that this sort of crossing was more durable than wooden crossings, and less liable to get out of repair, but also that horses were more liable to slip thereon than on a wooden crossing. *Held*, that a peremptory instruction for the defendants, the city and the railroad company, was proper.

Appeal from Circuit Court, Jefferson County, Chancery Division.

"To be officially reported."

Action by Pat Carroll's administrator against the city of Louisville and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Pryor & Sapinsky, Matt O'Doherty, and Thos. Walsh, for appellant. Helm, Bruce & Helm and Henry L. Stone, for appellees.

BURNAM, C. J. The appellant, who was the plaintiff below, brought this action to recover damages for the death of his intestate, which he alleges resulted from the negligence of the appellees, the city of Louisville and the Louisville & Nashville Railroad Company, in the construction of the railroad crossing at the intersection of Third and A streets, in the city of Louisville. The allegation of negligence recited in plaintiff's petition is as follows: "On or about April 1, 1901, the defendants arranged the crossing at Third and A streets in the following manner, to wit: That beginning with the extreme northern rail of the track to the extreme southern rail thereof there was placed, the entire length of said crossing, running parallel with said tracks, iron or steel rails about three inches apart, and between these

defendants, and each of them, to keep said intersection or crossing of said public highway in a reasonably safe condition for the use thereof by the public, but that the manner of said crossing, as above set forth, was not reasonably or at all safe, but was, on the contrary, highly dangerous, unsafe, and insecure; that said rails became, and were at all times, dangerously smooth and slippery, so that a horse stepping thereon would slip and fall; that said dangerous, insecure, and unsafe condition of said crossing was well known to the defendants and each of them, or could have been known to them and each of them by the exercise of ordinary care, for such a period of time preceding the happening of the accident hereinafter mentioned to have permitted and allowed said defendants to have remedied same, and make said crossing safe and secure, but that, notwithstanding all of the above, the said defendants permitted said crossing to remain and continue in said dangerous and unsafe condition; and that on August 8, 1901, plaintiff's decedent, Pat Carroll, while riding horseback over and along Third street, going in a southerly direction, approached said crossing, and while proceeding across same his horse, because of the said dangerous, unsafe, and insecure condition of said crossing, and especially the iron or steel rails which composed same, slipped and fell, with the result that said Pat Carroll was thrown violently to the ground, occasioning him such severe injuries that his death occurred therefrom within a few hours thereafter. Plaintiff says that the death of his son was brought about and occasioned solely and altogether by the negligence and carelessness on the part of the defendants, and each of them, in the matters aforementioned."

The allegations of negligence were traversed by separate answers, and the contributory negligence of the plaintiff's intestate was relied on. No issue was made as to the description of the construction of the crossing between the rails of the railroad track. Upon these issues the case went to trial, and at the conclusion of the testimony of the plaintiff the circuit court directed a verdict for the defendants. To this ruling of the trial court plaintiff excepted, and, a judgment having been rendered on the verdict, he has appealed.

It appears from the bill of evidence that two tracks of the Louisville & Nashville Railroad Company, about eight or ten feet apart, occupy A street as its intersection with Third, and have so occupied it for many years; that Third street is paved with asphalt, and is one of the most generally used streets of the city, both for light and heavy hauling; that about the 1st of April, 1901, a little over four months before the accident which resulted in the death of appellant's intestate, the Louisville & Nashville Railroad

plan therefor which had been prescribed by the board of public works of the city of Louisville; and that a similar design for railroad crossing had been prescribed and followed by the railroads at many points in the city. The gist of the complaint is that the plan or design of the crossing was imperfect and dangerous. There is no allegation that there had been any substantial change or deterioration in the crossing subsequent to its construction and previous to the accident. During the progress of the trial the plaintiff attempted to show by a witness that the original design of the crossing required that the filler rails should be covered over by cement to the depth of about an inch, and that the defendants had permitted this coat to wear off and to expose the surface of the iron rails. The defendants objected to the admission of this testimony on the ground that the alleged negligence charged went only to the design of construction, and not that it had been permitted to become out of repair. This objection was overruled by the trial court on the ground that the plaintiff had a right to so amend his cause of action that the pleadings would conform to the proof. But no such amendment was ever offered, and it is apparent from the general design of the crossing that it would have been practically impossible to have covered the iron rails with a cement coat which would have withstood for any length of time the pressure of heavily loaded wagons passing over it. To show that the design was dangerous, plaintiff introduced a witness who testified that he was a surveyor; that a crossing constructed in the manner of this one presented a smoother surface than a crossing constructed of oak planks; and that horses were more liable to slip upon such a crossing than upon a wooden one. He admitted, however, upon cross-examination, that there was no question that the design of this crossing was more durable and permanent in its character than wooden crossings, and less liable to get out of repair. Several other witnesses, living in the immediate vicinity of the crossing, were permitted, over the objection of the defendants, to prove that they had seen horses at various times stumble and slip upon this crossing. It does not clearly appear from their testimony when these accidents occurred, but we think it fairly inferable that they were so close in point of time to the accident which resulted in the death of plaintiff's intestate as to make the testimony competent, although there is decided conflict in the authorities as to the competency of this kind of evidence for any purpose except to bring home to the city and railroad company notice of the dangerous character of the crossing. That was immaterial, however, in this case, as it is admitted that the railroad company constructed

city, and both were chargeable with knowledge of the plan. It also appears from the testimony that decedent was riding at a very rapid pace on horseback out Third street about 9:30 o'clock on the night of August 8, 1901, and that while crossing the railroad tracks his horse stumbled or slipped and fell, and that he was thrown to the street, receiving the injuries which caused his death. There is some discrepancy in the testimony as to whether the horse fell while on the track of the railroad or in the street between the two tracks.

While it is the duty of the city to keep its streets in a reasonably safe condition for ordinary travel, a corresponding duty rests on those who legitimately use the streets to avoid being injured. The rule is admirably stated in Dillon on Municipal Corporations (section 1015) as follows: "The liability is not that of a guarantor of the safety of the traveler. The corporate authorities are only bound to use reasonable skill and diligence in making the streets and sidewalks safe and convenient for travel. It is under no obligation to provide for everything that may happen upon them, but only for such things as ordinarily exist, or such as may be reasonably expected to occur."

Section 2825 of the Kentucky Statutes of 1903, which is a provision of the charter of the city of Louisville, vests in the board of public works exclusive control over the construction of its streets. They had the right, and it was their duty, to prescribe a plan for the crossing of railroad tracks, at the intersection of the public streets of the city, and it was the duty of the railway company to conform to such requirements in this respect as the board of public works might prescribe. It is difficult for the most competent engineers to devise a plan for such a crossing that will meet the requirements of safety, durability, and convenience. In passing upon the liability of a city growing out of an alleged defective design or plan of construction, this court in *Teager v. City of Flemingsburg* (Ky.) 60 S. W. 718, 53 L. R. A. 791, used this language: "It is argued for the city in this case that the plan of street improvements is one within the discretion of the council, and not to be interfered with by the courts. Some authority is cited from other states supporting this contention. But we rather incline to the view that while the city governing body may exercise its discretion in the selection of a plan of street improvement, if the plan adopted is one palpably unsafe to travelers the city would be liable. But when the plan is one that many prudent men might approve, or where it would be so doubtful upon the facts whether the street, as planned or ordered by the city governing board, was dangerous or unsafe or not, that different minds might entertain different opinions with respect there-

while there is testimony that a horse is more likely to slip upon a crossing of the character complained of than a wooden one, the testimony fails to show any defect in its construction, or that it was not, all things being considered, of the best and most suitable design at that point. Undoubtedly horses are more liable to slip on asphalt than on macadam streets, and more liable to slip upon macadam than upon the ordinary country dirt road, but this is no ground or reason for the condemnation of asphalt streets. The necessities of modern city life require, next to safety, permanence and durability in the construction of the streets and crossings. The testimony in this case conduces to show that the unfortunate accident which resulted in the death of plaintiff's intestate was attributable to the rapid and negligent rate at which he was traveling when he attempted to pass the railroad crossing, rather than any defect in the crossing itself. It therefore follows, in the absence of testimony conducing to show that the accident complained of was attributable to the defective construction of the crossing, that the peremptory instruction should have gone.

Judgment affirmed.

JOSEPH'S ADM'R et al. v. LAPP'S ADM'R.
(Court of Appeals of Kentucky. March 1, 1904.)

PROCEEDS OF INSURANCE—HEIRS OF BENEFICIARY—ASSIGNMENT OF POLICY FOR COLLECTION—AGREEMENT WITH ATTORNEYS—LIEN—RIGHT OF ADMINISTRATRIX.

1. The heirs of a beneficiary in an insurance policy assigned it to a creditor of the beneficiary for collection, who contracted with attorneys to collect it. Afterwards the heirs themselves contracted with the attorneys to collect it for a contingent fee. The beneficiary's administratrix then secured the policy, sued on and collected it, and the attorneys intervened, claiming a lien on the proceeds under Ky. St. 1903, § 107, giving attorneys' liens on claims, etc., put into their hands for collection, and on judgments recovered thereon. *Held*, that under section 1403, providing that the surplus of personal estate, "after payment of funeral expenses * * * and debts," shall pass to the same persons as the realty, the heirs had no title to the policy, and could not assign it or make an agreement for its collection, and hence that the attorneys had no lien.

2. A client may discharge his attorney at any time for any cause, or without cause, even where the fee is contingent, the attorney being entitled to recover for services already rendered.

Appeal from Circuit Court, Jefferson County, Third Common Pleas Division.

"Not to be officially reported."

Action by Carrie Lapp, as administratrix of the estate of Margaret Lapp, deceased, against the Knights of Honor, in which Lafe Joseph's administrator and others intervene. From a judgment dismissing their petition, interveners appeal. Affirmed.

Alfred Seilgman, for appellants. W. T. Burch, for appellee.

¶ 2. See *Attorney and Client*, vol. 5, Cent. Dig. § 121.

Lapp, for \$2,000. She died a few days after the death of her son, without having collected the policy. After her death, on the 31st of January, 1899, Carrie Lapp and Lou Meglemary, children and her grandchildren, George Felix Stranger, Maggie Schweikert, and Desda Cochraon, who were her only heirs at law, transferred and delivered this policy of insurance, or benefit certificate as it is sometimes called, to Armour & Co. for the purpose of collection. The writing provided that after paying the cost of collection and debts due by John Lapp to Armour & Co. the balance was to be turned over to the heirs. Armour & Co. employed appellants, attorneys at law, to take such steps as might be necessary to collect the policy, and delivered it to them. On the 25th of April, 1899, appellants entered into a written contract with the heirs at law to represent them in the collection of this policy for a fee equal to one-third of the sum realized thereon. Shortly after the execution of this last contract appellee, Carrie Lapp, qualified as administratrix of the estate of her deceased mother, and demanded possession of the policy from appellants, which they refused to deliver. She thereupon instituted a suit for the collection of the policy, and caused a rule to issue against appellants requiring them to deliver the policy to her. They responded, setting out their contract with Armour & Co. and with the heirs at law, and asked that they be protected in their rights. Their response was held insufficient, and they were compelled to deliver the policy. Appellee prosecuted her suit against the insurance company to judgment, and recovered thereon the sum of \$2,958.26, the amount of the policy and interest. Thereupon appellants, upon their own petition, were made parties to this proceeding, and set out their contract with the heirs at law, and asked that they be adjudged \$986.00 from the fund collected from the insurance company, subject, however, to the claim in favor of Armour & Co. for \$185.87. A general demurrer was interposed and sustained to this pleading, and their petition dismissed, and they have appealed, and ask a reversal upon the ground that they had a valid, enforceable contract with the heirs at law, and a lien for their fee, under section 107 of the Kentucky Statutes of 1903.

Section 1403 of the Kentucky Statutes of 1903 provides that: "Where any person shall die intestate as to his personal estate, or any part thereof, the surplus after payment of funeral expenses, charges of administration, and debts, shall pass to and be distributed among the same persons as real estate is directed to descend, except," etc.

Under the provisions of this statute, the policy of insurance, or the proceeds thereof, became chargeable with the payment of her debts, and her heirs at law took no title there-

into a contract with appellants for its collection. An action cannot be maintained by the heir for the recovery of a debt due to the ancestor unless the obligation to the ancestor is by its terms payable to the heirs. See *Brunk v. Means*, 50 Ky. 214; *Montgomery v. Commonwealth*, 17 Ky. 197; *Newman's Code Pleading*, 94, and numerous authorities there cited. The trial court, therefore, decided that appellants were not entitled to a judgment to any portion of the fund which had been recovered by the administratrix. It was her duty to apply the money collected by her to the payment of the debts of her intestate in the manner directed by the statute, and the surplus which remained after the payment of such indebtedness became the property of the heirs. Appellants will have to look to their clients individually for anything due to them for their services. Besides, the law is well settled that a client has the right to discharge his attorney at any time with or without cause, even in a case where the fee is contingent. If, however, the discharge is without cause, and after the attorney has actually performed services in the line of his employment, he is entitled to recover the value of such services. See *Henry v. Vance* (Ky.) 6 S. W. 273.

For reasons indicated, the judgment is affirmed.

STROH v. SOUTH COVINGTON & C. ST. RY. CO.

(Court of Appeals of Kentucky. March 1, 1904.)

DAMAGES—EXTENT—PLEADING—SUFFICIENCY—INADEQUACY—EVIDENCE—EXAMINATION OF WITNESSES—APPEAL—RULINGS ON EVIDENCE—SUFFICIENCY OF RECORD.

1. Plaintiff, in an action for personal injuries, cannot ask for a reversal of a judgment in her favor because of the inadequacy of the damages to compensate her for loss of time, where the only special damage alleged in her petition was for expenses for medical treatment, nursing, etc.

2. In an action for personal injuries, evidence that the physicians who testified as to the extent of plaintiff's injuries had been appointed by the court, and the action of defendant's attorney in stating that fact in closing to the jury, were not prejudicial to plaintiff.

3. Where an expert witness had been thoroughly examined, it was proper for the court in its discretion to curtail any further cross-examination.

4. Where the record showed that plaintiff, in an action for injuries, made no avowal as to what the witness would state in answer to questions as to whether she would be rendered sterile as a result of the accident, the appellate court could not say whether plaintiff was prejudiced by the refusal of the court to permit the question to be answered.

Appeal from Circuit Court, Kenton County.
"Not to be officially reported."

Action by Carrie Stroh against the South Covington & Cincinnati Street Railway Company. From a judgment for plaintiff, she

by the refusal of the court to permit her counsel to further cross-examine the expert witness, Dr. Zinke; the doctor had been thoroughly examined, and had told all he knew on the subject in hand; any further cross-examination of him was an unnecessary prolongation of the trial, which the court, in its wisdom, had the right to curtail.

The fifth error assigned by appellant is the refusal of the court to permit her to show, on the question of the extent of her injuries, that she would probably be rendered sterile as a result of the accident. The record shows that, when the court sustained objections to the questions propounded along this line, appellant made no avowal as to what the witness would state, if permitted to answer the question. The failure so to do renders it impossible for us to say whether or not she was prejudiced by the refusal of the court to permit the witness to answer the question. *Brown v. Commonwealth*, 14 Bush, 398; *Bowler v. Lane*, 3 Metc. 311.

Judgment affirmed.

CRAIG v. WELSH-HACKLEY COAL & OIL CO.

(Court of Appeals of Kentucky. Feb. 26, 1904.)
PLEADING—AMENDMENT—AMENDING PETITION
AFTER JUDGMENT.

1. Where the court dismissed a petition, and an appeal was taken, and judgment was affirmed, the trial court had no authority to permit an amendment of the petition; it having no control over the judgment, and the action not being a pending one.

Appeal from Circuit Court, Knox County.
"Not to be officially reported."

Suit by Sarah F. Craig against the Welsh-Hackley Coal & Oil Company. From an order overruling a motion for the filing of an amended petition, plaintiff appeals. Affirmed.

John H. Wilson, for appellant. J. Smith Hays, for appellee.

PAYNTER, J. The appellant sued appellee in the Knox circuit court. The court sustained a demurrer to the petition, and dismissed it. An appeal was prosecuted to this court, and the judgment was affirmed. Afterwards appellant moved to redocket the case, and tendered and offered to file an amended petition, and the court overruled both motions. Complaint is made of that action of the court.

When the lower court dismissed the petition and adjourned for the term, it had no control over the judgment. It had no jurisdiction to disturb it, except in a direct proceeding (if at all) for a new trial. This was not sought. At the time the motions were made, the judgment was in full force and effect. The action was not pending in court, as it had been dismissed. The petition

ing. An amended petition can only be filed in a pending action or proceeding. This conclusion is supported by *Houston v. Kidwell* (Ky.) 14 S. W. 377.

The judgment is affirmed.

ELLIOTT v. CAMPBELL.

(Court of Appeals of Kentucky. Feb. 26, 1904.)
WITNESSES—INCOMPETENCY—TRANSACTIONS
WITH DECEDENTS—TRIAL—MOTIONS TO
EXCLUDE EVIDENCE—EFFECT.

1. Under Civ. Code Prac. § 606, subsec. 2, relating to testimony as to transactions with a decedent, on the issue of title claimed by plaintiff and defendant through a common deceased grantor, the respective tracts of the parties being contiguous, and the determination of the issue depending on the ascertainment of the location of the beginning corner of the survey, defendant was incompetent to testify as to a conversation had with his grantor in the absence of plaintiff, in which the grantor designated the beginning point of the survey.

2. A motion to exclude all the testimony of a witness after the taking of objections and exceptions to its admission does not forfeit the right previously reserved to have the incompetent testimony excluded, although some of the evidence subject to the motion was competent.

Appeal from Circuit Court, Knox County.
"To be officially reported."

Action by Henry Elliott against Levi Campbell. From a judgment for defendant, plaintiff appeals. Reversed.

J. Smith Hays, for appellant. B. B. Golden and Jas. D. Black, for appellee.

PAYNTER, J. Both appellant and appellee claim to have derived title to the land in controversy from Benjamin Eve. The right to the land depends upon the location of the beginning corner of the tract sold by Eve to appellee, Campbell, as appellant bought to the latter's line. Campbell claims the beginning corner is located on what is known in this record as the "reverse line," which was a boundary line to a 50-acre tract owned by Sol Campbell, while appellant claims the beginning corner is located at a different place in Sol Campbell's line, to a tract of land known as the Hiram Campbell land, but then owned by Sol Campbell. The title bond from Eve to appellee calls to begin in Sol Campbell's line "at the nearest point to Young's creek." So one of the litigants claims that "the point" is in a line to one tract of land which belonged to Sol Campbell, while the other claims that it is in a line of another tract of land which then belonged to Sol Campbell. This statement is made to show that the solution of the question at issue depends upon the ascertainment of the location of the beginning corner of the appellee's survey, and to show the importance of his testimony touching the issue, as appellant claims that its admission was highly prejudicial to him.

1. A husband's unexecuted intention to occupy certain land as his homestead was insufficient to create the right of homestead therein.

2. Under Ky. St. 1903, § 1702, providing the conditions on which the right of homestead in real property exists, and section 1707, declaring that the homestead shall be for the use of the widow so long as she occupies it, and that the unmarried infant children of the husband are entitled to joint occupancy with her, a widow had no homestead right in property of which her husband died seised which he had never occupied as a homestead.

3. In a proceeding to determine a widow's interest in real property of which her husband died seised, the fact that she was insane and confined in an asylum after her husband's death had no bearing on the question as to whether she took a homestead or dower interest in the property.

Appeal from Circuit Court, Jefferson County, Chancery Division No. 1.

"To be officially reported."

Proceeding between Dennis Higgins and others and Honora Higgins. From a judgment awarding certain property to Honora Higgins, widow of Bartholomew Higgins, deceased, as her homestead, Dennis Higgins and others appeal. Reversed.

Matt O'Doherty, for appellants.

PAYNTER, J. Bartholomew Higgins died, leaving as his widow Honora Higgins and two children, Mary and Dennis. Mary is dead, and Dennis is over 21 years of age. The question for determination on this appeal is whether the widow has a homestead or dower in a house and lot in the city of Louisville of which Bartholomew Higgins died seised.

The evidence tends to show that at one time after the death of her husband the widow occupied the house with the children, but for how long is not disclosed. The evidence fails to show when the husband died, or where he then lived, or that he ever occupied the house with his family or at all as a homestead. If he never occupied it with his family as a homestead, he never acquired a right to a homestead therein. An unexecuted intention to occupy it did not create the right. *Fant v. Talbot*, etc., 81 Ky. 25; *Hansford v. Holdam*, 14 Bush, 210. As the evidence fails to show that the husband had the right to the homestead in the property when he died, it is not shown that the widow did have such right. Section 1702, Ky. St. 1903, states the conditions upon which one has a homestead in real property. Section 1707 provides that the homestead shall be for the use of the widow so long as she occupies it, and the unmarried infant children of the husband are entitled to a joint occupancy with her. The language used shows the widow's right to a homestead is predicated upon

¶ 1. See *Homestead*, vol. 25, Cent. Dig. § 42.

the right of homestead therein. The fact that the widow is now insane and confined in an asylum does not have any bearing upon the question as to whether she took a homestead or dower interest in the property.

The judgment is reversed for proceedings consistent with this opinion.

SNELLING'S ADM'R v. LEWIS.

(Court of Appeals of Kentucky. March 1, 1904.)
JUDGMENT—SETTING ASIDE—REMEDY—EXCUSE FOR NONAPPEARANCE—SICKNESS OF ATTORNEY—PRACTICE.

1. As the only method of opening a final judgment is by petition, a motion to set it aside and grant a new trial is properly overruled.

2. Plaintiff, who resided in another county and some 60 miles distant, forwarded a reply to his local counsel within the time allowed for filing the same, and did not hear of the counsel's death until the commencement of the term at which default judgment was entered against him. The reply was never filed. Plaintiff's other counsel, at his place of residence, was sick, and not able to attend the term at which the judgment was rendered. Had the reply been filed, the burden of proving the affirmative matters in the answer would have been cast on defendant. The defense set up in the answer was without merit: *Held*, the judgment would be set aside, and a new trial granted, under Civ. Code Prac. § 518, empowering the court rendering judgment to vacate or modify it after the expiration of the term for unavoidable casualty or misfortune preventing the party from appearing.

Appeal from Circuit Court, Morgan County.

"Not to be officially reported."

Suit by John F. Alexander, as administrator of Franklin Snelling, against William H. Lewis. From a judgment for defendant, entered on sustaining a demurrer to the petition, plaintiff appeals. Reversed.

D. S. Trumbo and R. Gudgeon & Son, for appellant.

HOBSON, J. On May 26, 1896, John F. Alexander, as administrator of Frank Snelling, filed his petition in equity in the Morgan circuit court against William H. Lewis etc., to recover on a note executed by Lewis to his intestate dated May 20, 1882, and due on the 19th day of the next June, for \$857. the balance of the purchase price of land sold Lewis by the intestate. He also sought to enforce the lien on the land. He admitted the payment of \$500 on the note on October 11, 1882. The defendant answered, alleging that he had also paid on the note the sum of \$398 on May 26, 1882, and as evidence of the payment filed with his answer the following receipt: "May 26, 1882. Received of W. H. Lewis eight steers at \$330.00. \$50.00 and \$18.00 for back taxes on the land that this money was paid for in the year 1875 on the same land that this money is paid on. Frank Snelling. R. W. D. Hunt. T. J. Jones." The answer was filed at the June

or none appearing to have been died, on the second day of the November term, 1897, the case was submitted, and a judgment was entered in favor of the defendant on his counterclaim for \$27.28, with interest from June 11, 1882, he having pleaded that his two payments more than paid the note by this sum. At the March term, 1898, the plaintiff filed affidavits, and moved the court to set aside the judgment and grant him a new trial, on the ground that the judgment had been entered by a casualty preventing him from preparing his case on the merits. The court properly overruled this motion, as a final judgment had been rendered, which could be opened only by petition. Thereupon the plaintiff filed this suit, alleging the facts stated; also the following: That at the time of the institution of the suit he employed as his counsel Hon. John P. Salyer, then a resident of Morgan county, and an efficient attorney of the bar of Morgan county, who prepared and filed the suit; that the plaintiff also employed as associate counsel D. S. Trumbo, of Bath county; but that the engagement of the counsel was that Salyer was to conduct the case in court, prepare the pleadings, and take control of the action; and that Trumbo was to attend to the taking of the testimony the plaintiff might want taken in Bath county, where the plaintiff's witnesses resided; that before the expiration of the 60 days given him to file reply the plaintiff prepared a reply and sent it to his attorney Salyer to be filed; whether the reply was filed or not he did not know, but that the reply was not on file with the papers of the case; that the plaintiff then resided and still resides in Bath county, nearly 60 miles from the Morgan county courthouse; that his counsel Salyer died some time in the month of March or April, 1897, and the plaintiff did not learn of his death until the commencement of the November term, 1897, of the court; that at this term of court, and for some time before, Trumbo, his other counsel, was sick, and unable to attend that term of the Morgan circuit court; that the case was submitted and heard without any representation by counsel or otherwise on his behalf; that he had depended upon his counsel Salyer to conduct his case in court; that by some unavoidable calamity or misfortune his counsel failed to receive and file his reply to the answer, which was a traverse of its affirmative allegations, and cast the burden of proof on the defendant to support his plea of payment of the note sued on; that the death of his counsel without his knowledge, his failure to file the reply, and the subsequent submission of the case for trial with the answer uncontroverted, and when he was not represented by counsel, was such an accident and surprise as he could not have guarded against with ordinary prudence. He also alleged that the \$398 for which the receipt filed with the an-

rendant still owed the balance of the debt, and after the death of his intestate had admitted that he owed it, and promised and agreed to pay it to him. The court sustained a demurrer to the petition, and dismissed it. The plaintiff appeals.

By section 518 of the Civil Code of Practice the court rendering a judgment shall have power, after the expiration of the term, to vacate it or modify it for unavoidable casualty or misfortune preventing the party from appearing or defending, and in construing this section the court has laid down the rule that a new trial may be had where the casualty or misfortune preventing the party from appearing or defending is such as ordinary care would not have guarded against. *L. & N. R. v. Bickel*, 97 Ky. 222, 30 S. W. 600; *White v. Richards* (Ky.) 49 S. W. 337; *Vittetow v. Ames & Company* (Ky.) 51 S. W. 1.

In the case before us, if the reply had been filed by the attorney, the burden of proof would have been on the defendant to make out his own defense, and the case could not have been submitted and judgment taken for the defendant on the pleadings before he had taken any depositions to sustain his defense. The plaintiff lived 60 miles from the court, and naturally relied upon his attorney Salyer to manage his case, it being a suit in equity. The attorney had died without his knowledge, and he did not learn of his death until the commencement of the November term of the court, and on the second day of the term the case was submitted, his other attorney, Trumbo, by reason of sickness not being present at that term of the court.

On demurrer the allegations of the petition must be taken as true, and it is therefore conceded that the payment pleaded in the answer was paid on another debt; and in view of the geographical situation of the parties, the death of the leading counsel, and the sickness of the other at that term of court, it seems to us there was such surprise and misfortune in the case being submitted without a reply being filed that a new trial should be granted, if the allegations of the petition are sustained by the proof.

Judgment reversed, and cause remanded with directions to overrule the demurrer to the petition, and for further proceedings consistent herewith.

WATTS v. PARKS.

(Court of Appeals of Kentucky. March 8, 1904.
MORTGAGE—SETTLEMENT—RELEASE—CONSIDERATION—DESCRIPTION.

1. On a settlement between a mortgagor and a mortgagee, the mortgagor's promise to pay the amount due is no consideration for an agreement by the mortgagee to release his lien on the land.

2. In an action to foreclose a mortgage, an allegation in the answer that there had been settlement, and there was due the mortgage

not be construed as an allegation that the mortgagee agreed to release his mortgage.

3. In a mortgage the description of "a certain tract or parcel of land known as the D. farm on left hand fork of Troublesome Creek" is sufficient, where the evidence fully identified the D. farm.

4. The provision that "this mortgage is just to include a sufficient amount of said farm to secure said debt" does not affect the validity of the mortgage.

Appeal from Circuit Court, Knox County.
"Not to be officially reported."

Suit by W. C. Parks against J. T. Watts to foreclose a mortgage. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. M. Bailey, for appellant.

HOBSON, J. J. M. Bailey filed this suit against J. T. Watts, setting up a debt secured by mortgage on a tract of land known as the "A. H. Draughn Place," the property of Watts, seeking the enforcement of the mortgage. W. C. Parks, who was made a defendant to the action and alleged to hold a lien on it, answered, setting up a note of \$300 and a mortgage to secure it. He made his answer a cross-petition against Watts, but no process seems to have been then issued. This was at the June term, 1898. After this, Watts settled with Bailey, and at the November term, 1901, an order was made that the action should thereafter proceed in the name of W. C. Parks against J. T. Watts, and process was awarded on the cross-petition. At the next term of the court Watts filed an answer pleading "that, after the note sued upon was executed, he made several small payments on same, and on the 18th day of March, 1902, they made a full and complete settlement on the note sued upon, and the cost and interest on same, and that the defendant Watts was due the said Parks the sum of \$261.19, for which amount he is willing for Parks to have judgment, as the mortgage lien was released and settled up, and the said amount is all that was due upon the note sued upon on date of settlement, and that said Parks agreed to have the case dismissed without prejudice. Judgment for \$261.19, which defendant Watts agreed to pay." No reply was filed to this answer, and, the case being submitted, the court gave judgment in favor of Parks for \$261.19, with interest from the date of the settlement, and ordered the sale of so much of the land as was necessary to pay the debt and costs. Watts complains that anything more than a personal judgment was rendered against him under the allegations of his answer.

At the date of the settlement Watts was indebted to Parks, on the allegations of the answer, in the sum of \$261.19. His promise to pay this debt, which was then due, was only a promise to pay what he owed. Such a

on the land, and, if the answer can be construed as averring that Parks agreed to release his mortgage, such agreement by him was without consideration; but, as the pleading must be taken rather against the pleader, we think it properly means no more than that there was a settlement on March 18, 1902, which fixed the amount of the debt at \$261.19. The judgment was not entered until the March term, 1903. Watts had failed to pay the debt, and it is not disputed that a personal judgment was properly entered against him. The plea is insufficient to show that the mortgage lien was released.

It is also urged that Parks' mortgage does not sufficiently describe the property. The description in the mortgage is as follows: "A certain tract or parcel of land known as the A. H. Draughn farm on left hand fork of Troublesome Creek." The rule is that that is certain which may be made certain, and that parol evidence may be received to show what body of land was known and designated by the name given in the mortgage. The A. H. Draughn farm, as shown by the record, is the farm conveyed by Draughn to Watts. It is fully identified in the record.

The mortgage also contains these words: "This mortgage is just to include a sufficient amount of said farm to secure said debt." It is urged that these words render the mortgage bad; but this would be the legal effect of the instrument if the words were omitted. They add nothing to it and take nothing from it.

Judgment affirmed.

BROWN v. COMMONWEALTH.

(Court of Appeals of Kentucky. March 2, 1904.)

MURDER—CIRCUMSTANTIAL EVIDENCE—FAILURE TO GIVE FULL INSTRUCTIONS.

1. In a prosecution for murder, in which the state's evidence is wholly circumstantial, omission to instruct on voluntary manslaughter and self-defense is reversible error, though no such instructions were requested.

Paynter and Hobson, JJ., dissenting.

Appeal from Circuit Court, Scott County.
"To be officially reported."

Church Brown was convicted of murder. and appeals. Reversed.

Ford & Ford, for appellant. N. B. Hays and Lorraine Mix, for the Commonwealth.

NUNN, J. This case was before this court on a former appeal, and was reversed because there was not anything with which to connect the accused with the death of Lair, nor was there evidence that Lair came to his death as the result of violence on the part of any one. See opinion, for history of the case, in 69 S. W. 1098. On the return of the case to the lower court, another trial was had, and resulted in appellant's conviction.

monwealth on the last trial strengthened its evidence to some extent. We cannot say that there was no evidence to sustain a conviction. The record shows that there was not a witness who professed to be an eyewitness to the homicide, or any part of the transaction by which Lair lost his life. Under this state of case, the lower court only gave to the jury two instructions—one, in proper form, on the question of murder; the other on reasonable doubt. The court did not give, nor was it requested to give, instructions on the questions of voluntary manslaughter and self-defense. This, under the law as it exists, as decided by this court, was an error prejudicial to the substantial rights of the appellant. In the case of *Buckles v. Commonwealth*, 68 S.W. 1086, after discussing the question as to whether there is such a substantial difference between error in giving or failing to give the law of the case in instructions, and error in what may be called the practice of the case, in admitting or rejecting testimony, and the like, as would justify this court in taking cognizance of an error in the one case, though not excepted to, when this court would refuse it in the other, the court said: "But when we come to the question on instruction a different rule obtains. The trial court is required, without request, to give the law, the correct law, and the whole law, of the case. It is not necessary to call the judge's attention to an error. The law requires his attention. It is not only not necessary to specify the error which he has committed, but it is not required that he be requested to give all the law of the case." This court has decided in at least three cases that, when the evidence of the homicide is entirely circumstantial, the whole law applicable to any state of case that might have existed should be given. In the case at bar the whole of the evidence produced against appellant was entirely circumstantial. He testified that he did not take the life of Lair, nor did he have any knowledge or information as to how or by what means he lost his life. If appellant committed the homicide, either by murder, voluntary manslaughter, or in self-defense, and as there was no person present and saw the act, he may have concluded the best thing for his safety and preservation was to deny all knowledge of the transaction. In such state of case, if his crime, in fact, had only been manslaughter, yet, under the instructions given, he must be hung, or confined in the penitentiary for life, not because he was guilty of murder, but for the reason that he told a falsehood when he denied any part in or knowledge of the homicide. In *McDowell v. Commonwealth*, 4 Ky. Law Rep. 354 (opinion by Judge Hines), the court said: "In cases depending entirely upon circumstantial evidence, it is the duty of the court to give the whole law

"When no witness introduced on the trial saw the homicide committed, or saw the parties after they met on the occasion when the killing occurred, the law applicable to murder, manslaughter, and self-defense should be given, in order to meet any state of fact the jury may find, from the circumstance in evidence, to have existed." In the case of *Justice v. Commonwealth* (Ky.) 46 S. W. 505 the court said: "While it was the duty of the court to give the whole law of the case this does not extend to giving the law of apparent necessity, unless there was some proof of that fact, or an entire absence of proof as to how death was produced, and only circumstantial evidence relied on to show the cause. But this court has repeatedly held that, if there be an eyewitness to the homicide, the case is taken outside of circumstantial evidence, and the court is relieved from giving instructions as to all degrees of homicide and self-defense, but will only give those warranted by the proof." To the same effect is section 993 of Roberson's work on Criminal Law.

For these reasons, the judgment of the lower court is reversed, and cause remanded for proceedings consistent herewith.

PAYNTER and HOBSON, JJ., dissent.

HALL v. HALL.

(Court of Appeals of Kentucky. Feb. 28, 190

HUSBAND AND WIFE — SEPARATE MAINTENANCE—ALIMONY—EXCESSIVENESS.

1. Defendant was a farmer by occupation well advanced in years, and owned an 80-acre tract of land worth \$1,600, and four-fifths of 125-acre tract, worth \$1,500, the remaining one-fifth belonging to plaintiff. The 180 acres of land was in two contiguous tracts, with a dwelling house on each. Defendant also owned about \$250 or \$300 worth of personal property, consisting of two horses, one cow, some hogs, a household goods, and had paid plaintiff \$1 temporary alimony in her suit for separate maintenance. Held, that a judgment awarding plaintiff \$2,000 alimony and \$150 attorney fees, and directing defendant's real estate to be sold to pay the same, was excessive, and should be so modified as to give plaintiff one-third the 180 acres, so laid off as to include one of the dwelling houses, if possible, adjoining 25 acres, for her use for life, together with one horse and one cow, and a counsel fee of \$100.

Appeal from Circuit Court, Graves County.
"Not to be officially reported."

Action by Rose Hall against W. S. H. From a judgment awarding permanent alimony and counsel fees, defendant appealed. Modified.

Lee & Hester, for appellant. James Webb and R. E. Johnston, for appellee.

BURNAM, C. J. The appellee, Rose H. brought this action against her husband, S. Hall, under section 2124, Ky. St. 1903, alimony and maintenance upon the ground

loss against his property. The answer was a traverse of all the affirmative allegations contained in the petition. Upon final submission of the case the trial court decided that appellee was entitled to a judgment of divorce a mensa et thoro, and for \$2,000 alimony, and that all the real estate of appellant be sold to pay same, with interest and cost, including an allowance of \$150 to her attorneys. Appellant, W. S. Hall, asks a reversal of the judgment for alimony and the allowance to appellee's attorneys.

It appears from the pleadings and proof that appellant and appellee were married on the 1st day of April, 1871, and lived together as husband and wife from that time in the same neighborhood until the 16th day of June, 1902, when appellee voluntarily abandoned the home of appellant, taking with her their youngest daughter and the bulk of the household furniture. It is developed by the proof that for several years prior to appellee's withdrawal from the home of her husband that they had lived very unhappily together, and that she had repeatedly threatened to take the step which she finally did. The main ground of complaint was that her husband had transferred the affection due to her as his wife to another woman, and, smarting under this real or fancied injury, she had grown unhappy, and was habitually disagreeable to her husband in their domestic relations, and often gave vent to her feelings in abusive talk to and about him to their neighbors and friends. Three children were born to them—one, now a married woman about 30 years of age; a son about grown; and a daughter 15 years of age. The older daughter and son testified in behalf of the father, the youngest daughter being the chief witness for the mother. It would be unprofitable to review in detail the various criminalations and recriminations proven in the record. The sole question we have the power to consider upon this appeal is the reasonableness of the amount allowed to appellee by way of alimony. It is shown that appellant is a farmer by occupation, well advanced in years; that he owns a tract of 80 acres of land worth about \$1,600, and four-fifths of a tract of 125 acres, the remaining one-fifth belonging to his wife, worth about \$1,500, and about \$250 or \$300 worth of personal property, consisting of two horses, a cow, some hogs, and household plunder—all his property being worth in the aggregate not exceeding \$3,500. There is some evidence in the record conducing to show that he may have some little money. This evidence is, however, very vague and uncertain. It also appears that he had paid to appellee as temporary alimony \$175, and that the judgment in this case in favor of appellee, with interest and cost of the suit, which is very large, including the allowance to her attorneys of

directed to be sold by the master commissioner. The petition in this case did not pray for a divorce, but only for alimony and maintenance, and, whilst the judgment decrees divorce from bed and board, this judgment, under the statute, does not bar either dower or appellee's distributable rights in appellant's estate in the event she should survive him. It seems therefore entirely probable that his entire estate would be swept away if the judgment were enforced. There is no fixed rule laid down in this state for determining the amount of alimony which should be allowed, but it is manifest that the allowance made by the trial court is grossly excessive, and out of all proportion to the residue of appellant's estate or his ability to pay. Appellant owns 180 acres of land. The two tracts are contiguous, and both have dwelling houses on them. We think, therefore, that appellee should have been adjudged by way of alimony one-third of the 180 acres, or 60 acres, so laid off as to include one of the dwelling houses, if possible, and adjoining the 25 acres owned by her, for her use and occupation during her life, or whilst living apart from her husband, one horse, and one cow, in lieu of the judgment for \$2,000, and that the attorneys' fee allowed her counsel should be reduced from \$150 to \$100.

For reasons indicated, the judgment is reversed, and cause remanded for proceedings in conformity with this opinion.

PEARSON v. COMMONWEALTH.

(Court of Appeals of Kentucky. March 1, 1904.)
FORGERY—NATURE OF INSTRUMENT—PARENT'S
CONSENT TO A MARRIAGE—FALSE
MAKING OF CERTIFICATE.

1. Ky. St. 1903, § 2106, provides that if one of the parties be under 21 years of age no marriage license shall issue without the consent of his or her father, guardian, etc., personally given, certified in writing, and attested by two witnesses, and proved by the oath of one of them, administered by the clerk. *Held*, that the false making of an instrument certifying that the one by whom it purported to be signed thereby gave permission that his daughter might marry, but which was not attested by witnesses, and which was not identified and proven under oath on presentation to the clerk, was not a certificate, within the statute, and hence the false making of it was not forgery.

Appeal from Circuit Court, Owsley County.
"To be officially reported."

Major Pearson was convicted of forgery, and he appeals. Reversed.

E. E. Hogg, for appellant. N. B. Hays, Atty. Gen., and Loraine Mix, for the Commonwealth.

BURNAM, C. J. The appellant, Major Pearson, was indicted by the grand jury of

¶ 1. See Forgery, vol. 23, Cent. Dig. §§ 29, 30, 32.

saying that the clerk of the Owsley county court should issue a license authorizing the marriage of his infant daughter, Fanny P. Eavens, to the appellant, and that the clerk of the Owsley county court, relying upon the genuineness of the writing, issued a license for the marriage of the appellant, Major Pearson, and the infant, Fanny P. Eavens. A trial before a jury resulted in appellant's conviction, and his sentence to the penitentiary for a term of two years. The paper which he is charged to have forged, set out in the indictment, is as follows: "Green Hall, Ky., Jan. 4, 1904. This is to certify that I have given Major Pearson my consent for him and my daughter, Fanny P. Eavens, to marry. You are authorized to issue a license to him. Job Eavens."

The indictment is under the following sections of the Kentucky Statutes of 1903:

"Sec. 2105. No marriage shall be solemnized without a license therefor, issued by the clerk of the county in which the female resides at the time. But where she is of full age or a widow, and it is issued on her application in person, or by writing signed by her, it may be by any county clerk.

"Sec. 2106. If either of the parties be under twenty-one years of age, and not before married, no license shall issue without the consent of his or her father or guardian, or, if there is none, or he is absent from the state, without the consent of his or her mother, personally given, or certified in writing to the clerk over his or her signature, attested by two subscribing witnesses, and proved by the oath of one of them, administered by the clerk. Where the parties are personally unknown to the clerk, a license shall not issue until bond, with good surety, in the penalty of one hundred dollars, is given to the commonwealth, with condition that there is no lawful cause to obstruct the marriage."

A reversal of the judgment of conviction is asked by the appellant on the ground that the writing alleged to have been forged by him, purporting to have been signed by the girl's father, does not purport to be and is not a certificate within the meaning of the statute, for the reason that it was not attested by two subscribing witnesses as therein required, and was therefore not valid for the purpose for which it purports to have been designed, or sufficient to deceive or mislead the clerk to whom it was directed into the issuance of a license to marry. The rule established by the text-writers and the adjudications of this and other states is that a writing invalid on its face cannot be the subject of forgery, because it has no legal

the rule as follows: Subsec. 1. A writing affirmatively invalid on its face cannot be the subject of forgery, because it has no legal tendency to effect a fraud." Subsec. 3. Whether a bond or other instrument is valid is a question of law, and if, therefore, a statute authorize a writing of this sort not known to the common law, and so prescribes its form as to render any other null, forgery cannot be committed by making a false statutory one in the form thus invalid by the statute, even though it is so like the genuine as to deceive most persons. For example, it is not indictable to forge a will attested by less witnesses than the law requires."

"Legal forgery cannot be made out by imputing a possible, or even actual, ignorance of the law to the person intended to be defrauded; however dark may be the moral hue of a transaction, courts of justice can only act upon a legal crime upon criminal breaches of perfect legal operation." *People v. Shall*, 9 Cow. 778.

"Howsoever clear the fraudulent purpose, unless the writing is sufficient to accomplish that purpose it is not a forgery, since, without a single exception, actions only, and no evil intentions, are punishable by the English law." See *Hammond Digest*, c. 1, 142, "Forgery."

In the very elaborate note to the case of *People v. Munroe*, 100 Cal. 664, 35 Pac. 326, reported in 24 L. R. A. 83, 38 Am. St. Rep. 323, the editor has collated a large number of cases in which the question involved in this case is elaborately considered, and the general principle announced that "a writing void on its face, because of the want of the legal requisites to its validity, is not the subject of indictment for forgery in consequence of its incapacity to effect fraud."

It was essential to the validity of the writing which is the basis of this prosecution that it should have been attested by two subscribing witnesses, and even then the county court clerk was not authorized to issue the license on the strength of it, unless it was identified and proven under oath by one of the subscribing witnesses. We therefore conclude that the paper in controversy does not purport to be and is not a certificate of consent by the father, within the meaning of section 2106 of the Kentucky Statutes of 1903, and that the defendant was not guilty of the crime charged in the uttering and publishing of it, as alleged.

The judgment of the trial court is therefore reversed, and cause remanded for proceedings consistent with this opinion.

METHOD OF ASSESSMENT—STREET IMPROVEMENT—LIMITATIONS—"TEN-YEAR PLAN"—ABSENCE OF REQUEST FOR ADOPTION.

1. Act April 19, 1890 (2 Acts 1889-90, p. 899, c. 902), relative to street improvements, provided (section 3) that the cost of such an improvement was to be borne, two-thirds by the owner of abutting property, and one-third by the city, unless on request of the property owner the "ten-year plan" was adopted. In the latter event the property owner paid the whole of the cost in ten equal installments, for which the city issued its bonds and paid interest thereon. Ky. St. 1903, § 2515, bars in five years a liability to pay for street improvements. *Held* that, in the absence of a request by the abutting owner therefor, the adoption of such ten-year plan by the city did not operate to extend the period of limitations beyond five years from the completion and acceptance of the work.

2. The five-year limitation for liability to pay for street improvements, provided by Ky. St. 1903, § 2515, applies to the collection thereof by distraint, authorized by Act April 19, 1890 (2 Acts 1889-90, p. 899, c. 902), as well as to the suit to enforce liens authorized by Act March 19, 1894 (Acts 1894, p. 260, c. 100).

Appeal from Circuit Court, Fayette County.
"Not to be officially reported."

Action by the city of Lexington and another against Perry Crosthwaite. Judgment for defendant, and plaintiffs appeal. Affirmed.

Allen & Duncan, for appellants. Forman & Forman, for appellee.

O'REAR, J. This action involves the right of appellant city of Lexington to collect the cost of a certain street improvement from an abutting property on South Broadway street, done in 1892. The work was done, not under the present statute, but under the act of April 19, 1890 (2 Acts 1889-90, p. 899, c. 902). There is a material difference between the two statutes. By the third section of the act of April 19, 1890, when such an improvement was properly ordered, its cost was to be borne, two-thirds by the owner of the abutting property, and one-third by the city, unless, upon request of the property holder, the ten-year plan was adopted. In the latter event the property holder paid the whole of the cost of improvement in ten equal installments, for which the city issued its bonds, the interest upon which was paid by the city. In this case there was not a request by the abutting property holder to the city to permit the adoption of the ten-year plan of payment. Notwithstanding, the city did adopt that plan, and issued installment warrants against the property accordingly. This suit, brought in 1901, seeks to enforce the lien for the several years' installments which had accrued, some owing to the city, and others claimed to have been sold by the city to appellant Irvine H. Forbing. Appellee interposed, among other defenses, the plea of limitation.

Having concluded that that plea is good as a bar to the suit, we do not find it necessary to pass upon the other defenses presented.

statute of 1890 made two-thirds of the cost and no more, a charge against the abutting property, and made it due when the work was completed and accepted. The right to enforce the payment then accrued to the city, and no more, a charge against the abutting property. The city could not, without the request of the lot owner, enlarge his liability by increasing it and extending the time for payment for ten years. Its action in attempting to do so in this case was void. A liability to pay for street improvements was one created by statute, and is barred if not enforced within five years from its accrual. Section 2515, Ky. St. 1903. The act of 1890 provided for the collection of the assessment by distraint. There was no provision for a suit to enforce the liens. The limitation applied alike to both remedies. *L. & J. Ferry v. Commonwealth* (Ky.) 57 S. W. 626; *Commonwealth v. Nute* (Ky.) 111 W. 1119; *Commonwealth v. Nute* (Ky.) 111 W. 1090; *Kirwin v. Nevin* (Ky.) 6 S. W. 647; *Gleason v. Stone Co.* (Ky.) 66 S. W. 281; *Stengel v. Preston*, 89 Ky. 616, 13 S. W. 281. The judgment of the circuit court sustaining the petition of appellant Forbing against the cross-petition of the appellant city of Lexington is affirmed.

MEMORANDUM DECISION

ILLINOIS CENT. R. CO. v. C. (Court of Appeals of Kentucky, Feb. 1902). Appeal from Circuit Court, Ballard. "Not to be officially reported." A Charlie Gentry against the Illinois Central Railroad. From a judgment for plaintiff, appeals. Affirmed. *Robbins & Thorpe*, *Dickinson, Pirtle & Trabue*, and *Jacob* for appellant. *J. M. Nichols & Son*, for appellee.

NUNN, J. The appellant has prosecuted this appeal, asking a reversal of a judgment of the circuit court for the sum of \$600.00, as appears of record, are in substance as follows: During the year 1902 the appellee, the Halliday farm, which was situated on the river opposite Cairo, Ill. That portion of the farm contained 80 acres, which was used in corn. During this same year the appellee, as lessee, and in the name of the St. Louis & New Orleans Railroad, constructed a railroad from the city of St. Louis to a point opposite Cairo, Ill., passing this Halliday farm and the portion of the farm. Appellee alleged and proved that on or about the 20th of May in that year his corn was planted and had begun to grow. The agent of the appellant, T. M. Inducement to appellee to permit the construction of the road, promised to pay him the damages to his interest in the land actually taken for the construction of the road, and also the damages, if any

actually destroyed in the construction of the dump, but those who followed and constructed the trestles and bridges, in the latter part of July, left the gates open, tore the fencing down, and permitted cattle and hogs in large numbers to enter and destroy his corn crop; that he was able to save only about 500 bushels, when, if it had not been destroyed, he would have realized about 3,000 bushels. Appellant claims that Orr did not represent it in the agreement with reference to paying him for his losses, but represented the Chicago, St. Louis & New Orleans Railroad Company, which last-named company was constructing this road, and converted the damages alleged to have been sustained by appellee. The evidence was heard on these issues, and the jury, under proper instructions, found a verdict for appellee. There was sufficient and competent evidence to authorize the jury to find that the appellant constructed this road in the name of the Chicago, St. Louis & New Orleans Railroad Company, that T. M. Orr acted as appellant's agent in making the contract with him, and as to the extent of his damages, and we do not feel authorized to disturb their verdict. Wherefore the judgment of the lower court is affirmed.

MOONEY et al. v. KENTUCKY WESTERN RY. CO. et al. (Court of Appeals of Kentucky. Feb. 18, 1904.) Appeal from Circuit Court, Webster County. "Not to be officially reported." Controversy between Sarah J. Mooney and others and the Kentucky Western Railway Company and others. Judgment for the railway company below. Affirmed. M. C. & G. D. Givens, for appellants. W. E. Bourland, J. M. Dickinson, and Pirtle & Trabue, for appellees.

PAYNTER, J. Substantially the same questions are involved in this case as were in the case of *H. M. Curry v. Kentucky Western Railway Company*, 78 S. W. 435; and by the authority of the opinion delivered in that case February 3, 1904, the judgment is affirmed.

PRATT v. COULTER, State Auditor. (Court of Appeals of Kentucky. March 2, 1904.) Appeal from Circuit Court, Franklin County. "Not to be officially reported." Action by Clifton J. Pratt against Gus G. Coulter, as Auditor of State. From a judgment for defendant, plaintiff appeals. Affirmed. M. C. & G. D. Givens and McKenzie Todd, for appellant. Atty. Gen. Hays, for appellee.

NUNN, J. In the year 1899 the appellant, O. J. Pratt, and one R. J. Breckenridge were opposing candidates for the office of Attorney General. The State Board of Election Commissioners awarded the certificate of election to C. J. Pratt. Breckenridge at once entered into a contest for the office. The board of contest decided that Breckenridge was entitled to the certificate. The circuit court of Franklin county affirmed the action of the board of contest, and Pratt, under protest, surrendered the office to Breckenridge, who assumed the duties of the office. Thus matters stood without a supersedeas or appeal for about a year, when Pratt appealed from the decision of the circuit court to the Court of Appeals, which reversed the circuit court, and adjudged that appellant, Pratt, was entitled to the office. 65 S. W. 136; 66 S. W. 405. Breckenridge surrendered the office to Pratt, who assumed the duties of the same. Appellant brought this action to require the Auditor to issue a warrant upon the Treasurer for the amount of his salary from the time Breckenridge went into the office, under the judgment of the circuit court, to the time he was ousted by the Court of Appeals. It is admitted that the

case; and for the reason therein given the judgment of the lower court is affirmed.

SHARP et al. v. HARRIS et al. (Court of Appeals of Kentucky. Jan. 19, 1904.) Appeal from Circuit Court, Madison County. "Not to be officially reported." Action by D. F. Sharp and others, trustees, etc., against R. W. Harris and others. From a judgment for defendants, plaintiffs appeal. Affirmed. C. F. Burnam and Burnam & Moberley, for appellants. W. B. Smith, for appellees.

BARKER, J. The appellants are the trustees of the Church of Missionary Baptists at Panola, Madison county, Ky. The appellees are members of the Christian Church, living in and near Panola. The matter in dispute is the respective rights of the parties litigant in a church building in Panola. This is the second time this case has been here on appeal. The opinion on the first appeal was delivered in the case of *Sharp v. Benton*, 64 S. W. 636, and in an extended opinion reported in 65 S. W. 16. On the former appeal this court held that the title and control of the church building was in appellants, as trustees, etc., for the use and benefit, first, of the Missionary Baptist Church at Panola, and second, with the right of any other Protestant denomination to worship in the building when it was not being occupied by the Missionary Baptist Church; that appellants, who hold the legal title to the property, and are its custodians, are entitled to reasonable notice of the time when other Protestant denominations desire to occupy the building for religious purposes, and that, if they receive notices that more than one other Protestant denomination desires to occupy the building at the same time, they may determine which applicant is entitled to so use it; and that they may also require the other religious denominations using the building to make reasonable contributions to keep it in repair. But they (appellants) have not the right to determine the character of religious services which may be conducted in the building when so occupied by other denominations. This litigation grows out of a misunderstanding as to what was decided on the former appeal. After the opinion in the former case was rendered, it was read in an open meeting by the Baptist congregation, and an order entered in their church book requiring, as reasonable and proper, that one week's notice should be given them by the other religious bodies desiring to use the house for church purposes. It seems that the appellees, and those with whom they are associated, and who constitute the Christian Church at Panola, selected the first Sunday in each month as the day upon which to hold their religious services in the building in question, and claimed the right to go into the building at their own will, and had a key made with which to unlock the door when they saw fit. In order to restrain the appellees from so doing, this action was instituted. It is not necessary to minutely set forth the allegations pleaded, or to analyze the evidence. It is sufficient to say that the annoyance and distress of which the appellants complain are more sentimental than real. It is not shown, or even pretended, that the appellees have in any way interfered with the appellants in the use of the building. The record shows that the Baptist congregation worship in the building on the third Sunday in the month, and have no desire to use it on the first; nor is any other congregation desirous of using the building on the first Sunday. The record fails to show any instance of a clash between the parties litigant, so far as the desire to use the building is concerned. But appellants insist that they are entitled, each week, to notice and request on the part of ap-

senior below held that, while the Missionary Baptist Church has the first right to the use of the property, the appellees' right was not permissive merely, and appellants have no right to arbitrarily exclude them from the use of the property, as this would be contrary to the letter and spirit of the subscription paper and deed; that, as each of the congregations interested in this controversy had a regular time to meet, which did not conflict, and as no other denomination was complaining, the giving of further notice by appellees to appellants, for the use of the church building at the regular time which they had selected, was unnecessary, but that, when appellees desired the use of the church building at other than the regular times, they must give appellants one week's notice, at least, and, upon so doing, they are entitled to the use of the property for that purpose, unless previous application had been made for its use by some other parties entitled thereto, or unless appellants had themselves previously determined to use it at the same time; that, if appellees decided to use the building for the holding of a protracted meeting, they should give appellants at least four days' notice of their desire to use the building for such specific purpose, and appellants should, in like manner, inform appellees, four days in advance of the desired time, whether the church would be then idle and subject to their use. It was also held that, while it would be less annoying to all parties for both the Baptist and the Christian churches to have a key to the building, yet, as appellants are the legal custodians of the building, appellees, under this state of facts, are not entitled to have a key, but that the appellants shall either open, or cause to be opened, the church for them, from time to time, or give them the key whenever they are entitled to its use, which appellees shall return to appellants. This judgment is in accordance with the opinion heretofore rendered, and is affirmed.

LIPPINCOTT, JOHNSON & CO. v. HERMAN. (Supreme Court of Missouri, Division No. 2, Feb. 1, 1904.) Appeal from Circuit Court, Greene County; Jas. T. Neville, Judge. Action by Lippincott, Johnson & Company against Daniel H. Herman. From a judgment in favor of defendant, plaintiffs appeal. Affirmed. Heffernan & Heffernan, for appellants. W. D. Tatlow, for respondent.

FOX, J. The same questions are involved in this case that are determined in the case of Harrington & Goodman v. Daniel H. Herman, 172 Mo. 344, 72 S. W. 546, 60 L. R. A. 885. Adopting the views as expressed in the last-mentioned case, the judgment in this cause will be affirmed. All concur.

EDWARDS v. MERCHANTS' BANK OF JEFFERSON CITY.* (Court of Appeals at Kansas City, Mo. Feb. 15, 1904.) Appeal from Circuit Court, Osage County; Wm. A. Davidson, Judge. Action by William J. Edwards against the Merchants' Bank of Jefferson City. From a judgment in favor of plaintiff, defendant appeals. Reversed. W. S. Pope and W. L. Vaughan, for appellant. Silver & Brown and Ryors & Voshell, for respondent.

ELLISON, J. This action is to recover a dividend of 5 per cent., which plaintiff alleges was declared by, and was due him from, the defendant bank. Plaintiff prevailed in the trial court. The case is in all respects like the first

be reversed. **BROADDUS, J.,** concurs. **SMITH, C. J.,** not sitting.

LONDON GUARANTEE & ACCIDENT CO., Limited, v. SCOTT WILSON COAL CO.* (Court of Appeals at St. Louis, Mo. Dec. 15, 1903.) Appeal from St. Louis Circuit Court; Warwick Hough, Judge. Action by the London Guarantee & Accident Company, Limited, against the Scott Wilson Coal Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed. Robt. A. Holland, Jr., for appellant. Stewart, Cunningham & Elliott, for respondent.

REYBURN, J. This action appears to be in all respects similar to the case of the same plaintiff against the Missouri & Illinois Coal Company (78 S. W. 306), with which it was tried and submitted, and which has just been decided by this court, except in the respects that this case originated before a justice of the peace, and the issues are therefore not so precisely defined by appropriate pleadings, and no formal application for insurance was tendered in advance of the issuance and delivery of the policy. These differences are not sufficient to affect the question common to and controlling both cases; and upon the authority of, and for the reasons contained in, the case of this plaintiff against the Missouri & Illinois Coal Company, the judgment herein is affirmed.

BLAND, P. J., and **GOODE, J.,** concur.

STATE v. BATES. (Court of Appeals at St. Louis, Mo. Feb. 2, 1903.) Appeal from Criminal Court, Greene County; J. J. Gideon, Judge. George Bates was convicted of petit larceny, and he appeals. Affirmed. F. M. Wolf, for appellant. A. B. Loran, for the State.

REYBURN, J. Defendant was prosecuted for petit larceny, by information lodged by the prosecuting attorney in the criminal court of Greene county, upon the charge of stealing two butts of tobacco, of the value of \$5 each, from the St. Louis & San Francisco Railroad Company. He was arraigned, and pleaded not guilty, and recognized to appear for trial. December 19, 1901, a trial was had, and at its close defendant, by his counsel, filed a demurrer to the evidence, in form of imperative instruction to the jury that, under the law and the evidence, the verdict should be found for the defendant. "Not guilty," which the court refused, and the trial proceeded to its conclusion. The defendant introduced testimony to establish the defense of an alibi, and after submission of the case the jury returned a verdict finding the defendant guilty and imposing a punishment of 12 months in the county jail. After motion for new trial, an appeal was granted to this court; the defendant entering into recognizance pending its determination. No appearance of counsel has been made in this court for argument of the appeal, nor has any brief been filed on behalf of the defendant or the state; but, in obedience to the mandate of the law in such cases, the record exhibited has been gone over with diligence and attention. Defendant was vigorously defended by counsel in the trial in the circuit court. The information was not challenged, and, while the proof offered by the state was assailed by demurrer, abundant testimony was introduced inclining to establish, in accordance with the law, the guilt of defendant. The defense interposed by him was submitted to the jury; and the instruction given upon that issue, as well as the instruc-

*Rehearing denied March 7, 1904.

*Rehearing denied February 2, 1904.

to trial. No error has been disclosed, and the judgment is affirmed.

BLAND, P. J., and GOODE, J., concur.

STATE v. VETTE. (Court of Appeals at St. Louis, Mo. Jan. 5, 1904.) Appeal from St. Louis Criminal Court; Hiram N. Moore, Judge. John H. Vette was indicted for leasing a house to be used as a bawdy house, and from a judgment quashing the indictment the state appeals. Affirmed. C. P. Williams, for the State. Jamison & Thomas, for respondent.

GOODE, J. Indictment against the defendant for leasing a house in the city of St. Louis to be used as a bawdy house. The indictment was quashed. The question involved was decided by this court in *State v. Lewis*, 5 Mo. App. 465. Since then there has been no legislation which changes the law on the subject as to this city. *State v. Clarke*, 54 Mo. 17, 14 Am. Rep. 471; *State v. De Bar*, 58 Mo. 395. As *State v. Lewis* is conceded to be directly in point, the judgment of the court below is affirmed, on the authority of that case.

BLAND, P. J., and REYBURN, J., concur.

WHITESIDE v. LONGACRE (TALL, Garnishee). (Court of Appeals at St. Louis, Mo. Jan. 19, 1904.) Appeal from Circuit Court, Clark County; E. R. McKee, Judge. Action by John A. Whiteside against Guy M. Longacre. Joseph S. Tall appears as garnishee. From a judgment for plaintiff, the garnishee appeals. Affirmed. Berkheimer & Dawson, for appellant. J. A. Whiteside and T. L. & S. J. Montgomery, for respondent.

GOODE, J. The facts of this cause will be found in the report of the decision given on a former appeal. 88 Mo. App. 168. By that decision the first judgment in favor of Whiteside, the garnishing creditor, was reversed, and the cause remanded for retrial, because of the refusal of an instruction setting forth the proposition that the plaintiff could not recover if the defendant Longacre, the garnishee, Tall, and Mrs. Lewellyn had agreed, before Tall was served as garnishee, that the latter should pay a note on Longacre, held by Mrs. Lewellyn, out of the money collected on the collateral notes deposited by Longacre with Tall. At the second trial several instructions presenting that defense in different phases were given, but the plaintiff again prevailed. It is contended on this appeal that the jury disregarded the testimony, which is said to have been consistent and positive, to the effect that an arrangement was made by said parties, prior to the garnishment, for the payment by Tall of Mrs. Lewellyn's note. There was testimony on that issue for the jury's consideration; but it was not so free from ambiguity as to render it proper for us to interfere with the verdict. The judgment is affirmed.

BLAND, P. J., and REYBURN, J., concur.

SUPREME COUNCIL A. L. H. v. TAYLOR et al. (Supreme Court of Texas. Jan. 31, 1904.) Error to Court of Civil Appeals of Third Supreme Judicial District. Action by Hattie E. Taylor and others against the Supreme Council American Legion of Honor. Judgment for plaintiffs was affirmed by the Court of Civil Appeals (75 S. W. 1184), and defendant brings error. Modified. Monta J. Moore and John L. Terrell, for plaintiff in error. Hefley, McBride & Watson, for defendants in error.

BROWN, J. The facts in this case are the same as in Supreme Council American Legion

writ of error. For the reasons given in the opinion filed in that case, it is ordered that the judgment of the district court of Milam county be reformed, so as to expunge therefrom the damages and attorney's fees allowed therein, and, as so reformed, that the said judgment be affirmed. It is further ordered that the defendants in error pay all costs of the Court of Civil Appeals and of this court.

HAYDEN v. STATE. (Court of Criminal Appeals of Texas. Feb. 10, 1904.) Appeal from District Court, Harris County; J. K. P. Gillaspie, Judge. Arthur Hayden was convicted of murder, and appeals. Affirmed. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of 50 years. We find neither bill of exceptions nor statement of facts in the record. Appellant, in his amended motion for new trial, complains of various errors; but none of them can be reviewed in the absence of the facts. No error appearing in the record, the judgment is affirmed.

HIGHTOWER v. STATE. (Court of Criminal Appeals of Texas. Jan. 27, 1904.) Appeal from Navarro County Court; A. B. Graham, Judge. Rol Hightower was convicted of violating the local option law, and appeals. Affirmed. J. T. Williams, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is a conviction for violating the local option law; the penalty assessed being a fine of \$25 and 20 days' confinement in the county jail. The record is before us without statement of facts or bill of exceptions. The only question presented for revision is the sufficiency of the indictment. This form of indictment has been held sufficient in a number of cases. We deem it unnecessary to review the matter. *Williams v. State*, 70 S. W. 213, 5 Tex. Ct. Rep. 911; *Racer v. State*, 73 S. W. 968, 7 Tex. Ct. Rep. 553; *Key v. State*, 38 S. W. 773; *Zollicoffer v. State*, Id. 775; *English v. State*, Id. 778; *Hall v. State*, 39 S. W. 117; *Brown v. State*, Id. 578; *Williams v. State*, Id. 664. The judgment is affirmed.

JOHNSON v. STATE.* (Court of Criminal Appeals of Texas. Dec. 16, 1903.) Appeal from Cherokee County Court; Jas. P. Gibson, Judge. J. M. Johnson was convicted of violating the local option stock law, and appeals. Affirmed. O. G. White, for appellant. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This appeal is from a conviction for violating the local option stock law in a subdivision of Cherokee county. The main question is the alleged insufficient description of the territory, and the failure of the court to call the election at the next term of the commissioners' court after the filing of the petition. The questions relied upon were also raised in a civil proceeding, which found its way on appeal to the Court of Civil Appeals at Galveston, in *Kirkland v. Box et al.*, 62 S. W. 1101, 2 Tex. Ct. Rep. 388, and were there decided adversely to appellant's contention. The conclusions reached in that case are correct, and we deem it unnecessary to review them. The law was there sustained. The judgment is affirmed.

MENZING v. STATE. (Court of Criminal Appeals of Texas. Feb. 10, 1904.) Appeal

*Rehearing denied February 17, 1904.

BROOKS, J. Appellant was convicted of knowingly selling intoxicating liquor to a minor, and his punishment assessed at a fine of \$25. The only question necessary to be reviewed is the sufficiency of the evidence. We have carefully read the evidence, and in our opinion the verdict of the jury is warranted by the evidence. The judgment is affirmed.

PURVIS v. STATE. (Court of Criminal Appeals of Texas. Jan. 13, 1904.) Appeal from Tarrant County Court; R. F. Milam, Judge. From a conviction for crime, Joe Purvis appeals. Dismissed. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This record is before us without a recognition or evidence showing appellant is and was confined in jail pending his appeal. The motion of the Assistant Attorney General to dismiss the appeal, based upon this ground, is sustained. The appeal is dismissed.

SIMS v. STATE. (Court of Criminal Appeals of Texas. Jan. 27, 1904.) Appeal from Hunt County Court; F. M. Newton, Judge. Jim Sims was convicted of permitting gambling in his house, and appeals. Affirmed. Howard Martin, Asst. Atty. Gen., for the State.

BROOKS, J. Appellant was fined \$25 under an information charging that he "did then and there unlawfully permit a game called 'craps,' played with dice, to be played and bet at in his house and a house under his control, the said house then and there being a public place, to wit, a house where cold drinks were sold, and a restaurant there situated, and commonly open to the public for business purposes, and where people commonly resorted to get cold drinks and meals, and the same then and there being a house for retailing spirituous liquors," etc. The only question presented for our consideration is whether or not the evidence is sufficient to sustain the conviction. The evidence for the state supports the conviction, and we will not disturb the finding of the jury. The judgment is affirmed.

WALLIS v. STATE. (Court of Criminal Appeals of Texas. Jan. 13, 1904.) Appeal from Tarrant County Court; R. F. Milam, Judge. George Wallis was convicted of keeping a disorderly house, and appeals. Affirmed. Howard Martin, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. The indictment is sufficient to charge the offense of keeping a disorderly house, where prostitutes and lewd women, and women having bad reputation for chastity, were allowed to display and conduct themselves in a manner inhibited by the statute. There are no bills of exceptions in the record. The facts show an unquestioned violation of the statute. The judgment is affirmed.

MISSOURI, K. & T. RY. CO. OF TEXAS v. FOSTER.* (Court of Civil Appeals of Texas. Jan. 2, 1904.) Appeal from District Court, Hopkins County; H. C. Conner, Judge. Action by W. T. Foster against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment for plaintiff, defendant appeals. Reformed and affirmed. J. S. Miller and Perkins, Craddock & Wall, for appellant. Crosby & Dinsmore, for appellee.

*Rehearing denied January 30, 1904.

Columbus, Ga., caused by contracting with the coach. There was a trial before a jury February 10, 1903, resulting in a verdict and judgment for appellee for \$800. Defendant appealed.

Conclusions of Fact. Prior to December 21, 1901, the appellant railway company advertised in Hunt, Rains, Hopkins, and other counties that it would run a through train from Greenville, through Winnsboro, to Columbus, Ga., without change of cars. Appellant's agent at Sulphur Springs also informed appellee, prior to December 21, 1901, that his company would run a through train of cars to Columbus, Ga., without change of cars. Relying upon these representations, the appellee purchased from appellant a round-trip ticket, entitling the holder thereof to one first-class passage from Winnsboro to Columbus, Ga., and return. Appellee's wife, as the holder of this ticket, entered upon the train as a passenger at Winnsboro, intending to go to Columbus, Ga. The ticket was an excursion coupon ticket. It contained the stipulation that, in selling the same, the appellant company "acts as agent only, and is not responsible beyond its own line." At the time Mrs. Foster boarded the train the conductor directed her which car to take, which directions she followed. The day was cold and disagreeable, and she suffered from cold by reason of the car not being properly heated and kept warm and comfortable between Winnsboro and Shreveport. The car in which she was riding was defective, in that the steam pipe provided for heating the car was broken and useless, and the break indicated it was an old break, and its condition could have been discovered by inspection of the car. The only other means provided for heating the car was a small stove in one end of the car, and no fuel was provided for this stove. The train was made up by appellant on its lines north and west of Greenville, and passed through Greenville, and the company had employes at Greenville whose duty it was to inspect all cars, including the heating equipment. At Shreveport the appellant turned the train, including this defective car, over to its connecting carrier, and the same was operated by the connecting carrier to Meridian, Miss., where the defective car in which Mrs. Foster was riding was taken out of the train and another substituted in its place. Between Shreveport and Meridian the weather was cold and disagreeable, and the car was cold and uncomfortable, and appellee's wife suffered by reason thereof. The act of appellant in furnishing a defective car for the through trip was negligent, which negligence proximately caused appellee's wife to sustain injury, whereby appellee has been damaged in the amount found by the jury.

Opinion. This is a companion case to the case of Missouri, Kansas & Texas Railway Company of Texas v. Harrison (decided by us December 19, 1903) 77 S. W. 1036. The questions presented are the same as those decided in that case, and are disposed of in accordance with the opinion in that case. The criticism to that portion of the charge authorizing a recovery for moneys paid for medicine is sound. The evidence does not show that the amount paid for medicines was reasonable. The evidence in reference to physicians' services did not authorize a recovery for more than \$4, and there is evidence tending to show that this amount was reasonable. The appellee having offered to remit the highest amount which the evidence shows the jury could have found for medicine, the judgment will be reformed, and credited, as of the date of the judgment in the trial court, with \$26.23, the total amount paid for medicines. As reformed, the same is affirmed. The costs of this appeal are taxed against appellee.

Appeals of Texas. Dec. 16, 1903.) Appeal from Hays County Court; Ed. R. Kone, Judge. Action by J. W. Kellum & Co. against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment in favor of plaintiffs, defendant appeals. Affirmed. Fiset, Miller & McClendon, for appellant. O. T. Brown, for appellees.

FISHER, O. J. We have carefully examined into all the questions raised by appellant's assignments and find no reversible error. The judgment is affirmed.

MISSOURI, K. & T. RY. CO. OF TEXAS v. WOODS.* (Court of Civil Appeals of Texas. Dec. 16, 1903.) Appeal from Hays County Court; Ed. R. Kone, Judge. Action by Peter Woods against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment in favor of plaintiff, defendant appeals. Affirmed. Fiset, Miller & McClendon, for appellant. O. T. Brown, for appellee.

KEY, J. This is a companion case to M., K. & T. Railway Co. v. Kellum (this day decided) ubi supra. The questions presented have been duly considered, and the conclusion reached that no error is shown. Judgment affirmed.

POOLE et al. v. BURNET COUNTY.† (Court of Civil Appeals of Texas. Nov. 25, 1903.) Appeal from District Court, Burnet County; M. D. Slator, Judge. Action by Burnet county against R. J. Poole and others. From a judgment for plaintiff, defendants appealed to the Court of Civil Appeals, which certified questions to the Supreme Court. On remand, after answer to questions (76 S. W. 425). Judgment below affirmed. Matthews & Browning, for appellants. Ike D. White, T. E. Hammond, and Dayton Moses, for appellee.

ALLEN, Special Chief Justice. This was a suit brought by the county of Burnet against R. J. Poole and the other appellants for breach of a bond as treasurer of the school fund of Burnet county; the said Poole being the principal, and the other appellants sureties thereon. From a judgment in favor of the county, the case is appealed to this court. The facts, so far as they are necessary to a decision of the case, are as follows: At the general election in 1900, the appellant R. J. Poole was elected county treasurer of Burnet county, Tex. On November 27, 1900, he executed his bond to the county judge of said county in the sum of \$25,000, conditioned that he would safely keep and faithfully disburse the school fund of Burnet county, according to law. The bond so given was in words and figures as follows: "The State of Texas, County of Burnet. Know all men by these presents, that we, Robert J. Poole, as principal, and W. H. Boggess, J. P. Barton, B. H. Stewart, W. J. Powell, Wm. Russell, J. G. Brydson, M. L. Ater, J. W. Wilkerson, and T. D. Vaughan, as sureties, are held and bound un-

ment of which we hereby bind ourselves, and our heirs, executors, and administrators, jointly and severally by these presents. Signed with our hands, and dated this 27th day of Nov., 1900. The condition of the above obligation is such that, whereas, the above bounden R. J. Poole was, on the 6th day of November, 1900, duly elected to the office of treasurer in and for Burnet county, in the state of Texas: Now, therefore, if the said R. J. Poole shall faithfully perform and discharge all the duties required of him by law as treasurer aforesaid, and shall safely keep and faithfully disburse the school fund of Burnet county according to law, and render a just and true account thereof to the commissioners' court at each regular term, then this obligation to be void; otherwise, to remain in full force and effect. In testimony whereof, witness our hands." This bond was properly approved by the county judge of said county on December 3, 1900. On May 12, 1902, said Poole, as treasurer of said county, should have had in his hands a balance, belonging to the school fund of said county, amounting to \$6,234.02. The commissioners' court of said county, on said date having ascertained from the reports of said treasurer that said amount should have been in his hands belonging to said fund, thereupon called on the said Poole to produce the money which he had actually on hand belonging to said fund, and said Poole then produced only \$514.04, and the reason that he gave for not producing the remainder of said money was that he had deposited the same in the bank of W. H. Westfall & Co., which bank had become insolvent, and said treasurer, when called upon to produce said money by said commissioners' court, failed to produce more than \$514.04, and he was then and up to the time of the trial unable, for the reason stated, to produce the balance, which was the amount for which the county recovered a judgment in the trial court. Said Poole, at the time of the trial of this cause, was still the county treasurer of said county, and there is no evidence that he had failed to pay any warrant drawn against said fund, and, being still in office, no occasion has ever arisen for him to pay the balance of said funds to his successor in office, so that the only evidence of a breach of the bond was the facts hereinbefore stated. The Supreme Court, upon certified questions by this court, has passed upon all the material issues raised in this case, and has decided such issues adversely to the appellants. See R. J. Poole v. County of Burnet, 76 S. W. 523, 8 Tex. Ct. Rep. 300. Upon the authority of their decision upon such certified questions, we find no error in the judgment of the lower court, and such judgment is therefore affirmed.

TEXAS & P. RY. CO. v. TAYLOR et al. (Court of Civil Appeals of Texas. Feb. 3, 1904.) Appeal from Coleman County Court; B. F. Rose, Judge. Action by J. F. Taylor and others against the Texas & Pacific Railway Company. From a judgment for plaintiffs, defendant appeals. Affirmed. Hall, Flippen & McCormick, for appellant. Woodward, Baker & Woodward, for appellees.

FISHER, C. J. We find no error in the record, and the judgment is affirmed. Affirmed.

*Rehearing denied February 10, 1904.

†Rehearing denied January 30, 1904, and writ of error denied by Supreme Court.

Particular causes or grounds of action.
 See "Bills and Notes," § 3; "Contribution"; "Death," § 1; "Forcible Entry and Detainer," § 1; "Fraud," § 2; "Insurance," §§ 12, 14; "Malicious Prosecution," § 1; "Negligence," § 4; "Nuisance," § 1; "Torts"; "Trespass"; "Work and Labor."
 Assessments for public improvements, see "Municipal Corporations," § 5.
 Bond for costs, see "Costs," § 2.
 Bond of indemnity against lien, see "Mechanics' Liens," § 1.
 Bond of tax collector, see "Taxation," § 8.
 Breach of contract, see "Sales," § 8.
 Breach of contract for carriage of passengers, see "Carriers," § 6.
 Breach of warranty, see "Sales," § 8.
 City taxes, see "Municipal Corporations," § 9.
 Compensation of attorney, see "Attorney and Client," § 2.
 Delay in delivery of telegraph message, see "Telegraphs and Telephones," § 2.
 Discharge from employment, see "Master and Servant," § 1.
 Drainage assessment, see "Drains," § 1.
 Fire caused by operation of railroad, see "Railroads," § 9.
 Injuries from flowage, see "Waters and Water Courses," § 1.
 Injuries to live stock in transportation, see "Carriers," § 3.
 Killing of animals caused by operation of railroad, see "Railroads," § 8.
 Personal injuries, see "Carriers," § 8; "Master and Servant," § 8; "Municipal Corporations," § 8; "Parent and Child"; "Railroads," §§ 5-7; "Street Railroads," § 2.
 Price of goods, see "Sales," § 7.
 Price of land, see "Vendor and Purchaser," § 4.
 Recovery of goods by buyer, see "Sales," § 8.
 Recovery of land sold by vendor, see "Vendor and Purchaser," § 4.
 Services, see "Work and Labor."
 Taking of or injury to property in exercise of power of eminent domain, see "Eminent Domain," § 3.
 Wrongful attachment, see "Attachment," § 3.
 Wrongful conversion of goods by carrier, see "Carriers," § 2.
 Wrongful death caused by operation of railroad, see "Railroads," § 7.
 Wrongful discharge of school teacher, see "Schools and School Districts," § 1.
 Wrongful execution, see "Execution," § 4.
 Wrongful foreclosure, see "Mortgages," § 6.
 Wrongful seizure by sheriff, see "Sheriffs and Constables," § 2.
Particular forms of action.
 See "Ejectment"; "Replevin"; "Trespass," § 1; "Trespass to Try Title."
Particular forms of special relief.
 See "Divorce"; "Injunction"; "Specific Performance."
 Alimony, see "Divorce," § 2; "Husband and Wife," § 7.
 Dissolution of partnership, see "Partnership," § 3.
 Enforcement of landlord's lien, see "Landlord and Tenant," § 4.
 Enforcement of lien, see "Liens."
 Enforcement of vendor's lien, see "Vendor and Purchaser," § 4.
 Establishment and enforcement of right of exemption, see "Exemptions," § 1.
 Establishment and enforcement of trust, see "Trusts," § 3.
 Establishment of boundaries, see "Boundaries," § 2.
 Establishment of will, see "Wills," § 3.

Separate maintenance of wife, see "Husband and Wife," § 7.
 Setting aside fraudulent conveyance, see "Fraudulent Conveyances," § 2.
 Setting aside will, see "Wills," § 3.
 Trial of tax title, see "Taxation," § 10.

Particular proceedings in actions.
 See "Appearance"; "Costs"; "Damages"; "Depositions"; "Dismissal and Nonsuit"; "Evidence"; "Execution"; "Judgment"; "Jury"; "Limitation of Actions"; "Motions"; "Parties"; "Pleading"; "Process"; "Removal of Causes"; "Trial"; "Venue."
 Default, see "Judgment," § 1.
 Nonsuit, see "Trial," § 6.

Particular remedies in or incident to actions.
 See "Attachment"; "Garnishment"; "Injunction"; "Receivers"; "Sequestration."
 Stay of proceedings, see "Appeal and Error," § 10.

Proceedings in exercise of special jurisdictions.
 Courts of limited jurisdiction in general, see "Courts," § 3.
 Criminal prosecutions, see "Criminal Law."
 Suits in equity, see "Equity."
 Suits in justices' courts, see "Justices of the Peace," § 2.

Review of proceedings.
 See "Appeal and Error"; "Exceptions, Bill of"; "Judgment," § 4; "Justices of the Peace," § 3; "New Trial."

§ 1. Grounds and conditions precedent.
 Where the holder of an unrecorded deed, subject to a remote vendor's lien, is not made a party to foreclosure of the lien, her remedy is, not an action for damages against such remote vendor, but on her warranties.—*Friend v. Means* (Ky.) 164.

§ 2. Joinder, splitting, consolidation, and severance.
 A suit to foreclose a chattel mortgage may be joined with an action for the conversion of the mortgaged property.—*Cassidy v. Willis & Connally* (Tex. Civ. App.) 40.

Causes of action against railroad for damages to property held properly joined.—*Jackson v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 724.

ACTION ON THE CASE.

See "Trespass," § 1.

ADEQUATE REMEDY AT LAW.

Effect on right to equitable relief, see "Injunction," § 1.
 Effect or right to relief by habeas corpus, see "Habeas Corpus," § 1.

ADJOINING LANDOWNERS.

See "Boundaries."

ADJOURNMENT.

Of court, see "Courts," § 2.
 Pending trial, see "Criminal Law," § 12.

ADJUDICATION.

Of courts in general, see "Courts," § 2.
 Operation and effect of former adjudication, see "Judgment," §§ 7, 8.

ror," § 2; "Courts," §§ 3, 4; "Criminal Law," § 18; "Justices of the Peace," § 3.

ANIMALS.

Carriage of live stock, see "Carriers," § 3.
Construction of contract for pasturing and feeding, see "Contracts," § 2.
Herding cattle on land of another under permission of person having lease taking effect in future, see "Trespass," § 1.
Injuries from operation of railroads, see "Railroads," § 8.
Liability of master to servant for injuries caused by vicious horse, see "Master and Servant," § 3.

Domestic animals may lawfully run at large on the public highway and on uninclosed lands.—*Muir v. Thixton, Millett & Co. (Ky.)* 466.

Facts held insufficient to show that defendants maintained an attractive nuisance on their premises, so as to render them liable for the death of plaintiff's horse, which strayed thereon and was drowned in a cistern.—*Muir v. Thixton, Millett & Co. (Ky.)* 466.

An owner of uninclosed lands is not liable for injuries to animals straying on the land from a highway, unless he maintains thereon a nuisance liable to attract such animals, to their injury.—*Muir v. Thixton, Millett & Co. (Ky.)* 466.

Facts held not to constitute a violation of Pen. Code 1895, art. 918, as to taking up and using an estray.—*Williams v. State (Tex. Cr. App.)* 928.

ANNULMENT.

Of will, see "Wills," § 3.

ANSWER.

Amendment of, in pleading, see "Pleading," § 3.

In pleading, see "Pleading," § 1.

Verification of, in pleading, see "Pleading," § 4.

ANTENUPTIAL CONTRACTS.

See "Husband and Wife," § 2.

APOTHECARIES.

See "Druggists."

APPEAL AND ERROR.

See "Exceptions, Bill of"; "New Trial."

Appellate jurisdiction of particular courts, see "Courts," § 4.

Recognizance on appeal in criminal prosecution, see "Bail," § 1.

Writ of error coram nobis, see "Judgment," § 3.

Review in particular civil actions.

See "Divorce," § 2.

Against personal representatives, see "Executors and Administrators," § 5.

By or against infant, see "Infants," § 2.

Foreclosure suits, see "Mortgages," § 7.

Scire facias on bail bond, see "Bail," § 1.

Review in special proceedings.

Condemnation proceedings, see "Eminent Domain," § 2.

Probate proceedings, see "Wills," § 3.

Compel listing of property for taxation, see "Taxation," § 5.

Review of proceedings of justices of the peace. See "Justices of the Peace," § 3.

§ 1. Nature and form of remedy.

Where one of the parties properly appeals to a certain one of the appellate courts, a cross-appeal of the other party must also be taken to the same court.—*Snoqualmi Realty Co. v. Moynihan (Mo. Sup.)* 1014.

§ 2. Decisions reviewable.

The amount in controversy held not sufficient under Ky. St. 1903, § 950, to allow defendant to appeal.—*Nevian v. Herr (Ky.)* 137.

An appeal involving questions of right to tax will be entertained, however small the amount involved.—*Willis v. Thornton (Ky.)* 215.

Withdrawal of a claim for damages for detention of the property sued for held a waiver thereof, and, the value of the property being only \$150, the amount in controversy was not sufficient for an appeal.—*Edward Thompson Co. v. Fenley (Ky.)* 416.

Court of Appeals held not to have jurisdiction of appeal from judgment for plaintiff for \$170, and dismissal of improper set-off for \$95, under Ky. St. 1903, § 950.—*Montgomery v. Montgomery (Ky.)* 465.

An action to enforce a lien held an action involving the title to real estate, and the Court of Appeals has jurisdiction, irrespective of value of the matter in controversy.—*Bishop v. Matney (Ky.)* 856.

An order refusing to enter a judgment for defendant on the pleadings, notwithstanding a verdict for plaintiff, is not such a final order as will sustain an appeal.—*Nelson County v. Bardstown & L. Turnpike Co. (Ky.)* 856.

An appeal held not to lie from a judgment, under Ky. St. 1903, § 950, regulating appeals to the Court of Appeals.—*Adkins v. Williams (Ky.)* 870.

Under Rev. St. 1899, § 806, permitting appeals from final judgments, no appeal will lie from a judgment overruling or sustaining a demurrer.—*Rodgers v. Kallmeyer (Mo. App.)* 334.

Under Rev. St. 1895, arts. 941, 1040, 1042, held that, pending in the Supreme Court a certificate of dissent from the Court of Civil Appeals, it will not grant a writ of error.—*McCord v. Nabours (Tex. Sup.)* 223.

§ 3. Right of review.

Where a judgment is affirmed by the Court of Appeals, and afterwards paid and settled, that fact does not prevent the court's consideration of a petition for a rehearing and reversal of the judgment for error disclosed by the record.—*Pike, Morgan & Co. v. Wathen (Ky.)* 137.

§ 4. Presentation and reservation in lower court of grounds of review—Issues and questions in lower court.

In an action on an accident policy, an objection not raised below cannot be relied on, on appeal.—*Pacific Mut. Life Ins. Co. v. Bailey (Ky.)* 119.

Plaintiff in an action for personal injuries held not entitled to reversal because of inadequacy of damages to cover loss of time.—*Stroh v. South Covington & C. St. Ry. Co. (Ky.)* 1120.

An owner of property assessed for a street improvement held not entitled to claim a deduction on appeal for a penalty chargeable to the contractor for delay.—*Heman Const. Co. v. Loevy (Mo. Sup.)* 613.

the point that the mortgagor's wife was entitled to one-half the penalty could not be raised for the first time on appeal.—*Henry v. Orear* (Mo. App.) 283.

§ 5. — Objections and motions, and rulings thereon.

An objection that an instruction was not sufficiently specific cannot be reviewed, where appellant did not request a more specific instruction.—*Board of Councilmen of City of Harrodsburg v. Mitchell* (Ky.) 210.

Improper argument of counsel cannot be taken advantage of by an appellant who failed to object thereto below.—*Owens v. Jenkins* (Ky.) 212.

Where the record failed to show the answer to a question asked of witness the appellate court could not say that its exclusion was prejudicial.—*Stroh v. South Covington & C. St. Ry. Co.* (Ky.) 1120.

Where defendant by its answer displays knowledge of matters showing defect of parties plaintiff, but raises no objection, the defect cannot be taken advantage of on appeal.—*Whitcotton v. St. Louis & H. Ry. Co.* (Mo. App.) 318.

In the absence of a request for a more specific instruction on the question of damages, defendant *held* not entitled to object to a correct general instruction given.—*Parman v. Kansas City* (Mo. App.) 1046.

Appellant cannot complain of admission of evidence under insufficient answer, where he did not object at the trial.—*Lapsley v. Merchants' Bank of Jefferson City* (Mo. App.) 1095.

Correctness of taxation of costs cannot be questioned on appeal, when not questioned before trial court.—*Valentine v. Sweatt* (Tex. Civ. App.) 385.

Objections not made to evidence at trial cannot be considered on appeal.—*Bath v. Houston & T. C. Ry. Co.* (Tex. Civ. App.) 993.

§ 6. — Exceptions.

Under *Sayles' Ann. Civ. St.* 1897, art. 1360, failure to except to court's ruling on objection to argument of counsel *held* to preclude review thereof.—*International & G. N. R. Co. v. Mercer* (Tex. Civ. App.) 562.

§ 7. — Motions for new trial.

Under *Civ. Code Prac.* § 763, void judgment *held* not reversible on appeal, where motion to set it aside has not been acted on.—*Lyon's Ex'x v. Logan County Bank's Assignee* (Ky.) 454.

Where an order sustaining a motion for a new trial contains no statement of the reason therefor, as required by *Rev. St.* 1899, § 801, the appellate court cannot overrule the decision, unless every assignment in the motion was without merit.—*Secrist v. Eubank* (Mo. App.) 315.

Alleged error in refusing an instruction *held* not reviewable.—*Jennings v. Kansas City* (Mo. App.) 1041.

Assignment of error as to insufficiency of evidence *held* insufficient on appeal.—*Houston & T. C. R. Co. v. Shults* (Tex. Civ. App.) 45.

Question of sufficiency of evidence, not raised on motion for new trial, will not be considered on appeal.—*Valentine v. Sweatt* (Tex. Civ. App.) 385.

§ 8. — Cases and questions reserved or certified.

The Supreme Court has no authority to answer an abstract question certified by the Court of Civil Appeals.—*Gulf, C. & S. F. Ry. Co. v. Johnson* (Tex. Sup.) 224.

Administrator of estate having no creditors *held* required, under *Rev. St.* 1895, arts. 1408, 2257, to give bond on appeal from order dismissing administration proceedings as void.—*Holman v. Klatt* (Tex. Civ. App.) 1088.

§ 10. Supersedeas or stay of proceedings.

Under *Code*, §§ 228, 747, *held*, that where an attachment under which sale had been made was discharged, and defendant entered an order of satisfaction on the sale bond, before supersedeas issued, the subsequent supersedeas and appeal did not affect the validity of the payment.—*Hey v. Harding* (Ky.) 136.

§ 11. Record and proceedings not in record.

To authorize review on appeal of a ruling on a motion, there must be an exception to the ruling, preserved by a bill of exceptions.—*State ex rel. McKinney v. Pulliam* (Mo. App.) 315.

Appellant's failure to state in his abstract that a motion for new trial was filed *held* cured by the respondent's statement in an additional abstract.—*Lapsley v. Merchants' Bank of Jefferson City* (Mo. App.) 1095.

An assignment of error to the exclusion of evidence cannot be reviewed, where the grounds of the objection to the evidence are not stated in the bill of exceptions.—*Metropolitan Life Ins. Co. v. Gibbs* (Tex. Civ. App.) 398.

Statement of facts will not be stricken out, where judge's delay in acting on it prevented it from being filed in time.—*Bull v. San Antonio & A. P. Ry. Co.* (Tex. Civ. App.) 525.

The Supreme Court *held* not authorized to inquire whether the bill of exceptions was approved and filed during the term at which the cause was tried.—*Western Union Tel. Co. v. Christensen* (Tex. Civ. App.) 744.

Under *Rev. St.* 1895, art. 1379, a disagreement of the parties as to a proposed statement of facts will be presumed, where the statement in the record is signed and approved by the judge, but not signed by the parties.—*Bath v. Houston & T. C. Ry. Co.* (Tex. Civ. App.) 993.

Statement of facts on appeal *held* not properly before the court.—*Ft. Worth & D. C. Ry. Co. v. Roberts* (Tex. Civ. App.) 1000.

§ 12. — Questions presented for review.

A motion for a new trial for newly discovered evidence cannot be reviewed, where the newly discovered evidence is not in the record.—*Board of Councilmen of City of Harrodsburg v. Mitchell* (Ky.) 210.

An objection, in an action against a city, that taxpayers were excluded from the jury, not sustained by the appeal record, cannot be reviewed.—*Board of Councilmen of City of Harrodsburg v. Mitchell* (Ky.) 210.

Where there is no bill of evidence in the record, the only thing for the consideration of the Court of Appeals is whether the pleadings support the verdict.—*United States Cast Iron Pipe & Foundry Co. v. Gable* (Ky.) 485.

Where the record on appeal from an order overruling a motion to quash an execution contained no information as to the judgment on the petition, the order could not be reviewed.—*State ex rel. Flentge v. Gawronski* (Mo. Sup.) 807.

In suit to enjoin cutting of timber on land claimed by plaintiff under a tax deed, which he had altered, *held*, on appeal, that he was not entitled to relief as equitable owner.—*Kalbach v. Mathis* (Mo. App.) 684.

Where the abstract of the record entries made by the clerk, contained in an appeal record, did

Only the grounds set forth in the bill of exceptions for the exclusion of evidence will be noticed in the appellate court, though other grounds are embodied in the assignments of error.—*Metropolitan Life Ins. Co. v. Gibbs* (Tex. Civ. App.) 398.

Special charges requested may not be considered on appeal, the record not showing whether they were given or refused.—*Texas Cotton Products Co. v. Denny Bros.* (Tex. Civ. App.) 557.

In the absence of a statement of facts, the findings of the trial court are conclusive on appeal.—*Altgelt v. Caupbell* (Tex. Civ. App.) 967.

Under Rev. St. 1895, art. 998, a Court of Civil Appeals cannot consider affidavits relative to the statement of the facts.—*Bath v. Houston & T. C. Ry. Co.* (Tex. Civ. App.) 993.

§ 13. Assignment of errors.

Assignment that court erred in sustaining general demurrer and special exceptions of a party *held* too general.—*City of San Antonio v. Talerico* (Tex. Civ. App.) 28.

In action for injuries, evidence *held* not to warrant reversal of verdict for defendant as contrary to evidence.—*Bull v. San Antonio & A. P. Ry. Co.* (Tex. Civ. App.) 525.

The ruling of the trial court on the admission of testimony cannot be reviewed on appeal, in the absence of assignments of error.—*Hale v. Bickett* (Tex. Civ. App.) 531.

Proposition on instruction would not be considered on appeal, in absence of specific assignment on point.—*Equitable Life Assur. Soc. v. Maverick* (Tex. Civ. App.) 560.

Assignments presenting two questions, the admissibility of testimony for the purpose of proof and for the purpose of contradiction, are not in such form as to require consideration on appeal.—*Houston & T. C. R. Co. v. De Berry* (Tex. Civ. App.) 736.

An assignment of error, alleging inconsistency between the main charge and a special charge in the case, will not be considered, where there is no proposition therein or elsewhere presented under the same.—*Galveston, H. & S. A. Ry. Co. v. Butchek* (Tex. Civ. App.) 740.

An assignment of error, which is not a proposition in itself, not followed by propositions, and upon which, in argument, at least two propositions are based, cannot be considered.—*Gulf, C. & S. F. Ry. Co. v. Dunn* (Tex. Civ. App.) 1080.

§ 14. Briefs.

Appeal dismissed for failure to file briefs.—*Lopez v. Vogis* (Tex. Civ. App.) 239.

Appellant's brief will not be stricken out for failure to file in accordance with rules, where appellee was not injured.—*Bull v. San Antonio & A. P. Ry. Co.* (Tex. Civ. App.) 525.

§ 15. Dismissal, withdrawal, or abandonment.

That the original abstract failed to contain the judgment and show a bill of exceptions is not cause for dismissal, where the transcript shows judgment, and the amended abstract shows bill of exceptions filed.—*Trippensee v. Braun* (Mo. App.) 674.

§ 16. Review.

The opinion on appeal is the law of the case on subsequent appeals.—*A. Booth & Co. v. Bethel* (Ky.) 868.

A cause will be determined on appeal to the Supreme Court on the same theory that was

in the nature of a demurrer to the evidence, the court on appeal would only review the weight of the evidence to ascertain the correctness of the ruling.—*People's Nat. Bank v. Central Trust Co.* (Mo. Sup.) 618.

On appeal from a judgment for plaintiff, in considering question whether a compulsory nonsuit should have been granted, testimony offered for plaintiff should be taken as true, and every reasonable inference in favor of plaintiff drawn.—*Baxter v. St. Louis Transit Co.* (Mo. App.) 70.

Judgment against railroad company for attorney's fee, as authorized by Rev. St. 1889, § 2613, modified, in view of unconstitutionality of statute, notwithstanding refusal to do so by Supreme Court.—*Brown v. Missouri, K. & T. Ry. Co.* (Mo. App.) 273.

An appellee who insists that the findings and judgment be affirmed is precluded from denying the truth of a finding.—*Jones v. Horn* (Mo. App.) 638.

Under Rev. St. 1899, § 4079, relating to amendment of pleadings, notice to administrator of claim, given under section 197, *held* amendable, on appeal from probate to circuit court, to conform to section 188.—*Corson v. Waller* (Mo. App.) 656.

§ 17. — Parties entitled to allege error.

A party on appeal *held* not entitled to complain of a ruling which he had invited.—*Snoqualmi Realty Co. v. Moyuiban* (Mo. Sup.) 1014.

Where a correct instruction given for plaintiff conflicts with one given for defendant by a defect in the latter, the defendant cannot complain of the inconsistency.—*Weston v. Lackawanna Min. Co.* (Mo. App.) 1044.

An objection by appellant in a boundary suit that the court was not authorized to submit to the jury the question whether the surveys were actually made on the ground will not be considered on appeal, where it appears that appellant invited a charge on that issue.—*Master-son v. Ribble* (Tex. Civ. App.) 358.

§ 18. — Presumptions.

On appeal from setting aside on court's own motion of an order granting a license to practice law, it would be presumed that there were good grounds for the action.—*Killian v. State* (Ark.) 766.

Where appellant did not show that an order granting a motion for a new trial was not sustained by any of the grounds alleged therefor, it would be presumed that it was justified.—*Morrison Mfg. Co. v. Roach & Green* (Mo. App.) 644.

Appellate court will presume trial court exercised discretion fairly in refusing new trial, where there is substantial evidence to support verdict.—*Hunt v. Ancient Order of Pyramids* (Mo. App.) 649.

Where municipal obligations were contracted to meet current expenses, it would be presumed that current revenue was sufficient, if collected, to have liquidated same.—*City of Tyler v. L. L. Jester & Co.* (Tex. Sup.) 1058.

On appeal, it will be presumed that a charge, requested because of certain alleged argument of plaintiff's counsel, was refused because no such argument was made.—*International & G. N. R. Co. v. Mills* (Tex. Civ. App.) 11.

Presumption that a county was "organized," within purview of Gen. Laws 1879, p. 48, c. 52, indulged in favor of judgment of district court.—*McCaleb v. Rector* (Tex. Civ. App.) 956.

ligence, where plaintiff
case against defendant,
the verdict in favor of
rmed, notwithstanding
zen on defendant's be-
ty of St. Louis (Mo.

action to recover value
iff is prevented from
ses, as to measure of
r reversal.—Exchange
v. Schuchman Real-

requiring city both
about a street exca-
der the evidence.—
erry (Mo. App.) 292.

vidence bearing ex-
disputed is harm-
(Mo. App.) 296.

asure of damages in
ure to deliver *held*
S. Howell & Co.
5.

was guilty of mis-
d not palliate his
was inadvertent.
pp.) 677.

ttorney in argu-
been offered and
hat two former
s favor, *held* re-
irker (Mo. App.)

traction engine
s instruction as
held prejudicial.—
pp.) 4.

passenger, al-
from the inju-
held merely de-
ries sustained,
N. T. Ry. Co.

passenger, an
of more than
safety after
ecos & N. T.
pp.) 5.

ot prejudiced
of action.—
r. Civ. App.)

imony *held*
ied to same
an Antonio

the plaintiff
defendant's
th, an in-
g "on or
e defend-
r. Turney

defend-
will be
the ab-
etropoli-
r. App.)

said de-
sion of
y from
like the



pany for negligent delivery of message *held* to necessitate verdict for plaintiff, so that opening case for additional evidence in plaintiff's behalf was not ground for reversal.—*Western Union Tel. Co. v. Roberts* (Tex. Civ. App.) 522.

Omission of allegation from petition of the grade of one of the streets to which defendant is to adjust the grade of its railroad tracks *held* harmless, in view of the judgment.—*Houston & T. C. R. Co. v. City of Dallas* (Tex. Civ. App.) 525.

Charge in an action against carrier for injuries received by failing to require proper conduct on the part of passengers *held* not cause for reversal on the ground of undue repetition of the results of the injuries.—*Texas & P. Ry. Co. v. Bratcher* (Tex. Civ. App.) 531.

Where the facts clearly entitle plaintiff to recover, error in instructing the jury to find in his favor if the evidence satisfied them of certain facts is immaterial.—*Bonner v. Bonner* (Tex. Civ. App.) 535.

An assignment complaining of the admission in evidence of certain letters cannot be sustained, when another letter to the same effect was admitted without objection.—*Equitable Life Assur. Soc. v. Maverick* (Tex. Civ. App.) 560.

Where the same facts are shown by other testimony, the admission of incompetent testimony is harmless error.—*Texas & P. Ry. Co. v. Mur-tishaw* (Tex. Civ. App.) 953.

Exclusion of the opinion of a qualified expert was harmless, where he testified on the same point as a matter of fact.—*Bath v. Houston & T. C. Ry. Co.* (Tex. Civ. App.) 993.

§ 22. Determination and disposition of cause.

Under Rev. St. 1899, § 865, a judgment in a will contest cannot be reversed for errors in the appointment of a guardian ad litem for minors which did not result in injury to appellants.—*Vaile v. Sprague* (Mo. Sup.) 609.

Irregularities in procedure resulting in judgment *held* not cause for reversal, under Rev. St. 1899, § 865, where it did not materially affect the result.—*Woody v. St. Louis & S. F. Ry. Co.* (Mo. App.) 658.

The Court of Civil Appeals on defendant's appeal *held* not authorized to increase plaintiff's recovery, so as to render judgment for a portion of the claim sued for which was disallowed at the trial.—*F. Groos & Co. v. Brewster* (Tex. Civ. App.) 359.

Where, in trespass to try title, judgment is rendered in favor of interveners, and defendants alone appeal, the judgment may be affirmed as against the plaintiffs.—*Eddy v. Bosley* (Tex. Civ. App.) 565.

Where, in an action against a principal and agent, on a contract made by the agent, who signed the same as surety, a judgment against the principal was reversed, judgment could not be rendered against the agent until the issue of the agent's authority was determined as against the principal.—*Tabet v. Powell* (Tex. Civ. App.) 997.

APPEARANCE.

A nonresident, who appears to an action against him in the state and files pleadings therein, subjects himself to the jurisdiction.—*Cassidy v. Willis & Connally* (Tex. Civ. App.) 40.

APPLICATION.

Of assets of partnership, see "Partnership," § 2.

APPOINTMENT.

Of executor or administrator, see "Executors and Administrators," § 1.

Of guardian, see "Guardian and Ward," § 1.

Of guardian ad litem, see "Infants," § 2.

Of highway officers, see "Highways," § 2.

Of judge, see "Judges," § 1.

Of receiver, see "Receivers," § 1.

ARGUMENT OF COUNSEL.

Exceptions for purpose of review, see "Appeal and Error," § 6.

Harmless error, see "Appeal and Error," § 21;

"Criminal Law," § 22.

In civil actions, see "Trial," § 5.

In criminal prosecutions, see "Criminal Law," § 13.

Objections for purpose of review, see "Appeal and Error," § 5; "Criminal Law," § 19.

Review dependent on presentation of grounds in record, see "Criminal Law," § 20.

ARREST.

See "Bail"; "Escape."

ASSAULT AND BATTERY.

Assault with intent to rape, see "Rape," § 1, 2.

Evidence of other offenses in prosecution for assault, see "Criminal Law," § 8.

Harmless error in admission of evidence, see "Criminal Law," § 22.

§ 1. Criminal responsibility.

One who, in striking at a person in self-defense, wounds another, cannot be guilty of maliciously stabbing the latter.—*O'Rear v. Commonwealth* (Ky.) 407.

In a prosecution for aggravated assault, evidence that, on the night before, the prosecuting witness and another arrested defendant and others for gambling, is admissible.—*Wilson v. State* (Tex. Cr. App.) 232.

In a prosecution for aggravated assault, the evidence *held* not to sustain conviction.—*Reese v. State* (Tex. Cr. App.) 511.

In prosecution for assault, evidence *held* to require an instruction on self-defense.—*Maxwell v. State* (Tex. Cr. App.) 516.

Evidence *held* sufficient to authorize charge on assault with premeditated design.—*Blain v. State* (Tex. Cr. App.) 518.

Instruction, in prosecution for assault, as to degree of force permissible to repel assault, *held* proper.—*Redden v. State* (Tex. Cr. App.) 929.

In prosecution for aggravated assault, evidence *held* to raise issue of mistake of fact, which should have been submitted to jury.—*Stermer v. State* (Tex. Cr. App.) 1072.

In prosecution for aggravated assault, issue as to whether defendant's conduct produced any disagreeable emotion of shame, etc., in prosecutrix should have been submitted to jury.—*Stermer v. State* (Tex. Cr. App.) 1072.

In order to constitute an assault where the only act committed was to slightly raise prosecutrix's gown, there must have been an intent on defendant's part to make indecent proposal to prosecutrix, occasioning shame, etc.—*Stermer v. State* (Tex. Cr. App.) 1072.

Of compensation for property taken for public use, see "Eminent Domain," § 2.
Of damages, see "Damages," § 5.
Of expenses of public improvements, see "Drains," § 1; "Municipal Corporations," § 5.
Of loss on insured, see "Insurance," §§ 8, 14.
Of tax, see "Taxation," § 5.

ASSETS.

Of partnership, see "Partnership," § 2.

ASSIGNMENT OF ERRORS.

See "Appeal and Error," § 13.

ASSIGNMENTS.

For benefit of creditors, see "Assignments for Benefit of Creditors."

Fraud as to creditors, see "Fraudulent Conveyances."

In bankruptcy, see "Bankruptcy," § 2.

Transfers of particular species of property, rights, or instruments.

See "Judgment," § 9; "Life Estates"; "Mortgages," § 4.

Corporate bonds, see "Corporations," § 4.

Dower interest, see "Dower," § 2.

Insurance policy, see "Insurance," § 3.

Leases, see "Landlord and Tenant," § 1.

Nontransferable railroad ticket, see "Carriers," § 5.

§ 1. Operation and effect.

A lien on goods purchased to secure advances made by a factor *held* an equitable lien, which passed to the factor's assignee of the debt for which the property was pledged.—*Cincinnati Tobacco Warehouse Co. v. Leslie & Whitaker's Trustee* (Ky.) 413.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

See "Bankruptcy," § 2.

By husband as bar to dower of wife, see "Dower," § 1.

§ 1. Administration of assigned estate.

Where an assignee of a logging firm continued their business, it was improper to charge him for logs which were unavailable for manufacture.—*Cooper v. Lankford* (Ky.) 197.

Where an assignee for the benefit of creditors continued the assignor's business over the creditors' protest, and lost the cash and manufactured product, he was properly charged with the amount so lost.—*Cooper v. Lankford* (Ky.) 197.

On exceptions to a judicial sale of the property of an assignor for creditors, purchaser could not bring in daughter of assignor, when she had no interest in the property.—*McAdams & Morford v. Norton's Assignee* (Ky.) 880.

ASSOCIATIONS.

Mutual benefit insurance associations, see "Insurance," § 14.

An involuntary association cannot be subjected to an ordinary judgment for debt.—*Methodist Episcopal Church South v. Clifton* (Tex. Civ. App.) 732.

ASSUMPTION.

Of risk by employé, see "Master and Servant," § 6.

See "Execution"; "Garnishment"; "Sequestration."

Contribution among creditors liable for wrongful attachment, see "Contribution."

Effect of proceedings in bankruptcy, see "Bankruptcy," §§ 1, 2.

Exemptions, see "Exemptions"; "Homestead."

Priority of attachment against partnership, see "Partnership," § 2.

§ 1. Nature and grounds.

Liability to landlord of one who receives and sells crops subject to lien may be treated as contractual, and hence landlord may maintain attachment, under Sand. & H. Dig. § 325.—*Judge v. Curtis* (Ark.) 746.

A general deed of assignment for creditors, executed prior to Act March 16, 1894 (Ky. St. 1903, §§ 74-96), and giving grounds for attachment under the prior law, still gives right of attachment.—*Fitch v. Duckwall* (Ky.) 185.

§ 2. Claims by third persons.

A claimant of property attached as the property of another *held* not entitled to recover attorney's fees against the attaching creditors after successfully resisting the attachment.—*Bogard v. Tyler's Adm'r* (Ky.) 138.

§ 3. Wrongful attachment.

Where plaintiffs were prevented from carrying on business by reason of a wrongful levy, the reasonable value of clerk hire they were compelled to pay *held* a proper element of damages.—*Hooks & Hines v. Pafford* (Tex. Civ. App.) 991.

Where plaintiffs by reason of a wrongful levy were prevented from carrying on business under a saloon license, which was worthless to any one else, they were entitled to recover the value of such license as a part of their damages.—*Hooks & Hines v. Pafford* (Tex. Civ. App.) 991.

ATTORNEY AND CLIENT.

Argument and conduct of counsel at trial in civil actions, see "Trial," § 5.

Arguments and conduct of counsel at trial in criminal prosecutions, see "Criminal Law," § 13.

Appointment of attorney in proceedings for removal of officer, see "Officers," § 1.

Attorney's fees as element of damages for wrongful seizure by sheriff or constable, see "Sheriffs and Constables," § 2.

Attorney's fees in action for divorce, see "Divorce," § 2.

Attorney's fees in attachment proceedings, see "Attachment," § 2.

Attorneys in fact, see "Principal and Agent."

Authority of stockholders to employ, see "Corporations," § 3.

City attorney, see "Municipal Corporations," § 3.

Exceptions to arguments of counsel for purpose of review, see "Appeal and Error," § 6.

Harmless error as to arguments of counsel, see "Appeal and Error," § 21.

Liability of insurance association for attorney's fees on failure to pay loss, see "Insurance," § 14.

Objections to arguments of counsel for purpose of review, see "Appeal and Error," § 5.

Power of court to set aside order granting license to practice law, see "Motions."

Trial of cause pending engagement of counsel, see "Trial," § 2.

§ 1. Retainer and authority.

A client may discharge his attorney at any time, for any cause, or without cause, even where the fee is contingent; the attorney being entitled to recover for services already rendered.—*Joseph's Adm'r v. Lapp's Adm'r* (Ky.) 1119.

pending the suit.—Breathitt Coal, Iron & Lumber Co. v. Gregory (Ky.) 148.

Opinions of witnesses as to what would have been the result of suits had plaintiff continued as attorney therein, *held* not admissible.—Breathitt Coal, Iron & Lumber Co. v. Gregory (Ky.) 148.

Contract with heirs of beneficiary of insurance policy for collection thereof *held*, under Ky. St. 1903, § 1403, not to give attorneys lien, under section 107, on proceeds realized in suit on policy by beneficiary's administratrix.—Joseph's Adm'r v. Lapp's Adm'r (Ky.) 1119.

A client may discharge his attorney at any time for any cause, or without cause, even where the fee is contingent; the attorney being entitled to recover for services already rendered.—Joseph's Adm'r v. Lapp's Adm'r (Ky.) 1119.

Client could not affect attorney's right to contract value of services by compromising suit.—Cosgrove v. Burton (Mo. App.) 667.

Where a claimant for personal injuries against a railroad company assigned one-half of his claim to his attorney, in consideration of legal services to be rendered, a private settlement thereafter made between the claimant and the railroad company affected only the claimant's interest.—Powell v. Galveston, H. & S. A. Ry. Co. (Tex. Civ. App.) 975.

Where a railroad company privately settled a claim, with notice that a portion thereof had been assigned to claimant's attorney, and then, by concealing the claimant, prevented the attorney from continuing the action, the railroad was liable for the attorney's proportion of the amount of the settlement.—Powell v. Galveston, H. & S. A. Ry. Co. (Tex. Civ. App.) 975.

Where a defendant in a suit for injuries settled with the claimant, after notice of an assignment of a portion of the claim to the claimant's attorney, for services, the latter was entitled to prosecute the suit to judgment and to recover to the extent of his interest.—Powell v. Galveston, H. & S. A. Ry. Co. (Tex. Civ. App.) 975.

An objection that a contract for attorney's services, in the settlement of a claim for injuries, was without consideration, *held* unsustainable.—Tabet v. Powell (Tex. Civ. App.) 997.

In an action on a contract for attorney's services, the burden of proof that the contract was void for unreasonableness was on the defendant.—Tabet v. Powell (Tex. Civ. App.) 997.

AUTHORITY.

Of agent, see "Principal and Agent," §§ 2, 3.
Of justice of the peace, see "Justices of the Peace," § 1.

BAGGAGE.

Of passenger, see "Carriers," §§ 11, 12.

BAIL.

§ 1. In criminal prosecutions.

Rev. St. 1899, § 4160, *held* not to limit the power of a judge to let defendant to bail under sections 2543, 2545, and take his recognizance in chambers, after the court had adjourned from that day to the next.—State v. Woodson (Mo. Sup.) 603.

A recognizance binding one to appear "from time to time" *held* not a substantial compliance with Code Cr. Proc. art. 887, requiring appear-

887, so as to necessitate dismissal of appeal.—Holcomb v. State (Tex. Cr. App.) 231.

A recognizance on appeal, which omits the concluding phrase "in this case," as contained in the form prescribed in Code Cr. Proc. 1895, art. 887, is defective, and the appeal will be dismissed.—Gaither v. State (Tex. Cr. App.) 234; Lockett v. State, *Id.*

Recognizance on appeal reading, "who has been convicted in this court," *held* not a sufficient compliance with Code Cr. Proc. 1895, art. 887.—Perkins v. State (Tex. Cr. App.) 346.

A recognizance on appeal in a misdemeanor case *held* insufficient, under Code Cr. Proc. 1895, art. 887.—Cooper v. State (Tex. Cr. App.) 346.

Scire facias on a forfeited bail bond *held* not affected by the fact that, after forfeiture and the rendition of the judgment, the complaint in the prosecution of the principal is altered.—Abbott v. State (Tex. Cr. App.) 510.

A peremptory instruction may be given in scire facias on a forfeited bail bond.—Abbott v. State (Tex. Cr. App.) 510.

The statement of facts on appeal from a judgment in scire facias on a forfeited bail bond must show the judgment nisi was introduced in evidence.—Abbott v. State (Tex. Cr. App.) 510.

Recognizance on appeal in criminal case, failing to comply with Code Crim. Proc. 1895, art. 887, *held* insufficient.—Robertson v. State (Tex. Cr. App.) 517.

BAILMENT.

See "Carriers," § 2.

Larceny by bailee, see "Larceny," § 1.

Bank *held* to be a gratuitous bailee of check sent to it by the payor for delivery, and liable only for gross negligence in performance of undertaking.—King v. Exchange Bank (Mo. App.) 1038.

Evidence in an action against a bank to recover loss by plaintiff on account of delivery to the wrong person of plaintiff's check examined, and *held* insufficient to show that the defendant was guilty of negligence.—King v. Exchange Bank (Mo. App.) 1038.

BANKRUPTCY.

See "Assignments for Benefit of Creditors."

Objections to reception of evidence in action by trustee in bankruptcy, see "Trial," § 4.

Taking of deposition in suit by trustee in bankruptcy, see "Depositions."

§ 1. Constitutional and statutory provisions.

Bankr. Act July 1, 1898, c. 541, § 67, subsec. "c," 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], providing for the dissolution of attachment liens on a bankrupt's property, if it was acquired while the bankrupt was insolvent or its enforcement would work a preference, etc., *held* binding on the state courts.—Thompson v. Ragan (Ky.) 485.

§ 2. Assignment, administration, and distribution of bankrupt's estate.

In an action by a trustee in bankruptcy to set aside a sale of the bankrupt's property, *held* error for the court to adjudge cancellation of certain chattel mortgage.—E. S. Bonnie & Co. v. Perry's Trustee (Ky.) 208.

Under Ky. St. 1903, § 4203 et seq., relative to liquor licenses, a liquor license is a mere

does not render the creditor liable to pay anything for the license to the licensee's trustee in bankruptcy.—*E. S. Bonnie & Co. v. Perry's Trustee* (Ky.) 208.

Under Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], transfer by an insolvent saloonkeeper of stock and fixtures *held void*, and same could be recovered by trustee against transferee.—*E. S. Bonnie & Co. v. Perry's Trustee* (Ky.) 208.

Transferee of bankrupt's property *held* not entitled, on avoidance of transfer by trustee, to a credit for sum paid to bankrupt.—*E. S. Bonnie & Co. v. Perry's Trustee* (Ky.) 208.

A husband, after sale of homestead, *held* to have the right to give proceeds to his wife, and, on her investment of the same in other land, the property so acquired was not subject to subsequent debts of the husband.—*Bohannon v. Clark* (Ky.) 479.

Rule for distribution of proceeds of sale of husband's land, where he is indebted to his wife for the money to buy the land, which is also incumbered for the purchase price, determined.—*Bohannon v. Clark* (Ky.) 479.

On an application of a trustee in bankruptcy to vacate an attachment against the bankrupt, it was no defense that under the laws of the state of the bankrupt's residence the property was exempt, and that, by reason of an insufficiency of assets over the exemption, there was nothing for distribution among creditors.—*Thompson v. Ragan* (Ky.) 485.

Under Bankr. Act July 1, 1898, c. 541, §§ 18e, 18f, 21d, 21e, 30 Stat. 551, 552 [U. S. Comp. St. 1901, pp. 3429, 3430], *held*, there must be affirmative proof the judge was absent to give the referee jurisdiction to make the adjudication.—*Page v. Roberts, Johnson & Rand Shoe Co.* (Mo. App.) 52.

An instruction *held* too broad, as authorizing recovery not asked in the petition.—*Page v. Roberts, Johnson & Rand Shoe Co.* (Mo. App.) 52.

BANKS AND BANKING.

As bailee of check received by it for delivery, see "Bailment."

Authority of bank agents, see "Principal and Agent," § 3.

Taxation of banks and bank property, see "Taxation," §§ 1, 3, 7.

§ 1. Banking corporations and associations.

Declaration of dividend by bank, in violation of Rev. St. 1899, § 1293, *held void*.—*Lapsley v. Merchants' Bank of Jefferson City* (Mo. App.) 1095.

In action by stockholder for dividend, answer *held* sufficient to allow defense that 10 per cent. of net profits had not been set off for surplus before a dividend was declared.—*Lapsley v. Merchants' Bank of Jefferson City* (Mo. App.) 1095.

President of bank *held* to have no right to recover for his services.—*Lapsley v. Merchants' Bank of Jefferson City* (Mo. App.) 1095.

§ 2. Functions and dealings.

Checks of a bearer of a letter of credit, cashed by a bank without notice of the letter, could not be charged in extinguishment of the amount named in the letter, as against another paying the bearer's checks subsequently drawn on the faith of the letter.—*Bank of Seneca v. First Nat. Bank* (Mo. App.) 1092.

That a bank, issuing a letter of credit, erroneously assumed that checks of the bearer had been cashed on the faith thereof, *held* immaterial, as against the holder of other checks

App.) 1092.

BAR.

Of action by former adjudication, see "Judgment," § 7.

Of action by limitation, see "Limitation of Actions," § 4.

Of dower, see "Dower," § 1.

BASTARDS.

§ 1. Illegitimacy in general.

The legitimacy of children is presumed, and one claiming the contrary has the burden of proof.—*Lewis v. Sizemore* (Ky.) 122.

BATTERY.

See "Assault and Battery."

BENEFICIAL ASSOCIATIONS.

See "Associations."

Mutual benefit insurance associations, see "Insurance," § 14.

BEQUESTS.

See "Wills."

BEST AND SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 5.

In criminal prosecutions, see "Criminal Law," § 6.

BETTING.

See "Gaming."

BIAS.

Of juror, see "Jury," § 4.

BILL OF EXCEPTIONS.

See "Exceptions, Bill of."

BILL OF LADING.

See "Carriers," § 2.

BILLS AND NOTES.

See "Limitation of Actions"; "Usury," § 1.

Action on lost note, see "Lost Instruments."

Interest on, see "Interest," § 2.

Liability of married women, see "Husband and Wife," § 1.

Notes for insurance premiums, see "Insurance," § 5.

Of municipality, see "Municipal Corporation," § 9.

Parol evidence, see "Evidence," § 10.

Sureties on notes, see "Principal and Surety," § 1.

Testimony as to transactions with decedent, see "Witnesses," § 1.

Transfer of, in consideration of compound felony, see "Contracts," § 1.

§ 1. Requisites and validity.

Where a wife executed a note in settlement of notes of husband, there was sufficient consideration, though the old notes were not returned.—*Wm. Deering & Co. v. Veal* (Ky.) 886.

§ 2. Rights and liabilities on indorsement or transfer.

Notice to bona fide holder of note that it was without consideration *held* not to affect his right to recover on renewal note.—*Beattyville Bank v. Roberts* (Ky.) 901.

Bona fide purchaser of notes secured by vendor's lien on homestead, which was invalid under Const. art. 16, § 50, *held* in no better position than the payees thereof.—*Peaslee v. Walker* (Tex. Civ. App.) 980.

§ 3. Actions.

Evidence *held* insufficient to support a finding that a note for \$600 had been raised from \$60.—*Rogers v. Costigan* (Ky.) 121.

In an action on a note, contention that plaintiff was entitled to judgment on the pleadings, because there was no rejoinder to the reply, *held* without merit.—*Ellis' Adm'r v. Blackerby* (Ky.) 181.

Possession of a note by the payor creates a presumption of its payment.—*Ellis' Adm'r v. Blackerby* (Ky.) 181.

Where a note is in possession of the payor, the burden of proof, in an action thereon, to show that it has not been paid, rests on the payee.—*Ellis' Adm'r v. Blackerby* (Ky.) 181.

Charge requested, in an action on a note in which counterclaim was filed, that the presumption was that defendant owed plaintiff the amount of the note on the day it was executed, *held* properly refused.—*Oliver v. Love* (Mo. App.) 335.

In an action on a note, in which counterclaim was filed, charge that the burden is on defendants to prove items of the counterclaim admitted, *held* erroneous.—*Oliver v. Love* (Mo. App.) 335.

One signing a note cannot plead that he does not know the name of the payee.—*Burge v. Duden* (Mo. App.) 653.

In an action on a note, the indorsements themselves *held* insufficient to prove the allegations as to ownership.—*Dunlap v. Kelly* (Mo. App.) 664.

In an action on a note by the original payee, who alleges an indorsement to a third person and by the third person back to her, a failure to prove the allegations is fatal.—*Dunlap v. Kelly* (Mo. App.) 664.

A petition alleging that the note sued on was not paid at maturity, thereby entitling the holder to attorney's fees, *held* sufficient, without alleging that suit was brought on the note.—*Harris v. Scrivener* (Tex. Civ. App.) 705.

BOARD.

Of Capitol Commissioners, see "States," § 1.

Of health, see "Health," § 1.

BONA FIDE PURCHASERS.

At execution sale, see "Execution," § 2.

Of bill of exchange or promissory note, see "Bills and Notes," § 2.

Of lands, see "Vendor and Purchaser," § 3.

BONDS.

Action on lost bond, see "Lost Instruments."

Corporate bonds, see "Corporations," § 4.

Indemnity against liens, see "Mechanics' Liens," § 1.

Liability of corporation on bond of predecessor, see "Corporations," § 5.

Liquor dealer's bond, see "Intoxicating Liquors," § 4.

Municipal bonds, see "Municipal Corporations," § 9.

Not to violate liquor law, see "Breach of the Peace."

Bonds for performance of duties of trust or office.

See "Sheriffs and Constables," § 1.

Of tax collector, see "Taxation," § 8.

Bonds in legal proceedings.

See "Appeal and Error," § 9; "Bail"; "Costs," § 2.

Appeal in justice's court, see "Justices of the Peace," § 3.

BOUNDARIES.

§ 1. Description.

Description in deed *held*, under the evidence, not to include land sued for by grantees.—*Cincinnati Southern Ry. Co.'s Trustees v. Society of Shakers' Trustees* (Ky.) 130.

The general description of a deed, fixing the boundaries by governmental monuments and a natural object, will prevail over erroneous description by metes and bounds.—*Patton v. Fox* (Mo. Sup.) 804.

In a boundary suit the fact that there are well-known and undisputed original corners established on the ground, *held* not to control other calls, which are conflicting and contradicting.—*Masterson v. Ribble* (Tex. Civ. App.) 358.

In determining intention of a surveyor in a boundary suit, *held*, that the jury should consider his purpose, as gathered from what he did in making the surveys, the description of the land he gave, and all the circumstances attending the transaction.—*Masterson v. Ribble* (Tex. Civ. App.) 358.

§ 2. Evidence, ascertainment, and establishment.

Charge in boundary suit *held* erroneous, as placing too great a burden on plaintiff.—*Masterson v. Ribble* (Tex. Civ. App.) 358.

BREACH.

Of condition, see "Insurance," § 8.

Of contracts, see "Contracts," § 3; "Sales," § 4; "Vendor and Purchaser," § 2.

Of covenant, see "Insurance," § 8.

Of liquor dealer's bond, see "Intoxicating Liquors," § 4.

Of warranty, see "Insurance," § 7; "Sales," §§ 6, 8.

BREACH OF THE PEACE.

See "Disturbance of Public Assemblage."

A bond required by the court of one not to violate the prohibitory liquor law *held* void. Cr. Code Prac. §§ 382, 391.—*Cornett v. Commonwealth* (Ky.) 858.

BREAKING.

Within burglary laws, see "Burglary," § 1.

BRIBERY.

In view of Const. U. S. art. 1, § 2, an indictment for bribery at a primary election, alleging that a certain person was candidate "for the office of Congress," is fatally defective.—*Allison v. State* (Tex. Cr. App.) 1065.

BRIEFS.

On appeal or writ of error, see "Appeal and Error," § 14.

See Factors.
Judicial power to restrain brokers from dealing in nontransferable railroad tickets, see "Constitutional Law," § 2.
Restraining sale of nontransferable railroad tickets, see "Injunction," § 1.

§ 1. Compensation and lien.

Real estate agent *held* not entitled to recover commissions on revoked written contract with his principal, where sale was made under subsequent oral contract.—*Braly v. Barnett* (Tex. Civ. App.) 905.

BUILDING CONTRACTS.

See "Contracts."

BUILDINGS.

Defects in demised building, see "Landlord and Tenant," § 3.

BURDEN OF PROOF.

In civil actions, see "Evidence," § 3.

BURGLARY.

Evidence as to time of offense, see "Criminal Law," § 7.

Impeachment of witness, see "Witnesses," § 3.
Questions for jury in general, see "Criminal Law," § 14.

Sufficiency of evidence in general, see "Criminal Law," § 10.

§ 1. Offenses and responsibility therefor.

One may not be convicted of breaking a warehouse, though he removes a window strip, where his action does not, without additional effort, make entry possible.—*Gaddie v. Commonwealth* (Ky.) 162.

A person may be convicted of a burglary and acquitted of the accompanying larceny.—*State v. Helms* (Mo. Sup.) 592.

Under Rev. St. 1899, § 1886, repealing Rev. St. 1889, § 3526, chicken house *held* susceptible of being burglarized.—*State v. Helms* (Mo. Sup.) 592.

Unbuttoning the outside door of a chicken house and removing the slat fastening the inner door constitutes a burglarious breaking.—*State v. Helms* (Mo. Sup.) 592.

§ 2. Prosecution and punishment.

In a prosecution for burglary, a requested instruction as to the acts of an alleged detective in soliciting the commission of the crime *held* properly refused.—*State v. Chappell* (Mo. Sup.) 585.

Evidence in a prosecution for burglary *held* sufficient to sustain a finding of a breaking into the building.—*State v. Helms* (Mo. Sup.) 592.

Testimony in prosecution for burglary, showing defendant's connection with another burglary on the same night, *held* admissible as part of the *res gestæ*.—*Perry v. State* (Tex. Cr. App.) 513.

Testimony in prosecution for burglary, as to tools used in gaining entrance to burglarized store, *held* admissible.—*Perry v. State* (Tex. Cr. App.) 513.

Evidence in prosecution for burglary *held* sufficient to sustain a conviction.—*Perry v. State*, two cases (Tex. Cr. App.) 513; *Brown v. State* (Tex. Cr. App.) 936.

The mere possession of recently stolen property, without evidence of breaking, is insuffi-

BY-LAWS.

Of municipal corporation, see "Municipal Corporations," § 2.

Of mutual benefit insurance associations, see "Insurance," § 14.

CALENDARS.

Computation of time, see "Time."

CANCELLATION OF INSTRUMENTS.

Cancellation of deed for invalidity, see "Deeds," § 1.

Cancellation of insurance certificate, see "Insurance," § 14.

Cancellation of insurance policy, see "Insurance," § 6.

Cancellation of lease of public lands, see "Public Lands," § 1.

Cancellation of subscription for corporate stock, see "Corporations," § 2.

Setting aside fraudulent conveyances, see "Fraudulent Conveyances," § 2.

CARNAL KNOWLEDGE.

See "Rape."

CARRIERS.

Admissions by agents, see "Evidence," § 6.

Applicability of instructions to pleadings and evidence in action against, see "Trial," § 10.

Construction of instructions in action against, see "Trial," § 12.

Documentary evidence in action against, see "Evidence," § 9.

Duty of railroad as to providing separate coaches for white and colored passengers, see "Civil Rights."

Evidence as to value in action against, see "Evidence," § 4.

Expert testimony in action for injuries to passenger, see "Evidence," § 11.

Harmless error in action for injuries to passenger, see "Appeal and Error," § 21.

Hearsay evidence in action for injuries to passenger, see "Evidence," § 8.

Judicial power to restrain brokers from dealing in nontransferable railroad tickets, see "Constitutional Law," § 2.

Necessity and subject-matter of instructions in action against, see "Trial," § 8.

Opinion evidence in action for injuries to goods, see "Evidence," § 11.

Province of court and jury in action for personal injuries, see "Trial," § 7.

Relevancy of evidence in action for injuries to passenger, see "Carriers," § 4.

Remarks and conduct of counsel in action for injuries to goods, see "Trial," § 3.

Requests for instructions in actions against, see "Trial," § 11.

Sufficiency of instructions in action against, see "Trial," § 10.

§ 1. Control and regulation of common carriers.

Shipment of goods from sister state *held* to have lost its character as interstate commerce, so as to fall within jurisdiction of state railroad commission.—*Gulf, C. & S. F. Ry. Co. v. State* (Tex. Sup.) 495.

Finding in action against railroad company for excessive charges, in which the issue was as to the interstate character of certain shipment, *held* sustained by evidence.—*Gulf, C. & S. F. Ry. Co. v. State* (Tex. Sup.) 495.

§ 2. Carriage of goods.

That railway appropriated coal to its own use through mistake *held* not to affect consignee's

against railway company, it cannot, under general denial, recoup money paid to consignor, raise the question of subrogation to his rights, or claim allowance for freight.—*Frazier v. Atchison, T. & S. F. R. Co.* (Mo. App.) 679.

Consignees of property held entitled to sue carrier for damage thereto, though contract was made with consignor.—*Burris & Haynie v. Missouri Pac. Ry. Co.* (Mo. App.) 1042.

Evidence held sufficient to authorize a jury to conclude that goods placed near a railway track for shipment were set on fire by sparks from its engine.—*Missouri, K. & T. Ry. Co. of Texas v. Beard* (Tex. Civ. App.) 253.

Evidence held sufficient to authorize submission to the jury of an issue as to whether goods placed near a railway track for shipment were by course of dealing and custom to be deemed in the possession of the railway company.—*Missouri, K. & T. Ry. Co. of Texas v. Beard* (Tex. Civ. App.) 253.

Where plaintiff claims that his goods were destroyed by defendant's negligence, and also that they had been delivered to defendant as a carrier, it was error to instruct that defendant was liable if it caused the fire.—*Missouri, K. & T. Ry. Co. of Texas v. Beard* (Tex. Civ. App.) 253.

Instructions in an action for loss of goods placed near a railway track for shipment held irreconcilably conflicting.—*Missouri, K. & T. Ry. Co. of Texas v. Beard* (Tex. Civ. App.) 253.

Goods delivered to a carrier may be transported without a bill of lading, and regarded as in the possession of the carrier from the time received, without instructions for immediate shipment.—*Missouri, K. & T. Ry. Co. of Texas v. Beard* (Tex. Civ. App.) 253.

Bills of lading and drafts held to constitute a written contract to deliver consignment in a particular county.—*Callender, Holder & Co. v. Short* (Tex. Civ. App.) 366.

In an action against a carrier for unreasonable delay in delivering potatoes, shipper is entitled to recover difference in market value of potatoes in condition in which they should have arrived and that in which they did arrive.—*Garlington v. Ft. Worth & D. C. Ry. Co.* (Tex. Civ. App.) 368.

In an action against carriers for injuries to a shipment of cotton, evidence as to the meaning of a receipt for the same, given by connecting carrier, held improperly excluded.—*Bath v. Houston & T. C. Ry. Co.* (Tex. Civ. App.) 993.

§ 3. Carriage of live stock.

In action against carrier for damages to cattle, held proper to refuse to charge that, if the condition of the cattle contributed to their death or injury, damages so occasioned should be excluded.—*Texas & P. Ry. Co. v. Dawson* (Tex. Civ. App.) 235.

In an action against a carrier for injuries to cattle, submission of an issue of negligence which was neither pleaded nor proved held error.—*St. Louis, I. M. & S. Ry. Co. v. Carlisle* (Tex. Civ. App.) 553.

Time necessarily lost by a carrier in stopping cattle for food and rest, under a federal statute, should not be considered in computing alleged negligent delay.—*St. Louis, I. M. & S. Ry. Co. v. Carlisle* (Tex. Civ. App.) 553.

Where a carrier accepted a defective car containing cattle from a connecting carrier, it became liable for damages for delay on its road caused by such defects.—*St. Louis, I. M. & S. Ry. Co. v. Carlisle* (Tex. Civ. App.) 553.

have arrived.—*Texas & P. Ry. Co. v. Murtishaw* (Tex. Civ. App.) 953.

In an action for injuries to a shipment of live stock, interest on the recovery from the date of the injury at 6 per cent. is properly allowed, where the pleadings asked therefor.—*Texas & P. Ry. Co. v. Murtishaw* (Tex. Civ. App.) 953.

A shipment of live stock, accompanied by the owner, over connecting lines of railroad, held within Laws 26th Leg. p. 214, c. 125, § 1, so that one company could not object that it was not sued in the county of its domicile.—*Texas & P. Ry. Co. v. Murtishaw* (Tex. Civ. App.) 953.

Laws 26th Leg. p. 214, c. 125, § 1, relative to venue in actions against connecting carriers of goods, held applicable to interstate shipments.—*Texas & P. Ry. Co. v. Murtishaw* (Tex. Civ. App.) 953.

In an action against two railroad companies for injury to a shipment of live stock, evidence as to the cause of injury on one line, elicited by the cross-examination of plaintiff by the other company, is admissible, though plaintiff did not plead such cause of injury.—*Texas & P. Ry. Co. v. Murtishaw* (Tex. Civ. App.) 953.

In an action for injury to a shipment of live stock, evidence that some of the mares lost their foals after reaching their destination is admissible.—*Texas & P. Ry. Co. v. Murtishaw* (Tex. Civ. App.) 953.

In an action against a railroad company for damages to a shipment of cattle, caused by rough handling, measure of damages stated.—*Gulf, C. & S. F. Ry. Co. v. Ware & Walker* (Tex. Civ. App.) 961.

In an action against a railroad company for injuries to a shipment of stock by failure to feed and water, evidence that the stock drank too much water at a certain station held admissible, in view of other evidence.—*Gulf, C. & S. F. Ry. Co. v. Dunn* (Tex. Civ. App.) 1080.

In an action against a railroad company for damages to stock during shipment, caused by rough handling and failure to feed and water, exclusion of a part of the contract, requiring the shipper to feed and water, held not error, in view of other evidence.—*Gulf, C. & S. F. Ry. Co. v. Dunn* (Tex. Civ. App.) 1080.

§ 4. Carriage of passengers—Relation between carrier and passenger.

The right to railway passenger carriage is open, within a reasonable degree, to those ailing and infirm.—*Mathew v. Wabash R. Co.* (Mo. App.) 271.

Where plaintiff knew nothing of the rule prohibiting carriage of passengers on freight trains, and such trains had been in the habit of carrying passengers, and plaintiff boarded such a train at the instance of conductor, and paid his fare, he was authorized to presume that carriage of passengers was permitted.—*Missouri, K. & T. Ry. Co. of Texas v. Huff* (Tex. Civ. App.) 249.

Where railroad employes openly and habitually violate rules prohibiting carriage of passengers on freight trains, and such violation is known, or should have been known, to the company's officers, who made no attempt to enforce the rules, they will be presumed abrogated.—*Missouri, K. & T. Ry. Co. of Texas v. Huff* (Tex. Civ. App.) 249.

If a brakeman, in violation of company's orders, invites passengers on freight train, with knowledge of officers, or under such circumstances that they should have had knowledge,

§ 5. — Fares, tickets, and special contracts.

Where a person buys and sells to a third person a special nontransferable ticket, the railroad can invoke the aid of equity to cancel the contract for fraud, or sue in damages for breach of contract.—*Schubach v. McDonald* (Mo. Sup.) 1020; *Hirt v. Kinealy, Id.*; *Leonard v. Fisher, Id.*; *Schubach v. Hough, Id.*; *Steiner v. Wood, Id.*; *Wasserman & Co. v. Hough, Id.*

It is competent for a railroad to issue non-transferable tickets at reduced rates, and the original purchaser thereof cannot assign or transfer them to third persons.—*Schubach v. McDonald* (Mo. Sup.) 1020; *Hirt v. Kinealy, Id.*; *Leonard v. Fisher, Id.*; *Schubach v. Hough, Id.*; *Steiner v. Wood, Id.*; *Wasserman & Co. v. Hough, Id.*

§ 6. — Performance of contract of transportation.

In an action for injuries to a passenger from exposure from being compelled to walk back to her station, evidence as to her condition of health, and that she was unprotected with sufficient clothing to withstand the weather, *held* admissible.—*Pecos & N. T. Ry. Co. v. Williams* (Tex. Civ. App.) 5.

§ 7. — Personal injuries in general.

Where a passenger and the conductor agree that the passenger shall leave the train at a water tank, the carrier is bound to use the same care in stopping there as if it were a station.—*Chesapeake & O. Ry. Co. v. Topping* (Ky.) 135.

Under Ky. St. 1890, § 784, requiring railroads to call stations, passenger may assume, on station being called, that train has arrived thereat.—*Coe v. Louisville & N. R. Co.* (Ky.) 439.

An invalid passenger is entitled to receive the same general high degree of care as other passengers.—*Mathew v. Wabash R. Co.* (Mo. App.) 271.

Where city ordinance requires street cars to stop at crossings, rule of company as to stopping when car is late *held* inadmissible.—*Maguire v. St. Louis Transit Co.* (Mo. App.) 838.

Where street car slowed down at usual point, company *held* liable for consequences of any mistake in believing it slowed down for passengers.—*Maguire v. St. Louis Transit Co.* (Mo. App.) 838.

A street car should be brought to a stop at crossing when signaled, and held reasonable time to permit persons to board it.—*Maguire v. St. Louis Transit Co.* (Mo. App.) 838.

An instruction that if a street car conductor could have prevented a passenger from leaving the car while in motion, and failed to do so, the passenger could recover, was erroneous.—*Shareman v. St. Louis Transit Co.* (Mo. App.) 846.

Where a railroad train has almost stopped at a station, a sudden jerk, injuring a passenger, is negligence.—*Moorman v. Atchison, T. & S. F. Ry. Co.* (Mo. App.) 1089.

A carrier owes the same degree of care to a passenger while he is boarding a train at any point on its premises, where its act has made it necessary or proper for him to go, as it owes after he has boarded the train.—*San Antonio & A. P. Ry. Co. v. Turney* (Tex. Civ. App.) 256.

In an action for injuries to a passenger, an instruction that, if the place where plaintiff was injured was a portion of defendant's depot grounds where the public would not ordinarily resort, defendant was not required to keep a ditch therein covered, *held* properly refused.—

The rule of high care which a carrier of passengers must use in maintaining its depot in safe condition for passengers applies to a part of its premises where by the acts of the carrier it is made necessary or proper for a passenger to go to board a train.—*San Antonio & A. P. Ry. Co. v. Turney* (Tex. Civ. App.) 256.

Under Const. art. 10, § 2, and Sayles' An. Civ. St. 1897, arts. 319, 320, a railroad cannot contract away its liability for injuries to newsboy transported on its trains.—*Texas P. Ry. Co. v. Fenwick* (Tex. Civ. App.) 548.

§ 8. — Actions for personal injuries.

Evidence in passenger's action for injury *held* insufficient to sustain a verdict for plaintiff.—*Cincinnati, N. O. & T. P. Ry. Co. v. Harcomb* (Ky.) 205.

In an action against a street railway company for personal injuries received by a passenger in alighting from a car, evidence examined, and *held* to tend to show the negligence alleged, and not to warrant a nonsuit.—*Dulac v. St. Louis Transit Co.* (Mo. App.) 831.

Instruction declaring it negligence to start before passenger had time to get on and "a place of safety" *held* proper, and not inconsistent with another instruction.—*Maguire v. St. Louis Transit Co.* (Mo. App.) 838.

In action for injuries in boarding car at certain point, instructions that cars should stop at that point *held* proper.—*Maguire v. St. Louis Transit Co.* (Mo. App.) 838.

Instruction authorizing recovery for injury in attempting to board street car, if plaintiff believed car was stopping for passengers, *held* proper under the evidence.—*Maguire v. St. Louis Transit Co.* (Mo. App.) 838.

Permission to amend a complaint for injury to plaintiff's wife while alighting from defendant's street car *held* properly granted.—*Shareman v. St. Louis Transit Co.* (Mo. App.) 846.

A complaint in an action for injuries to a passenger on defendant's street car *held* to state a cause of action.—*Shareman v. St. Louis Transit Co.* (Mo. App.) 846.

Evidence in an action for injuries to a passenger in a street car *held* not to show a variance between proof and allegations.—*Sharer v. St. Louis Transit Co.* (Mo. App.) 846.

In an action by a passenger against a railroad for personal injuries alleged to have been caused by a sudden jerk as the train was stopping at a station, evidence *held* to justify submission to jury of the issue as to whether the jerk was the proximate cause of the injury.—*Moorman v. Atchison, T. & S. F. Ry. Co.* (Mo. App.) 1089.

In action against street railway for injury to a passenger, *held* not error to refuse to instruct as to the true meaning of the phrase "human skill and foresight."—*Nashville R. v. Howard* (Tenn.) 1098.

In action against street railway for injury to a passenger, defendant *held* not entitled to complain of an instruction to the effect that it was incumbent on defendant to keep its cars and appliances in safe order and condition.—*Nashville R. v. Howard* (Tenn.) 1098.

In an action against street railway for injuries sustained by a passenger, owing to derailment in track, evidence that others had nearly been injured as plaintiff was, and that cars had been derailed at the point where the accident happened, *held* admissible.—*Nashville R. v. Howard* (Tenn.) 1098.

In an action by a passenger for injuries from the starting of a train, evidence *held* to justify

In an action by a passenger against a railroad company for personal injuries, in which the petition alleged two negligent acts, proof of both *held* required to justify a recovery.—*Williams v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.) 45.

In an action for injuries to a passenger alighting from a freight train, evidence *held* sufficient to justify a finding that defendant's brakeman was negligent in causing plaintiff to alight under the circumstances.—*Missouri, K. & T. Ry. Co. of Texas v. Huff* (Tex. Civ. App.) 249.

In an action for injuries to a passenger on a freight train, evidence *held* sufficient to warrant the presumption that a rule prohibiting carriage of passengers had been abrogated.—*Missouri, K. & T. Ry. Co. of Texas v. Huff* (Tex. Civ. App.) 249.

In an action against a railway company for personal injuries to a passenger, evidence *held* to warrant an instruction as to plaintiff's acting under the directions of defendant's conductor.—*San Antonio & A. P. Ry. Co. v. Turney* (Tex. Civ. App.) 256.

Whether a railway company was guilty of negligence in not having the ditch near its depot lighted or guarded, and in failing to warn a passenger, who fell into it, was for the jury.—*San Antonio & A. P. Ry. Co. v. Turney* (Tex. Civ. App.) 256.

Instruction, in action by passenger for injury, as to degree of care required of carrier, *held* proper.—*Mathew v. Wabash R. Co.* (Mo. App.) 271.

Whether fellow passengers were smoking, drinking whisky, cursing, and crowding up against plaintiff's wife *held* question for jury, in action against carrier for injuries to the wife.—*Texas & P. Ry. Co. v. Bratcher* (Tex. Civ. App.) 531.

In an action against street railway company for injuries to a passenger, instruction on proximate cause *held* proper.—*Pelly v. Denison & S. Ry. Co.* (Tex. Civ. App.) 542.

In an action for injuries to a passenger, evidence *held* to justify the submission of the question as to whether plaintiff was injured by the derailment of the car, which occurred as a part of the accident.—*San Antonio Traction Co. v. Williams* (Tex. Civ. App.) 977.

A passenger is not precluded from alleging negligence generally, in an action for injuries, by the fact that she had knowledge of the particular act of negligence causing the injury.—*San Antonio Traction Co. v. Williams* (Tex. Civ. App.) 977.

In an action for injuries to a passenger, a second amended petition, alleging negligence generally, *held* not defective because the previous petition had specified the specific negligence relied on.—*San Antonio Traction Co. v. Williams* (Tex. Civ. App.) 977.

§ 9. — Contributory negligence of person injured.

A passenger, who leaves his seat and goes to the door of the coach as the train is slowing up to stop at his station, but before it has become stationary, is not negligent per se.—*Chesapeake & O. Ry. Co. v. Topping* (Ky.) 135.

An instruction on contributory negligence in passenger's action for injuries *held* properly refused as inapplicable to the evidence.—*Cincinnati, N. O. & T. P. Ry. Co. v. Halcomb* (Ky.) 205.

Instruction *held* not objectionable, as requiring verdict against street car company for in-

negligence of instruction denning street car company's duties toward passenger after alighting from car *held* erroneous.—*Louisville Ry. Co. v. Meglemery* (Ky.) 217.

That passenger was negligent in leaving a train in reliance on the call of his station by the trainmen is a matter of defense.—*Coe v. Louisville & N. R. Co.* (Ky.) 439.

Passenger who leaves his seat before stopping of train cannot recover for fall resulting from its stoppage in usual manner.—*Illinois Cent. R. Co. v. Jolly* (Ky.) 476.

In action against railroad for injuries to passenger, caused by a fall resulting from his leaving his seat before the train stopped, charge of contributory negligence should have been given.—*Illinois Cent. R. Co. v. Jolly* (Ky.) 476.

Whether passenger is negligent in leaving his seat and standing in aisle before train stops is question for jury.—*Illinois Cent. R. Co. v. Jolly* (Ky.) 476.

Passenger, in action against street railway company for injuries, *held* entitled to instruction that, to show her negligence, there must be preponderance of evidence that she attempted to alight before car stopped.—*Kennedy v. St. Louis Transit Co.* (Mo. App.) 77.

Where, in an action against a street railway company for injuries to a passenger, there was no plea of contributory negligence, there was no occasion for an instruction that issue of such negligence was not in the case.—*Duffy v. St. Louis Transit Co.* (Mo. App.) 831.

Instruction that burden of proving contributory negligence rests on defendant *held* not error, though such negligence, if shown at all, was shown by plaintiff's evidence alone.—*Maguire v. St. Louis Transit Co.* (Mo. App.) 838.

Whether it was negligence to board slowly moving car *held* question for jury, and to have been properly submitted.—*Maguire v. St. Louis Transit Co.* (Mo. App.) 838.

In an action by a passenger for injuries from starting of a train, evidence *held* to justify submission to jury of the issue of contributory negligence.—*Williams v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.) 45.

In an action for injuries sustained by a passenger, owing to the negligent starting of a train, an instruction that, if the endeavor to get off the train contributed to the injury, plaintiff could not recover, *held* not error.—*Williams v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.) 45.

In an action by a passenger for injuries by the negligent starting of a train, an instruction that, if plaintiff was guilty of negligence, he could not recover, *held* not error.—*Williams v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.) 45.

In an action for personal injuries alleged to have been caused while attempting to alight from a train because of fear of a collision, a charge on the subject of the fear required to justify plaintiff in alighting *held* not erroneous.—*Williams v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.) 45.

In an action against a railway company for personal injuries to a passenger, *held*, that the question of whether he saw or should have seen a gully in boarding a train was a question for the jury.—*San Antonio & A. P. Ry. Co. v. Turney* (Tex. Civ. App.) 256.

In an action against street railway for injuries to a passenger, issue of discovered peril *held* not raised.—*Pelly v. Denison & S. Ry. Co.* (Tex. Civ. App.) 542.

Southern Ry. Co. in Kentucky (Ky.) 470.

§ 11. — Passengers' effects.

A railroad company is not an insurer of luggage taken by passengers into a day coach.—Nashville, C. & St. L. R. Co. v. Lillie (Tenn.) 1055.

§ 12. — Palace cars and sleeping cars.

Where a passenger carried a valise into a sleeping car, and on retiring placed it under his berth, the railroad company was an insurer thereof.—Nashville, C. & St. L. R. Co. v. Lillie (Tenn.) 1055.

CARRYING WEAPONS.

See "Weapons."

CASE CERTIFIED OR RESERVED.

For determination of questions of law, see "Appeal and Error," § 8.

CATTLE

See "Animals."

CATTLE GUARDS.

On railroads, see "Railroads," § 4.

CAUSE OF ACTION.

See "Action"; "Attachment," § 1.

CERTIFICATE.

Certified copies, see "Evidence," § 9.

Of case or question of law for determination, see "Appeal and Error," § 8.

Of dissent, see "Appeal and Error," § 2.

To bill of exceptions, see "Criminal Law," § 20.

CERTIORARI.

Review of proceedings before justices of the peace, see "Justices of the Peace," § 3.

CHALLENGE.

To juror, see "Jury," § 4.

CHAMPERTY AND MAINTENANCE.

A conveyance of land by a purchaser thereof at a foreclosure sale, who has not been put into possession and while the land is in possession of the mortgagor's heir, is champertous and void.—Stovall v. Haynes (Ky.) 896.

CHANCERY.

See "Equity."

CHANGE OF VENUE.

Of criminal prosecutions, see "Criminal Law," § 4.

CHARACTER.

Of accused in criminal prosecutions, see "Criminal Law," § 8.

Of witness, see "Witnesses," § 3.

78 S.W.—73

To jury in criminal prosecutions, see "Criminal Law," § 15.

CHARITIES.

§ 1. Creation, existence, and validity.

Will held to point out with reasonable certainty the purpose of its charity and the beneficiaries thereof, as Ky. St. 1903, § 317, requires.—Leak's Heirs v. Leak's Ex'r (Ky.) 471.

§ 2. Construction, administration, and enforcement.

In a suit against a voluntary religious association, held, that it did not appear that there was any property which could in equity be subjected to plaintiff's claim.—Methodist Episcopal Church South v. Clifton (Tex. Civ. App.) 732.

CHARTER.

Of municipal corporation, see "Municipal Corporations," § 1.

CHATTEL MORTGAGES.

Admissibility in evidence, see "Evidence," § 9.

Cancellation of, in action by trustee in bankruptcy, see "Bankruptcy," § 2.

Joinder of action for foreclosure with action for conversion of mortgaged goods, see "Action," § 2.

§ 1. Requisites and validity.

A mortgage of part only of a lot of cattle of the same description on a farm held good against a purchaser from the mortgagor.—Sparks v. Deposit Bank of Paris (Ky.) 171.

§ 2. Construction and operation.

Evidence held sufficient to put party on inquiry as to the existence of a mortgage on chattels at the time he caused an attachment to be levied thereon.—Cassidy v. Willis & Connally (Tex. Civ. App.) 40.

§ 3. Rights and remedies of creditors.

Mortgage on goods, under which mortgagor sells them without accounting for proceeds, held void as to creditors.—Gee v. Van Natta-Lynds Drug Co. (Mo. App.) 288.

§ 4. Foreclosure.

Chattel mortgagee, selling goods at private sale, held liable for loss, if goods are sold for less than best price obtainable.—First Nat. Bank v. Wright (Mo. App.) 686.

CHEAT.

See "Fraud."

CHECKS.

See "Banks and Banking," § 2.

CHILD.

See "Adoption"; "Bastards"; "Guardian and Ward"; "Infants"; "Parent and Child."

Allowance to children of decedent, see "Executors and Administrators," § 3.

Care required of railroads as to children on or near tracks, see "Railroads," § 7.

Contributory negligence of children injured or killed by operation of railroad, see "Railroads," § 6.

Imputed negligence of parent, see "Negligence," § 3.

CIRCUIT COURTS.

Criminal jurisdiction, see "Criminal Law," § 3.

CITATION.

See "Process."

CITIES.

See "Municipal Corporations."

CITIZENS.

See "Removal of Causes," § 1.

CIVIL RIGHTS.

Under the separate coach law (Ky. St. 1899, §§ 795-801), a railroad company is not required to carry a separate coach, or have separate compartments for white and colored passengers, with a freight train, carrying a combination car used as caboose.—*Louisville & N. R. Co. v. Commonwealth* (Ky.) 167.

Indictment against a railroad for discrimination between the white and colored races in furnishing separate coaches therefor held insufficient, under the separate coach law (Ky. St. 1899, § 796).—*Louisville & N. R. Co. v. Commonwealth* (Ky.) 167.

An indictment against a negro by a grand jury composed of white men held not invalid on the ground of alleged discrimination against the negro race.—*Smith v. State* (Tex. Cr. App.) 694.

CLAIM AND DELIVERY.

See "Replevin."

CLAIMS.

Against estate of decedent, see "Executors and Administrators," § 4.

To property levied on, see "Attachment," § 2.

CLASS LEGISLATION.

See "Constitutional Law," § 4.

CLERKS OF COURTS.

Acts 1893, p. 1157, c. 226, § 44, relating to public officers, held not applicable to the clerk of the Court of Appeals.—*Chinn v. Shackelford* (Ky.) 908.

Collection of outstanding fees due the office of clerk of the Court of Appeals, and application thereof to the conduct of the office, held to become the duty of a new incumbent.—*Chinn v. Shackelford* (Ky.) 908.

COIN.

Counterfeiting, see "Counterfeiting."

COLLATERAL AGREEMENT.

Parol evidence, see "Evidence," § 10.

COLLATERAL ATTACK.

On judgment, see "Judgment," § 6.

On judgment of justice, see "Justices of the Peace," § 2.

On tax sale, see "Taxation," § 9.

Of taxes, see "Taxation," § 8.

COLOR OF TITLE.

To sustain adverse possession, see "Adverse Possession."

COMMERCE.

Carriage of goods and passengers, see "Carriers."

COMMISSIONERS.

Power of governor to appoint, see "States," § 1.

COMMISSION MERCHANTS.

See "Factors."

COMMISSIONS.

Of broker, see "Brokers," § 1.

COMMON CARRIERS.

See "Carriers."

COMMON SCHOOLS.

See "Schools and School Districts," § 1.

COMMUNITY PROPERTY.

See "Husband and Wife," § 6.

COMPENSATION.

For property taken for public use, see "Eminent Domain," § 1.

Of agent, see "Principal and Agent," § 2.

Of attorney, see "Attorney and Client," § 2.

Of broker, see "Brokers," § 1.

Of officers in general, see "Officers," § 2.

COMPETENCY.

Of evidence in civil actions, see "Evidence," § 4.

Of experts as witnesses, see "Evidence," § 11.

Of juror, see "Jury," § 4.

Of witnesses in general, see "Witnesses," § 1.

COMPLAINT.

In civil actions, see "Pleading."

In criminal prosecution, see "Indictment and Information."

COMPOSITIONS WITH CREDITORS.

See "Compromise and Settlement."

Agreement by an insolvent debtor to obtain a release of certain preferences, and subsequent pro rata distribution of the property, held a sufficient consideration for a release of the debtor from liability.—*McNealey v. Baldrige* (Mo. App.) 1031.

Failure of creditor of an insolvent to read an instrument releasing the latter from all liability held not to render the release ineffectual.—*McNealey v. Baldrige* (Mo. App.) 1031.

Statements made to a creditor of an insolvent debtor on execution of a release held a mere expression of opinion, not entitling the creditor to avoid the release.—*McNealey v. Baldrige* (Mo. App.) 1031.

COMPOUNDING FELONY.

Consideration of contract, see "Contracts," § 1.

COMPOUND INTEREST.

See "Interest," § 2.

On price of goods sold, see "Sales," § 2.

COMPROMISE AND SETTLEMENT.

See "Compositions with Creditors"; "Release."

Admissibility of offer of, as admission, see "Evidence," § 6.

As consideration of contract, see "Contracts," § 1.

Effect of compromise by client on right of attorney to fees, see "Attorney and Client," § 2.

Plaintiff's payment of a draft for advancements, in the absence of a statement which defendant agreed to attach to the drafts, held not to constitute a settlement, precluding plaintiff from recovering overcharges.—*D. Sullivan & Co. v. Owens* (Tex. Civ. App.) 373.

COMPUTATION.

Of interest, see "Interest," § 2.

Of period of limitation, see "Limitation of Actions," § 2.

Of time, see "Time."

CONCEALED WEAPONS.

See "Weapons."

CONCEALMENT.

Effect on limitation, see "Limitation of Actions," § 2.

CONCLUSION.

Of witness, see "Evidence," § 11.

CONDEMNATION.

Taking property for public use, see "Eminent Domain."

CONDITIONS.

In insurance policies, see "Insurance," §§ 7, 8.

In mortgages, see "Mortgages," § 5.

In subscriptions in aid of railroads, see "Railroads," § 2.

CONFESSION.

Admissibility in evidence, see "Criminal Law," § 9.

Instructions, see "Criminal Law," § 15.

CONFIDENTIAL RELATIONS.

Disclosure of communications, see "Witnesses," § 1.

Of parties to contract or conveyance, see "Fraudulent Conveyances," § 1.

CONFLICT OF LAWS.

As to employer's liability for injuries to employee, see "Master and Servant," § 2.

As to insurance, see "Insurance," §§ 4, 8.

As to liability of telegraph companies for delay in delivery of messages, see "Telegraphs and Telephones," § 2.

CONSIDERATION.

For composition agreement, see "Compositions with Creditors."

Of bill of exchange or promissory note, see "Bills and Notes," §§ 1, 2.

Of contract, see "Contracts," § 1.

Of fraudulent conveyance, see "Fraudulent Conveyances," § 1.

Parol evidence, see "Evidence," § 10.

CONSIGNMENT.

See "Factors."

CONSOLIDATION.

Of corporations, see "Corporations," § 5.

CONSPIRACY.

Evidence of acts and declarations of conspirators, see "Criminal Law," § 6.

CONSTITUTIONAL LAW.

Protection of civil rights, see "Civil Rights."

Provisions relating to particular subjects.

See "Bankruptcy," § 1; "Bills and Notes," § 2; "Elections," "Intoxicating Liquors," § 2; "Jury," § 1; "Licenses," § 1; "Taxation," § 2.

Appointment of state commissioners and officers, see "States," § 1.

Indictment for bribery, see "Bribery."

Officers' salaries, see "Officers," § 2.

Punishment for second conviction, see "Criminal Law," § 23.

Right of accused to confront witnesses, see "Homicide," § 4.

Special or local laws, see "Statutes," § 1.

Strike injunction as trenching on criminal jurisdiction, see "Injunction," § 2.

Subjects and titles of statutes, see "Statutes," § 2.

§ 1. **Construction, operation, and enforcement of constitutional provisions.**

Expert testimony held not admissible to prove a police regulation to preserve health and safety of employes was not necessary.—*State v. Cantwell* (Mo. Sup.) 569.

The provision of Acts 1899, p. 382, amending Const. art. 2, § 28, relating to unanimity required of jurors, held self-executing in so far as it applied to grand juries and juries in courts of record in civil cases, but not self-executing as applicable to juries in courts not of record.—*Sharp v. National Biscuit Co.* (Mo. Sup.) 787.

Acquiescence in the exercise of powers under unconstitutional legislation, though continued for any length of time, cannot legalize such exercise of power, when clearly usurped.—*Ex parte Heyman* (Tex. Cr. App.) 349.

§ 2. **Distribution of governmental powers and functions.**

The court, by granting an injunction restraining ticket brokers from buying and selling non-transferable railroad tickets, does not infringe on the powers of the Legislature.—*Schubach v. McDonald* (Mo. Sup.) 1020; *Hirt v. Kinealy*, Id.; *Leonard v. Fisher*, Id.; *Schubach v. Hough*, Id.; *Steiner v. Wood*, Id.; *Wasserman & Co. v. Hough*, Id.

Acts 27th Leg. p. 262, attempting to fix the place of sale of intoxicating liquors within lo-

Ky. St. 1903, § 679, relating to by-laws of insurance companies as evidence, *held* to establish a rule of evidence only, and not invalid as interfering with contract rights.—*Hunziker v. Supreme Lodge K. P. (Ky.)* 201.

§ 4. Privileges or immunities, and class legislation.

Act March 23, 1901 (Laws 1901, p. 211), regulating hours of employment in mines, *held* not special or class legislation.—*State v. Cantwell (Mo. Sup.)* 569.

§ 5. Due process of law.

Constitutional provision as to due process of law does not prevent Legislature from enacting statute like Act Feb. 13, 1899 (Acts 1899, p. 11), providing for summary destruction of liquor without jury trial.—*Kirkland v. State (Ark.)* 770.

The fact that Acts 1901, p. 27, establishing a drainage district for the purpose of maintaining a particular levee, does not provide for the interested party to have a day in court, does not violate Const. U. S. Amend. 14, § 1, providing that no person shall be deprived of property without due process of law.—*St. Louis Southwestern Ry. Co. v. Grayson (Ark.)* 777.

CONTEMPT.

Refusing to be sworn as witness, see "Witnesses," § 2.

CONTEST.

Of election, see "Elections," § 2.

Of will, see "Wills," § 3.

CONTINUANCE.

Affidavit for as deposition, see "Depositions."

Harmless error in rulings on motions for, see "Criminal Law," § 22.

In criminal prosecution, see "Criminal Law," § 11.

Refusal of, as ground for new trial in criminal prosecution, see "Criminal Law," § 16.

Review of denial of, as dependent on presentation of grounds of review in record, see "Criminal Law," § 20.

CONTRACTS.

Agreements within statute of frauds, see "Frauds, Statute of."

Alteration, see "Alteration of Instruments."

Assignment, see "Assignments."

Impairing obligation, see "Constitutional Law," § 3.

Operation and effect of champerty, see "Champerty and Maintenance."

Operation and effect of gaming laws, see "Gaming," § 1.

Operation and effect of usury laws, see "Usury," § 1.

Parol or extrinsic evidence, see "Evidence," § 10.

Specific performance, see "Specific Performance."

Subrogation to rights or remedies of creditors, see "Subrogation."

Contracts of particular classes of parties.

See "Attorney and Client," § 2; "Carriers," §§ 2, 5, 7; "Corporations," § 4; "Husband and Wife," § 3; "Master and Servant"; "Municipal Corporations," §§ 4, 5, 9; "Principal and Agent," § 3; "Schools and School Districts," § 1.

Married women, see "Husband and Wife," § 4.

Passenger, see "Carriers," § 1.
Making bequest or devise, see "Wills," § 1.
Transportation of goods, see "Carriers," § 2.
Transportation of passengers, see "Carriers," § 5.

Particular classes of express contracts.

See "Bailment"; "Bills and Notes"; "Insurance"; "Liens"; "Partnership"; "Rewards"; "Subscriptions."

Agency, see "Principal and Agent."

Bills of lading, see "Carriers," § 2.

Employment, see "Master and Servant."

Leases, see "Landlord and Tenant."

Marriage settlements, see "Husband and Wife," § 2.

Mutual benefit insurance, see "Insurance," § 14.

Sales of personality, see "Sales."

Sales of realty, see "Vendor and Purchaser."

Suretyship, see "Principal and Surety."

Particular classes of implied contracts.

See "Contribution"; "Work and Labor."

Particular modes of discharging contracts.

See "Compromise and Settlement"; "Release."

§ 1. Requisites and validity.

A promise, after the making of a contract of sale, to pay more than provided therein, *held* without consideration.—*Howard v. McNeil (Ky.)* 142.

An agreement by which a note is transferred to the payor, to be canceled, in consideration of the compounding of a felony, is void.—*Bishop v. Matney (Ky.)* 856.

An agreement between a debtor and some of his creditors *held* supported by a sufficient consideration.—*Cumberland Valley Bank's Assignee v. Citizens' Nat. Bank (Ky.)* 889.

Mortgagor's promise to pay amount found due on settlement *held* no consideration for mortgagee's agreement to release mortgage lien.—*Watts v. Parks (Ky.)* 1125.

Contract between printers and newspaper publishers to bid only the maximum rate allowed by law on public work *held* unlawful.—*Pendleton v. Asbury (Mo. App.)* 651.

Breach of contract between printers and newspaper publishers to bid only the maximum rate allowed by law on public work *held* to give party thereto no standing in court.—*Pendleton v. Asbury (Mo. App.)* 651.

Compromise of suit to recover defendant's homestead under void claim *held* sufficient consideration for promissory notes.—*Peaslee v. Walker (Tex. Civ. App.)* 980.

§ 2. Construction and operation.

In action by owner on building contract, *held*, that the parties were bound by the specifications under which the work was done.—*Snoqualmi Realty Co. v. Moynihan (Mo. Sup.)* 1014.

In action on building contract, the phrase "San Domingo mahogany" in the contract *held* to have meant any good figured mahogany of the density of that grown in San Domingo.—*Snoqualmi Realty Co. v. Moynihan (Mo. Sup.)* 1014.

In action on a building contractor's bond, evidence was admissible to show that the phrase "San Domingo mahogany" was a trade term, meaning a good figured mahogany equal in density to the San Domingo variety.—*Snoqualmi Realty Co. v. Moynihan (Mo. Sup.)* 1014.

Where defendant assumed all the policies of another insurance company by which plaintiff was insured, plaintiff *held* entitled to sue defendant in his own name to recover a loss for which defendant was liable under such contract

Of assumption.—Ruohs v. Traders' Fire Ins. Co. (Tenn.) 83.

A contract for pasturing and feeding plaintiff's cattle construed.—Rudolph v. Sneed (Tex. Civ. App.) 1001.

A stipulation in a contract for pasturing and feeding cattle *held* to authorize a recovery by the owner for feed furnished by him, on a failure to supply the same.—Rudolph v. Sneed (Tex. Civ. App.) 1001.

§ 3. Performance or breach.

The levy of an attachment by a creditor on property of his debtor *held* not to release other creditors from their prior agreement with the debtor.—Cumberland Valley Bank's Assignee v. Citizens' Nat. Bank (Ky.) 889.

Under a contract whereby plaintiff was to be reimbursed for paying defendant's debt by timber from defendant's land, defendant *held* not entitled to credit for timber not removed.—Bennett v. Ryan (Ky.) 892.

In action by owner against building contractor on his bond, claim of defendant for materials, improperly rejected by plaintiff in doing over work that had been done under the contract, *held* properly disallowed.—Snoqualmi Realty Co. v. Moynihan (Mo. Sup.) 1014.

CONTRADICTION.

Of record, see "Appeal and Error," §§ 11, 12.
Of witness, see "Witnesses," § 3.

CONTRIBUTION.

Among co-tenants, see "Tenancy in Common," § 1.
Promises to contribute, see "Subscriptions."

Evidence *held* insufficient to show defendants joint tort-feasors with plaintiff in attachment proceedings, so as to entitle him to contribution from them to recover amount of judgment for damages rendered against him.—Paddock-Hawley Iron Co. v. Rice (Mo. Sup.) 634.

Stipulations filed by attaching creditors in their individual suits *held* not a ratification of trespass committed by the other attaching creditors.—Paddock-Hawley Iron Co. v. Rice (Mo. Sup.) 634.

Rev. St. 1899, § 2870, relating to contribution between tort-feasors, *held* not to authorize contribution, where there was no concert of action among them.—Paddock-Hawley Iron Co. v. Rice (Mo. Sup.) 634.

CONTRIBUTORY NEGLIGENCE.

See "Negligence," §§ 3, 4.
Of passenger, see "Carriers," § 9.
Of person injured by operation of railroad, see "Railroads," §§ 5-7.
Of person injured by operation of street railroad, see "Street Railroads," §§ 1, 2.
Of servant, see "Master and Servant," §§ 7, 8.
Of traveler on street, see "Municipal Corporations," § 8.

CONVEYANCES.

In fraud of creditors, see "Fraudulent Conveyances."
In trust, see "Trusts," § 1.
Operation and effect of champerty, see "Champerty and Maintenance."

Conveyances of particular species of property.

See "Easements," § 1; "Homestead," § 2.

Particular classes of conveyances.

See "Assignments"; "Assignments for Benefit of Creditors"; "Chattel Mortgages"; "Deeds"; "Mortgages."

CORAM NOBIS.

Writ of error coram nobis, see "Judgment," § 3.

CORPORATIONS.

Citizenship for purpose of federal jurisdiction, see "Removal of Causes," § 1.

Liability for deceit in sale of corporate shares, see "Fraud," § 2.

Mandamus, see "Mandamus," § 1.

Necessity of service of amended petition alleging cause of action against partnership where original petition set up cause of action against corporation, see "Process," § 1.

Taxation of corporations and corporate property, see "Taxation," §§ 2, 3.

Particular classes of corporations.

See "Municipal Corporations"; "Railroads."

Banks, see "Banks and Banking," § 1.

Insurance companies, see "Insurance."

Telegraph and telephone companies, see "Telegraphs and Telephones."

Turnpike companies, see "Turnpikes and Toll Roads," § 1.

Water companies, see "Waters and Water Courses," § 2.

§ 1. Corporate name, seal, domicile, by-laws, and records.

A change of a corporation's name does not exonerate it from liabilities previously created, if it is substantially the same concern.—Wilhite v. Convent of Good Shepherd (Ky.) 138.

§ 2. Capital, stock, and dividends.

Validity of cancellation of subscription for stock of a corporation whose chief office is in the state *held* governed by laws of the state.—Scottish Security Co.'s Receiver v. Starks (Ky.) 455.

Release from liability on written subscription for stock *held* valid, though in parol.—Scottish Security Co.'s Receiver v. Starks (Ky.) 455.

§ 3. Members and stockholders.

Stockholders *held* not authorized to employ attorney to represent corporation.—Breathitt Coal, Iron & Lumber Co. v. Gregory (Ky.) 148.

Release of subscription for stock by unanimous consent of the other subscribers *held* valid.—Scottish Security Co.'s Receiver v. Starks (Ky.) 455.

Members of an insolvent corporation *held* liable as partners.—Hyatt v. Van Riper (Mo. App.) 1043.

An allegation in a petition against the members of an insolvent corporation, seeking to recover against them as partners, *held* to state a cause of action supporting the judgment.—Hyatt v. Van Riper (Mo. App.) 1043.

§ 4. Corporate powers and liabilities.

Coupon bonds of a corporation in the hands of an assignee *held* subject to prior equities.—Georgetown Water Co. v. Fidelity Trust & Safety Vault Co. (Ky.) 113; Montgomery v. Same, Id.

On foreclosure of mortgage securing corporation bonds, one holding bonds as security *held* entitled to payment of entire claim, though proceeds of his bonds are insufficient.—Georgetown Water Co. v. Fidelity Trust & Safety Vault Co. (Ky.) 113; Montgomery v. Same, Id.

Persons holding corporation bonds *held* entitled to share in their proceeds in proportion to the number of bonds, and not to the claims secured.—Georgetown Water Co. v. Fidelity Trust & Safety Vault Co. (Ky.) 113; Montgomery v. Same, Id.

Assignment of corporation bond as security by one having no title to it *held* an assignment

Purchaser of mortgaged property *held* entitled on foreclosure to compensation for betterments which may be removed without injuring freehold.—Georgetown Water Co. v. Fidelity Trust & Safety Vault Co. (Ky.) 113; Montgomery v. Same, *Id.*

Where, in an action against an alleged corporation, its incorporation is denied in the answer, and there is no proof of its corporate capacity, a judgment for plaintiff is a nullity.—Pike, Morgan & Co. v. Wathen (Ky.) 137.

Action against corporation by former name *held* not defeated by change of name, without change of membership.—Wilhite v. Convent of Good Shepherd (Ky.) 138.

Sheriff's return of service of process on a corporation should not be quashed, because it is not correctly named, on affidavit which does not show the true name.—Wilhite v. Convent of Good Shepherd (Ky.) 138.

On petition against a corporation and answer alleging that it had not been organized till after the acts alleged, plaintiff *held* entitled to judgment on the face of pleadings.—Wilhite v. Convent of Good Shepherd (Ky.) 138.

Corporation *held* to have no greater privilege or right than a natural person to maintain a nuisance, in the absence of anything in its charter expressly granting it such right.—Powell v. Brookfield Pressed Brick & Tile Mfg. Co. (Mo. App.) 646.

Acts of a corporation subsequent to the execution of a deed of trust in its behalf by its president *held* to constitute a ratification of his act.—Clark v. Elmendorf (Tex. Civ. App.) 538.

§ 5. Consolidation.

A corporation succeeding another *held* liable on a bond executed by its predecessor.—Manny v. National Surety Co. (Mo. App.) 69.

CORRECTION.

Of judgment, see "Judgment," § 3.

Of record on appeal or writ of error, see "Appeal and Error," §§ 11, 12.

CORROBORATION.

Of accomplices, see "Criminal Law," § 6.

Of witness in general, see "Witnesses," § 8.

COSTS.

Action on lost bond for costs, see "Lost Instruments."

Objections to taxation of costs for purpose of review, see "Appeal and Error," § 5.

§ 1. Nature, grounds, and extent of right in general.

In an action for conversion, defendant was not entitled to recover costs, though plaintiff's recovery was only for \$47 damages.—Black v. Golden (Mo. App.) 301.

A successful plaintiff should not be charged with the costs up to the filing of an amended petition which does not change the cause of action.—Keas v. Gordy (Tex. Civ. App.) 385.

§ 2. Security for payment.

Parties executing bond for costs *held* estopped to deny it was given in an action, though the name of city, a nominal party, was omitted from title given.—McGee v. Smith (Mo. App.) 305.

Bond for costs *held* admissible in evidence in action on it, notwithstanding the omission of the name of a city, a nominal party, from the

it, the court might, on motion of the defendant, enter judgment against the sureties on the bond for costs.—Jordan v. Vaughn (Mo. App.) 316.

CO-TENANCY.

See "Tenancy in Common."

COUNCIL

See "Municipal Corporations," § 2.

COUNTERCLAIM.

See "Set-Off and Counterclaim."

COUNTERFEITING.

See "Forgery."

Under Pen. Code 1901, arts. 557, 559, 561. *held*, that one may be convicted of passing a counterfeit coin who passes as a dime a cent covered with a wash, to give it the color of a dime.—Glass v. State (Tex. Cr. App.) 1068.

COUNTIES.

Acquisition of turnpike by, see "Turnpikes and Toll Roads," § 1.

Enforcement of claim against railroad company, see "Railroads," § 1.

Liability for expenses incurred by board of health, see "Health," § 1.

§ 1. Creation, alteration, existence, and political functions.

On the issue as to the date of the organization of a county, evidence that the commissioners' court provided in a certain year that the transcript of the surveyor's records of a land district be placed in the custody of the county surveyor was immaterial.—McCaleb v. Rector (Tex. Civ. App.) 956.

§ 2. Fiscal management, public debt, securities, and taxation.

Vote on proposition to purchase turnpike *held*, under Const. § 157, to authorize county to incur future indebtedness, but not to authorize bond issue, under Ky. St. 1903, § 4748b, subsec. 9.—Bardstown & L. Turnpike Co. v. Nelson County (Ky.) 851.

COUNTY COURTS.

See "Courts," § 3.

COURTS.

Binding effect on state court of provisions of bankruptcy act relating to dissolution of liens, see "Bankruptcy," § 1.

Clerks, see "Clerks of Courts."

Judges, see "Judges."

Judicial power, see "Constitutional Law," § 2.

Justices' courts, see "Justices of the Peace."

Powers, as to granting new trial, see "New Trial," § 1.

Powers as to supplying missing records, see "Records."

Province of court and jury, see "Trial," § 7.

Removal of action from state court to United States court, see "Removal of Causes."

Review of decisions, see "Appeal and Error."

Right to trial by jury, see "Jury," § 1.

Jurisdiction of particular actions, proceedings, or subjects.

See "Criminal Law," § 3.

Appeal in tax assessment proceedings, see "Taxation," § 5.

tion does not affect jurisdiction of court.—*Schubach v. McDonald* (Mo. Sup.) 1020; *Hirt v. Kinealy, Id.*; *Leonard v. Fisher, Id.*; *Schubach v. Hough, Id.*; *Steiner v. Wood, Id.*; *Wasserman & Co. v. Hough, Id.*

Jurisdiction over subject-matter cannot be obtained by consent.—*Mercer v. Wood* (Tex. Civ. App.) 15.

§ 2. Establishment, organization, and procedure in general.

Refusal to adopt another state's construction of a life policy made in this state held not a failure to give its laws full faith and credit.—*Washington Life Ins. Co. v. Glover* (Ky.) 146.

An adjournment of a special term, called under Rev. St. 1899, §§ 1605, 1606, held not to adjourn an adjourned term of the regular term.—*State v. Riddle* (Mo. Sup.) 606.

§ 3. Courts of limited or inferior jurisdiction.

Under Ky. St. 1903, § 1840, fiscal court held not to have jurisdiction to determine question of turnpike company's abandonment of road.—*Bardstown & L. Turnpike Co. v. Nelson County* (Ky.) 851.

Where, in an action in the county court, defendant by cross-action set up a claim against plaintiff for an amount exceeding the jurisdiction of the court, such cross-action should have been dismissed.—*D. Sullivan & Co. v. Owens* (Tex. Civ. App.) 373.

Whether the amount in controversy is within the jurisdiction of the county court is to be determined by the amount put in controversy by the plaintiff.—*Standefor v. Aultman & Taylor Machinery Co.* (Tex. Civ. App.) 552.

The county court has jurisdiction to cancel an indebtedness, evidenced by a note secured by a vendor's lien the amount of which is within its jurisdiction.—*Hollis v. Finks* (Tex. Civ. App.) 555.

Action to recover purchase money paid for land and to cancel indebtedness held not to directly involve title to land, and within jurisdiction of county court.—*Hollis v. Finks* (Tex. Civ. App.) 555.

§ 4. Courts of appellate jurisdiction.

An order denying a motion to quash an execution on a judgment for taxes against a minor held not appealable directly to the Supreme Court.—*State ex rel. Flentge v. Gawronski* (Mo. Sup.) 807.

Only \$4,500 having been sued for and recovered in an action under Rev. St. 1899, § 2864, that is the amount in dispute, as regards appellate jurisdiction.—*Marsh v. Kansas City Southern Ry. Co.* (Mo. App.) 284.

Where a decree appealed from to the Court of Appeals finds that plaintiff is entitled to stock of the par value of \$20,000, and adjudges the delivery thereof, the cause will be certified to the Supreme Court.—*Dennison v. Keasbey* (Mo. App.) 1041.

The Court of Civil Appeals is not required to file the testimony on any given point, but only its conclusions as to what facts have been established.—*Galveston, H. & S. A. Ry. Co. v. Cloyd* (Tex. Civ. App.) 43.

COURTS OF APPEALS.

Appellate jurisdiction, see "Appeal and Error," § 2; "Courts," § 4; "Criminal Law," § 18.

COVENANTS.

In insurance policies, see "Insurance," § 8.

CREDITORS.

Of witness, see "Witnesses," § 3.

CREDITORS.

See "Assignments for Benefit of Creditors"; "Bankruptcy"; "Compositions with Creditors"; "Fraudulent Conveyances."

Of testator, see "Wills," § 5.

Remedies against surety, see "Principal and Surety," § 3.

Rights as to chattel mortgage by debtor, see "Chattel Mortgages," § 3.

Subrogation to rights of creditor, see "Subrogation."

CREDITORS' SUIT.

Remedies in cases of fraudulent conveyances, see "Fraudulent Conveyances," § 2.

CRIMINAL LAW.

See "Jury"; "Witnesses."

Bail, see "Bail," § 1.

Grand jury, see "Grand Jury."

Indictment, information, or complaint, see "Indictment and Information."

Necessity that authority of judge to preside affirmatively appear in criminal prosecutions, see "Judges," § 2.

Rewards for apprehension of criminals, see "Rewards."

Trial of accused before special or substitute judge, see "Judges," § 2.

Offenses by particular classes of parties.

See "Infants," § 1; "Railroads," § 4.

Particular offenses.

See "Abduction"; "Assault and Battery," § 1; "Breach of the Peace"; "Bribery"; "Burglary"; "Counterfeiting"; "Disturbance of Public Assemblage"; "Escape"; "Forgery"; "Homicide"; "Larceny"; "Libel and Slander," § 1; "Perjury"; "Rape"; "Robbery."

Carrying concealed weapons, see "Weapons."

Taking up and using estray, see "Animals."

Violation of license laws, see "Licenses," § 1.

Violation of liquor laws, see "Intoxicating Liquors," §§ 5, 6.

§ 1. Nature and elements of crime and defenses in general.

Pen. Code 1895, art. 46, excusing a person for a crime committed under mistake of fact, held to apply to a prosecution for violating a local option law.—*Patrick v. State* (Tex. Cr. App.) 947.

An agreement between the county attorney and another, by which the latter is to bring about violations of the gambling law and testify thereto, is no defense to him, when prosecuted for such offenses.—*Gaines v. State* (Tex. Cr. App.) 1076.

§ 2. Capacity to commit and responsibility for crime.

Where a person indicted for embezzlement retained the intellectual power to perceive right and wrong, the fact that his will power was so impaired that he could not resist the impulse to do wrong is no defense.—*State v. Berry* (Mo. Sup.) 611.

§ 3. Jurisdiction.

The circuit court has jurisdiction of the common-law offense of obstructing a highway.—*Louisville & N. R. Co. v. Commonwealth* (Ky.) 124.

Under Rev. St. 1899, § 5798, a police judge of a city *held* to have jurisdiction to render a judgment convicting defendant of petit larceny.—State v. Chappell (Mo. Sup.) 585.

§ 4. Venue.

Record in criminal prosecution *held* to sufficiently show timely filing of record, on change of venue to county other than that in which killing occurred.—Brewer v. State (Ark.) 773.

Showing on motion for change of venue *held* not to authorize interference with the trial court's action in refusing the change.—Tardy v. State (Tex. Cr. App.) 1076.

§ 5. Former jeopardy.

The essence of the offense charged in the two counts of an indictment being the same, the acquittal on one was a bar to conviction on the other.—State v. Headrick (Mo. Sup.) 630.

An indictment charging defendant with having been previously convicted of the same offense, in order to increase his punishment, under Pen. Code 1895, art. 1014, *held* not objectionable on the ground of former jeopardy.—Kinney v. State (Tex. Cr. App.) 225.

Pen. Code 1895, art. 1014, increasing punishment for subsequent convictions of misdemeanors *held* not to place defendant twice in jeopardy for the same offense.—Kinney v. State (Tex. Cr. App.) 226.

§ 6. Evidence.

A confederacy or conspiracy not being shown, goods found in the house of another, also charged with the larceny, are not admissible against defendant.—State v. Drew (Mo. Sup.) 594.

Defendant *held* not to have shown witness could not be found after diligent search, so as to entitle him to read witness' testimony on a prior proceeding.—State v. Riddle (Mo. Sup.) 606.

Courts of general jurisdiction do not take judicial notice of city ordinances.—City of Tarkio v. Loyd (Mo. Sup.) 797.

Testimony of an accomplice cannot be corroborated by her statements made out of court.—Thompson v. State (Tex. Cr. App.) 691.

On trial for theft, statement of accused's father in his presence *held* admissible in evidence.—Gilford v. State (Tex. Cr. App.) 692.

In prosecution for violation of local option law, true copies of books in internal revenue collector's office are admissible, but not statements which witness swears were recorded there.—Thurman v. State (Tex. Cr. App.) 937.

In a prosecution for violating local option law, a witness' opinion that a record of entries in the office of the internal revenue collector, covered taxpayers from June 1, 1902, to the same date in 1903, is inadmissible.—Thurman v. State (Tex. Cr. App.) 937.

Evidence as to what caused prosecutor and a third person to go to the place where defendant was alleged to have illegally sold intoxicating liquor to prosecutor *held* inadmissible.—Patrick v. State (Tex. Cr. App.) 947.

In a prosecution for horse theft, it was not competent for the state to show what an alleged detective, who had testified for the state, told the officers about the theft of the horse.—Lightfoot v. State (Tex. Cr. App.) 1075.

In prosecution for horse theft, certain evidence *held* incompetent as hearsay.—Lightfoot v. State (Tex. Cr. App.) 1075.

§ 7. — Facts in issue and relevant to issues, and res gestæ.

In a prosecution for burglary, where the evidence as to the date of the crime was not specific, it was proper to permit witnesses

to testify to the facts by which they fixed the time.—Smith v. State (Tex. Cr. App.) 516.

In prosecution for homicide, certain testimony as to conversation of defendant *held* admissible as part of res gestæ.—Elmore v. State (Tex. Cr. App.) 520.

Evidence of conduct of one accused of theft of bacon, on search of his father's premises, *held* admissible.—Gilford v. State (Tex. Cr. App.) 692.

Evidence concerning buggy harness, taken with lap robe, *held* admissible in prosecution for theft of lap robe.—Thompson v. State (Tex. Cr. App.) 941.

Evidence as to what was said and done between the parties at the time of the alleged illegal sale of intoxicating liquor *held* admissible.—Patrick v. State (Tex. Cr. App.) 947.

In a prosecution for violating a local option law, evidence that others who might be equally guilty with defendant were not indicted by the grand jury, though an investigation was made as to their conduct, was inadmissible.—Patrick v. State (Tex. Cr. App.) 947.

Evidence that accused took a pistol from another and attempted to put it in his hip pocket, when witnesses saw another pistol there, *held* admissible.—Mumford v. State (Tex. Cr. App.) 1063.

§ 8. — Other offenses, and character of accused.

In a prosecution for obstructing a highway, it is error to admit evidence of different obstructions on various streets within a year prior to the finding of the indictment.—Louisville & N. R. Co. v. Commonwealth (Ky.) 124.

In a prosecution for violation of the local option law, evidence as to previous indictments against defendant *held* inadmissible.—Marks v. State (Tex. Cr. App.) 512.

In a prosecution for assault, it was error to permit the state to show previous instances in which defendant was arrested for disturbing the peace.—Maxwell v. State (Tex. Cr. App.) 516.

The state cannot prove the bad character of defendant, except after defendant has placed his character in issue.—Maxwell v. State (Tex. Cr. App.) 516.

On a prosecution for violating the local option law, evidence of a sale at another time than that charged *held* inadmissible.—Belt v. State (Tex. Cr. App.) 933.

§ 9. — Confessions.

While the jury must consider all parts of a confession, they need not believe such portions thereof as seem to them unreasonable.—Brewer v. State (Ark.) 773.

Confessions in homicide *held* voluntary and admissible.—Brewer v. State (Ark.) 773.

Confessions *held* admissible, subject to proper charge, where evidence conflicts as to whether they are voluntary.—Sanchez v. State (Tex. Cr. App.) 504.

The statements and acts of a party while under arrest for crime cannot be used against him unless he has been properly warned.—Thompson v. State (Tex. Cr. App.) 691.

§ 10. — Weight and sufficiency.

In a prosecution for robbery, evidence *held* sufficient to identify defendant as one of the robbers.—State v. Hyatt (Mo. Sup.) 601.

In a prosecution for permitting the drinking of intoxicating liquors in defendant's drug store, evidence *held* insufficient to prove the venue.—State v. Hottle (Mo. App.) 311.

In a prosecution for burglary, evidence *held* insufficient to present the defense of alibi.—*Smith v. State* (Tex. Cr. App.) 516.

§ 11. Time of trial and continuance.

Facts *held* to show proper diligence to procure attendance of witnesses, to authorize continuance for their absence.—*O'Rear v. Commonwealth* (Ky.) 407.

Facts showing diligence must be affirmatively shown to entitle one to a continuance, or to read the affidavit as their deposition.—*Dean v. Commonwealth* (Ky.) 1112.

In homicide, discretion of court in refusing continuance for absent witness *held* not abused prejudicially to defendant.—*Dean v. Commonwealth* (Ky.) 1112.

Defendant *held* not to have shown diligence entitling him to continuance for absence of witnesses.—*State v. Riddle* (Mo. Sup.) 606.

Under Rev. St. 1899, § 2642, *held*, that the term at which one on bail was indicted is not of the three at which he must be brought to trial.—*State v. Riddle* (Mo. Sup.) 606.

Continuance of liquor prosecution *held* properly refused.—*Shoun v. State* (Tenn.) 91.

A continuance of a criminal prosecution at the first term is equally within the discretion of the trial judge as when application therefor is made at a subsequent term.—*Shoun v. State* (Tenn.) 91.

Introduction of counter affidavits on motion for continuance of liquor prosecution *held* proper.—*Shoun v. State* (Tenn.) 91.

Continuance on account of absence of witness *held* properly refused.—*Randle v. State* (Tex. Cr. App.) 512.

The story which witness would testify to being shown to be improbable, refusal of continuance for his absence *held* not error.—*Dodson v. State* (Tex. Cr. App.) 514.

On motion for a continuance because of absent witness, *held*, that under the circumstances the motion should have been granted, though diligence was not entirely sufficient.—*Thompson v. State* (Tex. Cr. App.) 691.

On a motion for continuance because of absent witness, evidence *held* material.—*Thompson v. State* (Tex. Cr. App.) 691.

First application for continuance for absent witnesses should be granted, though their service would be cumulative.—*Gilford v. State* (Tex. Cr. App.) 692.

Refusal of a continuance for absence of witnesses *held* not error.—*Franklin v. State* (Tex. Cr. App.) 984.

§ 12. Trial.

A defendant, surprised by the testimony of a state's witness, but failing to move for a postponement, cannot complain on appeal.—*Fleming v. State* (Ark.) 766.

Refusal to delay trial for murder till court had signed a bill of exception *held* not error.—*Sanchez v. State* (Tex. Cr. App.) 504.

Verdict in homicide set aside as having been arrived at by lot.—*Sanders v. State* (Tex. Cr. App.) 518.

It is within the discretion of the court to permit the introduction of testimony at any time before the argument is closed.—*Ham v. State* (Tex. Cr. App.) 929.

Although hearsay testimony was not objected to at the time it was introduced, it should have been excluded, when subsequently called to the attention of the court.—*Lightfoot v. State* (Tex. Cr. App.) 1075.

On trial for carrying a pistol, court's remark in presence of jury *held* erroneous as comment

on evidence.—*Mumford v. State* (Tex. Cr. App.) 1003.

In a prosecution for murder, a motion for a severance, in order that a person indicted as accomplice should be tried first, should have been granted.—*Follis v. State* (Tex. Cr. App.) 1069.

§ 13. — Arguments and conduct of counsel.

Remarks of counsel assailing veracity of witness *held* prejudicial error.—*Willyard v. State* (Ark.) 765.

Remarks of prosecuting attorney as to conviction of defendant before justice *held* prejudicial error.—*Willyard v. State* (Ark.) 765.

Argument of prosecuting attorney *held* not ground for reversal.—*Ball v. State* (Tex. Cr. App.) 508.

Accused *held* entitled to new trial for improper remarks of district attorney to jury.—*Miller v. State* (Tex. Cr. App.) 511.

Remark of prosecuting attorney in argument *held* not prejudicial.—*Dodson v. State* (Tex. Cr. App.) 514.

In a prosecution of a negro prostitute for theft from the person, argument of the county attorney that she was a low-down black whore and common prostitute, unworthy of belief, was legitimate.—*Love v. State* (Tex. Cr. App.) 691.

On a criminal prosecution, remarks of the county attorney *held* prejudicial error.—*Howe v. State* (Tex. Cr. App.) 1064.

§ 14. — Province of court and jury in general.

Whether the jury should believe evidence in defense corroborating the prosecution, or other evidence in defense, was a matter for it.—*Pearcock Distillery Co. v. Commonwealth* (Ky.) 893.

In a prosecution for burglary, an instruction on prior conviction *held* not objectionable as assuming that such prior conviction was proven.—*State v. Chappell* (Mo. Sup.) 585.

The identification of defendant as the perpetrator of a robbery is a question of fact for the jury.—*State v. Hyatt* (Mo. Sup.) 601.

In a prosecution for assault with intent to rape, it was error for the court, in referring in its charge to testimony of defendant's witnesses, to assume such witnesses contradicted each other, and also assume a contradiction between two witnesses, where none existed.—*Dina v. State* (Tex. Cr. App.) 229.

It is error to frequently repeat a principle of law involved, so as to create an impression on the jurors' minds as to the court's opinion on the facts.—*Perrin v. State* (Tex. Cr. App.) 930.

Where there was a question whether or not witness was a detective or an accomplice with defendant in the theft, the question should have been submitted to the jury.—*Lightfoot v. State* (Tex. Cr. App.) 1075.

§ 15. — Necessity, requisites, and sufficiency of instructions.

Statements by accused *held* not confession, requiring instruction as to confessions out of court, under Cr. Code, § 240.—*Tipton v. Commonwealth* (Ky.) 174.

Defendant, in prosecution for horse stealing, *held* entitled to charge under Crim. Code, § 264, making misdemeanors degrees of felony.—*Cox v. Commonwealth* (Ky.) 423.

Where a conversation between defendant and witness as to stolen property was testified to, it was proper to charge as to the rules governing the consideration of defendant's statements.—*State v. Chappell* (Mo. Sup.) 585.

Instruction in prosecution for embezzlement, bearing on defense of insanity, *held* properly refused.—*State v. Berry* (Mo. Sup.) 611.

Charging the jury as to insanity of defendant, not raised by the evidence, *held* error.—*Griffith v. State* (Tex. Cr. App.) 347.

Charge on reasonable doubt as to whole case *held* sufficient, without charge as between degrees of murder and manslaughter.—*Smith v. State* (Tex. Cr. App.) 517.

Erroneous charge in prosecution for homicide *held* not cured by subsequent charge as to intent of defendant in the use of the weapon with which the killing was done.—*Posey v. State* (Tex. Cr. App.) 689.

Instruction in prosecution for manslaughter *held* not erroneous, as not applied to facts of case.—*Perrin v. State* (Tex. Cr. App.) 930.

In a prosecution for manslaughter, an instruction that, if the jury have a reasonable doubt as to whether the killing was in justifiable self-defense, they will acquit defendant, is proper.—*Perrin v. State* (Tex. Cr. App.) 930.

In prosecution for violating local option law, state's and defendant's theories of the case should both have been presented.—*James v. State* (Tex. Cr. App.) 951.

In a prosecution for murder, charge *held* not reversibly erroneous for failure to state that certain testimony should be considered for no other purpose than as affecting defendant's credibility.—*Tardy v. State* (Tex. Cr. App.) 1076.

In a prosecution for murder, an instruction relative to the testimony of defendant *held* properly refused, because singling out the testimony of one witness.—*Tardy v. State* (Tex. Cr. App.) 1076.

§ 16. Motions for new trial and in arrest.

Refusal to grant continuance *held* proper, for conflict in testimony for which it was asked with that of defendant.—*Meadows v. State* (Ark.) 761.

Discovery after trial of alleged previous expression of opinion of juror *held* not ground for setting aside verdict, in view of his explanation thereof.—*Vowell v. State* (Ark.) 762.

Disregard of statutes as to summoning jurors *held* not ground for new trial, in the absence of a showing of prejudice.—*State v. Riddle* (Mo. Sup.) 606.

§ 17. Appeal and error, and certiorari.

Under Const. art. 6, § 14, and Laws 1899, p. 309, c. 161, a fine of \$100 assessed by court for illegally selling liquor *held* properly reducible to \$50.—*Shoun v. State* (Tenn.) 91.

One arrested, pending appeal from conviction and fine, *held* entitled to discharge on habeas corpus.—*Ex parte Parsons* (Tex. Cr. App.) 502; *Ex parte Freedman* (Tex. Cr. App.) 503.

§ 18. — Form of remedy, jurisdiction, and right of review.

That a city was a party to a prosecution for the violation of a city ordinance *held* not to give the Supreme Court jurisdiction of an appeal.—*City of Tarkio v. Loyd* (Mo. Sup.) 797.

On appeal to Supreme Court from judgment dismissing prosecution under a city ordinance, *held*, that there was no jurisdiction on the ground that a constitutional construction was involved.—*City of Tarkio v. Loyd* (Mo. Sup.) 797.

Where, on appeal from justice's court in a prosecution for a misdemeanor, the defendant's punishment is assessed at a fine of less than \$100, the Court of Criminal Appeals has

no jurisdiction.—*Wilson v. State* (Tex. Cr. App.) 235.

A conviction in the county, with a fine of less than \$100, on appeal from a corporation court, *held* final.—*Parsons v. State* (Tex. Cr. App.) 1073.

§ 19. — Presentation and reservation in lower court of grounds of review.

The giving of an instruction by the court of its own motion after the argument of counsel, not having been excepted to at the time, may not be considered on appeal.—*State v. Riddle* (Mo. Sup.) 606.

Unless language used by a prosecuting attorney in closing is of such a character as to obviously require a reversal, the court will not reverse on account thereof, in the absence of a requested charge on the subject and a refusal to give the same, all saved by a bill of exceptions.—*Dina v. State* (Tex. Cr. App.) 229.

An exception on appeal from conviction, *held* too general to be available.—*Shankles v. State* (Tex. Cr. App.) 234.

Defendant's failure to request a written charge, when objecting to the argument of the prosecuting attorney, precludes a review thereof.—*Ball v. State* (Tex. Cr. App.) 508.

Where the bill of exceptions does not show the ground of objection to evidence, the ruling thereon cannot be reviewed.—*Love v. State* (Tex. Cr. App.) 691.

Where a clause of the court's charge was not excepted to at the trial, or objected to on motion for a new trial, a criticism thereof cannot be reviewed on appeal.—*Smith v. State* (Tex. Cr. App.) 694.

Bills of exceptions to the competency of prosecutrix as a witness are not reviewable, where her testimony is not shown therein.—*Ham v. State* (Tex. Cr. App.) 929.

Any error in instruction as to burden of proof *held* not ground for reversal, in absence of objection below.—*Redden v. State* (Tex. Cr. App.) 929.

An objection that officers were not properly sworn before selecting talesmen *held* not reviewable on appeal.—*Chism v. State* (Tex. Cr. App.) 949.

§ 20. — Record and proceedings not in record.

The verity of the bill of exceptions, as made by the judge's certificate in a criminal case, cannot be assailed by bystanders or the affidavits of interested parties.—*Dodson v. Commonwealth* (Ky.) 874.

On appeal from a conviction where there is no bill of exceptions, errors occurring during the trial are not presented for review.—*State v. Boyer* (Mo. Sup.) 601.

On appeal to circuit court in a prosecution for a violation of a city ordinance, an unauthenticated paper, purporting to be a copy of an ordinance, among the papers filed by the police judge, was no basis for a constitutional construction of the ordinance.—*City of Tarkio v. Loyd* (Mo. Sup.) 797.

Where, on appeal, the evidence is not preserved, and there is no bill of exceptions, the court is confined to errors appearing on the record proper.—*State v. Bates* (Mo. App.) 682.

The certificate of the trial judge to a bill of exceptions is not a certificate that the grounds of objection to testimony, as stated in the bill, are true in fact.—*Wilson v. State* (Tex. Cr. App.) 232.

Where, on appeal, there is no statement of fact on record, the court will affirm the judgment, so far as sufficiency of evidence is concerned.—*Bray v. State* (Tex. Cr. App.) 345.

Action in refusing continuance held not reviewable, where record contains no statement of facts.—*Sanchez v. State* (Tex. Cr. App.) 504.

A bill of exceptions should not be signed, with the qualification that the judge is not sure whether the remarks complained of were made.—*McCarty v. State* (Tex. Cr. App.) 506.

A complaint of the argument of the prosecuting attorney, in defendant's motion for a new trial, not verified by bill of exceptions or affidavit, cannot be considered on appeal.—*Ball v. State* (Tex. Cr. App.) 508.

Bills of exceptions to questions propounded cannot be considered, where the witnesses' answers are not disclosed in the bills.—*Blain v. State* (Tex. Cr. App.) 518.

Motion for new trial for newly discovered evidence could not be considered on appeal, when no bill of exceptions, order of trial court thereon, or exception thereto, appeared in record.—*Elmore v. State* (Tex. Cr. App.) 520.

Bill of exceptions to admission of evidence held insufficient.—*Elmore v. State* (Tex. Cr. App.) 520.

A bill of exceptions to the overruling of an objection to a question does not present error, where it does not show the answer to the question or how defendant was prejudiced thereby.—*Love v. State* (Tex. Cr. App.) 691.

Where a bill of exceptions to the exclusion of evidence does not show what the answer of the witness would have been, or in what way the testimony expected would have been pertinent to the issue on trial, the ruling cannot be reviewed.—*Love v. State* (Tex. Cr. App.) 691.

The refusal of a continuance and the instructions are not reviewable, in the absence of a statement of facts.—*Sampson v. State* (Tex. Cr. App.) 926.

A statement of facts held not subject to consideration on appeal. Acts 28th Leg. p. 32, c. 25, § 1.—*Sampson v. State* (Tex. Cr. App.) 926.

The order limiting the time within which to file a statement of facts must be entered at the term at which the conviction is had, and cannot be entered nunc pro tunc at the following term.—*Townsell v. State* (Tex. Cr. App.) 938.

A motion for a continuance will not be considered on appeal, where the statement of facts was not filed within the time allowed by order of court.—*Townsell v. State* (Tex. Cr. App.) 938.

Where the purpose of testimony sought to be attained is not shown in bills of exceptions, they cannot be considered.—*Townsell v. State* (Tex. Cr. App.) 938.

On appeal from conviction for theft, objections to testimony as to other stolen property held not reviewable, where bills of exceptions failed to show whether there was testimony connecting it with the theft.—*Thompson v. State* (Tex. Cr. App.) 941.

§ 21. — Dismissal, hearing, and rehearing.

In the absence of a certificate that appellant is confined in jail, and a recognizance in the record as provided by Code Cr. Proc. art. 887, an appeal will be dismissed.—*Jones v. State* (Tex. Cr. App.) 226.

If transcript does not contain a certificate that appellant is in jail, and there is no recognizance the appeal will be dismissed.—*Jones v. State* (Tex. Cr. App.) 227.

An appeal will be dismissed, where the recognizance was not entered into during the term at which conviction was had.—*Doyle v. State*, two cases (Tex. Cr. App.) 347.

§ 22. — Review.

In homicide, exclusion of certain impeaching testimony held not prejudicial.—*Vowell v. State* (Ark.) 762.

A juror's conversation with an outsider was shown to be without prejudice, when its subject was a domestic matter foreign to the subject of the trial.—*Vowell v. State* (Ark.) 762.

When a juror was seen conversing with an outsider, it devolved on the state to show that the conversation was without prejudice.—*Vowell v. State* (Ark.) 762.

In homicide, any error in holding a talesman, who was afterwards peremptorily challenged by defendant, was cured when the court accorded defendant an additional peremptory challenge.—*Brewer v. State* (Ark.) 773.

That defendant was put on trial without a formal arraignment and plea of not guilty is no ground for reversing a conviction of homicide, in the absence of any suggestion of prejudice.—*Brewer v. State* (Ark.) 773.

Under Cr. Code, § 340, judgment of conviction held not reversible for insufficiency of evidence.—*Tipton v. Commonwealth* (Ky.) 174.

When there is some evidence to support a conviction, it will not be reversed for insufficiency thereof.—*Kincaid v. Commonwealth* (Ky.) 433.

To reverse the judgment in a penal prosecution, because the penalty imposed is excessive, the abuse of its power by the jury must be flagrant.—*Peacock Distillery Co. v. Commonwealth* (Ky.) 893.

Continuances are within discretion of the court, which will not be interfered with on appeal, unless substantial rights of accused have been prejudiced.—*Dean v. Commonwealth* (Ky.) 1112.

Under Rev. St. 1899, § 2610, held, that it would be presumed defendant was present when the verdict was rendered.—*State v. Neighbors* (Mo. Sup.) 591.

A defendant in a prosecution for burglary cannot complain that he is acquitted of the accompanying larceny.—*State v. Helms* (Mo. Sup.) 592.

A verdict will not be disturbed, when there is substantial evidence to support it.—*State v. Hyatt* (Mo. Sup.) 601.

Remark of court as to examination of witness held not prejudicial.—*State v. Riddle* (Mo. Sup.) 606.

Refusal of continuance for absence of a witness whose evidence would have been merely cumulative is not ground for reversal.—*State v. Riddle* (Mo. Sup.) 606.

In the absence of a showing to the contrary, held, that it will be presumed the clerk swore a deputy sheriff, as required by Rev. St. 1899, § 3766, relative to summoning jurors.—*State v. Riddle* (Mo. Sup.) 606.

Where defendant's sentence did not exceed that prescribed by Pen. Code 1895, art. 382, for the first offense, he could not object that the indictment alleged other convictions, authorizing the court to increase the punishment under article 1014.—*Kinney v. State* (Tex. Cr. App.) 225.

In a prosecution for assault with intent to rape, accidental use of the word "conviction" by prosecuting attorney in closing, in referring to a former trial of defendant held not reversible error.—*Dina v. State* (Tex. Cr. App.) 229.

Evidence for defendant in prosecution for aggravated assault held immaterial, so that its rejection was not error.—*Wilson v. State* (Tex. Cr. App.) 232.

The impeachment of a witness by showing by parol evidence his former conviction of a larceny is harmless, where the record of conviction is afterwards introduced.—*Wilson v. State* (Tex. Cr. App.) 232.

Bill of exceptions in prosecution for aggravated assault *held* not to disclose error in admission of testimony objected to as hearsay.—*Wilson v. State* (Tex. Cr. App.) 232.

Judge's explanation of bill of exceptions, in prosecution for aggravated assault, *held* to necessitate presumption that evidence was admissible as impeaching testimony.—*Wilson v. State* (Tex. Cr. App.) 232.

Refusal to excuse jurors *held* not ground for reversal.—*Brown v. State* (Tex. Cr. App.) 507.

Where there is evidence to support a conviction, it will not be reversed because a preponderance of the evidence may favor defendant.—*Ball v. State* (Tex. Cr. App.) 508.

A mistake, in instructing in a criminal case, in referring to the trial as held at a previous term, *held* not ground for reversal.—*Ball v. State* (Tex. Cr. App.) 508.

Defendant, indicted for rape by force and threats, cannot complain of failure to define threats in instructions.—*Ball v. State* (Tex. Cr. App.) 508.

That juror had not paid poll tax, as he stated on voir dire, *held* not ground for reversal of conviction, where it was not shown that he was not fair and impartial.—*Smith v. State* (Tex. Cr. App.) 517.

In a prosecution for murder, argument of prosecuting counsel to jury *held* not sufficiently prejudicial to authorize reversal.—*Tardy v. State* (Tex. Cr. App.) 1078.

In a prosecution for disturbing religious worship, in which the evidence showed that the disturbance occurred in the house, defendant was not prejudiced by a charge that he would be guilty, if he disturbed the congregation in or out of the house.—*Clark v. State* (Tex. Cr. App.) 1078.

In a prosecution for disturbing religious worship, charge as to punishment under Pen. Code 1895, art. 193, instead of under Acts 25th Leg. p. 102, c. 78, amending article 193, *held* not prejudicial to defendant, in view of the verdict.—*Clark v. State* (Tex. Cr. App.) 1078.

§ 23. Successive offenses and habitual criminals.

Pen. Code 1895, art. 1014, providing for an increase of punishment in subsequent convictions for the same offense, is constitutional.—*Kinney v. State* (Tex. Cr. App.) 226.

CROPS.

See "Agriculture."

Exemption of crop on homestead from forced sale, see "Homestead," § 1.
Renting on shares, see "Landlord and Tenant," § 6.

CROSS APPEAL.

See "Appeal and Error," § 1.

CROSS-EXAMINATION.

Of experts, see "Evidence," § 11.

CROSSINGS.

Railroad crossings, see "Railroads," § 3.

CUMULATIVE EVIDENCE.

See "Criminal Law," § 11.

CURTESY.

See "Dower."

Under Ky. St. 1903, §§ 2134, 2148, husband *held* not entitled to dower in wife's lands held by her under will as trustee for her children.—*Rivers v. Morris* (Ky.) 198.

DAMAGES.

Compensation for property taken for public use, see "Eminent Domain," § 1.

Review as to amount of recovery, see "Appeal and Error," § 20.

Damages for particular injuries.

See "Death," § 1; "Malicious Prosecution," § 1.

Breach by seller of contract for sale of goods, see "Sales," § 8.

From fire caused by operation of railroad, see "Railroads," § 9.

Negligence in delivery of telegram, see "Telegraphs and Telephones," § 2.

Personal injuries caused by operation of street railroad, see "Street Railroads," § 2.

To live stock in transportation, see "Carriers," § 3.

Wrongful attachment, see "Attachment," § 3.

Wrongful execution, see "Execution," § 4.

Wrongful seizure by sheriff or constable, see "Sheriffs and Constables," § 2.

Recovery in particular actions or proceedings.

For services, see "Work and Labor."

§ 1. Nature and grounds in general.

In an action against a railway company for personal injuries to a passenger, *held*, that plaintiff was entitled to compensation for impaired capacity to work, though he continued to work, and received the same salary as before the injury.—*San Antonio & A. P. Ry. Co. v. Turney* (Tex. Civ. App.) 258.

§ 2. Grounds and subjects of compensatory damages.

Married woman *held* entitled to recover, in action for personal injuries, for any impairment of power to earn money, though there is no evidence that she had ever earned any.—*Louisville & N. R. Co. v. Dick* (Ky.) 914.

Mental anguish, distinguished from bodily pain, *held* a proper element of damages in action for injuries.—*Kennedy v. St. Louis Transit Co.* (Mo. App.) 77.

An invalid passenger, injured by the negligence of a railway company, is entitled to recover for an increase of her existing ailments.—*Mathew v. Wabash R. Co.* (Mo. App.) 271.

Future physical pain and mental anguish, the necessary and natural result of injury complained of, *held* proper elements of damage.—*Maguire v. St. Louis Transit Co.* (Mo. App.) 838.

In an action for injury to an employé, who was ruptured by a fall, the fact that he was physically susceptible thereto is of no avail to defendant as to the amount of damages.—*Galveston, H. & S. A. Ry. Co. v. Butchek* (Tex. Civ. App.) 740.

§ 3. Measure of damages.

An injured street car passenger *held* entitled to compensation for future pain and suffering, and impairment of earning capacity, though continuing the same work at the same wages.—*Duffy v. St. Louis Transit Co.* (Mo. App.) 831.

§ 4. Inadequate and excessive damages.

In an action for injuries to a building, a verdict in favor of plaintiff for \$400 *held* not excessive.—*Cumberland Telephone & Telegraph Co. v. Foster* (Ky.) 150.

Verdict for \$1,500 for injuries to man 61 years old *held* not excessive.—*Louisville Ry. Co. v. Mcglenery* (Ky.) 217.

The record on appeal in an action for personal injuries *held* not to authorize setting aside a verdict as excessive.—*City of Richmond v. Martin* (Ky.) 219.

In action for injuries, verdict for \$250 *held* not excessive.—*West Kentucky Telephone Co. v. Pharis* (Ky.) 917.

In action for injuries to plaintiff's minor son, owing to negligence of defendant, a verdict for \$2,000 *held* not excessive.—*Baxter v. St. Louis Transit Co.* (Mo. App.) 70.

Under evidence, verdict for \$3,500 for injury to plaintiff's leg, *held* not excessive.—*Maguire v. St. Louis Transit Co.* (Mo. App.) 838.

In an action to recover for breach of contract under which the defendant agreed to pay plaintiffs stipulated prices for the publication of four volumes of Texas Reports, evidence *held* to support judgment for \$5,929.—*Gammel Book Co. v. Ben C. Jones & Co.* (Tex. Civ. App.) 21.

In an action against a railway company for personal injuries to a passenger, *held*, that a verdict of \$5,000 was excessive, and should be reduced to \$4,000.—*San Antonio & A. P. Ry. Co. v. Turney* (Tex. Civ. App.) 256.

Verdict of \$7,000 for personal injuries *held* not excessive.—*International & G. N. R. Co. v. Mercer* (Tex. Civ. App.) 562.

A verdict for \$5,000, in an action for injury to an employe who was ruptured by a fall, *held* not excessive.—*Galveston, H. & S. A. Ry. Co. v. Butchek* (Tex. Civ. App.) 740.

In an action for injuries to a switchman, a verdict in favor of plaintiff for \$15,000 *held* not excessive.—*Missouri, K. & T. Ry. Co. of Texas v. Stinson* (Tex. Civ. App.) 986.

§ 5. Pleading, evidence, and assessment. Defendant, in action for death of a child, *held* not entitled to complain of an instruction as to measure of damages, under Rev. St. 1899, § 2866.—*Sharp v. National Biscuit Co.* (Mo. Sup.) 787.

In action by owner on building contract, plaintiff *held* not entitled to damages for the cost of watchman and fuel for heating the building during the progress of work done in order to make the building conform to the specifications.—*Snoqualmi Realty Co. v. Moynihan* (Mo. Sup.) 1014.

Evidence *held* to warrant instruction that, in determining damages, jury might consider necessary expenses for medicine and medical attendance.—*Campbell v. City of Stanberry* (Mo. App.) 292.

Instruction, in suit for personal injury, that the jury may estimate damages plaintiff "is entitled to recover," *held* erroneous.—*Nashville, C. & St. L. R. Co. v. Witherspoon* (Tenn.) 1052.

In an action for injuries to a traction engine hired to defendant, an instruction submitting a measure of damages applicable in an action for tort *held* erroneous.—*Smith v. Stratton* (Tex. Civ. App.) 4.

In an action for injuries to a passenger, an instruction *held* not objectionable as authorizing a double recovery.—*Pecos & N. T. Ry. Co. v. Williams* (Tex. Civ. App.) 5.

In an action for injuries, an instruction limiting plaintiff's damage to such results only as appeared from a preponderance of the evidence reasonably certain to ensue from the injury *held* properly refused.—*Cameron Mill & Elevator Co. v. Anderson* (Tex. Civ. App.) 8.

In an action for injuries to a minor, evidence as to his personal habits and characteristics *held* admissible.—*Cameron Mill & Elevator Co. v. Anderson* (Tex. Civ. App.) 8.

In an action for injuries, evidence as to the reasonable value of plaintiff's services *held* not

objectionable, as not within the petition.—*Pecos & N. T. Ry. Co. v. Bowman* (Tex. Civ. App.) 22.

An instruction in an action for personal injuries *held* confusing and misleading as to the amount of damages recoverable.—*Dallas Consol. Electric St. Ry. Co. v. Rutherford* (Tex. Civ. App.) 558.

An instruction in an action for personal injuries *held* subject to objection as submitting an item of damages not supported by the pleading and the evidence.—*Dallas Consol. Electric St. Ry. Co. v. Rutherford* (Tex. Civ. App.) 558.

In an action to recover damages to a farm, owing to the acts of a railroad company, a verdict for the full sum claimed *held* not sustained by the evidence.—*International & G. N. R. Co. v. Wiegrieffe* (Tex. Civ. App.) 704.

In an action for the death of plaintiff's husband, an instruction on the measure of damages *held* erroneous.—*Houston & T. C. R. Co. v. Turner* (Tex. Civ. App.) 712.

In an action by a parent for injuries sustained to a minor child, evidence of the good morals of the child was inadmissible.—*Cameron Mill & Elevator Co. v. Anderson* (Tex. Civ. App.) 971.

DEATH.

Instructions as to measure of damages for wrongful death, see "Damages," § 5.

Of horse, liability for causing, see "Animals." Sufficiency of instructions in action for causing, see "Trial," § 10.

Wrongful death caused by operation of railroad, see "Railroads," § 7.

§ 1. Actions for causing death.

In an action for negligent death of a boy nine years of age, a verdict of \$18,000 was palpably excessive.—*Illinois Cent. R. Co. v. Watson's Adm'r* (Ky.) 175.

A verdict of \$1,200 for the negligent killing of a boy three years old is not excessive.—*Louisville & N. R. Co. v. Logsdon's Adm'r* (Ky.) 409.

Ky. St. 1903, § 6, *held* not to authorize a recovery against a municipal corporation for the death of a person suffering from smallpox by the negligence of the corporation's officers in removing and caring for him at the pesthouse.—*Twyman's Adm'r v. Board of Councilmen of Frankfort* (Ky.) 446.

Under Ky. St. 1903, § 6, damages *held* recoverable for death caused by ordinary negligence.—*Southern Ry. Co. in Kentucky v. Otis Adm'r* (Ky.) 480.

Under Rev. St. 1899, § 2864, designating parties plaintiff in actions for death of a person, *held*, that action by wife of deceased, brought after six months from the death, cannot be maintained, where deceased left a minor child or children.—*Case v. Cordell Zinc & Lead Min. Co.* (Mo. App.) 62.

Evidence considered in action for death, under Rev. St. 1899, § 2865, designating actions that survive, and *held* insufficient to show that deceased left no minor child or children.—*Case v. Cordell Zinc & Lead Min. Co.* (Mo. App.) 62.

Rev. St. 1899, § 2864, authorizing recovery of \$5,000 for death from negligence *held* not strictly penal, so that suit may be for less than \$5,000.—*Marsh v. Kansas City Southern Ry. Co.* (Mo. App.) 284.

The fact that parents applied to the support of an unmarried daughter, who lived with them, a part of the sums received from their son, *held* not to deprive them of the right to recover to the full extent of contributions expected from him.—*Missouri, K. & T. Ry. Co. of Texas v. O'Connor* (Tex. Civ. App.) 374.

DEBTOR AND CREDITOR.

See "Assignments for Benefit of Creditors"; "Bankruptcy"; "Compositions with Creditors"; "Fraudulent Conveyances."

DECEDENTS.

Declarations, see "Evidence," § 6.
Estates, see "Descent and Distribution"; "Executors and Administrators."
Testimony as to transactions with persons since deceased, see "Witnesses," § 1.

DECEIT.

See "Fraud."

DECLARATIONS.

As evidence in civil actions, see "Evidence," §§ 6, 7.
As evidence in criminal prosecutions, see "Criminal Law," § 6.
Dying declarations, see "Homicide," § 4.

DEDICATION.

§ 1. Nature and requisites.

Circumstances *held* to show a parol dedication of land to a turnpike company.—*Halley v. Scott County Fiscal Court* (Ky.) 149.

In the absence of any showing to the contrary, a dedication of a piece of land to a turnpike company as a site for a tollhouse will be presumed a dedication of an easement only.—*Halley v. Scott County Fiscal Court* (Ky.) 149.

A dedication of an easement to a public use may be by parol.—*Halley v. Scott County Fiscal Court* (Ky.) 149.

Evidence *held* to show a sufficient dedication of the land of a married woman to the public for streets and alleys.—*City of Corsicana v. Zorn* (Tex. Sup.) 924.

Where the owner of platted land conveyed the same with reference to streets and alleys on the plat, acceptance of the dedication of streets by the town *held* unnecessary.—*City of Corsicana v. Zorn* (Tex. Sup.) 924.

Evidence *held* to show that owners of land did not disavow map showing streets, but sold the land with reference to it.—*City of Corsicana v. Anderson* (Tex. Civ. App.) 261.

Acts of a city *held* an acceptance of the dedication of streets by owners of a tract of land.—*City of Corsicana v. Anderson* (Tex. Civ. App.) 261.

Sale of land with reference to plat or map showing streets *held* a dedication of them.—*City of Corsicana v. Anderson* (Tex. Civ. App.) 261.

Whether streets were dedicated *held* to depend on acts of true owners of land, not of those who previously held possession without right.—*City of Corsicana v. Anderson* (Tex. Civ. App.) 261.

§ 2. Operation and effect.

Where an easement was dedicated to a public use, on the abandonment of the use, title and right of possession reverted to the grantor.—*Halley v. Scott County Fiscal Court* (Ky.) 149.

Under Rev. St. 1895, art. 375, city *held* to have the right to remove fences, obstructing streets to the use of which the city became entitled, because of conveyances in accordance with a plat showing streets and alleys.—*City of Corsicana v. Zorn* (Tex. Sup.) 924.

DEEDS.

See "Alteration of Instruments."

Absolute deed as mortgage, see "Mortgages," § 1.

Best and secondary evidence, see "Evidence," § 5.

Description of boundaries in, see "Boundaries," § 1.

Documentary evidence, see "Evidence," § 9.

Estoppel by deed, see "Estoppel," § 1.

In fraud of creditors, see "Fraudulent Conveyances."

In trust, see "Trusts," § 1.

Parol or extrinsic evidence, see "Evidence," § 10.

Recitals in, as notice to purchaser, see "Vendor and Purchaser," § 3.

Deeds of particular species of property.

See "Easements," § 1; "Homestead," § 2.

Particular classes of deeds.

Of trust, see "Chattel Mortgages," § 1; "Mortgages."

§ 1. Requisites and validity.

Facts *held* to show no innocent parties, preventing relief against a deed in which the grantee, after delivery, included other land; he then making a voluntary conveyance, taking back purchase-money notes, and assigning them. Ky. St. 1903, §§ 474-483.—*Gill v. Fugate* (Ky.) 188.

Facts *held* not to estop one from relief against a deed in which the grantee included land not sold.—*Gill v. Fugate* (Ky.) 188.

A deed, not delivered, *held* to have no legal effect.—*Dohmen v. Schlieff* (Mo. Sup.) 799.

Where a deed, reciting the execution of a contract by the grantor, is not binding on the grantor, the statements in the deed are of no force.—*Dohmen v. Schlieff* (Mo. Sup.) 799.

§ 2. Construction and operation.

Sand. & H. Dig. § 699, providing for the passing of interests subsequently acquired by a grantor, *held* not to affect interests which the grantor had not attempted to convey.—*Blanks v. Craig* (Ark.) 764.

A deed of an heir's interest in certain real estate *held* not to convey an interest therein which he subsequently acquired by the death of another heir.—*Blanks v. Craig* (Ark.) 764.

Where it appears possible to read the name of the grantee as written in a deed as either "Mack" or "Mock," it is for the court to determine which was intended.—*Fenderson v. Missouri Tie & Timber Co.* (Mo. App.) 819.

The construction of a deed is for the court, and its legal effect should not be submitted to the jury.—*Eddy v. Bosley* (Tex. Civ. App.) 565.

§ 3. Pleading and evidence.

A deed regular on its face and regularly acknowledged *held* prima facie evidence of its genuineness, when assailed as a forgery 27 years after its execution.—*Elliott v. Sheppard* (Mo. Sup.) 627.

In an action to quiet title to real estate, evidence *held* insufficient to justify a finding that a deed under which defendants claimed title was a forgery.—*Elliott v. Sheppard* (Mo. Sup.) 627.

DEFAMATION.

See "Libel and Slander."

DEFAULT.

Judgment by, see "Judgment," § 1.

DELAY.

In delivery of telegram, see "Telegraphs and Telephones," § 2.
In transportation or delivery of goods by carrier, see "Carriers," § 2.

DELEGATION.

Of authority, see "Master and Servant," § 2.

DELIVERY.

Of deed, see "Deeds," § 1.
Of goods by carrier, see "Carriers," § 2.
Of telegram, see "Telegraphs and Telephones."

DEMAND.

Before action to recover demised premises, see "Landlord and Tenant," § 5.

DEPOSITIONS.

See "Witnesses."

Negating waiver of notice of, in bill of exceptions, see "Exceptions, Bill of," § 1.

In a suit by a trustee in bankruptcy to set aside a transfer, *held* error to admit, as part of the bankrupt's deposition, copy of testimony previously given by him before referee.—*E. S. Bonnie & Co. v. Perry's Trustee* (Ky.) 208.

In homicide, court *held* to have properly refused to permit reading of an affidavit of continuance for insufficient showing of diligence in obtaining witness' attendance.—*Dean v. Commonwealth* (Ky.) 1112.

DESCENT AND DISTRIBUTION.

See "Curtsey"; "Dower"; "Executors and Administrators"; "Homestead," § 3; "Wills."
Inheritance by adopted children, see "Adoption."

§ 1. Nature and course in general.

Land purchased by mother, and conveyed to her and minor children jointly, *held* to pass, on death of surviving minor, to the father, under Ky. St. 1903, § 1393, and not to the mother's heirs, under section 1401.—*Hagan v. Clemons* (Ky.) 899.

§ 2. Rights and liabilities of heirs and distributees.

The title to personal property, including choses in action, of an intestate, passes to the administrator, and the heir at law has no right to collect or dispose of the same.—*Bishop v. Matney* (Ky.) 856.

Action by administratrix, seeking a lien on land for the purchase money, *held* not an election to sue for the purchase money, preventing the heirs from afterwards suing for the land.—*Row v. Johnston* (Ky.) 906.

Certificate granted to heirs, and judgment against such heirs and in favor of plaintiffs' predecessor in interest, *held* to show title to land in plaintiffs.—*Houston & T. C. R. Co. v. De Berry* (Tex. Civ. App.) 736.

DESCRIPTION.

Of debt secured by mortgage, see "Mortgages," § 2.

Of devisees or legatees in will, see "Wills," § 4.
Of property conveyed, see "Boundaries," § 1; "Deeds," § 2.

Of property devised or bequeathed, see "Wills," § 4.

Of property in sheriff's return of execution, see "Execution," § 3.

Of property mortgaged, see "Mortgages," § 1.

DETINUE.

See "Replevin."

DEVISES.

See "Wills."

DILIGENCE.

In procuring absent testimony as ground for continuance, see "Criminal Law," § 11.

DIRECTING VERDICT.

In civil actions, see "Trial," § 6.

DISABILITIES.

Effect on limitation, see "Limitation of Actions," § 2.

Of married women, see "Husband and Wife," § 4.

DISCHARGE.

From employment, see "Master and Servant," § 1.

From indebtedness, see "Compositions with Creditors"; "Compromise and Settlement"; "Release."

Liability as surety, see "Principal and Surety," § 2.

Of attorney, see "Attorney and Client," § 1.

DISCONTINUANCE.

Of action, see "Dismissal and Nonsuit," § 1.

DISCRETION OF COURT.

As to amendment of pleading, see "Pleading," § 3.

As to continuance, see "Criminal Law," § 11.

As to granting new trials, see "New Trial," § 1.

As to striking out pleading, see "Pleading," § 6.

Review in civil actions, see "Appeal and Error," § 19.

DISMISSAL AND NONSUIT.

At trial, see "Trial," § 6.

Dismissal of appeal or writ of error, see "Appeal and Error," §§ 14, 15; "Criminal Law," § 21.

§ 1. Voluntary.

Refusing defendant leave to amend plea in reconvention, after granting plaintiff's nonsuit and sustaining demurrer to plea, *held* error, under *Sayles' Ann. Civ. St. arts. 1260, 1301*.—*Blank v. Robertson* (Tex. Civ. App.) 564.

DISORDERLY CONDUCT.

See "Breach of the Peace"; "Disturbance of Public Assemblage."

DISQUALIFICATION.

Of experts, see "Evidence," § 11.

DISSOLUTION.

Of partnership, see "Partnership," § 3.

DISTRIBUTION.

Of estate of decedent, see "Descent and Distribution."

Of proceeds of sale on execution, see "Execution," § 2.

DISTRICT AND PROSECUTING ATTORNEYS.

Arguments and conduct at trial, see "Criminal Law," § 13.
 Harmless error in argument of, see "Criminal Law," § 22.
 Necessity that district attorney prosecute proceedings for removal of officers, see "Officers," § 1.
 Review of arguments of, as dependent on presentation of grounds of review in record, see "Criminal Law," § 20.
 Review of arguments of, as dependent on presentation of grounds of review in trial court, see "Criminal Law," § 19.

DISTURBANCE OF PUBLIC ASSEMBLAGE.

Harmless error in instructions, see "Criminal Law," § 22.

In a prosecution for disturbing religious worship, a charge that defendant was guilty if he disturbed any part of the congregation *held* not error.—Clark v. State (Tex. Cr. App.) 1078.

DITCHES.

See "Drains."

DIVERSE CITIZENSHIP.

Ground of jurisdiction of United States courts, see "Removal of Causes," § 1.

DIVIDENDS.

On corporate stock, see "Banks and Banking," § 1.

DIVORCE.

Documentary evidence, see "Evidence," § 9.
 Separate maintenance, see "Husband and Wife," § 7.

§ 1. Jurisdiction, proceedings, and relief.

Evidence in a suit for divorce for intolerable indignities *held* to authorize the denial thereof to the wife, but not the denial to the husband.—Shy v. Shy (Mo. App.) 299.

§ 2. Alimony, allowances, and disposition of property.

Under Ky. St. 1903, § 900, \$250 counsel fees were properly awarded wife in divorce, though divorce was improperly granted.—Donnelly v. Donnelly (Ky.) 182.

Although Court of Appeals has no jurisdiction of divorce appeal, it will examine merits of divorce on appeal from judgment for alimony, and reverse award if divorce was improper.—Donnelly v. Donnelly (Ky.) 182.

DOCUMENTS.

As evidence in civil actions, see "Evidence," § 9.

DOMICILE.

As affecting venue, see "Venue," § 1.
 Residence of employé as affecting venue of action for personal injuries, see "Master and Servant," § 8.
 Residence of parties as affecting jurisdiction of justices of the peace, see "Justices of the Peace," § 1.

DOWER.

See "Curtesy."

§ 1. Inchoate interest.

Execution of assignment for benefit of creditors by husband, in which wife does not join, *held* not to divest her of inchoate dower right.—Hanna's Assignees v. Gay (Ky.) 915.

§ 2. Rights and remedies of widow.

Where a widow was entitled to dower in a building which was a part of her deceased husband's estate, her infant son, who possessed a reversionary interest in the building, was not a necessary party to an action by her to recover for injuries thereto.—Cumberland Telephone & Telegraph Co. v. Foster (Ky.) 150.

On the death of her husband, a widow's inchoate dower becomes consummate, and she can then sell it by deed or contract.—Hanna's Assignees v. Gay (Ky.) 915.

Widow *held* to have divested herself of dower interest in her husband's land.—Hanna's Assignees v. Gay (Ky.) 915.

DRAFT.

Attached to bills of lading, see "Carriers," § 2.
 Interest on, see "Interest," § 1.

DRAINS.

See "Levees."

Laws establishing drainage district for purpose of maintaining a particular drain without giving interested party a day in court as denial of due process of law, see "Constitutional Law," § 5.

Special or local laws, see "Statutes," § 1.

§ 1. Assessments and special taxes.

Under Ky. St. 1899, § 2400, the statute begins to run against an action to enforce the contractor's lien for construction of a drainage ditch only from acceptance of the work and the giving of a certificate by the county surveyor.—Dixon v. Labry (Ky.) 430.

DRUGGISTS.

Pen. Code 1895, arts. 455, 466, *held* not to prohibit sale of liquor on prescription under license, or of patent medicines and pills by one not a qualified pharmacist.—Watson v. State (Tex. Cr. App.) 504.

DUE PROCESS OF LAW.

See "Constitutional Law," § 5.

DUPLICITY.

In affidavit for writ of sequestration, see "Sequestration."
 In indictment, see "Indictment and Information," § 2.

DYING DECLARATIONS.

See "Homicide," § 4.

EASEMENTS.

See "Dedication"; "Highways."

§ 1. Creation, existence, and termination.

Evidence *held* sufficient to sustain verdict in favor of plaintiff's right to passway through an alley.—Walling v. Eggers (Ky.) 428.

Proof that an owner established a passway over his land for his own convenience *held* not

a part of the premises.—*Evans v. Motley* (Ky.) 877.

One who took possession of land under a parol gift, and used a passway over the donor's other land, *held* not to have acquired a prescriptive right to the passway at the end of 15 years.—*Smith v. Smith* (Ky.) 884.

Warranty in deed and permission to grantee to erect improvements *held* not to estop grantor, who has retained a tract surrounded by the one granted, to claim a right of way.—*Holman v. Patterson* (Tex. Civ. App.) 989.

In action for right of way, judgment for passageway, directing sheriff to remove obstructions, *held* not erroneous as establishing road for public use over defendants' land.—*Holman v. Patterson* (Tex. Civ. App.) 989.

In action for right of way, plaintiff's oral testimony as to defendants' title to the land *held* admissible.—*Holman v. Patterson* (Tex. Civ. App.) 989.

In action for right of way over land, deeds thereof to defendants, their execution being proven, *held* admissible in evidence.—*Holman v. Patterson* (Tex. Civ. App.) 989.

In action for right of way, answers showing defendants' title to the land *held* admissible in evidence.—*Holman v. Patterson* (Tex. Civ. App.) 989.

Grantor who retains tract surrounded by tract conveyed, *held* to impliedly reserve right of way.—*Holman v. Patterson* (Tex. Civ. App.) 989.

§ 2. Extent of right, use, and obstruction.

A devisee of land charged with providing a suitable passway to other devisees *held* not entitled to stipulate for the forfeiture of the passway on the failure of the devisees to keep the gates closed.—*Evans v. Motley* (Ky.) 877.

EJECTION.

Of passengers, see "Carriers," § 10.

EJECTMENT.

See "Trespass to Try Title."

Burden of proof, see "Evidence," § 3.

Order of proof, see "Trial," § 4.

§ 1. Pleading and evidence.

In ejectment, where defendant pleaded adverse possession, evidence as to payment of taxes by plaintiff *held* competent.—*Walling v. Eggers* (Ky.) 428.

On issue of ownership of strip of land and easement in alley, certain evidence as to acts and claims of parties *held* competent.—*Walling v. Eggers* (Ky.) 428.

ELECTION.

Between causes of action pleaded, see "Pleading," § 6.

ELECTIONS.

Contracts of election districts, see "Municipal Corporations," § 4.

Entry in surveyor's book as evidence of time of election of surveyor, see "Public Lands," § 1.

Local option elections, see "Intoxicating Liquors," §§ 2, 3.

Of special judge, see "Judges," § 2.

Recovery of money bet on elections, see "Gaming," § 1.

Submission to popular vote of proposition to purchase turnpike by county, see "Counties," § 2.

78 S.W.—74

Const. art. 6, § 2, as amended in 1901 (Laws 1901, p. 822), providing that one subject to poll tax shall not vote unless he has paid the tax, *held* not to require the receipt to be exhibited at the time of voting.—*Stinson v. Gardner* (Tex. Sup.) 492.

Gen. Laws 1903, p. 63, c. 45, § 1, extending time for payment of county taxes in certain counties, *held* not to abrogate requirement of Const. art. 6, § 2, as to payment of poll tax, being a prerequisite to right to vote, but that, if it did so, it would be unconstitutional.—*Black v. Pool* (Tex. Sup.) 922.

§ 2. Contests.

Const. art. 5, § 8, *held* not self-executing, and district court has no jurisdiction to try contested election cases, save in the manner prescribed by statute.—*Mercer v. Woods* (Tex. Civ. App.) 15.

In order to confer jurisdiction over a statutory contest, the requirements of the statute as to serving notice must be complied with.—*Mercer v. Woods* (Tex. Civ. App.) 15.

Actual notice to one of defendants in contested local option election of grounds of contest *held* not to dispense with necessity for serving written notice required by statute to confer jurisdiction.—*Mercer v. Woods* (Tex. Civ. App.) 15.

EMBEZZLEMENT.

Capacity to commit, see "Criminal Law," § 2.
Instructions, see "Criminal Law," § 15.

EMINENT DOMAIN.

Public improvements by municipalities, see "Municipal Corporations," § 5.

§ 1. Compensation.

Measure of damage in action for value of land taken for railroad right of way *held* to be simply the value of the ground taken.—*Whitcotton v. St. Louis & H. Ry. Co.* (Mo. App.) 318.

§ 2. Proceedings to take property and assess compensation.

Gen. Laws 1899, 26th Leg. p. 105, c. 70, relating to condemnation proceedings by railroads, *held* not to authorize appeal by property owners after their acceptance of a judgment of the county court and receipting in full.—*Parks v. Dallas Terminal Ry. & Union Depot Co.* (Tex. Civ. App.) 533.

§ 3. Remedies of owners of property.

Defense, in an action for the value of land taken by railroad, that plaintiff had acquired no title to the land, *held* not available to the railroad.—*Whitcotton v. St. Louis & H. Ry. Co.* (Mo. App.) 318.

Trustee of discharged deeds of trust *held* not proper party plaintiff, in action against railroad for the value of right of way through the land affected thereby.—*Whitcotton v. St. Louis & H. Ry. Co.* (Mo. App.) 318.

EMPLOYES.

See "Master and Servant."

ENTRY, WRIT OF.

See "Ejectment."

EQUITABLE ESTOPPEL.

See "Estoppel," § 2.

EQUITABLE SET-OFF.

See "Set-Off and Counterclaim."

EQUITY.

Equitable estoppel, see "Estoppel," § 2.
 Equitable set-off, see "Set-Off and Counterclaim."
 Joinder of legal and equitable actions, see "Action," § 2.
 Relief against judgment, see "Judgment," § 5.
 Review of evidence in equitable actions, see "Appeal and Error," § 20.

Particular subjects of equitable jurisdiction and equitable remedies.

See "Fraudulent Conveyances"; "Injunction"; "Receivers"; "Specific Performance"; "Trusts."

Cancellation of wrongfully assigned nontransferable railroad ticket, see "Carriers," § 5.
 Enforcement of state demand against railroad company, see "Railroads," § 1.
 Setting aside fraudulent conveyance in action by devisee, see "Wills," § 5.
 Setting aside tax sale, see "Taxation," § 10.

§ 1. Jurisdiction, principles, and maxims.

Subsequent simplification of account, by agreement, *held* not to oust equity jurisdiction conferred by Code Prac. § 10, subd. 4.—*Ellison v. Dunlap* (Ky.) 155.

ERROR, WRIT OF.

See "Appeal and Error."

ESCAPE.

A building used as a jail, and in which a prisoner is confined, is within the statute punishing jail deliveries, though not in an incorporated town and not the property of the county.—*Irrington v. State* (Tex. Cr. App.) 928.

ESTABLISHMENT.

Of boundaries, see "Boundaries," § 2.
 Of counties, see "Counties," § 1.
 Of lost instruments, see "Lost Instruments."
 Of public schools, see "Schools and School Districts," § 1.
 Of telegraphs or telephones, see "Telegraphs and Telephones," § 1.
 Of turnpikes or toll roads, see "Turnpikes and Toll Roads," § 1.
 Of will, see "Wills," § 3.

ESTATES.

Created by will, see "Wills," § 4.
 Decedents' estates, see "Descent and Distribution"; "Executors and Administrators."
 Restrictions on creation of future estates, see "Perpetuities."

Particular estates.

See "Curtesy"; "Dower"; "Life Estates"; "Tenancy in Common."
 For years, see "Landlord and Tenant."

ESTOPPEL.

By judgment, see "Judgment," §§ 7, 8.
 Of surety to deny liability, see "Principal and Surety," § 2.
 To allege that agent exceeded authority, see "Principal and Agent," § 3.
 To avoid or forfeit insurance policy, see "Insurance," § 9.
 To cancel deed for invalidity, see "Deeds," § 1.
 To claim homestead, see "Homestead," § 4.
 To contest will, see "Wills," § 3.
 To deny knowledge of falsity of misrepresentations by vendee of goods, see "Sales," § 1.

To deny liability of city for injuries from defect in sidewalks, see "Municipal Corporations," § 8.

To deny ownership of property assessed for public improvements, see "Municipal Corporations," § 5.

To enforce vendor's lien, see "Vendor and Purchaser," § 4.

To object to reception of evidence, see "Trial," § 4.

To take appeal, see "Appeal and Error," § 3.

§ 1. By deed.

Wife, having joined husband in mortgage conveying "all their interest" in lot, *held* estopped to deny that her life estate was intended to be conveyed.—*Simmons v. Reinhardt* (Ky.) 890.

§ 2. Equitable estoppel.

In an action for damages for the cutting of trees, evidence showing an estoppel not pleaded *held* incompetent.—*Hilton v. Colvin* (Ky.) 890.

An owner of the record title to property sold for taxes *held* estopped to assert such title as against the purchaser at the sale.—*Spence v. Renfro* (Mo. Sup.) 597.

The defense of estoppel may be raised by demurrer, where the essential facts appear in the petition.—*Stone v. Cook* (Mo. Sup.) 801.

Owner of real estate *held* estopped by representations of agent to deny right of occupant to remove buildings.—*Exchange Real Estate & Building Co. v. Schuchman Realty Co.* (Mo. App.) 75.

Where the balance of coffee sold and not delivered was tendered in a suit for the price, the buyer's failure to obtain a delivery in such suit did not estop it from recovering the proportion of the price after judgment rendered for the buyer on a plea of payment for the entire lot.—*Borches & Co. v. Arbuckle Bros.* (Tenn.) 266.

ESTRAYS.

See "Animals."

EVIDENCE.

See "Depositions"; "Witnesses."

Applicability of instructions to evidence, see "Trial," § 10.

Assignment of errors as to admission, see "Appeal and Error," § 13.

Comments on, by counsel, see "Criminal Law," § 13.

Comments on, by court, see "Criminal Law," § 12.

Harmless error in admission or exclusion, see "Appeal and Error," § 21; "Criminal Law," § 22.

Materiality of testimony on which perjury is founded, see "Perjury," § 1.

Necessity of motion for new trial presenting grounds of review, see "Appeal and Error," § 7.

Newly discovered evidence as ground for new trial, see "New Trial," § 2.

Objections for purpose of review, see "Appeal and Error," § 5.

Province of court and jury as to, see "Trial," § 7.

Questions of fact for jury, see "Trial," § 6.

Reception at trial, see "Criminal Law," § 12; "Trial," § 4.

Review dependent on preservation of grounds of review in record, see "Appeal and Error," § 12; "Criminal Law," § 20.

Review on appeal or writ of error, see "Appeal and Error," § 20; "Criminal Law," § 22.

Validity of laws relating to by-laws of insurance companies as evidence, as impairing obligation of contracts, see "Constitutional Law," § 3.

Weight and effect of, as question for jury, see "Trial," § 6.

As to particular facts or issues.

See "Adverse Possession," § 3; "Alteration of Instruments," "Damages," § 5; "Easements," § 1; "Fraudulent Conveyances," § 2; "Partnership," § 1; "Sales," § 1.

Agency, see "Principal and Agent," § 1.

Authority of agent, see "Principal and Agent," § 3.

Constitutionality of police regulations, see "Constitutional Law," § 1.

Contributory negligence of servant, see "Master and Servant," § 8.

Genuineness of deed, see "Deeds," § 3.

Legitimacy of children, see "Bastards," § 1.

Negligence of master, see "Master and Servant," § 8.

Purchase of realty in good faith, see "Vendor and Purchaser," § 3.

Services, see "Work and Labor," § 1.

To establish trust, see "Trusts," § 1.

Undue influence in procuring making of will, see "Wills," § 2.

In actions by or against particular classes of parties.

See "Attorney and Client," § 2; "Carriers," §§ 2, 3, 6; "Corporations," § 4; "Executors and Administrators," § 5; "Master and Servant," § 8; "Principal and Agent," § 3; "Railroads," §§ 6-9; "Street Railroads," § 2.

School district, see "Schools and School Districts," § 1.

In particular civil actions or proceedings.

See "Divorce," § 1; "Ejectment," § 1; "Fraud," § 2; "Negligence," § 4; "Specific Performance," § 3; "Torts," "Trespass," § 1; "Trespass to Try Title," § 1.

For breach of contract for carriage of passengers, see "Carriers," § 6.

For compensation of attorney, see "Attorney and Client," § 2.

For destruction of liquor illegally kept, see "Intoxicating Liquors," § 7.

Foreclosure, see "Mortgages," § 7.

For fire caused by operation of railroad, see "Railroads," § 9.

For injury to live stock in transportation, see "Carriers," § 3.

For personal injuries, see "Master and Servant," § 8; "Railroads," §§ 6, 7; "Street Railroads," § 2.

For price of goods sold, see "Sales," § 7.

For services, see "Work and Labor," § 1.

For wrongful death caused by operation of railroad, see "Railroads," § 7.

For wrongful discharge of school teacher, see "Schools and School Districts," § 1.

On bill or note, see "Bills and Notes," § 3.

On contract of purchase of turnpike, see "Turnpikes and Toll Roads," § 1.

On insurance certificate, see "Insurance," § 14.

On insurance policy, see "Insurance," § 12.

In criminal prosecutions.

See "Assault and Battery," § 1; "Burglary," § 2; "Criminal Law," §§ 6-10; "Homicide," § 4; "Larceny," § 1; "Libel and Slander," § 1; "Perjury," § 2; "Rape," § 2; "Robbery," § 1.

For carrying concealed weapons, see "Weapons," § 1.

For violation of license laws, see "Licenses," § 1.

For violation of liquor laws, see "Intoxicating Liquors," § 6.

§ 1. Judicial notice.

A court will not take judicial notice that a particular street is within five miles of the limits of a city.—*Stealey v. Kansas City* (Mo. Sup.) 599.

§ 2. Presumptions.

On an issue as to whether lands in Arkansas had been deeded absolutely, or whether the con-

veyance was intended to create a trust, it was to be presumed that the law of Arkansas was the same as that of Texas.—*Boyd v. Boyd* (Tex. Civ. App.) 39.

Proof of the law of New Mexico held not to defeat an action against a telegraph company for mental anguish occasioned by the failure to promptly deliver a telegram tendered it in New Mexico for delivery in Texas.—*Western Union Tel. Co. v. McNairy* (Tex. Civ. App.) 969.

§ 3. Burden of proof.

Burden of proof in ejectment, and to establish easement in alley, held, under pleadings, on defendant, on whole case, under Civ. Code, § 526.—*Walling v. Eggers* (Ky.) 428.

§ 4. Relevancy, materiality, and competency in general.

On issue of waiver of landlord's lien on certain crops, evidence as to waiver of lien on other crops held inadmissible.—*Wimp v. Early* (Mo. App.) 343.

In an action for death of a servant in a mine, a remark of the foreman, occurring at the time he threw a block into the mine which killed deceased, held admissible as *res gestæ*.—*Strode v. Conkey* (Mo. App.) 678.

In an action for injuries to a passenger, evidence that plaintiff and her father were too poor to employ a physician held competent to explain why a physician had not been employed.—*Pecos & N. T. Ry. Co. v. Williams* (Tex. Civ. App.) 5.

Amount for which land sold on execution held, under the circumstances, not evidence of its value.—*W. T. Rickards & Co. v. J. H. Bemis & Co.* (Tex. Civ. App.) 229.

In an action against a carrier for unreasonable delay in delivering potatoes, evidence of price for which potatoes actually sold held admissible on issue of damages.—*Garlington v. Ft. Worth & D. C. Ry. Co.* (Tex. Civ. App.) 368.

In an action against a carrier for unreasonable delay in delivering potatoes, certain evidence held admissible on the issue of market value.—*Garlington v. Ft. Worth & D. C. Ry. Co.* (Tex. Civ. App.) 368.

In an action against a carrier for unreasonable delay in delivering potatoes, certain evidence held to show market value of merchantable potatoes.—*Garlington v. Ft. Worth & D. C. Ry. Co.* (Tex. Civ. App.) 368.

Statement of insured's attorney in letter to defendant company held not objectionable, in action on policy for reference to compromise, made in reply to letter admitted without objection.—*Ætna Ins. Co. v. Fitze* (Tex. Civ. App.) 370.

In an action against a railroad for personal injuries received by a person in alighting from a train, letter from medical witness to plaintiff's counsel, referring to the cause of the injury, held competent.—*Missouri, K. & T. Ry. Co. of Texas v. Criswell* (Tex. Civ. App.) 388.

Declarations of principal as to contract made by him with third person held inadmissible in support of factors' action against him.—*Beakley v. Rainier* (Tex. Civ. App.) 702.

In action against railroad for damages sustained by one whose property abutted on a street, owing to construction of the road in the street, evidence as to what another lot sold for after such construction held erroneously admitted.—*Newbold v. International & G. N. R. Co.* (Tex. Civ. App.) 1079.

§ 5. Best and secondary evidence.

Parol evidence held admissible to prove contents of lost contract with corporation, though minutes of board of directors accepting the

same are not produced.—*Ellison v. Dunlap* (Ky.) 155.

In action for deceit in the sale of corporate shares, plaintiff could testify as to contents of memorandum shown him by corporation's book-keeper at instance of defendant, and which had been lost.—*Drake v. Holbrook* (Ky.) 158.

Under Rev. St. 1899, § 933, the record of a deed in the possession of one of the parties *held* admissible for the adverse party.—*Patton v. Fox* (Mo. Sup.) 804.

Testimony as to contents of lost letters *held* admissible.—*First Nat. Bank v. Wright* (Mo. App.) 688.

Parol evidence *held* inadmissible to show that a deed absolute in form was intended to create a trust.—*Boyd v. Boyd* (Tex. Civ. App.) 89.

Evidence *held* to constitute a sufficient predicate for the introduction of secondary evidence in proof of a judgment.—*Houston & T. O. R. Co. v. De Berry* (Tex. Civ. App.) 736.

§ 6. Admissions.

In a will contest, evidence of admissions by testator's wife, to whom a large part of the estate was devised, *held* admissible to prove undue influence exercised by her, as admissions against interest.—*Powers' Ex'r v. Powers* (Ky.) 152.

Declarations made by a party when articles dissolving a partnership were executed *held* admissible as a part of the transaction, where the articles had previously been introduced to prove a partnership.—*Marks & Stix v. Hardy's Adm'r* (Ky.) 864, 1105.

Evidence of a compromise offered by plaintiffs was properly rejected, where it did not appear that defendant himself made an offer of compromise, or authorized it, or that he knew that an offer was made.—*Marks & Stix v. Hardy's Adm'r* (Ky.) 864, 1105.

A portion of plaintiff's abandoned petition *held* admissible in evidence against him.—*Galloway v. San Antonio & G. Ry. Co.* (Tex. Civ. App.) 32.

To counteract the effect of a statement in an abandoned pleading as an admission, a party must show that he did not know the pleading contained the statement when filed.—*Galloway v. San Antonio & G. Ry. Co.* (Tex. Civ. App.) 32.

In an action by the buyer of threshing machinery for breach of warranty, statements of defendant's general agent, while attempting to make the machinery operate properly, *held* admissible.—*Standefor v. Aultman & Taylor Machinery Co.* (Tex. Civ. App.) 552.

In an action against a carrier for injuries to beef cattle, declarations of the conductor of the train, constituting admissions of negligence, *held* inadmissible against the carrier.—*St. Louis, I. M. & S. Ry. Co. v. Carlisle* (Tex. Civ. App.) 553.

Declarations of a decedent as to being asleep when he was struck by a train *held* admissible as against interest.—*Smith v. International & G. N. R. Co.* (Tex. Civ. App.) 556.

§ 7. Declarations.

Statement of insured's attorney in letter to defendant company *held* not objectionable, in action on policy, as self-serving declaration.—*Ætna Ins. Co. v. Fitze* (Tex. Civ. App.) 370.

§ 8. Hearsay.

Statement of insured's attorney in letter to the defendant company *held* not objectionable, in action on policy, as hearsay.—*Ætna Ins. Co. v. Fitze* (Tex. Civ. App.) 370.

Testimony, in an action against a railroad for personal injuries received by a passenger in alighting from a train, as to what a physician said after an examination of the person injured,

is hearsay.—*Missouri, K. & T. Ry. Co. of Texas v. Criswell* (Tex. Civ. App.) 388.

In an action against street railway for injuries to a passenger, certain evidence on the issue as to whether the passenger was ruptured prior to the accident *held* properly excluded.—*Pelly v. Denison & S. Ry. Co.* (Tex. Civ. App.) 542.

§ 9. Documentary evidence.

In suit for divorce for adultery, letters *held* improperly admitted; no foundation having been laid.—*Donnelly v. Donnelly* (Ky.) 182.

Mercantile reports *held* inadmissible to prove a partnership.—*Marks & Stix v. Hardy's Adm'r* (Ky.) 864, 1105.

On an issue as to whether a certain deed was a forgery, a diary kept by the grantor *held* inadmissible, without proof identifying it as in the grantor's possession at the place and on the day the statements contained therein were written.—*Elliott v. Sheppard* (Mo. Sup.) 627.

That a letter from a bank was handed to mortgagor by its authorized agent is *prima facie* evidence of its execution by the bank.—*First Nat. Bank v. Wright* (Mo. App.) 688.

Refusal to admit contract of affreightment, in action against carrier for injuries to consignment of cattle in transit, to prove allegations of answer, *held* error.—*Burris & Haynie v. Missouri Pac. Ry. Co.* (Mo. App.) 1042.

Where plaintiff's injuries were alleged to be permanent, mortality tables were admissible, though plaintiff's condition of health was not such as to render her an insurable subject.—*Pecos & N. T. Ry. Co. v. Williams* (Tex. Civ. App.) 5.

Under Rev. St. 1895, arts. 2308, 2315, 4218p. General Land Commissioner's certified copy of a judgment in favor of a third person against defendant in an action involving title to land *held* admissible.—*Trevey v. Lowrie* (Tex. Civ. App.) 18.

Under Rev. St. 1895, arts. 2315, 4218p, 4218u. Land Commissioner's certified copy of release of a lease of state school lands *held* admissible in evidence in a suit involving title to land.—*Trevey v. Lowrie* (Tex. Civ. App.) 18.

Evidence that photographs of defective sidewalk, taken two months after injury, were correct representations of locality at time of injury, *held* admissible.—*City of San Antonio v. Talerico* (Tex. Civ. App.) 28.

Photographs taken after repair of sidewalk, after an injury, showing cement patch, *held* admissible to show extent of hole which caused injury.—*City of San Antonio v. Talerico* (Tex. Civ. App.) 28.

Photographs of defective sidewalk, taken two months after injury there, but before repair, *held* admissible in evidence.—*City of San Antonio v. Talerico* (Tex. Civ. App.) 28.

Record, authorized by Acts 1901, pp. 294, 295, c. 125, §§ 4, 5, of cancellation of lease of state lands, *held* admissible in evidence.—*Valentine v. Sweatt* (Tex. Civ. App.) 385.

Sayles' Ann. Civ. St. 1897, art. 2312, relating to use of certified copy of recorded instrument in evidence, *held* to apply to all cases where such use is attempted.—*Valentine v. Sweatt* (Tex. Civ. App.) 385.

Chattel mortgage *held* inadmissible in foreclosure against third party until execution is proved as at common law.—*Peterson v. W. J. Martinez & Bros.* (Tex. Civ. App.) 401.

§ 10. Parol or extrinsic evidence affecting writings.

Parol evidence is admissible, as against creditors, to show that a widow's deed of her homestead to a tenant was made under an agreement that she would sell to him, if she had

the legal right to do so.—*Moore v. Moore* (Ky.) 141.

Evidence of declarations made by a party when articles dissolving a partnership were executed *held* not to violate the rule against the oral testimony to alter or modify a written contract.—*Marks & Stix v. Hardy's Adm'r* (Ky.) 864, 1105.

In an action on note, evidence of contemporaneous parol agreement *held* inadmissible.—*Beattyville Bank v. Roberts* (Ky.) 901.

A contract *held* not to admit of parol evidence of a condition varying its terms.—*Martin v. Witty* (Mo. App.) 829.

In unlawful detainer, *held*, that Rev. St. 1899, § 645, does not authorize evidence that the trust deed under which plaintiff claimed was without consideration.—*Wishart v. Gerhart* (Mo. App.) 1094.

Evidence that one injured did not understand the contents of a release he executed *held* admissible.—*Galloway v. San Antonio & G. Ry. Co.* (Tex. Civ. App.) 32.

Owner of land *held* in privity with one who mortgaged it, so neither owner nor mortgagee can vary terms of mortgage by parol evidence.—*W. C. Belcher Land Mortg. Co. v. Norris* (Tex. Civ. App.) 390.

Where assignment of lease was indefinite, testimony of assignor as to lease which was intended was admissible.—*Ascarete v. Pfaff* (Tex. Civ. App.) 974.

§ 11. Opinion evidence.

Where an expert had told all he knew of the subject in hand, it was proper to curtail any further cross-examination.—*Stroh v. South Covington & C. St. Ry. Co.* (Ky.) 1120.

Expert evidence as to defect, which might occasion injury in manner alleged by brakeman, *held* improperly admitted.—*East Tennessee & W. N. C. R. Co. v. Lindamood* (Tenn.) 99.

Cross-examination of a property owner, testifying to the sum to which the value of the property has been reduced by the proximity of a nuisance, as to whether he will take that for it and as to what he will take, is proper.—*Eastern Texas Ry. Co. v. Scurlock* (Tex. Sup.) 490.

Witness *held* incompetent to testify in action for damages to property from railway's occupancy of a neighboring street.—*Eastern Texas Ry. Co. v. Scurlock* (Tex. Sup.) 490.

In an action for injuries alleged to have been caused by a defective angle cock in an air brake, certain question *held* a proper subject for expert testimony.—*International & G. N. R. Co. v. Mills* (Tex. Civ. App.) 11.

A hypothetical question to an expert witness is not objectionable, because calling for an answer drawing deductions from the facts and bearing on a fact in issue for the jury.—*International & G. N. R. Co. v. Mills* (Tex. Civ. App.) 11.

A question to an expert witness is not objectionable because assuming issuable facts, if the testimony tends to prove them.—*International & G. N. R. Co. v. Mills* (Tex. Civ. App.) 11.

That hole in sidewalk was big enough for witness' foot to go in *held* a fact of which he might testify, without being an expert.—*City of San Antonio v. Talerico* (Tex. Civ. App.) 28.

An experienced section foreman's testimony that, if his signal had been observed, the hand car would have been stopped and accident averted, *held* admissible.—*Galloway v. San Antonio & G. Ry. Co.* (Tex. Civ. App.) 32.

Wife's opinion concerning her husband's mental capacity *held* admissible, in connection with facts on which it is based.—*Galloway v. San Antonio & G. Ry. Co.* (Tex. Civ. App.) 32.

Evidence of mental and physical condition of one injured, by one who had known him a long time, *held* admissible.—*Galloway v. San Antonio & G. Ry. Co.* (Tex. Civ. App.) 32.

In an action against a railroad for personal injuries received by a passenger in alighting from a train, opinion of witness as to the cause of the injury *held* competent.—*Missouri, K. & T. Ry. Co. of Texas v. Criswell* (Tex. Civ. App.) 888.

Where plaintiff was qualified to testify as an expert, the fact that he was a party to the suit did not disqualify him.—*Standefer v. Aultman & Taylor Machinery Co.* (Tex. Civ. App.) 552.

In an action for breach of warranty in the sale of threshing machinery, plaintiff *held* competent to testify as an expert that the machinery was old when delivered.—*Standefer v. Aultman & Taylor Machinery Co.* (Tex. Civ. App.) 552.

Expert testimony as to the probable result of the failure to replace a womb after childbirth *held* unauthorized by the evidence, in an action for injuries to plaintiff's wife.—*Dallas Consol. Electric St. Ry. Co. v. Rutherford* (Tex. Civ. App.) 558.

A physician *held* not qualified to testify as to the customary compensation of a professional nurse.—*Cameron Mill & Elevator Co. v. Anderson* (Tex. Civ. App.) 971.

In an action against carriers for injuries to a shipment of cotton, opinion evidence *held* properly excluded, as invading the province of the jury.—*Bath v. Houston & T. O. Ry. Co.* (Tex. Civ. App.) 993.

§ 12. Weight and sufficiency.

The testimony of defendant, sued for breach of contract for the exchange of property, *held* not to preclude him from the benefits of certain other defense.—*Harper v. Fidler* (Mo. App.) 1084.

The fact that plaintiff in a personal injury action is the only witness testifying to the circumstances of the injury does not preclude a recovery.—*International & G. N. R. Co. v. Mills* (Tex. Civ. App.) 11.

EXAMINATION.

Of expert witnesses, see "Evidence," § 11.

Of witnesses in general, see "Witnesses," § 2.

EXCEPTIONS.

Necessity for purpose of review, see "Appeal and Error," § 6; "Criminal Law," § 19.

Preservation in record on appeal, see "Appeal and Error," §§ 11, 12.

EXCEPTIONS, BILL OF.

In criminal prosecutions, see "Criminal Law," §§ 19, 20.

§ 1. Nature, form, and contents in general.

Under Rev. St. 1899, § 728, *held*, the preserving of exceptions by separate term bills is proper, though all must be embraced in the final bill of exceptions.—*Page v. Roberts, Johnson & Raud Shoe Co.* (Mo. App.) 52.

On objection to depositions, that the opposite party was not served with notice of interrogatories, his bill of exceptions must negative waiver of notice.—*Texas & P. Ry. Co. v. Murtishaw* (Tex. Civ. App.) 953.

§ 2. Settlement, signing, and filing.

Failure to object to a bill of exceptions when filed, or to an order extending the time for its filing, and an examination of the bill when ten-

dered, *held* a waiver of objections.—*Walling v. Eggers* (Ky.) 428.

Where there was no entry or minute of the clerk of the trial court, showing that the bill of exceptions was ever filed, such bill could not be considered on appeal.—*Fast v. Gray* (Mo. App.) 1048.

EXCESSIVE DAMAGES.

See "Damages," § 4.

For wrongful death, see "Death," § 1.

EXCISE.

Regulation of traffic in intoxicating liquors, see "Intoxicating Liquors."

EXCUSABLE HOMICIDE.

See "Homicide," § 2.

EXECUTION.

See "Attachment"; "Garnishment."

Exemptions, see "Exemptions"; "Homestead." Review of order on motion to quash, see "Appeal and Error," § 12.

In particular actions or proceedings.

For price of land, see "Vendor and Purchaser," § 4.

Of judgment setting aside fraudulent conveyance, see "Fraudulent Conveyances," § 2.

§ 1. Stay, quashing, vacating, and relief against execution.

The county in which the judgment was rendered was the proper forum for quashing the execution issued to another county for failure to comply with Ky. St. 1903, § 1656.—*Gorman v. Glenn* (Ky.) 873.

§ 2. Sale.

Purchasers at execution sale of property subject to mortgage *held* liable on sale bond.—*Georgetown Water Co. v. Fidelity Trust & Safety Vault Co.* (Ky.) 113; *Montgomery v. Same*, *Id.*

Under Ky. St. 1903, § 1682, subsec. 2, requiring land sold under execution to be advertised 15 days next preceding the date of sale, a judgment granting possession to purchasers at execution sale of land advertised but 10 days is erroneous.—*Scott v. Powers, Little & Co.* (Ky.) 408.

Sale of land on execution by sheriff for inadequate price and in irregular manner *held* void.—*Scott v. Powers, Little & Co.* (Ky.) 408.

Under Ky. St. 1903, § 1689, authorizing a purchaser of land under an execution sale to obtain a writ of possession on notice "after" obtaining a conveyance therefor, a judgment granting such writ is erroneous, where the record does not disclose a conveyance by the sheriff.—*Scott v. Powers, Little & Co.* (Ky.) 408.

Where an execution was levied on two lots, and the court ordered only so much sold as would satisfy the execution, it is to be presumed that the property was divisible.—*Gorman v. Glenn* (Ky.) 873.

In proceedings to compel a sheriff to pay over proceeds of execution sale, where adverse claimants under an assignment from plaintiffs were made parties, burden was on plaintiffs to show false representations, invalidating assignment.—*W. T. Rickards & Co. v. J. H. Bemis & Co.* (Tex. Civ. App.) 239.

Execution creditor, who becomes purchaser of realty, *held* to stand on footing of bona fide purchaser as against debtor's prior unrecorded

deed.—*Sanger Bros. v. Collum* (Tex. Civ. App.) 401.

Heir *held* to have record title of ancestor, to which possession would be referred, rather than to unrecorded deed from co-heir, on question of notice to execution purchaser.—*Sanger Bros. v. Collum* (Tex. Civ. App.) 401.

Possession of heir *held* referable to record title as heir, and not to unrecorded title as purchaser of co-heir's interest, and hence such possession was not notice to execution purchaser of unrecorded title.—*Sanger Bros. v. Collum* (Tex. Civ. App.) 401.

§ 3. Return.

Sheriff's return to execution and his deed *held* not void for uncertainty of description, when with extrinsic evidence they designate property intended to be conveyed.—*Buckner v. Vancleave* (Tex. Civ. App.) 541.

§ 4. Wrongful execution.

Evidence in action for damages for loss of crop from wrongful levy examined, and *held* sufficient to sustain verdict for plaintiff.—*Parker v. Hale* (Tex. Civ. App.) 535.

EXECUTORS AND ADMINISTRATORS.

See "Descent and Distribution"; "Wills."

Action by personal representative as bar to action by heirs, see "Abatement and Revival," § 1.

Capacity of administrator to sue on insurance policy, see "Insurance," § 12.

Necessity of giving bond on appeal, see "Appeal and Error," § 9.

Power of administratrix to appoint substitute trustee, see "Mortgages," § 6.

Testamentary trustees, see "Trusts."

Testimony as to transactions with decedents, see "Witnesses," § 1.

§ 1. Appointment, qualification, and tenure.

In an action by next of kin to set aside letters of administration, circuit court *held* required to hear case on appeal from the county court de novo.—*Fitzgerald v. Smith* (Tenn.) 1050.

Shannon's Code, § 3939, concerning eligibility of persons to administer on decedents' estates, *held* not to require preference of personally unfit next of kin.—*Fitzgerald v. Smith* (Tenn.) 1050.

§ 2. Collection and management of estate.

Under Rev. St. 1899, § 130, an executrix, without the consent of the devisees or their agent, *held* not entitled to step in and appropriate rent due the devisees.—*Brent v. Chipley* (Mo. App.) 270.

§ 3. Allowances to surviving wife, husband, or children.

Under Gen. St. c. 31, art. 36, § 11, subd. 5, the setting apart of exempt property of intestate to his widow vests in her complete title, to the exclusion of infant children.—*Harris' Adm'r v. Adams* (Ky.) 156.

An administrator's failure to publish notice of his appointment *held* not to affect the conclusiveness of an order awarding certain property to intestate's children as their homestead, as against the holder of a deed of trust thereon.—*Tiboldi v. Palms* (Tex. Civ. App.) 728.

§ 4. Allowance and payment of claims.

Failure to object to claim against decedent's estate, before answer, because affidavit and demand required by Ky. St. 1903, §§ 3370-3872, were not made, *held* waiver of such affidavit and claim.—*Lyon's Ex'r v. Logan County Bank's Assignee* (Ky.) 454.

Under Rev. St. 1899, § 188, notice to administrator of claim against estate *held* insufficient

in failing to state amount and nature of claim.—Corson v. Waller (Mo. App.) 656.

Affidavit by agent in support of claim against decedent's estate, defective for failure to disclose that it was made by agent, may be cured by amendment.—Dawson v. Wombles (Mo. App.) 823.

Sufficiency of an affidavit by an agent in support of a claim against a decedent's estate determined.—Dawson v. Wombles (Mo. App.) 823.

Where the holder of a deed of trust, on the death of the grantor, did not file a claim for the debt against the grantor's estate, and the land was set apart to the grantor's children as their homestead, in such proceedings, the holder of the deed thereby lost his lien on the land.—Tiboldi v. Palms (Tex. Civ. App.) 728.

§ 5. Actions.

Judgment against decedent, purchased by judgment debtor before filing of appraise bill, held not proper set-off against judgment, which was necessary asset to make up widow's statutory exemption (Ky. St. 1899, § 1403) and pay preferred claims.—Thompson v. Thompson (Ky.) 418.

That a record on appeal fails to show affirmatively that demand was made on personal representative of a decedent within a year of his death, as required by Ky. St. 1903, § 3884, held not ground for reversal.—Lyon's Ex'r v. Logan County Bank's Assignee (Ky.) 454.

Evidence considered, and held sufficient to establish, as against an executor, the ownership of a house and lot claimed by him as a part of his intestate's estate.—Liter v. Johnson's Ex'r (Ky.) 905.

EXECUTORY DEVISES.

Sales of, see "Vendor and Purchaser," § 1.

EXEMPLIFICATIONS.

As evidence, see "Evidence," § 9.

EXEMPTIONS.

See "Homestead."

§ 1. Protection and enforcement of rights.

Under Rev. St. 1899, § 4335, a married woman may claim any exemption, except where her husband has claimed it for the protection of his own property.—White v. Smith (Mo. App.) 51.

EXPERT TESTIMONY.

Harmless error in exclusion, see "Appeal and Error," § 21.

In civil actions, see "Evidence," § 11.

To prove validity of police regulations, see "Constitutional Law," § 1.

FACTORS.

See "Brokers."

Assignees of drafts, which had been refused by the drawee, held not entitled to object to his failure to draw other drafts on the drawers of the original drafts under a subsequent arrangement, until after corn for which the original drafts were drawn had been sold, in the absence of proof of prejudice.—F. Groos & Co. v. Brewster (Tex. Civ. App.) 359.

An action by a commission merchant to recover the difference between the price at which certain corn sold and the amount of drafts drawn by the shipper, attached to the bill of lading, held based on a written obligation, and

was therefore within the four-year statute of limitations.—F. Groos & Co. v. Brewster (Tex. Civ. App.) 359.

An assignee of certain drafts attached to bills of lading for corn shipped held liable to the consignee for the difference between the amount paid on such drafts and the value of the corn.—F. Groos & Co. v. Brewster (Tex. Civ. App.) 359.

Factors held not entitled to recover from principal for money advanced to purchase goods, more than average price paid for all goods so purchased.—Beakley v. Rainier (Tex. Civ. App.) 702.

Factors held not to have lien on goods purchased for principal, to cover damages arising from his refusal to receive other goods.—Beakley v. Rainier (Tex. Civ. App.) 702.

FALSE IMPRISONMENT.

See "Malicious Prosecution."

FALSE SWEARING.

See "Perjury."

FEEES.

In attachment proceedings, see "Attachment,"

§ 2.

Of attorney, see "Attorney and Client," § 2.

Of city officers, see "Municipal Corporations,"

§ 3.

FEE SIMPLE.

Creation by will, see "Wills," § 4.

FELLOW SERVANTS.

See "Master and Servant," § 5; "Negligence,"

§ 3.

FENCES.

Building of, by railroads, see "Railroads," § 4.
Injuries to animals caused by failure to fence railroad, see "Railroads," § 8.

FERTILIZERS.

See "Agriculture."

FILING.

Bill of exceptions, see "Exceptions, Bill of," § 2.

FINAL JUDGMENT.

Appealability, see "Appeal and Error," § 2.

FINDINGS.

Review on appeal or writ of error, see "Appeal and Error," § 20.

FINES.

Extent of, as affecting appellate jurisdiction, see "Criminal Law," § 18.

FIRE INSURANCE.

See "Insurance."

FIRES.

Caused by operation of railroad, see "Railroads," § 9.

Liability of carrier for injuries to goods in shipment caused by fire, see "Carriers," § 2.

FLOWAGE.

See "Waters and Water Courses," § 1.

FORCIBLE DEFILEMENT.

See "Rape."

FORCIBLE ENTRY AND DETAINER.

See "Landlord and Tenant," § 5.

Appointment of receiver in action for, see "Receivers," § 1.

Equitable relief against judgment in, see "Judgment," § 5.

Right of purchaser under deed of trust to maintain, see "Mortgages," § 6.

§ 1. Civil Liability.

Under Civ. Code Prac. § 452, subsec. 1, only issue in trial of forcible entry *held* to be whether defendant had entered on land in the actual possession of plaintiff, without reference to question of defendant's title or right of entry.—*Robinson v. Marshall* (Ky.) 904.

Where a tenancy is ended, and the tenant leaves the property, consenting that the landlord shall take possession, his doing so is not a forcible entry, within Civ. Code Prac. § 452, subsec. 1.—*Robinson v. Marshall* (Ky.) 904.

Evidence in an action of forcible entry considered, and *held* to require the submission to the jury of the question whether plaintiff, who had occupied as defendant's lessee, had not, on the termination of the tenancy, consented to defendant's resumption of possession.—*Robinson v. Marshall* (Ky.) 904.

Under Rev. St. 1899, § 3323, *held*, that complaint in unlawful detainer need not allege the property to have been in the city ward of the justice before whom the complaint was filed.—*Wishart v. Gerhart* (Mo. App.) 1094.

FORECLOSURE.

Of corporate mortgages, see "Corporations," § 4.

Of mortgage, see "Chattel Mortgages," § 4; "Mortgages," §§ 6, 7.

FOREIGN PROBATE.

See "Wills," § 3.

FORFEITURES.

For violation of gaming laws, see "Gaming," § 2.

Of bail, see "Bail," § 1.

Of easement, see "Easements," § 2.

Of insurance, see "Insurance," §§ 13, 14.

Of purchase of public lands, see "Public Lands," § 1.

FORGERY.

See "Counterfeiting."

An instrument *held* not to amount to a forgery.—*Harrison v. State* (Ark.) 763.

The false making of an instrument *held* not a certificate, within Ky. St. 1903, § 2106, relating to marriage licenses, and hence not forgery.—*Pearson v. Commonwealth* (Ky.) 1128.

An indictment for forgery *held* sufficient.—*Franklin v. State* (Tex. Cr. App.) 934.

Under Pen. Code 1895, arts. 530, 536, 537, will *held* not subject to forgery during lifetime of purported testator.—*Huckaby v. State* (Tex. Cr. App.) 942.

One cannot be prosecuted for having a forged will in his possession with intent to utter, un-

til after the purported testator's death.—*Huckaby v. State* (Tex. Cr. App.) 942.

An indictment for forging a will must allege a devisable estate in testator and that he was dead at the time of the forgery.—*Huckaby v. State* (Tex. Cr. App.) 942.

Allegation that forged instrument purported to be act of another than defendant *held* not necessary in indictment for forgery.—*Huckaby v. State* (Tex. Cr. App.) 942.

FORMER ADJUDICATION.

See "Judgment," §§ 7, 8.

FORMER JEOPARDY.

Bar to prosecution, see "Criminal Law," § 5.

FORMS OF ACTION.

See "Ejectment"; "Replevin"; "Trespass," § 1.

FRAUD.

See "Fraudulent Conveyances."

Effect on limitation, see "Limitation of Actions," § 2.

Secondary evidence, see "Evidence," § 5.

By particular classes of persons.

See "Principal and Agent," § 3.

Vendee of goods, see "Sales," § 1.

In particular classes of conveyances, contracts, or transactions.

See "Insurance," §§ 6, 7.

Procuring making of will, see "Wills," § 2.

Transfer of railroad ticket, see "Carriers," § 5.

Particular remedies.

See "Injunction," § 1.

§ 1. Deception constituting fraud, and liability therefor.

A seller of cattle notes represented to be secured by mortgage on cattle *held* not liable to the purchaser for deceit, on its being subsequently discovered that the notes were not so secured.—*People's Nat. Bank v. Central Trust Co.* (Mo. Sup.) 618.

Statement of one that he has a landlord's lien *held* not necessarily a mere conclusion of law, and not ground for an action for false representations.—*Texas Cotton Products Co. v. Denny Bros.* (Tex. Civ. App.) 557.

One, though not intending to deceive, may be liable for a false statement of a character calculated to mislead.—*Texas Cotton Products Co. v. Denny Bros.* (Tex. Civ. App.) 557.

§ 2. Actions.

In an action for damages for deceit in the sale of corporate shares, evidence that plaintiff had received his money's worth, notwithstanding the misrepresentation, was irrelevant.—*Drake v. Holbrook* (Ky.) 158.

Where a life insurance company was induced by fraud to issue a policy, the doctrine of election of remedies does not apply, so as to entitle it to either rescind the contract or affirm the transaction by payment to the beneficiary and sue its agent who participated in the fraud.—*New York Life Ins. Co. v. Hord* (Ky.) 207.

FRAUDS, STATUTE OF.

§ 1. Agreements not to be performed within one year.

A contract of hiring for an indefinite time *held* not within the statute of frauds.—*Matthews v. Wallace* (Mo. App.) 296.

by Rev. St. 1899, § 4123, can be released without writing or by an agent having no written authority.—*Wimp v. Early* (Mo. App.) 848.

§ 3. Operation and effect of statute.

Taking possession of premises and paying rent under a parol lease for a longer time than one year *held* such performance as would take it out of Sayles' Ann. Civ. St. art. 2543, subds. 4, 5.—*Sorrells v. Goldberg* (Tex. Civ. App.) 711.

§ 4. Pleading, evidence, trial, and review.

Where a petition states a contract, and the payment of the full consideration by plaintiff, and the breach by defendant, the statute of frauds, if available, must be pleaded by defendant.—*Missouri Real Estate Syndicate v. Sims* (Mo. Sup.) 1006.

That a contract is without the statute of frauds is a matter of defense, to be established by defendant.—*Matthews v. Wallace* (Mo. App.) 296.

FRAUDULENT CONVEYANCES.

By bankrupt, see "Bankruptcy," § 2.
Right of devisee to have fraudulent conveyance set aside, see "Wills," § 5.

§ 1. Transfers and transactions invalid.

An agreement between a solvent debtor and certain creditors *held* not invalid as an act to prefer such creditors.—*Cumberland Valley Bank's Assignee v. Citizens' Nat. Bank* (Ky.) 889.

That an unconditional note and mortgage were given to secure mortgagee as mortgagor's surety *held* not to render them void as to creditors.—*Gee v. Van Natta-Lynds Drug Co.* (Mo. App.) 288.

An insolvent debtor cannot systematically give practically all earnings to his wife, and thereby allow her to accumulate property in her own name which, if acquired by him, would be subject to levy.—*Wolfsberger v. Mort* (Mo. App.) 817.

A deed from an insolvent, with or without a consideration, executed under such circumstances as to charge the vendee with notice, can be set aside by creditor.—*Davis v. Culp* (Tex. Civ. App.) 554.

An instruction requiring the purchaser of goods to have knowledge of facts sufficient only to "create a suspicion" of the seller's fraudulent intent *held* erroneous.—*Hooks & Hines v. Pafford* (Tex. Civ. App.) 991.

In an action for a wrongful levy, an instruction permitting a recovery for coal purchased, which plaintiffs were prevented from using, *held* improperly refused.—*Hooks & Hines v. Pafford* (Tex. Civ. App.) 991.

§ 2. Remedies of creditors and purchasers.

Evidence in a proceeding to obtain possession of land purchased at sheriff's sale by judgment creditors *held* sufficient to show that deeds made by the judgment debtor to his wife, and by the wife to others, after the commencement of the action and after the levy of executions, were made in an attempt to defraud the creditors.—*Scott v. Powers, Little & Co.* (Ky.) 408.

On a petition by an execution creditor, under Ky. St. 1903, § 1907a, to set aside a subsequent conveyance, the court may enforce the execution.—*Gorman v. Glenn* (Ky.) 873.

On a bill by an execution creditor to set aside a subsequent mortgage, an answer by the mortgagee *held* not sufficient to bring him within Ky. St. 1903, § 2358a, subsec. 2, protecting

by an execution debtor, an answer *held* insufficient to overcome the presumption that the execution creditor had complied with Ky. St. 1903, § 1656, relative to issuing executions to counties other than where the judgment was rendered.—*Gorman v. Glenn* (Ky.) 873.

A subsequent purchaser cannot attack a conveyance, under Rev. St. 1899, § 3398, as in fraud of creditors, but must show a fraud on himself.—*Davidson v. Dockery* (Mo. Sup.) 624.

In order to enable a creditor to attack a conveyance as fraudulent, he must have a judgment or lien against the property, or must show that he has no adequate remedy at law.—*Davidson v. Dockery* (Mo. Sup.) 624.

Evidence *held* to show that a husband's money was invested in part payment for a piano bought by his wife.—*Wolfsberger v. Mort* (Mo. App.) 817.

In an action for an alleged wrongful levy on goods claimed to have been sold in fraud of creditors, evidence that the seller's reputation for payment of debts was good *held* admissible.—*Hooks & Hines v. Pafford* (Tex. Civ. App.) 991.

FRUIT TREES.

Purchase for planting on homestead as creating a lien thereon, see "Homestead," § 2.

GAMING.

Alternative allegations in indictment, see "Indictment and Information," § 1.

Liability of person procuring violation of gambling laws under agreement with county attorney to testify thereto, see "Criminal Law," § 1.

Validity of statute providing for search for and destruction of gambling devices as not providing for jury trial, see "Jury," § 1.

§ 1. Gambling contracts and transactions.

Rev. St. 1899, §§ 3430, 3431, authorizing a recovery of money bet on elections, *held* not to apply to primary elections for the selection of such candidates.—*Dooley v. Jackson* (Mo. App.) 330.

Where plaintiff did not repudiate a wager until the result had been ascertained, he could not recover the amount from the stakeholder on the ground that the wager was illegal at common law.—*Dooley v. Jackson* (Mo. App.) 330.

§ 2. Penalties and forfeitures.

Sand. & H. Dig. § 1618, providing for search for and destruction of gambling devices, *held* not repealed by Acts 1901, p. 114.—*Furth v. State* (Ark.) 759.

Sand. & H. Dig. § 1618, providing for search for and destruction of gambling devices, *held* not void for uncertainty and ambiguity.—*Furth v. State* (Ark.) 759.

GARNISHMENT.

See "Attachment"; "Execution."

§ 1. Proceedings to support or enforce.

Under Sayles' Civ. St. art. 5, controverting affidavit in garnishment proceedings, *held* properly verified by plaintiff's attorney, notwithstanding language of article 245.—*Ferguson-McKinney Dry Goods Co. v. First Nat. Bank* (Tex. Civ. App.) 265.

GIFTS.

Charitable gifts, see "Charities."

GOOD FAITH.

Of purchaser, see "Bills and Notes," § 2; "Vendor and Purchaser," § 3.

GRAND JURY.

See "Indictment and Information."

Discrimination in selection as violation of civil rights, see "Civil Rights."
Self-executing character of constitutional provisions, see "Constitutional Law," § 1.
Testimony by grand juror to impeach witness, see "Witnesses," § 3.

Attempt to select grand jury in anticipation of Laws 1901, p. 192, § 3770a, *held* not ground for quashing indictment returned by jurors properly selected under Rev. St. 1899, §§ 3769, 3770.—*State v. Berry* (Mo. Sup.) 611.

GRANTS.

Of public lands, see "Public Lands."

GUARANTY.

See "Principal and Surety."

GUARDIAN AND WARD.

Guardian ad litem, see "Infants," § 2.

§ 1. Appointment, qualification, and tenure of guardian.

Rev. St. 1899, §§ 299, 301, authorizing public administrators to take charge of the estates of minors under 14 years of age, do not deprive a minor 14 years of age of the right to select a guardian, under Rev. St. 1899, § 3485.—*State ex rel. Mills v. Mast* (Mo. App.) 833.

HABEAS CORPUS.

Discharge on habeas corpus pending appeal, see "Criminal Law," §§ 17-22.

§ 1. Nature and grounds of remedy.

Relator, not actually detained, *held* not entitled to a writ of habeas corpus.—*Ex parte Lawrence* (Tex. Cr. App.) 346.

Habeas corpus will not issue to prevent a trial, the remedy at law being sufficient.—*Ex parte Windsor* (Tex. Cr. App.) 510.

HABITUAL CRIMINALS.

See "Criminal Law," § 23.

HARMLESS ERROR.

In civil actions, see "Appeal and Error," § 21.
In criminal prosecutions, see "Criminal Law," § 22; "Homicide," § 6.

HEALTH.

Scope of inquiry in determining constitutional questions relating to health, see "Constitutional Law," § 1.

§ 1. Boards of health and sanitary officers.

A county *held* liable for expenses incurred by the county board of health, though it is not made a matter of record.—*City of Bardstown v. Nelson County* (Ky.) 169.

Under Ky. St. 1903, §§ 2047-2072, a county *held* liable for expense incurred by the county board of health in quarantining persons with contagious diseases.—*City of Bardstown v. Nelson County* (Ky.) 169.

HEARSAY EVIDENCE.

Harmless error in admission of hearsay evidence, see "Appeal and Error," § 21.
In civil actions, see "Evidence," § 8.
In criminal prosecutions, see "Criminal Law," § 6.

HEIRS.

See "Descent and Distribution."

HIGHWAYS.

See "Municipal Corporations," §§ 7, 8; "Turnpikes and Toll Roads."

Accidents at railroad crossings, see "Railroads," § 6.

Animals running at large, see "Animals."

Evidence as to other offenses in prosecution for obstruction of highway, see "Criminal Law," § 8.

Jurisdiction of prosecution for obstructing, see "Criminal Law," § 3.

§ 1. Establishment, alteration, and discontinuance.

A petition to a county court *held* to definitely disclose a purpose to widen an existing road.—*Wilhite v. Wolf* (Mo. Sup.) 793.

A statement in a commissioners' report in proceedings to widen a road *held* to show that a landowner had refused to relinquish his land.—*Wilhite v. Wolf* (Mo. Sup.) 793.

The petition and notice thereof, required by Rev. St. 1899, §§ 9414, 9415, *held* to be all that was necessary to the jurisdiction of the county court to proceed to widen a road.—*Wilhite v. Wolf* (Mo. Sup.) 793.

§ 2. Highway districts and officers.

Under Ky. St. 1903, §§ 4313-4344, action of fiscal court in appointing justices of magisterial districts as assistants to county judge in supervising roads, and allowing them pay for their services, *held* invalid.—*Pulaski County v. Sears* (Ky.) 123.

§ 3. Regulation and use for travel.

In an action for injuries to plaintiff at a crossing over a railroad, not legally established, that she could have reached her destination by a legally established public road was no defense.—*Pecos & N. T. Ry. Co. v. Bowman* (Tex. Civ. App.) 22.

A railroad company *held* bound to exercise reasonable care for the safety of persons traveling on a road which crossed it, though not established as a road by dedication or prescription.—*Pecos & N. T. Ry. Co. v. Bowman* (Tex. Civ. App.) 22.

HOMESTEAD.

See "Exemptions."

Lien on homestead for taxes, see "Taxation," § 6.

§ 1. Nature, acquisition, and extent.

A homestead may not be sold, the proceeds invested in personality, and used in trading for an indefinite time, and then invested in another homestead, exempt from antecedent debts.—*Fitch v. Duckwall* (Ky.) 185.

A husband's unexecuted intention to occupy certain land as his homestead was insufficient to create a homestead right.—*Higgins v. Higgins* (Ky.) 1124.

Land on which there is no house, and which was never occupied by the owner, *held* not impressed with the character of a homestead.—*Zollinger v. Dunnaway* (Mo. App.) 666.

An ungathered crop on the homestead of a debtor is exempt from forced sale.—*Parker v. Hale* (Tex. Civ. App.) 555.

§ 2. Transfer or incumbrance.

Where a husband contracts and binds himself to convey all the title he has in land, he necessarily divests himself, and all others entitled thereto by relation, of a homestead in the land.—*Hanna's Assignees v. Gay* (Ky.) 915.

Although by Ky. St. 1903, § 1706, debtor cannot mortgage homestead without joining wife, he may sell it, whether she joins or not.—*Hanna's Assignees v. Gay* (Ky.) 915.

Contract for the purchase of fruit trees, to be planted on the homestead and paid for out of proceeds, creating a lien on the premises therefor, was not for such improvements as would constitute a lien paramount to the rights of the wife.—*Stark v. Anderson* (Mo. App.) 340.

Where a wife had not filed a claim to a homestead, as permitted by Rev. St. 1889, § 5435, the husband might, prior to the act of 1895, incur it by a contract creating a lien.—*Stark v. Anderson* (Mo. App.) 340.

Under Const. art. 16, § 50, husband's execution of debtor's lien notes on homestead in compromise of litigation *held* not to create lien thereon.—*Peaslee v. Walker* (Tex. Civ. App.) 980.

§ 3. Rights of surviving husband, wife, children, or heirs.

Conditional sale by widow of homestead *held* not to constitute an abandonment.—*Moore v. Moore* (Ky.) 141.

Wife's second husband *held* not entitled to homestead in lands held by her and her first husband as testamentary trustees for their children.—*Rivers v. Morris* (Ky.) 196.

A husband cannot claim a homestead in land devised to him by his wife, as against a debt of the testatrix.—*Dearing v. Moran* (Ky.) 217.

Under Ky. St. 1903, § 1707, declaring homestead to be for benefit of widow and infant children, where widow elects to take dower, infant children's right to homestead attaches to the dower.—*Hanna's Assignees v. Gay* (Ky.) 915.

Under Ky. St. 1903, §§ 1702, 1707, a widow *held* to have no right of homestead in land of which her husband died seised, which he had never occupied as his homestead.—*Higgins v. Higgins* (Ky.) 1124.

That a widow was insane, and confined in an asylum after her husband's death, *held* immaterial in determining whether she took a homestead or dower right in his real estate.—*Higgins v. Higgins* (Ky.) 1124.

§ 4. Abandonment, waiver, or forfeiture.

Under St. 1908, §§ 1702, 1706, *held*, that after two mortgages are given on a homestead, the first signed only by the debtor, and the second by him and his wife, waiving exemption, she cannot waive the exemption in favor of the first mortgage, as against the second.—*Mattingly's Adm'r v. Hazel* (Ky.) 178.

Evidence *held* to justify a finding that defendant had not abandoned his homestead rights in a certain tract of land levied on.—*Meyer Bros. Drug Co. v. Bybee* (Mo. Sup.) 579.

Under Rev. St. 1899, §§ 3616, 4335, a defendant *held* not estopped to claim his homestead exemption by a financial statement executed by him, in which he did not claim any part of his property to be exempt as his homestead.—*Meyer Bros. Drug Co. v. Bybee* (Mo. Sup.) 579.

HOMICIDE.

Admissibility of depositions, see "Depositions." Challenges to jurors, see "Jury," § 4.

Confessions, see "Criminal Law," § 9.

Continuance, see "Criminal Law," § 11.

Harmless error in general, see "Criminal Law," § 22.

Impeachment or corroboration of witness, see "Witnesses," § 3.

Instructions in general, see "Criminal Law," § 15.

Knowledge of witness as to reputation of deceased, see "Witnesses," § 1.

Manner of arriving at verdict, see "Criminal Law," § 12.

Res gestae, see "Criminal Law," § 7.

Separate trial of codefendants, see "Criminal Law," §§ 12-15.

Validity of indictment against principal stating that means are unknown where indictment against accessory states means, see "Indictment and Information," § 1.

§ 1. Manslaughter.

The fact that deceased accused defendant and his wife of having a venereal disease *held* not available to reduce killing from murder to manslaughter, where killing did not take place for a week or ten days.—*Townsell v. State* (Tex. Cr. App.) 938.

§ 2. Excusable or justifiable homicide.

The killing of an innocent person is not justified by the unlawful compulsion of third parties, rendering such act necessary to save one's own life.—*Brewer v. State* (Ark.) 773.

A compulsion that can reduce or mitigate the crime of murder must be more than a fear of future harm. It must appear that there was no alternative for defendant, except to kill deceased or lose his own life.—*Brewer v. State* (Ark.) 773.

The danger to one's life or great bodily harm to his person which authorizes a person to act in his defense may be real danger, or only apparent danger.—*Martin v. Commonwealth* (Ky.) 1104.

Mere intent and purpose to provoke a difficulty, as a pretext for killing a person, does not deprive the slayer of the right of self-defense.—*Tardy v. State* (Tex. Cr. App.) 1076.

§ 3. Indictment and information.

An information for murder *held* not to fail to charge the offense with certainty, because of the words "then and there being."—*State v. Riddle* (Mo. Sup.) 606.

§ 4. Evidence.

In a prosecution for willfully shooting at another with an intent to kill, evidence *held* to sustain a conviction.—*Knuckles v. Commonwealth* (Ky.) 469.

Proof of misdemeanors *held* inadmissible for purposes of impeachment.—*Martin v. Commonwealth* (Ky.) 1104.

After evidence introduced to show deceased convicted of felony to impeach dying declaration, the state cannot show pardon.—*Martin v. Commonwealth* (Ky.) 1104.

Evidence *held* sufficient to sustain a conviction of voluntary manslaughter.—*Dean v. Commonwealth* (Ky.) 1112.

Evidence in a prosecution for murder *held* to sustain a conviction of murder in the first degree.—*Brown v. State* (Tex. Cr. App.) 507.

In prosecution for homicide, certain testimony as to conversation of defendant *held* admissible as part of res gestae.—*Elmore v. State* (Tex. Cr. App.) 520.

Admission in evidence of dying declarations *held* not in violation of Const. art. 1, § 10, requiring defendant to be confronted with witnesses.—*Payne v. State* (Tex. Cr. App.) 934.

The fact that defendant, as secretary of a negro society, furnished evidence to grand jury as basis for an indictment of deceased for fornication, *held* irrelevant.—*Townsell v. State* (Tex. Cr. App.) 938.

Under an indictment charging murder by striking with an ax or stabbing with a knife,

the mere confession of defendant is insufficient proof of the manner of killing.—*Follis v. State* (Tex. Cr. App.) 1069.

§ 5. Trial.

Where the court instructs the jury that, to constitute murder, the killing must have been done with malice aforethought and premeditation, it need not repeat those elements of the crime in each paragraph of the charge.—*Brewer v. State* (Ark.) 773.

Instruction that, if such violence as accused used did not "at the time" appear reasonably necessary, etc., *held* not too indefinite.—*Williams v. Commonwealth* (Ky.) 134.

Where evidence of a murder was entirely circumstantial, the court properly instructed the jury on every phase of the law regarding homicide.—*Williams v. Commonwealth* (Ky.) 134.

Instruction, in prosecution for homicide, defining murder and manslaughter, *held* erroneous.—*Martin v. Commonwealth* (Ky.) 1104.

An instruction as to the right to carry a pistol to defend against an anticipated attack *held* erroneous for requiring the jury to find that it was without hostile intent.—*Nix v. State* (Tex. Cr. App.) 227.

An instruction on the law of self-defense *held* erroneous for being prefaced with the qualification that it applied to a defensive, and not to an offensive, act.—*Nix v. State* (Tex. Cr. App.) 227.

An instruction on self-defense *held* erroneous for requiring the jury to find that the deceased used certain words in connection with threatening acts toward defendant.—*Nix v. State* (Tex. Cr. App.) 227.

Omission of instruction on manslaughter, in prosecution for murder, *held* not error, under evidence.—*Brown v. State* (Tex. Cr. App.) 507.

Defendant, in prosecution for manslaughter, *held* entitled to charge under Pen. Code 1895, art. 717, relating to the intent of an offending party in the use of a weapon.—*Posey v. State* (Tex. Cr. App.) 689.

In a prosecution for homicide, facts *held* insufficient to present the issue of manslaughter.—*Smith v. State* (Tex. Cr. App.) 694.

In a prosecution for homicide, an instruction on murder in the second degree *held* proper.—*Smith v. State* (Tex. Cr. App.) 694.

An instruction that, if the jury found defendant not guilty of murder in the first degree, they should proceed to inquire as to his guilt of murder in the second degree, *held* not erroneous, as precluding an acquittal on a finding of not guilty of murder in the first degree.—*Smith v. State* (Tex. Cr. App.) 694.

Under Pen. Code 1895, art. 712, court *held* not required to charge on murder in the second degree, where, after plea of guilty, the evidence excludes murder in the second degree.—*Murray v. State* (Tex. Cr. App.) 927.

Instruction, in prosecution for manslaughter, summarizing elements of offense, *held* erroneous in omitting intent.—*Perrin v. State* (Tex. Cr. App.) 930.

Failure to charge on the law of maiming, in prosecution for manslaughter, *held* not error.—*Perrin v. State* (Tex. Cr. App.) 930.

In a prosecution for homicide, a charge on self-defense *held* erroneous, in combining too many elements as necessary to give the right, and as misleading.—*Dodson v. State* (Tex. Cr. App.) 940.

In a prosecution for murder, an instruction on the law of provoking difficulty *held* sufficient.—*Chism v. State* (Tex. Cr. App.) 949.

On a prosecution for murder, the court's instruction on manslaughter *held* sufficient.—*Chism v. State* (Tex. Cr. App.) 949.

Where on a prosecution for homicide the defense is self-defense, and the question is one not of real, but of apparent, danger, the court must instruct that the danger need not be real.—*Chism v. State* (Tex. Cr. App.) 949.

On prosecution for homicide, *held* not error to refuse an instruction on manslaughter.—*Chism v. State* (Tex. Cr. App.) 949.

On a prosecution for murder, an instruction on apparent danger, in relation to self-defense, *held* sufficient.—*Chism v. State* (Tex. Cr. App.) 949.

In a prosecution for murder, a charge on self-defense *held*, under the evidence, not subject to the complaint that it limited defendant's right of self-defense to an attack, and not to apparent danger.—*Tardy v. State* (Tex. Cr. App.) 1078.

§ 6. Appeal and error.

Any error in admitting evidence that one accused of murder and deceased had fought a year before *held* harmless, where it was proved they fought within a few hours of the death.—*Williams v. Commonwealth* (Ky.) 134.

Where it is doubtful as to whether an alleged dying declaration was made in extremis, the Court of Appeals will not interfere with the ruling admitting it in evidence.—*Martin v. Commonwealth* (Ky.) 1104.

In homicide, certain evidence as to deceased's knife *held* not prejudicial.—*Dean v. Commonwealth* (Ky.) 1112.

Ruling of trial court, under Code Prac. § 593, giving the court the right to reasonably control interrogation, *held* not prejudicial to defendant, in view of the opportunity given him subsequently to question witness.—*Dean v. Commonwealth* (Ky.) 1112.

In a prosecution for murder, in which the state's evidence is wholly circumstantial, omission to instruct on voluntary manslaughter and self-defense is reversible error, though no such instructions were requested.—*Brown v. Commonwealth* (Ky.) 1126.

Defendant may not complain of an instruction as to murder in the first degree, he having been convicted of a lower degree.—*State v. Riddle* (Mo. Sup.) 606.

In prosecution for homicide, excerpt from charge on self-defense *held* not prejudicial.—*Elmore v. State* (Tex. Cr. App.) 520.

HORSES.

See "Animals."

HOUSEBREAKING.

See "Burglary."

HUSBAND AND WIFE.

See "Curtsey"; "Divorce"; "Dower."

Competency as witnesses, see "Witnesses," § 1. Criminal responsibility of husband for slandering wife, see "Libel and Slander," § 1.

Estoppel of wife to deny conveyance of her life estate by joining in mortgage with husband, see "Estoppel," § 1.

Impairment of power of married woman to earn money as element of damages, see "Damages," § 2.

Mutual rights as to homestead, see "Homestead," § 2.

Right of married woman to claim exemption, see "Exemptions," § 1.

Rights of survivor, see "Executors and Administrators," § 3.

Transfers, in violation of Bankruptcy law, see "Bankruptcy," § 2.

§ 1. Mutual rights, duties, and liabilities.

Where the husband has reduced his wife's estate to possession, equity will not interpose to provide for the wife, to the exclusion of the husband's creditors.—*Scott v. Powers, Little & Co. (Ky.)* 408.

Where a wife signed note at husband's request, and gave it to him, she is bound by his representation that she signed it as principal, and is liable, though limitations would have run as to surety.—*Wm. Deering & Co. v. Veal (Ky.)* 888.

§ 2. Marriage settlements.

Antenuptial contract between husband and wife construed, and held to entitle the wife's personal representatives to recover from the husband's administrator the amount specified therein, to be paid to her at his death, though she died before the husband.—*Barlow's Adm'r v. Comstock's Adm'r (Ky.)* 475.

§ 3. Conveyances, contracts, and other transactions between husband and wife.

Release by wife, in contemplation of divorce, of any interest in her husband's property, held not to release him from liability on a note formerly given to her for borrowed money.—*Price v. Price (Ky.)* 888.

§ 4. Disabilities and privileges of coverture.

A separate contract by a wife for nursing and care in her last illness is valid.—*Dearing v. Moran (Ky.)* 217.

§ 5. Wife's separate estate.

Defendant having given certain notes to her daughter for money loaned, which the daughter was entitled to hold as against her husband, defendant could not set off the notes against a claim due from the husband.—*Terry v. Warder (Ky.)* 154.

Although a lease of a wife's separate estate was originally void because of her failure to join therein, it was rendered valid and binding, when, with full knowledge of the facts, she afterwards assigned, and acknowledged an assignment with the lease contract annexed.—*Ascarete v. Pfaff (Tex. Civ. App.)* 974.

§ 6. Community property.

Where a widow transfers a land certificate, which was community property, the interest therein of their children does not pass, though the transfer was made to obtain necessities for herself and children.—*Booth v. Clark (Tex. Civ. App.)* 392.

A land certificate, transferred to a husband during coverture, becomes community property.—*Booth v. Clark (Tex. Civ. App.)* 392.

Children held to have the burden of proving that the purchaser of community property, sold by their father as survivor, took with notice of their interests, or not for value.—*Eddy v. Bosley (Tex. Civ. App.)* 565.

As between a surviving husband, who sells a part of the community property, and his children, who are entitled to the community interest of their mother, a conveyance by him is a partition.—*Eddy v. Bosley (Tex. Civ. App.)* 565.

Sale of community property by the survivor held to convey only the interest which the sur-

vivor had having repudiated their claims.—*Miller v. Miller (Tex. Civ. App.)* 1085.

§ 7. Separation and separate maintenance.

A judgment awarding a wife \$2,000 alimony and \$150 counsel fee in a suit for separate maintenance held excessive, and modified so as to give her a life use of one-third of defendant's real estate, certain personal property, and \$100 counsel fee.—*Hall v. Hall (Ky.)* 1127.

HYPOTHETICAL QUESTIONS.

See "Evidence," § 11.

ILLEGITIMATE CHILDREN.

See "Bastards."

ILLITERACY.

Disqualification of jurors, see "Jury," § 2.

IMPAIRING OBLIGATION OF CONTRACT.

See "Constitutional Law," § 3.

IMPEACHMENT.

Of dying declaration, see "Homicide," § 4.
Of record, see "Appeal and Error," §§ 11, 12.
Of witness, see "Witnesses," § 3.

IMPLIED CONTRACTS.

See "Contribution"; "Work and Labor."

IMPRISONMENT.

See "Bail."
Escape of prisoner, see "Escape."
Habeas corpus, see "Habeas Corpus."

IMPROVEMENTS.

Liens, see "Mechanics' Liens."
On premises demised, see "Landlord and Tenant," § 3.
Plea of, in trespass to try title, see "Trespass to Try Title," § 1.
Public improvements, see "Municipal Corporations," § 5.

One entering on land without any color of right, and with knowledge that it belongs to another, has no lien on the land for improvements made.—*Wade v. Keown (Ky.)* 900.

IMPUTED NEGLIGENCE.

See "Negligence," § 3.

INCUMBRANCES.

On homestead, see "Homestead," § 2.

INDEBTEDNESS.

Of fraudulent grantor, see "Fraudulent Conveyances," § 1.
Of testator, see "Wills," § 5.

INDEMNITY.

See "Principal and Surety."

Against mechanic's lien, see "Mechanics' Liens," § 1.

In action on lost notes, see "Lost Instruments," Indemnity insurance, see "Insurance," §§ 2, 10, 11.

To sheriff, see "Sheriffs and Constables," § 2.

INDEPENDENT CONTRACTORS.

See "Master and Servant," § 9.

INDICTMENT AND INFORMATION.

See "Grand Jury."

Competency of wife to make affidavit supporting information for abandonment, see "Witnesses," § 1.

Discrimination as to selection of grand jury as violation of civil rights, see "Civil Rights." Harmless error in rulings on indictment, see "Criminal Law," § 22.

Against particular classes of parties.

See "Railroads," § 4.

For particular offenses.

See "Bribery"; "Forgery"; "Homicide," § 3; "Larceny," § 1; "Perjury," § 2; "Rape," § 2. Offenses against liquor laws, see "Intoxicating Liquors," § 6.

§ 1. Requisites and sufficiency of accusation.

That indictment of accessory to murder named the means *held* not to render invalid subsequent indictment of principal, stating the means are unknown.—*Sanchez v. State* (Tex. Cr. App.) 504.

A complaint, charging "Bill (or W. H.) G." with gambling, taken in connection with an information charging that "W. H. G." committed the offense, is not bad, as being in the alternative.—*Gaines v. State* (Tex. Cr. App.) 1076.

§ 2. Joinder of parties, offenses, and counts, duplicity, and election.

An indictment for suffering and committing a nuisance *held* not duplex.—*Peacock Distillery Co. v. Commonwealth* (Ky.) 893.

Rev. St. 1899, § 1842, prohibiting the taking away of a female for the purpose of prostitution of concubinage, *held* to create two offenses, which could not be joined in the same count of an indictment.—*State v. Adams* (Mo. Sup.) 588.

INDORSEMENT.

Of bill of exchange or promissory note, see "Bills and Notes," § 2.

INFANTS.

See "Adoption"; "Guardian and Ward"; "Parent and Child."

Care required of railroads as to children on or near tracks, see "Railroads," § 7.

Competency as witnesses, see "Witnesses," § 1. Contributory negligence of children injured or killed by operation of railroad, see "Railroads," § 6.

Effect of infancy on limitations, see "Limitation of Actions," § 2.

Injuries to youthful employes, see "Master and Servant," § 7.

Requests for instructions in action for personal injuries to, see "Trial," § 11.

Right to purchase public lands, see "Public Lands," § 1.

Sale of liquor to, see "Intoxicating Liquors," §§ 4, 6.

§ 1. Crimes.

A boy of 13 is presumed incapable of committing crime, and the state must show mental capacity enough to know right from wrong in reference to the offense charged.—*Harrison v. State* (Ark.) 763.

§ 2. Actions.

Under Civ. Code Prac. §§ 516, 517, rendering of judgment against infant defendants for whom no defense was made *held* not ground for appeal, unless acted on in circuit court.—*Lyon's Ex'r v. Logan County Bank's Assignee* (Ky.) 454.

Where the next friend of certain minors had no authority to sue for them, and the court properly dismissed the suits, as not for the best interest of the minors, an appeal from the orders of dismissal by such next friend will be dismissed.—*Robinson v. Talbot* (Ky.) 1108.

The dismissal of certain suits, brought for the ostensible benefit of certain minors, by their next friend, on the ground that the prosecution was not for the best interest of the infants, *held* a proper exercise of the chancellor's discretion.—*Robinson v. Talbot* (Ky.) 1108.

The chancellor *held* authorized to dismiss suits by the next friend of infant plaintiffs, instituted for their ostensible, but not for their real, interest.—*Robinson v. Talbot* (Ky.) 1108.

Plaintiffs and defendants in a will contest *held* not entitled to object on appeal to any irregularity in the appointment of a guardian and next friend for certain minors, made parties by scire facias.—*Vaile v. Sprague* (Mo. Sup.) 609.

In the absence of statutory enactment to the contrary, a court in a will contest *held* to have inherent power to appoint a guardian ad litem for minors, made parties by scire facias.—*Vaile v. Sprague* (Mo. Sup.) 609.

In an action for injuries to a minor, an instruction with reference to the damages recoverable *held* not objectionable on the ground that it authorized a recovery of damages recoverable only by the parent.—*Cameron Mill & Elevator Co. v. Anderson* (Tex. Civ. App.) 8.

Instruction that, if either father or son failed to use ordinary care, city is not liable for injuries of the son from defective sidewalk, *held* properly refused.—*City of San Antonio v. Talerico* (Tex. Civ. App.) 28.

INFERIOR COURTS.

See "Courts," § 8.

INFORMATION.

Criminal accusation, see "Indictment and Information."

INFORMERS.

Liability of persons procuring violation of law, see "Criminal Law," § 1.

INHERITANCE.

See "Descent and Distribution."

By adopted children, see "Adoption."

INJUNCTION.

Aider of pleading by allegations of adverse party, see "Pleading," § 8.

Judicial power to restrain brokers from dealing in nontransferable railroad tickets, see "Constitutional Law," § 2.

railroad crossing, see "Railroads," § 3.

§ 1. Nature and grounds in general.

Injunction will not lie to compel a railroad company to restore a crossing, where plaintiffs have an adequate remedy at law.—*Louisville & N. R. Co. v. Smith (Ky.)* 160.

Cr. Code Proc. §§ 383-392, relative to requiring security to keep the peace, *held* not to furnish adequate remedy ousting jurisdiction to issue strike injunction.—*Underhill v. Murphy (Ky.)* 482.

Under Rev. St. 1899, § 3649, injunction may issue to restrain threatened fraud, where defendant is insolvent, and the threatened injury would be irreparable, or its redress would result in multiplicity of suits.—*Schubach v. McDonald (Mo. Sup.)* 1020; *Hirt v. Kinealy, Id.*; *Leonard v. Fisher, Id.*; *Schubach v. Hough, Id.*; *Steiner v. Wood, Id.*; *Wasserman & Co. v. Hough, Id.*

Petition for injunction, in connection with rule to show cause, alleging threatened sale by ticket brokers of nontransferable railroad tickets, which had come into their possession, *held* to show an existent controversy within the jurisdiction of the court.—*Schubach v. McDonald (Mo. Sup.)* 1020; *Hirt v. Kinealy, Id.*; *Leonard v. Fisher, Id.*; *Schubach v. Hough, Id.*; *Steiner v. Wood, Id.*; *Wasserman & Co. v. Hough, Id.*

Ticket brokers, threatening to buy and sell nontransferable railroad tickets, invade property rights of railroads, and entitle them to injunction restraining them from so doing.—*Schubach v. McDonald (Mo. Sup.)* 1020; *Hirt v. Kinealy, Id.*; *Leonard v. Fisher, Id.*; *Schubach v. Hough, Id.*; *Steiner v. Wood, Id.*; *Wasserman & Co. v. Hough, Id.*

Allegations of a petition in a suit by a tenant *held* to entitle him to an injunction restraining the landlord from depriving him of a portion of the premises and of the crops, and for damages sustained.—*Foster v. Roseberry (Tex. Civ. App.)* 701.

§ 2. Subjects of protection and relief.

Under Ky. St. 1899, § 2361, injunction lies where the trespass to land is so vexatiously persisted in that a multiplicity of suits must result, or is by one who is insolvent.—*Chambers v. Haskell (Ky.)* 478.

Right to conduct business *held* property right, within protection of Constitution, to protect which injunction may issue.—*Underhill v. Murphy (Ky.)* 482.

Under constitutional guaranty of right of property and Ky. St. 1903, § 1291, refusal of strike injunction as trenching on criminal jurisdiction *held* improper.—*Underhill v. Murphy (Ky.)* 482.

§ 3. Actions for injunctions.

In view of Rev. St. 1889, §§ 2013, 2042, 2123, 5505, injunction suit, in which defendant voluntarily appeared at term preceding return term, *held* triable at term of appearance.—*Harding v. City of Carthage (Mo. App.)* 654.

§ 4. Preliminary and interlocutory injunctions.

Where it appears the continuance of a trespass to land would produce great or irreparable injury to plaintiff, a temporary injunction may be granted, under Civ. Code, § 272.—*Chambers v. Haskell (Ky.)* 478.

IN PAIS.

Estoppel, see "Estoppel," § 2.

INSANITY.

Of insured committing suicide, see "Insurance," § 14.

INSOLVENCY.

See "Assignments for Benefit of Creditors"; "Bankruptcy."

Of fraudulent grantor, see "Fraudulent Conveyances," § 1.

Presumption as to insolvency of insurance company because of refusal of license to do business in state, see "Insurance," § 1.

INSTRUCTIONS.

In civil actions, see "Trial," §§ 7-13.

In criminal prosecutions, see "Criminal Law," §§ 15, 19; "Homicide," § 5.

INSURANCE.

Admissibility of declarations in action on policy, see "Evidence," § 7.

Amendment of pleading in action on policy, see "Pleading," § 3.

Attorney's lien on proceeds of policy, see "Attorney and Client," § 2.

Competency of evidence in action on policy, see "Evidence," § 4.

Harmless error in action on policy, see "Appeal and Error," § 21.

Hearsay evidence in action on policy, see "Evidence," § 8.

Liability of insurance agent to company for fraud, see "Fraud," § 2.

Liability of sureties on fidelity bonds, see "Principal and Surety," § 3.

Refusal to adopt another state's construction of life policy as failure to give full faith and credit to judgment, see "Courts," § 2.

Right of action by assured against company assuming policies, see "Contracts," § 2.

Taxation of insurance companies, see "Taxation," § 2.

Validity of laws relating to by-laws of insurance companies as evidence as impairing obligation of contracts, see "Constitutional Law," § 3.

Verification of pleading in action on policy, see "Pleading," § 4.

§ 1. Control and regulation in general.

No presumption of the insolvency of a foreign insurance company arises from the fact that it has not been authorized to do business in the state.—*Jones v. Horn (Mo. App.)* 638.

§ 2. Insurance agents and brokers.

Parol contract of insurance *held* beyond scope of agent's authority, to applicant's knowledge.—*Hartford Fire Ins. Co. v. Trimble (Ky.)* 462.

A soliciting agent for an employers' liability company *held* without authority to change the rate of premium fixed by the policy.—*London Guaranty & Accident Co. v. Missouri & I. Coal Co. (Mo. App.)* 306.

Under Rev. St. 1899, §§ 7989, 8001, insurance agent *held* not personally liable for misrepresentation, inducing insurance, that foreign company had been admitted to do business in the state.—*Jones v. Horn (Mo. App.)* 638.

§ 3. Insurable interest.

Niece, having no expectation of pecuniary benefit from uncle, except occasional gift, *held* to have no insurable interest in his life.—*Willton v. New York Life Ins. Co. (Tex. Civ. App.)* 403.

Assignee of life policy, having no insurable interest in life insured, *held* not entitled to recover on the policy.—*Wilton v. New York Life Ins. Co.* (Tex. Civ. App.) 403.

§ 4. The contract in general.

Statute of another state requiring surrender value on lapsed life policies *held* not to apply to contract in this state.—*Washington Life Ins. Co. v. Glover* (Ky.) 146.

A parol contract of insurance, made with an insurance agent representing two companies, the company to take the risk not being specified, is not enforceable.—*Hartford Fire Ins. Co. v. Trimble* (Ky.) 462.

Where a policy of fire insurance is ambiguous, it will be construed most strongly against the insurance company.—*Continental Ins. Co. v. Daniel* (Ky.) 866.

The statutes of the state relating to insurance, in force at the time a policy is issued, become a part of the contract by implication, with the same effect as if embodied therein.—*Ritchie v. Home Ins. Co.* (Mo. App.) 341.

A clause of an accident policy excluding disability from disease contracted 15 days from the date of the policy *held* void, as repugnant to a previous provision purporting to insure complainant from the date of the policy.—*Bean v. Aetna Life Ins. Co.* (Tenn.) 104.

§ 5. Premiums, dues, and assessments.

Wife, induced by agent to apply for industrial insurance in husband's name without his knowledge, *held* entitled to recover premiums.—*Metropolitan Life Ins. Co. v. Asmus* (Ky.) 204.

Refusal of the company to change the beneficiary in a life insurance policy *held* no defense to an action on note for the premium.—*Harris v. Scrivener* (Tex. Civ. App.) 705.

§ 6. Cancellation, surrender, abandonment, or rescission of policy.

Provisions for cancellation in a fire insurance policy construed, and *held*, that cancellation should be made, and notice given, and tender of premium made, and five days after this the cancellation should take place.—*Continental Ins. Co. v. Daniel* (Ky.) 866.

Insurer *held* not entitled to cancel a policy, after loss, on the ground of fraudulent overvaluation.—*Ritchie v. Home Ins. Co.* (Mo. App.) 341.

Applicant *held* not estopped to deny knowledge of falsity of representations of insurance agent, though he could have informed himself from means at hand.—*Equitable Life Assur. Soc. v. Maverick* (Tex. Civ. App.) 560.

In suit to avoid insurance contract, *held* not necessary for plaintiff to offer payment of premiums; nor could defendant be prejudiced by plaintiff's retention of binding receipt or policy.—*Equitable Life Assur. Soc. v. Maverick* (Tex. Civ. App.) 560.

In suit to avoid insurance contract for false representations of agent, *held* not necessary to allege agent's knowledge of falsity of representations.—*Equitable Life Assur. Soc. v. Maverick* (Tex. Civ. App.) 560.

§ 7. Avoidance of policy for misrepresentation, fraud, or breach of warranty or condition.

Under Rev. St. 1899, § 7979, evidence of fraudulent representations overvaluing property insured *held* inadmissible, where the answer did not allege that, but for such misrepresentations, the policy would not have been issued.—*Ritchie v. Home Ins. Co.* (Mo. App.) 341.

In an action on a life insurance policy, alleged answers to questions not copied in the policy *held* immaterial.—*Metropolitan Life Ins. Co. v. Gibbs* (Tex. Civ. App.) 398.

Insurance agent, applying to other agents for a policy which he could not issue, *held* the agent of the company subsequently issuing the same in the issuance of the policy, so that his knowledge of facts relating to the risk was the knowledge of the insurer.—*Virginia Fire & Marine Ins. Co. v. Cummings* (Tex. Civ. App.) 716.

§ 8. Forfeiture of policy for breach of promissory warranty, covenant, or condition subsequent.

Terms of a life policy made in this state *held* to exclude the operation thereon of a statute of another state.—*Washington Life Ins. Co. v. Glover* (Ky.) 146.

In life policy, providing for paid-up policy on demand within six months after lapse of original policy, time *held* not of essence of contract.—*Washington Life Ins. Co. v. Glover* (Ky.) 146.

Under a provision for a paid-up policy on lapse of original policy, a demand within two years *held* within reasonable time.—*Washington Life Ins. Co. v. Glover* (Ky.) 146.

Failure to keep account of goods taken from stock for domestic consumption *held* not violation of clause in policy requiring books of account to be kept.—*Aetna Ins. Co. v. Fitze* (Tex. Civ. App.) 370.

While the iron safe clause in an insurance policy is a warranty, the breach of which will avoid the policy, yet, where it is open to two constructions, that one will be given it which favors the insured.—*Aetna Ins. Co. v. Fitze* (Tex. Civ. App.) 370.

Instruction, in action on policy, as to effect of inaccuracies in books of account kept by insured, *held* proper under the evidence.—*Aetna Ins. Co. v. Fitze* (Tex. Civ. App.) 370.

Insured *held* to have substantially complied with iron safe clause.—*Continental Fire Ins. Co. v. Cummings* (Tex. Civ. App.) 378.

An iron safe clause in a policy *held* substantially complied with, where books and papers preserved disclose a correct record of the business, etc., though one of the inventories and some of the invoices were left out of the safe, and were destroyed.—*Virginia Fire & Marine Ins. Co. v. Cummings* (Tex. Civ. App.) 716.

§ 9. Estoppel, waiver, or agreements affecting right to avoid or forfeit policy.

Where insurer was afforded every opportunity to survey a building before loss, and its agent who solicited the policy was well acquainted with its value, insurer was estopped from denying the valuation stated in the policy.—*Ritchie v. Home Ins. Co.* (Mo. App.) 341.

Receipt of premium *held* to estop insurance company from relying on misrepresentation as to title to property.—*Continental Fire Ins. Co. v. Cummings* (Tex. Civ. App.) 378.

A clause in a policy of life insurance, exempting the insurers from liability until actual payment of premium, may be waived.—*Metropolitan Life Ins. Co. v. Gibbs* (Tex. Civ. App.) 398.

§ 10. Risks and causes of loss.

Kidney disease produced in a servant by his handling infected rags in the discharge of his duties *held* within an employers' liability policy.—*Columbia Paper Stock Co. v. Fidelity & Casualty Co. of New York* (Mo. App.) 320.

The clause of an accident policy, limiting indemnity to \$100 in case of unnecessary exposure to danger, etc., *held* not to apply to casualties to which insured was exposed in the performance of the duties of the avocation in which he was engaged.—*Jamison v. Continental Casualty Co.* (Mo. App.) 812.

In an action on a fire policy, defendant company *held* to have waived preliminary proofs of loss.—*Pennsylvania Fire Ins. Co. v. C. D. Young & Co. (Ky.)* 127.

Where an insurance company denied liability from the date of the fire to the time of the trial, it was not incumbent on the holder of the policy to make proofs of loss.—*Continental Ins. Co. v. Daniel (Ky.)* 866.

A requirement in an employers' liability policy that the assured shall give immediate notice to the insurer of any accident is reasonable.—*Columbia Paper Stock Co. v. Fidelity & Casualty Co. of New York (Mo. App.)* 320.

A requirement in an employers' liability policy *held* to mean that assured should give insurer notice of any accident within a reasonable time.—*Columbia Paper Stock Co. v. Fidelity & Casualty Co. of New York (Mo. App.)* 320.

Certain facts *held* not to show notice to an employer of injury to a servant, so as to render employer in fault for not notifying the insurer in an employers' liability policy issued to the employer.—*Columbia Paper Stock Co. v. Fidelity & Casualty Co. of New York (Mo. App.)* 320.

Insurance company *held* to have waived proofs of loss.—*Continental Fire Ins. Co. v. Cummings (Tex. Civ. App.)* 378.

That plaintiff, at the time he demanded blanks for proofs of death from insurer, was not authorized to receive payment, did not prevent insurer's refusal of blanks from operating as a waiver of proofs of death.—*Metropolitan Life Ins. Co. v. Gibbs (Tex. Civ. App.)* 398.

§ 12. Actions on policies.

In an action on an accident policy an allegation in the answer that a misrepresentation as to plaintiff's occupation materially increased the risk *held* insufficient to show that the misrepresentation was material.—*Pacific Mut. Life Ins. Co. v. Bailey (Ky.)* 119.

Under Ky. St. 1903, § 639, an answer in an action on an accident policy, alleging misrepresentation as to plaintiff's occupation, but failing to allege facts showing such misrepresentation to be material, *held* demurrable.—*Pacific Mut. Life Ins. Co. v. Bailey (Ky.)* 119.

In an action on a fire policy, the only question for jury *held* to be as to value of property at time of loss.—*Pennsylvania Fire Ins. Co. v. C. D. Young & Co. (Ky.)* 127.

Evidence *held* to sustain finding that insured had not sufficient mind to understand he was taking his life, so that there could be recovery on his life policy.—*Supreme Council Knights of Equity of the World v. Heineman (Ky.)* 406.

The burden of proof that insured met death by unnecessary exposure to danger or obvious risk of injury, within a limited indemnity clause in an accident policy, is on the insurer.—*Jamison v. Continental Casualty Co. (Mo. App.)* 812.

Statements of deceased in answer to suggestive questions, while he was in a semiconscious condition, *held* not entitled to weight in determining whether he was injured while unnecessarily exposing himself to danger or obvious risk, within the terms of an accident policy.—*Jamison v. Continental Casualty Co. (Mo. App.)* 812.

In an action on an accident policy, the petition *held* not objectionable for failure to allege that the wound was received by accident, in that plaintiff disclaimed knowledge of the circumstances surrounding the accident.—*Jamison v. Continental Casualty Co. (Mo. App.)* 812.

Circumstances surrounding the death of insured *held* insufficient to establish as a matter of law that he met his death by unnecessary exposure to danger or obvious risk of injury, with-

out.—*Jamison v. Continental Casualty Co. (Mo. App.)* 812.

Statement of plaintiff's attorney in letter to defendant insurance company *held* not objectionable, in action on policy, as expression of legal opinion.—*Aetna Ins. Co. v. Fitze (Tex. Civ. App.)* 370.

Statement of insured's attorney in letter to defendant company *held* not objectionable, in action on policy, as irrelevant and immaterial.—*Aetna Ins. Co. v. Fitze (Tex. Civ. App.)* 370.

Evidence in action on policy *held* to support finding of waiver of production of books of account.—*Continental Fire Ins. Co. v. Cummings (Tex. Civ. App.)* 378.

In action on policy, *held* competent to show company's knowledge of true state of title to property, after policy issued and before fire.—*Continental Fire Ins. Co. v. Cummings (Tex. Civ. App.)* 378.

Evidence in action on policy *held* admissible on issue of agent's knowledge of true ownership of property.—*Continental Fire Ins. Co. v. Cummings (Tex. Civ. App.)* 378.

In an action on a policy, evidence *held* admissible to show waiver of proofs of death.—*Metropolitan Life Ins. Co. v. Gibbs (Tex. Civ. App.)* 398.

In an action on a life insurance policy by insured's special administrator, decedent's wife was not a necessary party.—*Metropolitan Life Ins. Co. v. Gibbs (Tex. Civ. App.)* 398.

In an action on an insurance policy, an objection to a card notifying deceased of the maturity of a premium, as immaterial and irrelevant, was properly overruled.—*Metropolitan Life Ins. Co. v. Gibbs (Tex. Civ. App.)* 398.

Where a temporary administrator was appointed, and his appointment was continued under Sayles' Ann. Civ. St. 1897, arts. 1931, 1933, proof of such appointment and continuance was admissible to establish his capacity to sue, in an action on a policy which he was appointed to prosecute.—*Metropolitan Life Ins. Co. v. Gibbs (Tex. Civ. App.)* 398.

Payee of life policy *held* not entitled to recover premiums paid thereon, when not pleaded.—*Wilton v. New York Life Ins. Co. (Tex. Civ. App.)* 403.

Evidence *held* insufficient to charge an insurance agent with knowledge that plaintiff's interest in the property was other than sole and unconditional ownership.—*Virginia Fire & Marine Ins. Co. v. Cummings (Tex. Civ. App.)* 716.

§ 13. Reinsurance.

Where an insurance company assumed all the outstanding policies of an insolvent company, and appropriated all of the latter's assets, it could not relieve itself from liability on the policies so assumed by repudiating the contract of assumption for nonpayment of installments due thereunder.—*Ruohs v. Traders' Fire Ins. Co. (Tenn.)* 85.

§ 14. Mutual benefit insurance.

Suicide while insured was insane *held* no defense against a policy containing no provision against suicide.—*Hunziker v. Supreme Lodge K. P. (Ky.)* 201.

A by-law of a fraternal insurance society, limiting a recovery to a proportionate amount of a policy in case of suicide, passed subsequent to the enactment of Ky. St. 1903, § 679, but not attached to a certificate previously issued, *held* not available as a defense thereto.—*Hunziker v. Supreme Lodge K. P. (Ky.)* 201.

Member of benefit association *held* not bound by amendment to its constitution adopted with-

out his express consent.—*Sisson v. Supreme Court of Honor* (Mo. App.) 297.

A hand rendered useless *held* lost, within constitution of benefit association, providing for payment of a sum on loss of a hand.—*Sisson v. Supreme Court of Honor* (Mo. App.) 297.

The enforcement of a law of a beneficial association to insure prompt payment of assessments may be waived by the association.—*Lavin v. Grand Lodge A. O. U. W.* (Mo. App.) 325.

Officer of subordinate lodge of beneficial association *held* not agent of grand lodge, so as to be able to bind it to a waiver of forfeiture for nonpayment of assessments.—*Lavin v. Grand Lodge A. O. U. W.* (Mo. App.) 325.

In an action on beneficial certificate, letter *held* admissible on issue of member's abandonment of the order, though authorship was denied by beneficiary.—*Lavin v. Grand Lodge A. O. U. W.* (Mo. App.) 325.

Where the proper officer of a beneficial association was tendered the assessment for a given month before the day that it fell due, there could be no forfeiture of the insurance for nonpayment of the assessment for that month.—*Lavin v. Grand Lodge A. O. U. W.* (Mo. App.) 325.

Self-executing by-law of beneficial association, declaring forfeiture in case of nonpayment of assessments when due, *held* valid.—*Lavin v. Grand Lodge A. O. U. W.* (Mo. App.) 325.

Evidence *held* to show that insured's killing of himself was accidental, supporting verdict for beneficiary, notwithstanding provision against suicide.—*Hunt v. Ancient Order of Pyramids* (Mo. App.) 649.

The defense of ultra vires cannot avail a beneficial association in an action on a life policy, where it was not pleaded.—*Weber v. Ancient Order of Pyramids* (Mo. App.) 650.

By executing life policy, beneficial association *held* to waive medical examination and application on forms required by its by-laws.—*Weber v. Ancient Order of Pyramids* (Mo. App.) 650.

In an action on life policy, defense that insured did not pay premiums as required, without stating wherein failure lay, *held* insufficient.—*Weber v. Ancient Order of Pyramids* (Mo. App.) 650.

Proofs of death of one insured in a beneficial association were unnecessary, where it denied all liability.—*Weber v. Ancient Order of Pyramids* (Mo. App.) 650.

Burden of showing that fraternal benefit society was withdrawn from the protection of Rev. St. 1895, art. 3096, through failure to make required annual statement, *held* to be on beneficiary suing on certificate.—*Supreme Council A. L. H. v. Story* (Tex. Sup.) 1.

Fraternal beneficiary corporation organized under laws of sister state *held* excepted by Rev. St. 1895, art. 3096, from the general insurance laws, so as not to be liable under article 3071 for attorney's fees and damages for failure to pay loss.—*Supreme Council A. L. H. v. Story* (Tex. Sup.) 1.

Board of directors of beneficial association *held* to have had authority to cancel a contract of membership.—*Travelers' Protective Ass'n of America v. Dewey* (Tex. Civ. App.) 1087.

INTENT.

Criminal, see "Assault and Battery," § 1; "Criminal Law," § 1.

Fraudulent, see "Fraud," § 1; "Fraudulent Conveyances," § 1.

INTEREST.

See "Usury."

Declaration against interest, see "Evidence," § 6.

Insurable interest, see "Insurance," § 3.

On damages for injury to live stock in transportation, see "Carriers," § 3.

On price of goods sold, see "Sales," § 2.

§ 1. Rights and liabilities in general.

Defendant, in an action on a note in which a counterclaim was filed, *held* entitled to interest on verdict in his favor from the date of its rendition to the date of final judgment.—*Oliver v. Love* (Mo. App.) 335.

Where defendants drew drafts on plaintiff in San Antonio, payable in Boston, with exchange, defendants were not entitled to charge interest until they received notice of payment of the drafts.—*D. Sullivan & Co. v. Owens* (Tex. Civ. App.) 373.

§ 2. Time and computation.

A note containing an obligation "to pay the interest annually" at 8 per cent. until paid, and interest on interest at 6 per cent. until the maturity of the note, does not draw interest on interest after maturity of the note.—*Carpenter v. Rice's Adm'r* (Ky.) 453.

In an action for alleged overcharges of interest, plaintiff *held* not entitled to recover an overcharge of interest after the payment of the advances, not pleaded.—*D. Sullivan & Co. v. Owens* (Tex. Civ. App.) 373.

INTERLOCUTORY INJUNCTION.

See "Injunction," § 4.

INTERLOCUTORY JUDGMENT.

Appealability, see "Appeal and Error," § 2.

INTERSTATE COMMERCE.

Failure to comply with regulations of interstate commerce commission as affecting liability of employer for injuries to employé, see "Master and Servant," § 2.

Regulation, see "Carriers," § 1.

INTERVENTION.

In attachment proceedings, see "Attachment," § 2.

In foreclosure, see "Mortgages," § 7.

INTESTACY.

See "Descent and Distribution."

INTOXICATING LIQUORS.

Best evidence in prosecution for violation of local option law, see "Criminal Law," § 6.

Bond not to violate liquor law, see "Breach of the Peace."

Competency of jurors, see "Jury," § 4.

Continuance of prosecution for violation of liquor laws, see "Criminal Law," § 11.

Evidence of other offenses in prosecution for violation of local option laws, see "Criminal Law," § 8.

Impeachment of witness in prosecution for violating liquor laws, see "Witnesses," § 3.

Instructions in general, see "Criminal Law," § 15.

Laws relating to summary destruction of liquor without jury trial as denial of due process of law, see "Constitutional Law," § 5.

Legislative power as to regulation of sale, see "Constitutional Law," § 2.

Opinion evidence in prosecution for violating local option laws, see "Criminal Law," § 6.
Reduction of sentence on appeal from prosecution for illegally selling liquors, see "Criminal Law," § 17.
Relevancy of evidence in general in prosecution for violation of liquor laws, see "Criminal Law," § 7.
Right to trial by jury in prosecution for illegal sale of liquors, see "Jury," § 1.
Sales by druggists, see "Druggists."
Sufficiency of evidence in prosecution for violating liquor laws in general, see "Criminal Law," § 10.

§ 1. Power to control traffic.

Under Rev. St. 1899, § 5978, a city of the fourth class had authority to require a license fee of a dramshop keeper who had duly obtained a license from the county court.—*Ex parte Hinkle* (Mo. App.) 317.

§ 2. Constitutionality of acts and ordinances.

Under Sand. & H. Dig. § 4877, Acts 1895, p. 86, Acts 1897, p. 107, and Acts 1899, p. 137, seller of native wine within three-mile limit after Acts 1899, p. 137, was passed, held punishable for violation of court's order made before the act was passed.—*Kettern v. State* (Ark.) 758.

Conceding the constitutionality of Laws 1897, p. 235, c. 162, it must be construed with reference to Sayles' Ann. Civ. St. 1897, arts. 3393-3395, and thus the action of the commissioners' court in combining justices' precincts for local option purposes, regardless of the fact that their status as wet or dry had been fixed within a two-year period, was unauthorized.—*Ex parte Heyman* (Tex. Cr. App.) 349.

Const. art. 16, § 20, providing for local option, contemplated that local option districts should be comprised of contiguous territory; and Laws 1897, p. 235, c. 162, authorizing commissioners' court to combine those precincts, without regard to any contiguity, into one local option district, is unconstitutional.—*Ex parte Heyman* (Tex. Cr. App.) 349.

Const. art. 16, § 20, contemporarily construed by Sayles' Ann. Civ. St. 1897, arts. 3393-3395, constrains the Legislature to preserve the autonomy of local option territories, and to preserve the right to vote periodically on prohibition; and Laws 1897, p. 235, c. 162, authorizing the commissioners' court to create new local option districts by combination, imperils that right, and is repugnant to the Constitution.—*Ex parte Heyman* (Tex. Cr. App.) 349.

While, under Const. art. 16, § 20, the Legislature may itself combine political subdivisions of a county for local option purposes, it cannot authorize commissioners' court, as it attempted to do by Laws 1897, p. 235, c. 162, to combine existing districts into new districts for such purposes.—*Ex parte Heyman* (Tex. Cr. App.) 349.

In accordance with general rule of construction, by which specific words following and enumerated of designated persons or things are regarded as limited in their meaning by the latter, Const. art. 16, § 20, relative to powers of commissioners' court to designate districts for local option purposes, must be construed as empowering such court to designate existing forms of county subdivisions.—*Ex parte Heyman* (Tex. Cr. App.) 349.

Const. art. 16, § 20, directs the Legislature to authorize commissioners' court to designate districts of a county in which local option elections may be held, but it does not sanction a

Const. art. 16, § 20, to render void an act authorizing the commissioners' court to designate a subdivision of a county composed of justices' precincts for the holding of a local option election.—*Ex parte Wells* (Tex. Cr. App.) 928.

§ 3. Local option.

Petition contesting a local option election held to state no ground of contest within Rev. St. 1895, art. 3397.—*Stinson v. Gardner* (Tex. Sup.) 492.

§ 4. Licenses and taxes.

Where judgment of county court refusing liquor license should have been affirmed by circuit court, applicant was not prejudiced by its action in remanding for a new trial.—*Hodges v. Metcalf County Court* (Ky.) 177.

Under Ky. St. 1903, §§ 4203-4214, the burden is on an applicant for a liquor license to show that he is in good faith a merchant, druggist, distiller, or tavern keeper.—*Hodges v. Metcalf County Court* (Ky.) 177.

Ky. St. 1903, § 4224, fixing tax for liquor licenses, held not to authorize granting of licenses not otherwise allowed by law.—*Hodges v. Metcalf County Court* (Ky.) 160.

An ordinance providing regulations to be complied with by an applicant for a saloon license held not inconsistent with a prior ordinance requiring a license and fixing the fee.—*Ex parte Hinkle* (Mo. App.) 317.

Ordinance requiring dramshop keepers to obtain licenses held not void for uncertainty.—*Ex parte Hinkle* (Mo. App.) 317.

One thousand dollars a year for a saloon license by a city of the fourth class is not so unreasonable a charge as to justify a court in declaring void the ordinance fixing it.—*Ex parte Hinkle* (Mo. App.) 317.

Under Rev. St. 1899, c. 129, §§ 8542, 8546, and Fayette City Ordinances, § 8, merchants doing business in the city held assessed taxpaying citizens, within section 2993, requiring dramshop license applications to be subscribed by two-thirds of such citizens in the block where the dramshop was to be located.—*State ex rel. Dike v. Kingsbury* (Mo. App.) 641.

A town ordinance held not to give an absolute right to demand a license to keep a dramshop, and to be void even if it did.—*State ex rel. Brown v. Stiff* (Mo. App.) 675.

Mandamus cannot be invoked to control the discretion of a town council in passing on an application for a license to sell intoxicating liquors.—*State ex rel. Brown v. Stiff* (Mo. App.) 675.

There is no civil liability for selling liquor to a minor, where the liquor dealer believed and had good reason to believe that the minor was over 21 years of age.—*Tinkle v. Sweeney* (Tex. Civ. App.) 248.

Evidence held not to show breach of condition of liquor dealer's bond relative to minors entering and remaining in place of business.—*Tinkle v. Sweeney* (Tex. Civ. App.) 248.

Evidence held not to show that a minor entered and remained in a saloon, within the meaning of the statute prescribing the conditions of a liquor dealer's bond.—*Ghio v. Stephens* (Tex. Civ. App.) 1084.

§ 5. Offenses.

One who sold, in quantities less than one gallon, wine made on his own premises, but only in part from grapes grown by him, held subject to the provisions of Rev. St. 1899, § 3014, and

not protected, as a "wine grower," by section 3015.—*State v. Miller* (Mo. App.) 643.

Facts held to constitute a violation of the Sunday liquor law, though the beer is sold on Saturday, with an agreement to keep it on ice till the next day, when it is handed out through a broken door to the purchasers.—*Wallis v. State* (Tex. Cr. App.) 231.

Evidence held to show a violation of local option law.—*James v. State* (Tex. Cr. App.) 951.

Evidence held to show that liquor became prosecutor's property on delivery by defendant's principal to express company, and to show no violation of local option law by defendant.—*James v. State* (Tex. Cr. App.) 951.

§ 6. Criminal prosecutions.

An instruction, on a prosecution for violating the local option law, as to evidence of other sales than that charged, held erroneous.—*Belt v. State* (Tex. Cr. App.) 933.

Evidence on prosecution for sale of intoxicating liquor to a minor held to sustain conviction.—*Menzing v. State* (Tex. Cr. App.) 935.

A charge requiring defendant to establish facts on which he relies to excuse or justify the prohibited act held inapplicable and erroneous.—*Ratliff v. State* (Tex. Cr. App.) 936.

Indictment for violation of local option law held improper, for failing to intelligently specify the date of sale.—*Thurman v. State* (Tex. Cr. App.) 937.

In a prosecution for violating a local option law, evidence held to entitle defendant to an instruction that, if the liquor was delivered by mistake, defendant was not guilty, under Pen. Code 1895, art. 46.—*Patrick v. State* (Tex. Cr. App.) 947.

Evidence that the grand jury failed to find any drunkenness traceable to the place where defendant worked on the day he was alleged to have illegally sold intoxicating liquor held inadmissible.—*Patrick v. State* (Tex. Cr. App.) 947.

In a prosecution for violating a local option law, evidence held to entitle defendant to an instruction that, before conviction, the proof must show that the liquor was intoxicating.—*Patrick v. State* (Tex. Cr. App.) 947.

Evidence as to the character of defendant's employment in a saloon, etc., at the time he was charged with having sold liquor illegally, held admissible.—*Patrick v. State* (Tex. Cr. App.) 947.

On trial for violation of local option law, evidence that defendant was in the habit of selling wine to boys for sacramental purposes held admissible.—*White v. State* (Tex. Cr. App.) 1006.

§ 7. Searches, seizures, and forfeitures.

Act Feb. 13, 1899 (Acts 1899, p. 11), providing for the condemnation and summary destruction of liquor illegally kept for sale, prescribes a civil proceeding, so that a mere preponderance of evidence is sufficient to sustain it.—*Kirkland v. State* (Ark.) 770.

IRON SAFE CLAUSE.

See "Insurance," § 8.

ISSUES.

In civil actions, see "Pleading," § 7.

Presented for review on appeal, see "Appeal and Error," § 4.

JAILS.

Escape from, see "Escape."

JEOPARDY.

Former jeopardy bar to prosecution, see "Criminal Law," § 5.

JOINDER.

Of causes of action, see "Action," § 2.

Of offenses in indictment, see "Indictment and Information," § 2.

Of parties in civil actions, see "Parties."

JOINT TENANCY.

See "Tenancy in Common."

JUDGES.

See "Courts"; "Justices of the Peace."

Comments on evidence, see "Criminal Law," § 12; "Trial," § 7.

Remarks and conduct at trial, see "Trial," § 3.

§ 1. Appointment, qualification, and tenure.

A statute creating a new judicial district, and appointing the judge of another district the judge thereof, held to have made him the lawful judge of the new district.—*Maroney v. State* (Tex. Cr. App.) 696.

§ 2. Special or substitute judges.

The authority of the judge to preside must affirmatively appear in criminal cases.—*Low v. State* (Tenn.) 110.

While a special judge has no control over his election, and cannot authenticate record thereof, it is his duty to see that a proper record is made before he signs the decree or judgment.—*Low v. State* (Tenn.) 110.

The record of the election and qualification of the special judge should be verified by the official signature of the clerk, and will constitute a part of the record of the case.—*Low v. State* (Tenn.) 110.

Requisites of order of election of special judge, under Shannon's Code, §§ 5730-5732, stated.—*Low v. State* (Tenn.) 110.

Power to hold election of special judge, under Shannon's Code, §§ 5730-5732, is vested in clerk alone, whose duty it also is to make a record of the election and authenticate it by his official signature.—*Low v. State* (Tenn.) 110.

Under Shannon's Code, §§ 5730-5732, providing for the election of a special judge, his authority and jurisdiction expires with the adjournment of the term of court at which he was elected.—*Low v. State* (Tenn.) 110.

Special judge in one case has no authority to authenticate election of special judge, under Shannon's Code, §§ 5730-5732, to try another case.—*Low v. State* (Tenn.) 110.

That regular judge signed the final adjourning order of term is insufficient to authenticate an election of a special judge, under Shannon's Code, §§ 5730-5732, to try a case in which regular judge was disqualified.—*Low v. State* (Tenn.) 110.

A person charged with crime cannot be tried by another than one constitutionally elected and qualified, even by his consent.—*Low v. State* (Tenn.) 110.

The legislative provision for the election of special judges is applicable to both regular and special terms.—*Missouri, K. & T. Ry. Co. v. Texas v. Huff* (Tex. Civ. App.) 249.

The statute providing for the election of special judges is applicable to both regular and special terms.—*Missouri, K. & T. Ry. Co. v. Texas v. O'Connor* (Tex. Civ. App.) 374.

When a special term is called, and the regular dge is not present, but is holding a regular rm in some other county of his district, the action of a special judge to preside at the ecial term is valid.—*St. Louis Southwestern v. Co. of Texas v. Swinney* (Tex. Civ. App.) 7.

Where a district judge had ordered a special term, but was holding a regular term in another county at the time appointed, a special judge was properly selected for such special term.—*Missouri, K. & T. Ry. Co. of Tex. v. Stinson* (Tex. Civ. App.) 986.

3. Rights, powers, duties, and liabilities.

Judicial officer *held* not protected against its for damages for acting maliciously or beyond his jurisdiction.—*Reed v. Taylor* (Ky.) 2.

JUDGMENT.

Decisions of courts in general, see "Courts," § 2.

Entry on remand from appellate court, see "Appeal and Error," § 22.

Refusal to follow decisions of courts of other states, see "Courts," § 2.

Review, see "Appeal and Error."

Right to object to parties after judgment, see "Parties," § 2.

Secondary evidence, see "Evidence," § 5.

Actions by or against particular classes of parties.

See "Principal and Agent," § 3.

Trustee in bankruptcy, see "Bankruptcy," § 2.

In particular civil actions or proceedings.

See "Trespass to Try Title," § 1.

For price of land, see "Vendor and Purchaser," § 4.

For sale of land for assessments for public improvements, see "Municipal Corporations," § 5.

Justices' courts, see "Justices of the Peace," § 2.

On appeal or writ of error, see "Appeal and Error," § 22.

Setting aside fraudulent conveyance, see "Fraudulent Conveyances," § 2.

1. By default.

Civ. Code Prac. §§ 340, 342, relating to new trials, *held* not applicable, where there was no issue of fact tried and decided by the court, nor verdict of a jury, and motion for default judgment may be made at any time during term at which it was rendered.—*Pennsylvania Fire Ins. Co. v. C. D. Young & Co.* (Ky.) 127.

Court *held* authorized to set aside a default judgment, on motion made during same term at which judgment was rendered.—*Pennsylvania Fire Ins. Co. v. C. D. Young & Co.* (Ky.) 127.

Plaintiff *held* entitled to have default judgment set aside and new trial granted, under Civ. Code Prac. § 518.—*Snelling's Adm'r v. Lewis* (Ky.) 1124.

Petition not stating residence of defendant, and citation served out of the county, *held*, under Rev. St. 1895, arts. 1191, 1212, 1214, 1215, 119, insufficient to sustain a judgment by default.—*Tyler v. Blanton* (Tex. Civ. App.) 564.

2. On trial of issues.

Where intervenor, in an action to restrain the enforcement of a judgment, admitted payment before intervention, plaintiff was entitled to judgment.—*Abce v. San Antonio Brewing Ass'n* (Tex. Civ. App.) 973.

3. Amendment, correction, and review in same court.

Where a judgment grants, by inadvertence, relief not sought in the pleadings, it is a clerical

misprision, which may be corrected on motion. *Binion v. Woolery* (Ky.) 898.

A judgment in the circuit court, in a cause entertained on an appeal from a justice of the peace, taken after the time limited by statute, *held* not to be vacated on writ of error coram nobis.—*Hadley v. Bernero* (Mo. App.) 64.

A court cannot amend its judgment after the adjournment of the term, except as provided by statute.—*Smallwood v. Love* (Tex. Civ. App.) 400.

On rendition of judgment, the adjudging of costs was a part of the judgment, and it could not be amended as to costs after the adjournment of the term, except as provided by statute.—*Smallwood v. Love* (Tex. Civ. App.) 400.

§ 4. Opening or vacating.

As the only method of opening a final judgment is by petition, a motion to set it aside and grant a new trial is properly overruled.—*Snelling's Adm'r v. Lewis* (Ky.) 1124.

§ 5. Equitable relief.

On affirmation by the Court of Appeals of a judgment for plaintiff in unlawful detainer, judgment in a suit to enjoin such action must go for defendant therein.—*Phillippi v. American Brass & Mfg. Co.* (Mo. App.) 77.

§ 6. Collateral attack.

Certain defects in a judgment under Pasch. Dig. art. 5400, providing for actions against unknown heirs, *held* not sufficient to affect it in a collateral proceeding.—*Houston & T. C. R. Co. v. De Berry* (Tex. Civ. App.) 736.

In trespass to try title, certain testimony as to filing of power of attorney in General Land Office *held* immaterial, as not affecting validity of plaintiffs' title.—*Houston & T. C. R. Co. v. De Berry* (Tex. Civ. App.) 736.

§ 7. Merger and bar of causes of action and defenses.

Under Ky. St. 1894, § 2463, as amended by Acts 1896, pp. 47-49, c. 29, judgment allowing a materialman to participate in a distribution in bankruptcy of contractor *held* a bar to subsequent proceedings to enforce the unpaid portion of his lien against the owner.—*Southern Planing Mill & Lumber Co. v. Doerhoefer* (Ky.) 882.

A judgment foreclosing a lien on threshing machinery for nonpayment of the price *held* not a bar to the buyer's remedy for breach of warranty.—*Standefor v. Aultman & Taylor Machinery Co.* (Tex. Civ. App.) 552.

§ 8. Conclusiveness of adjudication.

Circuit courts sustaining demurrer to plea of res judicata, on ground of lack of jurisdiction, *held* error.—*Kelley & Lysle Milling Co. v. Adams* (Ark.) 49.

Will *held* to vest in children of deceased child merely contingent remainder, so that they were bound by judgment obtained against their parent and the life tenant.—*Hermann v. Parsons* (Ky.) 125.

A judgment declaring that a note should be credited on another note, rendered in an action to which the innocent purchaser of the latter note was not a party, *held* to have no binding force or effect against him.—*Goldsmith v. Clark* (Ky.) 405.

Suit in which right of certain counties to tax railroad on franchises was determined adverse to railroad *held* not a determination adverse to the right of other counties to collect similar tax.—*Jefferson County v. Board of Valuation & Assessment of Kentucky* (Ky.) 443.

A judgment in favor of buyers in an action for the price of coffee, a part of which was not delivered, on a plea of payment, *held* res judicata in a subsequent claim by the sellers to re-

cover the price, on the ground that the sale was induced by fraud.—*Borches & Co. v. Arbuckle Bros.* (Tenn.) 266.

The direction of a verdict in the federal court in favor of sellers on an issue as to the making of a sale *held* conclusive on the buyers in a subsequent action involving the same issue, notwithstanding the buyers' pleading and testimony in the federal court denying such sale.—*Borches & Co. v. Arbuckle Bros.* (Tenn.) 266.

A judgment sustaining the validity of a mortgage lien *held* conclusive against a plea of usury in an action to foreclose a mortgage.—*W. C. Belcher Land Mortg. Co. v. Norris* (Tex. Civ. App.) 390.

§ 9. Assignment.

Defendants' right to proceeds collected by sheriff on execution *held* to have become absolute by virtue of contract with plaintiffs on purchase of a judgment, sale of the property, and payment of consideration to sheriff.—*W. T. Rickards & Co. v. J. H. Bemis & Co.* (Tex. Civ. App.) 239.

Defendants, as assignees of a judgment, *held* to have complied with contract by which they were to have land sold on execution without expense to plaintiffs.—*W. T. Rickards & Co. v. J. H. Bemis & Co.* (Tex. Civ. App.) 239.

§ 10. Pleading and evidence of judgment as estoppel or defense.

Where a verdict was directed on a particular issue, and other issues submitted to the jury, the direction of such verdict might be considered in a subsequent action to determine the conclusiveness of the judgment in the action in which such direction was made.—*Borches & Co. v. Arbuckle Bros.* (Tenn.) 266.

Res judicata *held* sufficiently pleaded against defense of usury in action to foreclose mortgage.—*W. C. Belcher Land Mortg. Co. v. Norris* (Tex. Civ. App.) 390.

JUDICIAL NOTICE.

In civil actions, see "Evidence," § 1.
In criminal prosecutions, see "Criminal Law," § 6.

JUDICIAL POWER.

See "Constitutional Law," § 2.

JUDICIAL SALES.

On execution, see "Execution," § 2.

JURISDICTION.

Amount in controversy, see "Appeal and Error," § 2; "Courts," §§ 3, 4; "Justices of the Peace," § 3.
Effect of appearance, see "Appearance."

Jurisdiction of particular actions or proceedings.

Appeal in tax assessment proceedings, see "Taxation," § 5.
By trustee in bankruptcy, see "Bankruptcy," § 2.
Criminal prosecutions, see "Criminal Law," § 3.
To quash execution, see "Execution," § 1.

Special jurisdictions.

See "Equity," § 1.
Appellate jurisdiction, see "Criminal Law," § 18; "Justices of the Peace," § 3.
Justices' courts in civil cases, see "Justices of the Peace," § 1.
Particular courts, see "Courts."

JURY.

See "Grand Jury."

Custody and conduct, see "Trial," § 13.
Disqualification or misconduct ground for new trial, see "Criminal Law," § 16; "New Trial," § 2.
Disqualification or misconduct of jurors as ground for reversal, see "Criminal Law," § 22.
Error in summoning jurors as ground for new trial of criminal prosecution, see "Criminal Law," § 16.
Instructions in civil actions, see "Trial," §§ 7-12.
Instructions in criminal prosecutions, see "Criminal Law," § 15.
Laws relating to summary destruction of liquor without jury trial as denial of due process of law, see "Constitutional Law," § 5.
Questions for jury in civil actions, see "Trial," § 6.
Questions for jury in criminal prosecutions, see "Criminal Law," § 14.
Review of objections to jury as dependent on preservation of grounds of review in record, see "Appeal and Error," § 12.
Self-executing character of constitutional provisions, see "Constitutional Law," § 1.
Taking case or question from jury at trial, see "Trial," § 6.

§ 1. Right to trial by jury.

Sand. & H. Dig. § 1618, providing for search for and destruction of gambling devices, *held* not unconstitutional, because not providing for a jury trial.—*Furth v. State* (Ark.) 759.

Act Feb. 13, 1899 (Acts 1899, p. 11), entitled "An act to suppress the illegal sale of liquors and to destroy the same in prohibited districts," does not require a jury trial in condemnation proceedings thereunder.—*Kirkland v. State* (Ark.) 770.

Constitutional provisions as to trial by jury do not prevent Legislature from enacting statute like Act Feb. 13, 1899 (Acts 1899, p. 11), providing for summary destruction of liquor without providing for jury trial.—*Kirkland v. State* (Ark.) 770.

Intentional disregard by county judge of Sayles' Rev. Civ. St. arts. 3155-3173, *held* a violation of the right of trial by jury, guaranteed by Bill of Rights, art. 1, §§ 10, 15, notwithstanding Code Cr. Proc. art. 695.—*White v. State* (Tex. Cr. App.) 1066.

§ 2. Qualifications of jurors and exemptions.

That a juror signed the verdict by making his mark *held* insufficient to establish his disqualification for illiteracy, within Rev. St. 1899, § 3799.—*Parman v. Kansas City* (Mo. App.) 1046.

§ 3. Summoning, attendance, discharge, and compensation.

Under Rev. St. 1899, § 3766, *held*, that the sheriff and deputies, being sworn at a regular term relative to impaneling the jury, need not be sworn at an adjourned term thereof.—*State v. Riddle* (Mo. Sup.) 606.

Objection that officers were not properly sworn before summoning talesmen *held* untenable.—*Chism v. State* (Tex. Cr. App.) 949.

§ 4. Competency of jurors, challenges, and objections.

In homicide, there was no error in permitting the prosecuting attorney to peremptorily challenge a juror after he had been accepted, when the juror informed the court that he had conscientious scruples against capital punishment.—*Brewer v. State* (Ark.) 773.

One *held* not incompetent as a juror in a murder case because he heard part of the testimony

a witness when defendant was admitted to trial.—*State v. Riddle* (Mo. Sup.) 606.

In a prosecution for violating a local option law, defendant *held* entitled to ask the jury whether they were prejudiced against a person who was in a position at the time to violate the law in question.—*Patrick v. State* (Tex. Cr. p.) 947.

Venire of jurors not selected by jury commissioners should be quashed on motion, notwithstanding Code Cr. Proc. arts. 661, 696.—*Witte v. State* (Tex. Cr. App.) 1066.

Voir dire examination of veniremen in a criminal case *held* to show that challenges for cause were properly overruled.—*Tardy v. State ex. Cr. App.*) 1076.

JUSTICES OF THE PEACE.

Criminal jurisdiction, see "Criminal Law," § 8.

1. Civil jurisdiction and authority.

Under Rev. St. 1899, §§ 3839, 4486, *held*, that justice has no jurisdiction in replevin, where the party is a resident of the county.—*Dennis v. Bailey* (Mo. App.) 669.

The mere fact that defendant appeared in plevin and proceeded to trial without objection before a justice who had no jurisdiction did not a waiver of the lack of jurisdiction.—*Dennis v. Bailey* (Mo. App.) 669.

2. Procedure in civil cases.

A justice of the peace *held* to be without power to set aside a judgment at the instance of plaintiff.—*H. W. Crooker Shoe Co. v. Fry* (Mo. p.) 313.

A judgment of a justice of the peace *held* not subject to collateral attack for insufficiency of process.—*H. W. Crooker Shoe Co. v. Fry* (Mo. p.) 313.

3. Review of proceedings.

Under Rev. St. 1895, art. 1670, one of several defendants to an action in justice court, not personally interested, may appeal, without naming his codefendants in judgment obligees in bond.—*C. E. Slayton & Co. v. Horsey* (Tex. p.) 919.

Where, on appeal from a justice to the county court, the bond did not state the time of doing the next regular term of the county court, as required by article 889, p. 291, Acts 18th Leg., the appeal should be dismissed.—*Witt v. State* (Tex. Cr. App.) 937.

That action of justice rendered it unnecessary for defendant to plead counterclaim *held* not to authorize him to plead it on appeal to county court.—*Clements v. Carpenter* (Tex. Civ. App.) 369.

Motion to strike out plea in reconvention, entered after appeal from justice, *held* not to be, after plaintiff's failure to controvert defendant's statement that he relied thereon.—*Clements v. Carpenter* (Tex. Civ. App.) 369.

When defendant's abandonment of its cross-claim before a justice left only in dispute plaintiff's claim for \$20, county court had no jurisdiction on appeal, under Const. art. 5, § 16, 1st Rev. St. 1895, art. 1158.—*Galveston, H. S. A. Ry. Co. v. Schlather* (Tex. Civ. App.) 1.

Under Sayles' Ann. Civ. St. 1897, arts. 344, 345, application for certiorari need not show why applicant did not appeal.—*Parlin & Sandorff Co. v. Keel* (Tex. Civ. App.) 1082.

JUSTIFICATION.

homicide, see "Homicide," § 2.

KIDNAPPING.

See "Abduction."

KNOWLEDGE.

By employer of defects in appliances or place for work, see "Master and Servant," § 3.

By grantee of fraud in conveyance, see "Fraudulent Conveyances," § 1.

By servant of defect or danger, see "Master and Servant," § 6.

Effect of ignorance of cause of action on limitation, see "Limitation of Actions," § 2.

LABELS.

Furnishing for fertilizers after receipt by purchaser, see "Agriculture."

LABOR LAWS.

See "Master and Servant," § 1.

LACHES.

In proceedings for probate, see "Wills," § 3.

LANDLORD AND TENANT.

See "Forcible Entry and Detainer."

Admissibility of evidence as to waiver of landlord's lien, see "Evidence," § 4.

Admission of parol lease to show occupancy as tenant, see "Adverse Possession," § 1.

Attachment against one receiving and selling crops subject to lien, see "Attachment," § 1.

Evidence of authority of agent to waive landlord's lien, see "Principal and Agent," § 3.

Herding cattle on land of another under permission from person having lease taking effect in future, see "Trespass," § 1.

Lease of public lands, see "Public Lands," § 1.

Lease of wife's separate property, see "Husband and Wife," § 5.

Parol evidence as to leases, see "Evidence," § 10.

Requirements of statute of frauds as to leases, see "Frauds, Statute of," § 3.

Requirements of statute of frauds as to release of landlord's lien, see "Frauds, Statute of," § 2.

Restraining landlord from depriving tenant of share of crops, see "Injunction," § 1.

§ 1. Terms for years.

Lease for one year, with privilege of renewal, *held* not to fall within Rev. St. 1899, § 4107, but to be assignable without the landlord's written consent.—*Jones & Oglebay v. Kansas City Board of Trade* (Mo. App.) 843.

Although by Sayles' Ann. Civ. St. 1897, art. 3250, tenant cannot assign lease without landlord's consent, such consent by landlord and acceptance of assignee as tenant releases original tenant from liability for rent.—*Ascarete v. Pfaff* (Tex. Civ. App.) 974.

§ 2. Tenancies at will and at sufferance.

A mere occupation of land with the knowledge, but without the consent, of the owner, does not create a tenancy at will.—*Center Creek Min. Co. v. Frankenstein* (Mo. Sup.) 785.

Agreement for occupation of premises, conditional upon payment of rent for past occupation, *held* not to create a tenancy at will.—*Center Creek Min. Co. v. Frankenstein* (Mo. Sup.) 785.

Commencement of ejectment suit by owner of land after an agreement to pay rent for past occupation of the land *held* not to create a lease.—Center Creek Min. Co. v. Frankenstein (Mo. Sup.) 785.

§ 3. Premises, and enjoyment and use thereof.

A tenant at will, on the termination of the tenancy, *held* not entitled to recover the value of the improvements which he placed on the property, in the absence of a contract.—Guthrie v. Guthrie (Ky.) 474.

In an action against a landlord for injuries to a tenant's property by the collapse of the building, the petition *held* not to state a cause of action against the landlord.—Franklin v. Tracey (Ky.) 1112.

§ 4. Rent and advances.

In a suit to fix the landlord's lien on the proceeds of a sale of the tenant's crop, the rent claim and its amount must be established by proper proof.—Judge v. Curtis (Ark.) 746.

Payment of rents for previous year by mortgagee of tenant's crops to landlord's agent *held* sufficient to put mortgagee on inquiry as to landlord's lien.—Judge v. Curtis (Ark.) 746.

Waiver by landlord's agent of landlord's lien on crops *held* good, though made without consideration.—Wimp v. Early (Mo. App.) 343.

In an action under Rev. St. 1899, § 4123, by landlord against one who purchased tenant's crop, answer *held* sufficiently broad to let in defense of waiver of landlord's lien.—Wimp v. Early (Mo. App.) 343.

In action by landlord, under Rev. St. 1899, § 4123, to recover value of tenant's crops purchased by defendant, evidence as to the value of certain land on which the landlord had held a trust deed to secure the rent *held* inadmissible.—Wimp v. Early (Mo. App.) 343.

Deed of trust taken by landlord on tenant's own premises to secure rent on demised premises *held* not to create a mortgage on crops grown on demised premises.—Wimp v. Early (Mo. App.) 343.

Where the evidence raised an issue of fact, the direction of a verdict was error.—Sorrrells v. Goldberg (Tex. Civ. App.) 711.

One who occupies premises is liable for rent during the period of his occupancy, irrespective of the validity of the lease under which he purports to hold.—Ascarete v. Pfaff (Tex. Civ. App.) 974.

§ 5. Re-entry and recovery of possession by landlord.

Under Ky. St. 1903, §§ 2295, 2298–2296, 2326, 2327, and Civ. Code Prac. § 452, lease *held* to warrant action of forcible detainer by lessor, on breach of covenant for clearing and cultivation of land by certain date.—Andrews v. Erwin (Ky.) 902.

Written demand for possession *held* not necessary preliminary to lessor's maintaining forcible detainer.—Andrews v. Erwin (Ky.) 902.

§ 6. Renting on shares.

Where nothing was said as to the fodder to be raised by a tenant under a cropper's contract to raise corn, the parties become tenants in common thereof.—Black v. Golden (Mo. App.) 301.

A tenant on shares *held* entitled to maintain suit for damages to crop by wrongful levy thereon.—Parker v. Hale (Tex. Civ. App.) 555.

LANDS.

See "Public Lands."

LARCENY.

See "Robbery."

Argument of counsel, see "Criminal Law," § 13.

Conviction of burglary where accused is acquitted of larceny, see "Burglary," § 1.

Declarations as evidence, see "Criminal Law," § 6.

Instructions in general, see "Criminal Law," § 15.

Jurisdiction of prosecution, see "Criminal Law," § 3.

Questions for jury in general, see "Criminal Law," § 14.

Relevancy of evidence, see "Criminal Law," § 7.

Testimony of conspirators, see "Criminal Law," § 6.

§ 1. Prosecution and punishment.

Defendant, in prosecution for horse stealing, *held* entitled to charge under St. 1903, § 1236, relating to the unlawful taking of property without felonious intent.—Cox v. Commonwealth (Ky.) 423.

Finding of stolen dress goods in the house of a man with a family *held* not to show exclusive possession in him, raising presumption of guilt.—State v. Drew (Mo. Sup.) 594.

An indictment, under Pen. Code 1895, art. 951, for theft of a horse, *held* sufficient against an objection that it failed to allege the theft of the horse in Oklahoma.—Beard v. State (Tex. Cr. App.) 348.

Indictment under Pen. Code 1895, art. 951, for theft of a horse, need not state its value.—Beard v. State (Tex. Cr. App.) 348.

An instruction defining theft *held* to be erroneous.—Beard v. State (Tex. Cr. App.) 348.

A charge in a prosecution for horse theft *held* to have correctly stated the punishment provided by Pen. Code 1895, art. 881.—Beard v. State (Tex. Cr. App.) 348.

The statement of facts on appeal, in a prosecution for theft of a horse in Oklahoma *held* insufficient to authorize a conviction, under Pen. Code 1895, art. 952, unless it contains the laws of that territory.—Beard v. State (Tex. Cr. App.) 348.

An indictment, under Pen. Code 1895, art. 877, making conversion by a bailee theft, *held* defective in allegations as to the agent of the bailor.—McCarty v. State (Tex. Cr. App.) 506.

On trial for theft, evidence by officer of search of premises, and arrest, *held* admissible under the evidence.—Gilford v. State (Tex. Cr. App.) 692.

Where evidence showed value of stolen lap robe without question, failure to submit some proved value to jury *held* not error.—Thompson v. State (Tex. Cr. App.) 941.

Instruction that, if accused's explanation of recent possession of stolen property was probably true, there could be no conviction, *held* proper.—Thompson v. State (Tex. Cr. App.) 941.

In a prosecution for horse theft, it was competent for the state to prove that witness was acting as a detective, for the purpose of ferreting out the crime with which defendant was charged, or assisting in his detection and apprehension.—Lightfoot v. State (Tex. Cr. App.) 1075.

LAW OF THE CASE.

Decision on appeal, see "Appeal and Error," § 16.

LAWS.

Presumptions as to laws of other states, see "Evidence," § 2.

LEADING QUESTIONS.

See "Witnesses," § 2.

LEASES.

See "Landlord and Tenant."

Of public lands, see "Public Lands," § 1.
Of wife's separate property, see "Husband and Wife," § 5.

LEGACIES.

See "Wills."

LEGISLATIVE POWER.

See "Constitutional Law," § 2.

LEGITIMACY.

See "Bastards," § 1.

LETTERS OF CREDIT.

See "Banks and Banking," § 2.

LEVEES.

Special or local laws, see "Statutes," § 1.

Act 1901, p. 27, establishing a drainage district for the purpose of maintaining a particular levee, is not repealed by Acts 1903, p. 278, relating to the reclamation of lands by the construction, widening, altering, or deepening any ditch, drain, or water course.—*St. Louis Southwestern Ry. Co. v. Grayson* (Ark.) 777.

Acts 1901, p. 27, establishing a drainage district for the purpose of maintaining a particular levee, does not suspend the general law on the subject contained in Sand. & H. Dig. §§ 1203-1232.—*St. Louis Southwestern Ry. Co. v. Grayson* (Ark.) 777.

Acts 1901, p. 27, establishing a drainage district for the purpose of maintaining a particular levee, and providing that it shall include the "tract and roadbed" of a certain railroad, includes the right of way of such railroad.—*St. Louis Southwestern Ry. Co. v. Grayson* (Ark.) 777.

The truth of the allegation, in a suit for injunction against the enforcement of taxes levied under Acts 1901, p. 27, establishing a drainage district for the purpose of maintaining a particular levee, that plaintiff's lands will not be benefited by the improvement, is not admitted by demurrer.—*St. Louis Southwestern Ry. Co. v. Grayson* (Ark.) 777.

LIBEL AND SLANDER.**§ 1. Criminal responsibility.**

Under the statute, a husband may be prosecuted for slandering his wife.—*Stayton v. State* (Tex. Cr. App.) 1071.

In a prosecution for slander, statements made by defendant at the same time, or shortly before or after those charged in the indictment, are admissible to show intent.—*Stayton v. State* (Tex. Cr. App.) 1071.

In a prosecution for slander, the alleged slanderous words held not to have been privileged.—*Stayton v. State* (Tex. Cr. App.) 1071.

Under Pen. Code, art. 750, a charge that the jury could not convict, unless they found malice, held required in a prosecution for slander.—*Stayton v. State* (Tex. Cr. App.) 1071.

In a prosecution for slander, in which statements made by defendant at nearly the same time as those charged were introduced to show intent, an instruction as to the purpose of such

evidence should have been given.—*Stayton v. State* (Tex. Cr. App.) 1071.

LICENSES.

For sale of intoxicating liquors, see "Intoxicating Liquors," §§ 1, 4.

Injuries to licensees, see "Railroads," § 5.

Levy of license and ad valorem taxes as double taxation, see "Taxation," § 2.

Of medical specialists, see "Physicians and Surgeons."

§ 1. For occupations and privileges.

Acts 1902, p. 355, c. 128, art. 10, § 32, subd. 3, taxing tobacco factories does not violate Const. § 171, declaring that taxes shall be uniform.—*Strater Bros. Tobacco Co. v. Commonwealth* (Ky.) 871.

Under Const. §§ 174, 181, held that Acts 1902, p. 355, c. 128, art. 10, § 32, subd. 3, taxing tobacco factories, is a license, and not a property tax.—*Strater Bros. Tobacco Co. v. Commonwealth* (Ky.) 871.

On prosecution for pursuing the occupation of traveling medical specialist, without having paid the required tax, held error to admit in evidence the records of the commissioners' court for a certain year.—*Howe v. State* (Tex. Cr. App.) 1004.

On a prosecution for pursuing the occupation of traveling medical specialist, without having paid the required tax, evidence considered, and held insufficient to sustain a conviction.—*Howe v. State* (Tex. Cr. App.) 1064.

LIENS.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 2.

Passing by assignment of debt, see "Assignments," § 1.

Liens acquired by particular remedies or proceedings.

See "Taxation," § 6.

Particular classes of liens.

See "Attorney and Client," § 2; "Mechanics' Liens."

For drainage assessment, see "Drains," § 1.

For improvements on land, see "Improvements."

For public improvements in municipalities, see "Municipal Corporations," § 5.

Landlord's lien for rent, see "Landlord and Tenant," § 4.

Of factor, see "Factors."

Vendor's lien on lands sold, see "Vendor and Purchaser," § 4.

Absolute owner of property sold by conversion must sue at law for its value, but lienor must proceed in equity to fix lien on proceeds.—*Judge v. Curtis* (Ark.) 746.

Assignment to surety by contractor of apportionment warrants against latter's own property held to create no lien enforceable by surety against mortgage executed by contractor.—*United Loan & Deposit Bank of Campbellsburg v. Bitzer* (Ky.) 183.

Death of owner and presentment and allowance of claim against his estate held not to take away lien and power of sale given to mechanic for repairs on steam boiler, under Rev. St. 1896, arts. 3320, 3322.—*Lithgow v. Sweedberg* (Tex. Civ. App.) 246.

LIFE ESTATES.

See "Curtesy"; "Dower."

Life estates and remainders may be created in personal property by the same language that

would create similar estates in realty.—*Stallcup v. Cronley's Trustee* (Ky.) 441.

Contingent remainder interest in personalty held not assignable at common law or under Ky. St. § 2341.—*Stallcup v. Cronley's Trustee* (Ky.) 441.

While contingent remainder interest in personalty is assignable in equity, it must be supported by valuable consideration.—*Stallcup v. Cronley's Trustee* (Ky.) 441.

Widow's right as life tenant, under statute governing descent and distribution (Rev. St. 1895, art. 1689), in oil subsequently discovered, determined.—*Lone Acre Oil Co. v. Swayne* (Tex. Civ. App.) 380.

LIFE INSURANCE.

See "Insurance."

LIMITATION.

Of municipal indebtedness, see "Municipal Corporations," § 9.

LIMITATION OF ACTIONS.

See "Adverse Possession."

Knowledge of agent as starting the running of, against principal, see "Principal and Agent," § 3.

Particular actions or proceedings.

Accounting for taxes paid, see "Taxation," § 8.

Actions for causing death, see "Death," § 1.

Against surety, see "Principal and Surety," § 3.

By or against heirs of community property, see "Husband and Wife," § 6.

For drainage assessment, see "Drains," § 1.

For sale of land for assessments for public improvements, see "Municipal Corporations," § 5.

§ 1. Statutes of limitation.

Wife, who signed note for her husband, held a principal, within Ky. St. 1903, §§ 2514, 2551, relating to limitations as against principal and surety.—*Wm. Deering & Co. v. Veal* (Ky.) 886.

§ 2. Computation of period of limitation.

Limitations against action for flooding crop, owing to railroad embankment, held to run from time of injury, and not from construction of embankment.—*St. Louis, I. M. & S. Ry. Co. v. Stephens* (Ark.) 766.

An action for relief of the children of insured by his first wife against the children of his second wife, on account of mistake in the policy on his life, made payable to her, if living, otherwise to his children, whereas it should have been payable to her alone, held barred by limitations. Ky. St. 1903, §§ 654, 2515, 2525, 2527.—*Webb v. Webb* (Ky.) 166.

Under Ky. St. 1903, § 2515, limitations commence to run against an action by a contractor on a street improvement apportionment warrant on its delivery to him.—*Smith v. M. J. Lawler & Son* (Ky.) 851.

Under Ky. St. 1903, §§ 2515, 2519, right of action for fraud in claiming land under a deed held not to accrue prior to the delivery of the deed.—*Row v. Johnston* (Ky.) 906.

Amendment in action on account held not to state new cause of action, so as to warrant sustaining demurrer based on limitations.—*Burton-Lingo Co. v. Beyer* (Tex. Civ. App.) 248.

Limitations held not to run against an action by a child to set aside a partition of property with her mother for fraudulent statements of the latter, until knowledge of the facts.—*Pitman v. Holmes* (Tex. Civ. App.) 961.

§ 3. Acknowledgment, new promise, and part payment.

Defendant's letter to plaintiff held an acknowledgment of the debt, and a new promise to pay it, taking it out of the statute.—*O'Neill v. Ellis* (Tex. Civ. App.) 1083.

§ 4. Operation and effect of bar by limitation.

Whether limitations have run against a note secured by deed of trust is immaterial, where the trustee only seeks to exercise the power conferred in the deed of trust by selling the property.—*Peacock v. Cummings* (Tex. Civ. App.) 1002.

LIMITATION OF LIABILITY.

Of carrier for personal injuries to passenger, see "Carriers," § 7.

LIQUOR SELLING.

See "Intoxicating Liquors."

LIS PENDENS.

Pendency of other action ground for abatement, see "Abatement and Revival," § 1.

LIVE STOCK.

Carriage of, see "Carriers," § 8.

Injuries from operation of railroads, see "Railroads," § 8.

LOCAL ACTIONS.

See "Venue," § 1.

LOCAL LAWS.

See "Statutes," § 1.

LOCAL OPTION.

Traffic in intoxicating liquors, see "Intoxicating Liquors," §§ 2, 3, 5, 6.

LOST INSTRUMENTS.

Where a lost bond for costs had been reinstated under Rev. St. 1899, § 4560, and a motion for judgment made thereon, it was not an action on a lost instrument, within the meaning of sections 642, 643, and the movant need not proceed according to those sections.—*Jordan v. Vaughn* (Mo. App.) 316.

Where a lost bond for costs has been reinstated under Rev. St. 1899, § 4560, the party interested was entitled to judgment thereon on motion, without proceeding under section 4561, relating to certain enumerated instruments, not including such bond.—*Jordan v. Vaughn* (Mo. App.) 316.

An original statement, filed with a justice in an action on lost notes, held a sufficient compliance with Rev. St. 1899, § 3854.—*Warder, Bushnell & Glessner Co. v. Libby* (Mo. App.) 338.

A memorandum in the clerk's minute book held a sufficient showing, on appeal, as to the approval of an indemnity bond in an action on lost notes.—*Warder, Bushnell & Glessner Co. v. Libby* (Mo. App.) 338.

MACHINERY.

Dangerous machinery, see "Negligence," § 1.

Liability of employer for defects, see "Master and Servant," § 3.

MAINTENANCE.

See "ChamPERTY and Maintenance."

MALICIOUS PROSECUTION.

Liability of employer for acts of employé, see "Master and Servant," § 9.

§ 1. Actions.

In action for malicious prosecution, though evidence authorized liberal redress and punitive damages, verdict rendered *held* excessive.—*Farrell v. St. Louis Transit Co.* (Mo. App.) 312.

MANDAMUS.

Mandatory injunction to compel restoration of railroad crossing, see "Railroads," § 3.

§ 1. Subjects and purposes of relief.

A city *held* entitled to mandamus; a railroad having refused to comply with an ordinance as to grade of its tracks at street crossings.—*Houston & T. C. R. Co. v. City of Dallas* (Tex. Civ. App.) 525.

The drawing of a warrant by a municipal officer for the payment of a definitely ascertained demand is a ministerial act, which may be compelled by mandamus.—*Altgelt v. Campbell* (Tex. Civ. App.) 967.

A claimant against a city *held* not entitled to mandamus to compel the issuance of a warrant for his claim out of its regular order.—*Altgelt v. Campbell* (Tex. Civ. App.) 967.

MANDATE.

See "Mandamus."

To lower court on decision on appeal or writ of error, see "Appeal and Error," § 22.

MANSLAUGHTER.

See "Homicide," § 1.

Instructions in prosecution for, see "Homicide," § 5.

MANUFACTURES.

See "Licenses," § 1.

MARRIAGE.

See "Divorce"; "Husband and Wife."

Forgery of marriage license, see "Forgery."

MARRIAGE SETTLEMENTS.

See "Husband and Wife," § 2.

MARRIED WOMEN.

See "Husband and Wife."

Right to claim exemptions, see "Exemptions," § 1.

MASTER AND SERVANT.

See "Work and Labor."

Employers' liability insurance, see "Insurance," §§ 2, 10, 11.

Laws regulating hours of employment in mines as class legislation, see "Constitutional Law," § 4.

Province of court and jury in action for personal injuries, see "Trial," § 7.

Recovery from stranger for injuries from concurrent negligence of stranger and fellow servant, see "Negligence," § 3.

Requests for instructions in action for personal injuries, see "Trial," § 11.

Res gestæ in action for personal injuries, see "Evidence," § 4.

§ 1. The relation.

Act March 23, 1901 (Laws 1901, p. 211), regulating hours of employment in mines, *held* a proper police regulation to secure the health and safety of the employes.—*State v. Cantwell* (Mo. Sup.) 569.

Receipt of commission by plaintiff on a sale of horses to defendant, initiated prior to his alleged employment by defendant to train his horses, *held* not inconsistent with his assertion of such employment.—*Matthews v. Wallace* (Mo. App.) 296.

An employé *held* not required, in diminution of damages for breach of employment, to seek other employment; he having waited in reasonable expectation of being called into service at any time by the employer.—*Matthews v. Wallace* (Mo. App.) 296.

§ 2. Master's liability for injuries to servant—Nature and extent in general.

The fact that the negligence of a third person contributed to that of the master in causing an injury to a servant is no defense to an action against the master.—*St. Louis, I. M. & S. Ry. Co. v. Neal* (Ark.) 220.

Failure of railroad to comply with rules of interstate commerce commission relative to drawbars *held* not to authorize recovery for death of a servant, unless it was the approximate cause of death.—*St. Louis, I. M. & S. Ry. Co. v. Neal* (Ark.) 220.

Insecure condition of platform *held* proximate cause of employé's injury, though he slipped and fell on it, causing it to fall.—*Monongahela River Consol. Coal & Coke Co. v. Campbell* (Ky.) 405.

Where an accident to an employé happened in Tennessee, the law of that state must govern in an action for the injury brought in Kentucky.—*Illinois Cent. R. Co. v. Jordan* (Ky.) 426.

Consent for one employé to direct another, being merely an inference from the evidence, *held* not to support further inference of authority to make such directions.—*Texas & P. Coal Co. v. Manning* (Tex. Civ. App.) 545.

Passive consent by employer to employé to direct another *held* not to fix liability on principal for negligent directions.—*Texas & P. Coal Co. v. Manning* (Tex. Civ. App.) 545.

§ 3. — Tools, machinery, appliances, and places for work.

In an action for death of servant, owing to failure of defendant railroad to comply with rules of interstate commerce commission relative to drawbars, *held* not necessary for plaintiff to show defendant's knowledge of the defect.—*St. Louis, I. M. & S. Ry. Co. v. Neal* (Ark.) 220.

Plaintiff, suing for wrongful death of railroad brakeman, *held* entitled to recover, though he did not show that the center of the draft line of the drawheads of the two cars, which crushed the brakeman, were not even, as required by rules of interstate commerce commission.—*St. Louis, I. M. & S. Ry. Co. v. Neal* (Ark.) 220.

Where plaintiff was the only servant employed at a pumping station, his knowledge of the defective condition of a roof over the same was the knowledge of his employer.—*Shemwell v. Owensboro & N. R. Co.* (Ky.) 448.

A master is not bound to make the place to work absolutely safe, and does not insure the servant against the ordinary risks incident to the employment.—*Wilson v. Chess & Wymond Co.* (Ky.) 453.

A master *held* liable to his servant for injuries caused by a vicious horse, furnished for

the servant's use.—*McCready v. Stepp* (Mo. App.) 671.

In an action for the death of a miner, caused by the caving in of a mine, plaintiff was not compelled to show that timbers were necessary to support the roof, and had been requested by the miners working therein.—*Weston v. Lackawanna Min. Co.* (Mo. App.) 1044.

§ 4. — Methods of work, rules, and orders.

The backing of a freight train upon a siding, against cars standing there, without warning by bell or whistle, *held* negligence as to brakeman thereon.—*Southern Ry. Co. in Kentucky v. Otis' Adm'r* (Ky.) 480.

Failure of conductor to warn, or attempt to prevent injury to, brakeman, *held* negligence.—*Southern Ry. Co. in Kentucky v. Otis' Adm'r* (Ky.) 480.

Noise of approaching train *held* insufficient warning to brakeman to justify failure to give him other warning.—*Southern Ry. Co. in Kentucky v. Otis' Adm'r* (Ky.) 480.

§ 5. — Fellow servants.

Under Rev. St. Mo. 1899, § 547, brakeman injured in Iowa by engineer's negligence *held* entitled to recover in Missouri, as authorized by *McClain's Code Iowa*, § 2002.—*Benedict v. Chicago Great Western Ry. Co.* (Mo. App.) 60.

A street railway is not within the provisions of the fellow servant statute, whereby the master of common servants is made answerable for their negligence to each other.—*Johnson v. Metropolitan St. Ry. Co.* (Mo. App.) 275.

Plaintiff, who was engaged in hauling away trash and rubbish made by carpenters in their work, was a fellow servant with the carpenters and could not recover for negligence inflicted by their negligence.—*Johnson v. Metropolitan St. Ry. Co.* (Mo. App.) 275.

Defendant's foreman, when he negligently tossed a block of wood onto a car, which fell into a mine, killing deceased, who was acting as a laborer, did not by the act become decedent's fellow servant.—*Strode v. Conkey* (Mo. App.) 678.

Under *Sayles' Ann. Civ. St.* 1897, art. 4560h, railway employes engaged in cleaning an engine need not be in contact with each other, or working on the same piece, or cognizant of each other's duties, in order to be fellow servants.—*Galveston, H. & S. A. Ry. Co. v. Cloyd* (Tex. Civ. App.) 43.

Railway employes, engaged in the common work of cleaning an engine, *held* fellow servants.—*Galveston, H. & S. A. Ry. Co. v. Cloyd* (Tex. Civ. App.) 43.

Testimony *held* to show that an employe was not a fellow servant with other employes.—*Galveston, H. & S. A. Ry. Co. v. Butchek* (Tex. Civ. App.) 740.

§ 6. Risks assumed by servant.

A master's promise to repair defects at the request of his servant *held* not to render the master an insurer of the servant's safety, but only to relieve the latter from the charge of contributory negligence for a reasonable time.—*Shemwell v. Owensboro & N. R. Co.* (Ky.) 448.

Where plaintiff was injured by the collapse of the roof of a building in which he was employed within a week after a promise to repair had been made, such time was not so unreasonable as to deprive him of the right to continue to work relying on the promise.—*Shemwell v. Owensboro & N. R. Co.* (Ky.) 448.

A promise to repair a defective roof over a building in which plaintiff was employed *held* not a promise to make the roof safe to walk on.—*Shemwell v. Owensboro & N. R. Co.* (Ky.) 448.

The right of an employe to recover for injuries from the fall of a platform is not affected by the fact that he had equal means with his employer of knowing that it had not been safely constructed.—*Pfisterer v. J. H. Peter & Co.* (Ky.) 450.

A servant, who was injured by falling into a vat of hot water which was unprotected, *held* to have assumed the risk of such injury.—*Wilson v. Chess & Wymond Co.* (Ky.) 453.

Risk from stopping train in unusual and unnecessary manner *held* not assumed by brakeman.—*Benedict v. Chicago Great Western Ry. Co.* (Mo. App.) 60.

A servant *held* to have assumed the risks usually incident to the business conducted by his master.—*Harrington v. Wabash R. Co.* (Mo. App.) 662.

The servant's knowledge of the master's neglect to furnish a safe place to work *held* to be considered on plea of contributory negligence.—*Weston v. Lackawanna Min. Co.* (Mo. App.) 1044.

Where a mature servant was injured by the caving of a sand bank, the condition of which was as obvious to him as to his master, he assumed the risk of such injury.—*Ft. Worth Stockyards Co. v. Whittenburg* (Tex. Civ. App.) 363.

A brakeman, killed while assisting in running cars onto a coal chute, had a right to rely on the observance of the signals and stopping of the train by the engineer, and in no event did he assume any risk due to the negligence of his co-employes.—*Missouri, K. & T. Ry. Co. of Texas v. O'Connor* (Tex. Civ. App.) 374.

§ 7. — Contributory negligence of servant.

Evidence considered, in action for damages for personal injuries to employe of defendant, and *held* not to show contributory negligence.—*Smith v. Kentucky Lumber Co.* (Ky.) 120.

Under *Thomp. & S. Code Tenn.* §§ 1298, 1299, as construed by the Supreme Court of that state, railroad employe *held* entitled to recover in an action in Kentucky for injuries occurring in Tennessee; evidence being sufficient to support verdict as to railroad's negligence.—*Illinois Cent. R. Co. v. Jordan* (Ky.) 426.

Where a servant had knowledge that a roof over the building in which he was employed was too defective to go upon, the master's promise to repair would not relieve him of contributory negligence in going on the roof, the falling of which caused his injuries.—*Shemwell v. Owensboro & N. R. Co.* (Ky.) 448.

Direction of a master that a servant should go on a defective roof to put out a fire *held* not to relieve the servant of contributory negligence in complying with such order; he having knowledge that the roof was too dangerous to go upon.—*Shemwell v. Owensboro & N. R. Co.* (Ky.) 448.

A boy 13 years of age, who was injured in defendant's employment, was bound to exercise only such care as reasonably might be expected of a boy of his age and capacity.—*Rogers v. Samuel Meyerson Printing Co.* (Mo. App.) 79.

An instruction that contributory negligence was a defense, though it was not the proximate cause of the death of plaintiff's husband, *held* properly refused.—*Houston & T. O. R. Co. v. Turner* (Tex. Civ. App.) 712.

§ 8. — Actions.

In an action against a railroad for death of servant, question whether defendant had failed to comply with the rules of the interstate commerce commission relative to drawbars, promulgated pursuant to Act Cong. March 2, 1893, c. 106, 27 Stat. 531 [U. S. Comp. St. 1901, p.

3175), *held* one for the jury.—St. Louis, I. M. & S. Ry. Co. v. Neal (Ark.) 220.

Evidence *held* to sustain findings that plaintiff was placed in insecure position, so that, as employé stepped on it, it fell, and he was injured.—Monongahela River Consol. Coal & Coke Co. v. Campell (Ky.) 405.

Where the evidence is conflicting as to whether railroad employé, on discovering plaintiff on track, failed to sound the alarm whistle and put down the brakes, the question is for the jury.—Illinois Cent. R. Co. v. Jordan (Ky.) 426.

An instruction as to the assumption of risk *held* inapplicable to a case wherein defendant's liability depended solely on whether plaintiff was supplied with a safe place to work.—Pfisterer v. J. H. Peter & Co. (Ky.) 450.

Whether negligence in leaving brakes of cars left on siding unset was proximate cause of injury to brakeman on later train *held* question for jury.—Louisville & N. R. Co. v. Ewing's Adm'x (Ky.) 460.

Whether brakeman, in exercise of due care, should have examined brakes of cars before uncoupling others from them, *held* question for jury.—Louisville & N. R. Co. v. Ewing's Adm'x (Ky.) 460.

In an action for servant's injuries, petition *held* sufficient to support verdict for plaintiff.—United States Cast Iron Pipe & Foundry Co. v. Gable (Ky.) 485.

Burden of showing necessity for stopping train in unusual manner, whereby brakeman was injured, *held* on company.—Benedict v. Chicago Great Western Ry. Co. (Mo. App.) 60.

Brakeman's position on caboose platform *held* not negligence, contributing to injury from employment of unusual and unexpected method of stopping train.—Benedict v. Chicago Great Western Ry. Co. (Mo. App.) 60.

In an action for negligence causing the death of a boy 13 years of age, the presumption was that the boy was careful.—Rogers v. Samuel Meyerson Printing Co. (Mo. App.) 79.

Whether an employer was negligent in failing to furnish a safe place to work, by failing to place guards across a window on a stair landing, *held* a question for the jury.—Rogers v. Samuel Meyerson Printing Co. (Mo. App.) 79.

Complaint in an action by a servant for personal injuries *held* to contain sufficient to show that defendant was a street railway company, and not within the fellow servant statute applicable to railroads.—Johnson v. Metropolitan St. Ry. Co. (Mo. App.) 275.

In an action by a servant for personal injuries, evidence of accident *held* to throw the burden on defendant of showing that it was not the result of negligence.—Johnson v. Metropolitan St. Ry. Co. (Mo. App.) 275.

Evidence in an action by a servant against his master for injuries received in the course of his employment *held* insufficient to entitle plaintiff to go to the jury.—Harrington v. Wabash R. Co. (Mo. App.) 662.

In an action for injuries to a servant by a vicious horse, furnished him by his master, evidence of the master's previous knowledge thereof *held* to justify a submission of such issue to the jury.—McCready v. Stepp (Mo. App.) 671.

In brakeman's action for injuries, refusal of defendant's instructions *held* error.—East Tennessee & W. N. C. R. Co. v. Lindamood (Tenn.) 99.

No presumption of the master's negligence arises from the mere fact of the servant's injury by an appliance latently defective.—East Tennessee & W. N. C. R. Co. v. Lindamood (Tenn.) 99.

The evidence in support of an action by a servant for injuries must conform to the specific acts of negligence alleged.—East Tennessee & W. N. C. R. Co. v. Lindamood (Tenn.) 99.

Evidence in an action for the death of an employé, caused by the bursting of an emery wheel, considered, and *held* sufficient to show negligence of defendant in not using the sounding test to determine defects in the wheel.—Chattanooga Machinery Co. v. Hargraves (Tenn.) 105.

Whether a railway company was negligent, in not having inspected a bridge within 14 hours of accident to an employé from its burning, *held* a question for jury.—Texas Mexican Ry. Co. v. Mendez (Tex. Civ. App.) 25.

Injury to employé from burning of railway bridge *held* insufficient in itself to warrant finding of negligence.—Texas Mexican Ry. Co. v. Mendez (Tex. Civ. App.) 25.

Evidence in action by employé *held* sufficient to sustain finding that railway bridge was burned in afternoon preceding an accident.—Texas Mexican Ry. Co. v. Mendez (Tex. Civ. App.) 25.

Evidence *held* not to require a verdict for a railroad company, in an action against it for injury from slipping off the front of a hand car.—Galloway v. San Antonio & G. Ry. Co. (Tex. Civ. App.) 32.

Evidence that it was the custom for foremen to ride on hand car in the manner one injured did *held* admissible.—Galloway v. San Antonio & G. Ry. Co. (Tex. Civ. App.) 32.

Evidence merely that an employé had worked for several weeks in the county where he was injured did not establish his "residence" in such county, under the statute relating to venue in such actions.—Galveston, H. & S. A. Ry. Co. v. Cloyd (Tex. Civ. App.) 43.

Objection to a portion of a charge, in an action for the death of a brakeman while assisting in running a train onto a coal chute, based on the ground that it made it the absolute duty of the engineer to have stopped at the signals given, *held* to have been obviated by other portions of the charge, correctly stating the law.—Missouri, K. & T. Ry. Co. of Texas v. O'Connor (Tex. Civ. App.) 374.

Charges, in an action for the death of a brakeman while assisting in running a train onto a coal chute, *held* to have been properly refused, because they imposed on defendant a greater burden, in order to establish contributory negligence, than the law required, and because the law therein was otherwise fully and fairly presented.—Missouri, K. & T. Ry. Co. of Texas v. O'Connor (Tex. Civ. App.) 374.

The sufficiency of evidence to show authority of one employé to direct another is, when it does not necessitate such conclusion, for jury.—Texas & P. Coal Co. v. Manning (Tex. Civ. App.) 545.

In an action for injuries to a servant on a switch track, defendant *held* entitled to have an issue of its violation of a speed ordinance submitted to the jury by special charge.—Houston & T. C. R. Co. v. Turner (Tex. Civ. App.) 712.

An employé, injured in falling into a pit under the tracks in a railroad machine shop, *held* not guilty of contributory negligence as a matter of law, by reason of rules requiring employes to inspect appliances and premises.—Galveston, H. & S. A. Ry. Co. v. Butchek (Tex. Civ. App.) 740.

Evidence in an action by an employé to recover for injuries from falling into a pit in a railroad machine shop *held* sufficient to show that a board used as a bridge across the pit was over the "dug-out" at the time in question.—Galveston, H. & S. A. Ry. Co. v. Butchek (Tex. Civ. App.) 740.

Testimony, in an action by an employé to recover for injuries, *held* not to admit holding that plaintiff assumed the risk as a matter of law.—*Galveston, H. & S. A. Ry. Co. v. Butchek* (Tex. Civ. App.) 740.

§ 9. Liabilities for injuries to third persons.

A proprietor of a store *held* not liable for the torts of a driver of a delivery wagon employed by one who, under an independent contract, delivered goods for the proprietor.—*Jahn's Adm'r v. Wm. H. McKnight & Co.* (Ky.) 862.

Act of conductor in setting on foot prosecution against plaintiff for rape, causing his arrest and carrying him as a prisoner on defendant's train through several counties, *held* not an actionable wrong as to the carrier.—*Patterson v. Maysville & B. S. R. Co.* (Ky.) 870.

Act of conductor in setting on foot prosecution against plaintiff for rape, for which the grand jury failed to indict, *held* not an actionable wrong as to the railroad.—*Patterson v. Maysville & B. S. R. Co.* (Ky.) 870.

Where defendants were authorized to construct oil tanks in a street, and plaintiff was injured by falling into a ditch dug therefor, which was unguarded by lights or barricades in the night, defendant was not relieved from liability by reason of having let the work to an independent contractor.—*Cameron Mill & Elevator Co. v. Anderson* (Tex. Civ. App.) 8.

MATERIALITY.

Of alteration of written instrument, see "Alteration of Instruments."

MEASURE OF DAMAGES.

See "Damages," § 3.

For injuries to live stock in transportation, see "Carriers," § 3.

Instructions as to, see "Damages," § 5.

MECHANICS' LIENS.

Applicability of instructions to evidence in action to enforce, see "Trial," § 10.

§ 1. Indemnity against liens.

The surety on the bond of a contractor and builder *held* not liable for the amount of a mechanic's lien filed for materials furnished under a new contract, made after the first was performed.—*Manny v. National Surety Co.* (Mo. App.) 69.

A bond executed by a contractor and builder, with surety, to save the owner harmless against all claims, mechanics' liens, etc., was a joint and several bond, under Rev. St. 1899, § 889.—*Manny v. National Surety Co.* (Mo. App.) 69.

In a suit against the surety on a contractor's bond to recover the amount of a mechanic's lien paid by the owner, *held*, that defendant could not make the defense that the lien was not filed in time.—*Manny v. National Surety Co.* (Mo. App.) 69.

The surety on a contractor's bond *held* liable for the amount of a mechanic's lien paid by the owner, with interest until payment, costs, and interest on the amount of lien and cash from the date of payment.—*Manny v. National Surety Co.* (Mo. App.) 69.

MEDICINES.

See "Druggists."

MENTAL ANGUISH.

As element of damage, see "Damages," § 2.

MENTAL CAPACITY.

Opinion evidence, see "Evidence," § 11.
To commit crime, see "Criminal Law," § 2.

MERCANTILE AGENCIES.

Admissibility of reports of, to prove partnership, see "Evidence," § 9.

MEXICAN GRANTS.

See "Public Lands," § 2.

MINES AND MINERALS.

Employés in mines, see "Master and Servant," § 3.

Laws regulating hours of employment in mines as class legislation, see "Constitutional Law," § 4.

Regulation of hours of employment in mines, see "Master and Servant," § 1.

Rights of life tenant, see "Life Estates."

MINORS.

See "Infants."

Right to purchase public lands, see "Public Lands," § 1.

Sale of liquor to, see "Intoxicating Liquors," §§ 4, 6.

MISDEMEANOR.

Former jeopardy, see "Criminal Law," § 5.

MISJOINDER.

Of parties, see "Parties," § 2.

MISREPRESENTATION.

See "Fraud."

By insurance agent, see "Insurance," § 2.

By insured, see "Insurance," §§ 7, 9.

By vendee of goods, see "Sales," § 1.

MISTAKE.

As affecting liability for crime, see "Criminal Law," § 1.

MONEY.

Counterfeiting, see "Counterfeiting."

MORTALITY TABLES.

Admissibility in evidence, see "Evidence," § 9.

MORTGAGES.

Conclusiveness of judgment on foreclosure, see "Judgment," § 8.

Estoppel by, see "Estoppel," § 1.

In fraud of creditors, see "Fraudulent Conveyances," § 1.

Issues presented for review on appeal in action to recover penalty for failure to release mortgage, see "Appeal and Error," § 4.

Knowledge of member of law firm as notice to partner acting as trustee under deed of trust, see "Partnership," § 2.

Liability of law partnership for wrongful act of member in foreclosing trust deed, see "Partnership," § 2.

Parol evidence, see "Evidence," § 10.

Mortgages by particular classes of parties.

See "Corporations," § 4.

Mortgages of particular species of property.

"Homestead," § 4.

Personal property, see "Chattel Mortgages."
Real property, see "Trusts," § 2.

1. Requisites and validity.

Deed absolute on its face may be shown to have been executed as a mortgage.—*Oberdorfer v. White* (Ky.) 436.

Provision that mortgage is just to include sufficient amount of farm to secure debt held to affect validity of mortgage.—*Watts v. Parks* (Ky.) 1125.

Description in mortgage of land held sufficient.—*Watts v. Parks* (Ky.) 1125.

2. Construction and operation.

Mortgage held not to secure repayment to mortgagee of sum expended in suit to cancel mortgage.—*W. C. Belcher Land Mortg. Co. v. Harris* (Tex. Civ. App.) 390.

3. Rights and liabilities of parties.

Holder of mortgaged property held entitled to its profits while in possession after mortgagor's refusal to appoint receiver.—*Georgetown Water Co. v. Fidelity Trust & Safety Vault Co.* (Ky.) 113; *Montgomery v. Same, Id.*
On an action against a trustee for misconduct in foreclosing a deed of trust, and against a firm of which he was a partner, a petition held to allege sufficient cause of action against the trustee.—*Fennett Shoe Co. v. Birdseye* (Mo. App.) 1036.

4. Assignment of mortgage or debt.

Contract extending time of note secured by deed held contract affecting incumbrance on land, and passed to assignee, who took property subject to incumbrance.—*Missouri Real Estate Syndicate v. Sims* (Mo. Sup.) 1006.

5. Payment or performance of condition, release, and satisfaction.

Evidence in an action with attachment of real estate held insufficient to sustain a finding that a mortgage thereon had been paid, that the attachment was not subject thereto.—*Fitch v. Duckwall* (Ky.) 185.

Under Rev. St. 1899, §§ 4358, 4363, a debt remaining due the mortgagee, but constituting part of the mortgage debt, does not excuse mortgagor from the penalty for not releasing the mortgage when paid.—*Henry v. Orear* (Mo. App.) 283.

Under Rev. St. 1899, §§ 4358, 4363, an assignee of a mortgage for collection is liable the penalty for refusal to release it when paid.—*Henry v. Orear* (Mo. App.) 283.

The penalty of 10 per cent. "on the amount of a mortgage, absolutely" imposed on a mortgagee by Rev. St. 1899, § 4363, for refusal to release the mortgage on receiving satisfaction, does not permit of deductions on account of partial payments or releases of portions of the debt.—*Henry v. Orear* (Mo. App.) 283.

In an action under Rev. St. 1899, § 4363, to recover a penalty for a mortgagee's refusal to release a mortgage, the defense that he was entitled to hold the mortgage as security for other debt should have been specially pleaded, to be available.—*Henry v. Orear* (Mo. App.) 283.

6. Foreclosure by exercise of power of sale.

One whose property is sold under trust deed in violation of agreement for extension may maintain action at law for damages.—*Missouri Real Estate Syndicate v. Sims* (Mo. Sup.) 1006.

Where an agreement for extension of a note cured by trust deed did not appear of record, the trustee would carry only a voidable title to the maker of the agreement, purchasing the

property.—*Missouri Real Estate Syndicate v. Sims* (Mo. Sup.) 1006.

The purchaser under a deed of trust may maintain unlawful detainer.—*Wishart v. Gerhart* (Mo. App.) 1064.

Nonresident administratrix, as the legal holder of deed of trust on property of her intestate in the state, held to have the right to appoint a substitute trustee to sell the trust property, without having taken out letters of administration in the state.—*Peacock v. Cummings* (Tex. Civ. App.) 1002.

§ 7. Foreclosure by action.

An offer by mortgagors to contest a decree of foreclosure held too late.—*Sulek v. McWilliams* (Ark.) 769.

Complaint, seeking to be allowed to intervene in proceedings foreclosing a mortgage, held demurrable.—*Sulek v. McWilliams* (Ark.) 769.

Court held not authorized to require holder of mortgaged water supply plant to operate it as receiver, without compensation.—*Georgetown Water Co. v. Fidelity Trust & Safety Vault Co.* (Ky.) 113; *Montgomery v. Same, Id.*

A sale of real estate in bulk on mortgage foreclosure, which could easily have been sold in parcels to better advantage, for which an inadequate price was obtained, should be set aside.—*Gleason v. Kentucky Title Co.* (Ky.) 170.

Where property was sold under foreclosure, a new trial would not be granted for the purpose of invalidating the sale.—*Walter v. Bruger* (Ky.) 419.

Evidence held to show that mortgage from tax collector to sureties on official bond was not procured by fraud.—*Simmons v. Reinhardt* (Ky.) 890.

Evidence of agreement to except certain tract from foreclosure sale for benefit of mortgagor's heir, in consideration of his not appearing in the suit, held admissible in behalf of his widow.—*Stovall v. Haynes* (Ky.) 895.

Allegation in answer in suit to foreclose mortgage held not to state that mortgagee had agreed to release his mortgage.—*Watts v. Parks* (Ky.) 1125.

Where, on appeal in an action on a note and to foreclose a mortgage, it is not shown what disposition has been made of the property under a writ of sequestration the appellate court cannot render a judgment of foreclosure.—*Henne & Meyer v. Moultrie* (Tex. Civ. App.) 11.

A creditor of a corporation, in possession of land under an oral agreement between him and an agent of the corporation, held not entitled to hold the same as against a purchaser on foreclosure of a deed of trust.—*Clark v. Elmendorf* (Tex. Civ. App.) 538.

A provision of a trust deed authorizing foreclosure for nonpayment of taxes held to refer to taxes which might remain unpaid at any time before the principal debt became due.—*Clark v. Elmendorf* (Tex. Civ. App.) 538.

An extension of time to pay the principal secured by a deed of trust held not to preclude the enforcement of a provision of the deed authorizing foreclosure for nonpayment of taxes.—*Clark v. Elmendorf* (Tex. Civ. App.) 538.

MOTIONS.

Continuance, see "Criminal Law," § 11.

Direction of verdict in civil actions, see "Trial," § 6.

Dismissal or nonsuit on trial, see "Trial," § 6.

New trial in civil actions, see "New Trial," § 3.

New trial in criminal prosecutions, see "Criminal Law," § 16.

Opening or setting aside default judgment, see "Judgment," § 1.
 Quashing or vacating execution, see "Execution," § 1.
 Relating to pleadings, see "Pleading," § 6.
 Separate trial of codefendants, see "Criminal Law," §§ 12-15.
 Striking out evidence, see "Criminal Law," § 12; "Trial," § 4.

The circuit court had power on its own motion, at the same term at which it had granted one a license to practice law, to set aside the order.—*Killian v. State* (Ark.) 766.

MULTIPLICITY OF SUITS.

As ground for equitable relief, see "Injunction," §§ 1, 2.

MUNICIPAL CORPORATIONS.

See "Counties"; "Schools and School Districts," § 1.

Accrual of action on street improvement apportionment warrant, see "Limitation of Actions," § 2.

Applicability of instructions to pleadings and evidence in action for personal injuries, see "Trial," § 10.

Construction of instructions in action for personal injuries, see "Trial," § 12.

Issues presented for review in proceedings to enforce street improvement assessment, see "Appeal and Error," § 4.

Judicial notice as to location of streets, see "Evidence," § 1.

Judicial notice of ordinances, see "Criminal Law," § 6.

Jurisdiction of police judge of prosecution for petit larceny, see "Criminal Law," § 3.

Liability of city for wrongful death of person suffering from smallpox, where death is alleged to have resulted from negligence of city officers removing and caring for patient, see "Death," § 1.

Mandamus, see "Mandamus," § 1.

Ordinances relating to maintenance of railroad crossings, see "Railroads," § 3.

Ordinances relating to intoxicating liquors, see "Intoxicating Liquors."

Requests for instructions in action for personal injuries, see "Trial," § 11.

Street railroads, see "Street Railroads."

Water supply, see "Waters and Water Courses," § 2.

§ 1. Creation, alteration, existence, and dissolution.

A city's right to taxes levied under a former charter is not impaired by a subsequent charter, repealing all former charters, without a saving clause as to rights accruing thereunder.—*Bennison v. City of Galveston* (Tex. Civ. App.) 1089.

§ 2. Proceedings of council or other governing body.

Petition by city to enforce a lien on property for unpaid assessments for street improvement, predicated on certain city ordinances, held to sufficiently allege the ordinances.—*City of Lexington v. Woolfolk* (Ky.) 910; Same v. Hayman, Id.

A city council need not act in accordance with its rules or by-laws, but may waive them.—*City of Sedalia v. Scott* (Mo. App.) 276.

In proceedings questioning the validity of a city ordinance, it will be presumed that it was legally adopted, unless it exceeds the legislative power of the city.—*Ex parte Hinkle* (Mo. App.) 317.

§ 3. Officers, agents, and employes.

Under Ky. St. 1899, § 3509, together with certain ordinances and resolutions of the city

of Ludlow, its city attorney held not entitled to recover fees, in addition to salary, for alleged extraordinary services.—*City of Ludlow v. Richie* (Ky.) 199.

A city attorney held entitled to recover expenses, in addition to salary, incurred in attending cases on behalf of the city in the Supreme Court.—*City of Ludlow v. Richie* (Ky.) 199.

Under St. Louis City Charter, art. 4, § 14, held, that an officer may remove an assistant without assignment of cause.—*Magner v. City of St. Louis* (Mo. Sup.) 782.

A city ordinance creating an office held not to empower the officer to remove an assistant, whom a later ordinance, imposing new duties on the officer, empowers him to appoint to aid in such new duties.—*Magner v. City of St. Louis* (Mo. Sup.) 782.

One ceases to be an officer, within St. Louis City Charter, art. 4, § 43, declaring all persons holding city positions with an annual salary or for a definite term to be officers, on repeal of the ordinance giving the yearly salary and fixed term.—*Magner v. City of St. Louis* (Mo. Sup.) 782.

§ 4. Contracts in general.

Under the charter of an election district, 2 Acts 1883-84, p. 1318, c. 1494, and Act April 14, 1888 (3 Acts 1887-88, p. 170, c. 1071), amending it, held, that the trustees thereof have no authority to contract for water for fire protection.—*South Covington Dist. v. Kenton Water Co.* (Ky.) 420.

A civil district, having no power to contract for water for fire protection, is not liable for water furnished for such purpose.—*South Covington Dist. v. Kenton Water Co.* (Ky.) 420.

Granting that a contract for a city water supply was void as creating a monopoly, the city is nevertheless liable for what it received under the contract.—*City of Tyler v. L. L. Jester & Co.* (Tex. Sup.) 1058.

§ 5. Public improvements.

Purchase of tax bills by city for street improvement assessments, under Ky. St. 1903, § 3187, giving cities such right, held valid.—*City of Lexington v. Woolfolk* (Ky.) 910; Same v. Hayman, Id.

Under Ky. St. 1903, § 3187, relating to the sale of property for taxes, held, that property owner, who allows property to be sold for street improvement assessments and bid in by city, has no right of redemption.—*City of Lexington v. Woolfolk* (Ky.) 910; Same v. Hayman, Id.

Penalties and compound interest to be imposed on delinquent taxpayers held not applicable to property bid in by city for street improvement assessment, under Ky. St. 1903, § 3187, giving cities such right.—*City of Lexington v. Woolfolk* (Ky.) 910; Same v. Hayman, Id.

Ky. St. 1903, § 3100, relating to errors in taxation proceedings, held to be intended to avoid strict construction with reference to such proceedings.—*City of Lexington v. Woolfolk* (Ky.) 910; Same v. Hayman, Id.

City's adoption of "ten-year plan" for payment of street improvement assessment, as provided by Act April 19, 1890 (2 Acts 1889-90, p. 899, c. 902), held not to extend the period of limitations provided by Ky. St. 1903, § 2515, beyond five years from the completion and acceptance of the work.—*City of Lexington v. Crosthwaite* (Ky.) 1130.

The five-year limitation for liability to pay for street improvements, provided by Ky. St. 1903, § 2515, applies to the collection thereof by distraint, authorized by Act April 19, 1890, as well as to the suit to enforce liens authorized by Act March 19, 1894 (Acts 1894, p. 260,

100).—*City of Lexington v. Crosthwaite* (Mo. App.) 1130.

A adjoining property owner *held* not entitled to a deduction for a delay in performance of a street improvement contract, in the absence of evidence as to when the work was finished.—*Heman Const. Co. v. Loevy* (Mo. Sup.) 613.

An action on a special tax bill, a personal judgment cannot be rendered against the owner of the property and the surety on his appeal.—*Heman Const. Co. v. Loevy* (Mo. Sup.)

Here the president of a board of public improvements signed a special tax bill after it had been computed and written out by his clerk, and thereby became the act of the president, in an ordinance requiring him to compute and assess the taxes.—*Heman Const. Co. v. Loevy* (Mo. Sup.) 613.

An objection to a tax bill for street improvement that it was levied before sidewalks which were to be laid by another constructor were considered *held* untenable.—*Heman Const. Co. v. Loevy* (Mo. Sup.) 613.

Here an annual sidewalk contract had been entered into, under St. Louis City Charter, art. 15 (Rev. St. 1899, p. 2511), the fact that a street improvement contract did not require the contractor to lay the sidewalk did not invalidate the bill for the street improvement.—*Heman Const. Co. v. Loevy* (Mo. Sup.) 613.

An objection that an ordinance for street improvement did not prescribe the width of sidewalks, nor the size, kind, nor quality of the materials, *held* untenable.—*Heman Const. Co. v. Loevy* (Mo. Sup.) 613.

Where a special tax bill for street improvement did not include a charge for sidewalks, an objection that the ordinance was void for failure to sufficiently specify the material and the width of the sidewalks was immaterial.—*Heman Const. Co. v. Loevy* (Mo. Sup.) 613.

Under Rev. St. 1899, c. 91, arts. 6, 7, §§ 6004-6006, relative to villages and cities, a village has no authority to purchase land for a park.—*Whitman v. Village of Greencastle* (Mo. App.)

The records of a city council in proceedings for public improvements at the expense of non-resident citizens must show jurisdiction; and, in failing to do so, its action is void, and cannot be validated by oral testimony.—*City of Sedalia v. Scott* (Mo. App.) 276.

Under Laws 1893, p. 92, c. 44, § 110, *held*, the jurisdiction of a city council in the matter of street improvements, to be paid for by special taxes, is ousted by the filing of a remonstrance with sufficient signers, and cannot be conferred by some of the signers afterwards withdrawing.—*City of Sedalia v. Scott* (Mo. App.) 276.

The authority of an agent or of an officer of a corporation, assuming to sign for his principal a remonstrance against a municipal improvement, need not accompany the remonstrance.—*City of Sedalia v. Scott* (Mo. App.) 276.

Work done in performance of a contract for street improvement *held* not to be repairs, in the meaning of Rev. St. 1899, § 5681.—*Archer Asphalt Pav. Co. v. Muchenberger* (Mo. App.) 280.

A lot *held* not subject to a lien for a sidewalk made in front of it, pursuant to proceedings under Rev. St. 1899, §§ 6261, 6262.—*City of Louisiana v. Schaffner* (Mo. App.) 287.

A person owning a fractional interest in property adjoining a street was liable for his proportion of an improvement, though notice was served on him as sole owner, and no notice was served on the other owners.—*City of Louisiana v. McAllister* (Mo. App.) 314.

A property owner *held* estopped to set up, in an action for the cost of a street improvement, the defense that he was not the sole owner of the property.—*City of Louisiana v. McAllister* (Mo. App.) 314.

§ 6. Police power and regulations.

City ordinance, relative to the obstruction of streets by railway trains, *held* void, in so far as it conflicts with Ky. St. 1903, § 768.—*Louisville & N. R. Co. v. Commonwealth* (Ky.) 124.

§ 7. Use and regulation of public places, property, and works.

A temporary use of a street for the purpose of building houses or making improvements and for a reasonable time is a lawful use, and what is a reasonable time is to be determined by the circumstances of the case.—*Hesselbach v. City of St. Louis* (Mo. Sup.) 1009.

§ 8. Torts.

City is not liable for unhealthy condition of pesthouse in which it confines person afflicted with contagious disease.—*Having v. City of Covington* (Ky.) 431.

Where a city in its governmental capacity adopted ordinances for the care of persons suffering from contagious diseases at the pesthouse, it could not become a participant in the negligent acts of its officers in enforcing the same.—*Twyman's Adm'r v. Board of Councilmen of Frankfort* (Ky.) 446.

Acts of a city in removing plaintiff's intestate, suffering from smallpox, to the pesthouse, and in caring for him there, until he died, *held* the exercise of governmental functions, and hence the city was not liable for the negligence of its officers in performing the same.—*Twyman's Adm'r v. Board of Councilmen of Frankfort* (Ky.) 446.

City, which negligently permits telephone wires to lie in the streets, is liable for damages to pedestrians.—*West Kentucky Telephone Co. v. Pharis* (Ky.) 917.

The fact that a pedestrian had previously observed wire by which she was injured *held* not to show contributory negligence in law.—*West Kentucky Telephone Co. v. Pharis* (Ky.) 917.

To authorize verdict for injuries sustained in street, jury must find dangerous obstruction, that plaintiff was using ordinary care, and that the obstruction was, or should have been, known to defendant.—*West Kentucky Telephone Co. v. Pharis* (Ky.) 917.

General knowledge of the existence of an obstruction in a street, on the part of one injured thereby, is not alone sufficient to show contributory negligence.—*West Kentucky Telephone Co. v. Pharis* (Ky.) 917.

Peremptory instruction for defendants, in action against city and railroad company for death of plaintiff's intestate from defective street crossing, *held* proper.—*Carroll's Adm'r v. City of Louisville* (Ky.) 1117.

Where city authorities prescribe, and a railroad company follows, a plan of constructing a street crossing, claimed to be defective, both are chargeable with knowledge of the plan, and the question of notice is immaterial.—*Carroll's Adm'r v. City of Louisville* (Ky.) 1117.

An ultra vires ordinance, providing for the improvement of a street without the limits of a city, *held* not to estop the city from denying liability for injuries sustained by defects in the sidewalk, on the ground that it was not required to improve the same.—*Stealey v. Kansas City* (Mo. Sup.) 599.

Under Kansas City Charter, § 1, subd. 5, and article 9, § 2, the city *held* to have no jurisdiction over sidewalks outside the city limits, and was not, therefore, liable for injuries caused by defects therein.—*Stealey v. Kansas City* (Mo. Sup.) 599.

Rev. St. 1889, § 7846, *held* not to render a city, having improved a highway outside the city limits under such section, liable for injuries from defects in a sidewalk thereon.—*Stealey v. Kansas City* (Mo. Sup.) 599.

Plaintiff *held* barred by contributory negligence, as matter of law, from recovering for injury from having run onto an obstruction in a street which he had driven past daily for a year.—*Wheat v. City of St. Louis* (Mo. Sup.) 790.

Plaintiff, suing a city on one theory of negligence, could not recover on any other theory.—*Hesselbach v. City of St. Louis* (Mo. Sup.) 1009.

Where a contractor tears up a public sidewalk, it is its continuing duty to use reasonable care to keep stones safely piled and excavations properly guarded.—*Hesselbach v. City of St. Louis* (Mo. Sup.) 1009.

A pile of stones placed on a sidewalk by a contractor *held* not a necessarily dangerous obstruction to travel.—*Hesselbach v. City of St. Louis* (Mo. Sup.) 1009.

Where plaintiff predicated recovery on negligence of contractor, permitted by city, and failed to show contractor's negligence, she could not recover against the city.—*Hesselbach v. City of St. Louis* (Mo. Sup.) 1009.

Instruction *held* not objectionable as requiring a city to keep a street absolutely safe.—*Campbell v. City of Stanberry* (Mo. App.) 292.

Instruction that, if injuries from falling into street excavation were merely result of accident, there could be no recovery, *held* properly refused.—*Campbell v. City of Stanberry* (Mo. App.) 292.

Instruction that a city was negligent in leaving street excavation unlighted and unguarded *held* not objectionable as excluding other possible protection.—*Campbell v. City of Stanberry* (Mo. App.) 292.

Action for negligence may be brought against municipality for failure to keep streets in reasonably fit condition for use of public.—*Campbell v. City of Stanberry* (Mo. App.) 292.

Evidence *held* to make question for jury as to whether ice on sidewalk was obstruction to travel, so as to render city liable for injuries to pedestrians.—*Quinlan v. Kansas City* (Mo. App.) 660.

In an action against city for injuries from icy sidewalk, instructions *held* erroneous as not requiring, as condition of recovery, that ice be an obstruction to travel.—*Quinlan v. Kansas City* (Mo. App.) 660.

In an action against a city for injuries from defective sidewalk, a demurrer to plaintiff's evidence *held* properly overruled.—*Jennings v. Kansas City* (Mo. App.) 1041.

A pedestrian is guilty of contributory negligence in not passing around an obvious and dangerous defect in a sidewalk.—*Jennings v. Kansas City* (Mo. App.) 1041.

Charge concerning contributory negligence, but not leaving it to the jury, *held* properly refused.—*City of San Antonio v. Talerico* (Tex. Civ. App.) 28.

Where it was policeman's duty to report defects in sidewalks, notice to him of such defect is notice to the city.—*City of San Antonio v. Talerico* (Tex. Civ. App.) 28.

§ 9. Fiscal management, public debt, securities, and taxation.

In a suit on municipal evidences of indebtedness, limitations on the original debts funded thereby is to be computed up to the date that they were funded.—*City of Tyler v. L. L. Jester & Co.* (Tex. Sup.) 1058.

Notes executed by a city, replacing old notes, did not increase or create a debt, so as to require provision for interest and sinking fund.—*City of Tyler v. L. L. Jester & Co.* (Tex. Sup.) 1058.

The making of a contract by a city for water for a number of years, to be delivered in the future, does not create a debt against the city; but its liability thereunder arises on the use of the water by the city during each year.—*City of Tyler v. L. L. Jester & Co.* (Tex. Sup.) 1058.

City need not enact ordinance in order to enable officers to contract for current expenses, but it is sufficient if authority be found in minutes of council.—*City of Tyler v. L. L. Jester & Co.* (Tex. Sup.) 1058.

Contract to provide city with water for given year is valid, though not paid during said year, and should in that case be paid out of revenue for future years, under Rev. St. 1893, arts. 465, 466.—*City of Tyler v. L. L. Jester & Co.* (Tex. Sup.) 1058.

Under Rev. St. 1895, art. 465, certain municipal evidences of indebtedness *held* notes, so that provisions of statutes as to issuance of bonds did not apply.—*City of Tyler v. L. L. Jester & Co.* (Tex. Sup.) 1058.

A plea in abatement to a city's action for taxes, that the state and county are necessary parties, is properly overruled, where it does not appear that the state and county taxes are unpaid.—*Pennison v. City of Galveston* (Tex. Civ. App.) 1089.

MURDER.

See "Homicide."

MUTUAL BENEFIT INSURANCE.

See "Insurance," § 14.

NAMES.

Of corporations, see "Corporations," § 1.

Of grantee in deed, see "Deeds," § 2.

NEGLIGENCE.

Causing death, see "Death," § 1.

Causing injury to child, see "Parent and Child."

Harmless error, see "Appeal and Error," § 21.

Measure of damages, see "Damages," § 3.

Sufficiency of instructions in action for, see "Trial," § 10.

By particular classes of parties.

See "Carriers," §§ 2, 7, 8; "Municipal Corporations," § 8.

Bailee, see "Bailment."

Employers, see "Master and Servant," §§ 2-8.

Railroad companies, see "Railroads," §§ 4-9.

Telegraph or telephone companies, see "Telegraphs and Telephones."

Condition or use of particular species of property, works, or machinery.

See "Highways," § 3; "Railroads," §§ 4-9; "Street Railroads."

Demised premises, see "Landlord and Tenant," § 3.

Contributory negligence.

Of passenger, see "Carriers," § 9.

Of person injured by operation of railroad, see "Railroads," §§ 5-7.

Of person injured by operation of street railroad, see "Street Railroads," §§ 1, 2.

Of servant, see "Master and Servant," §§ 7, 8.

Of traveler on street, see "Municipal Corporations," § 8.

Acts or omissions constituting negligence.

here a department store maintained a reception room for women patrons accompanied by children, it was bound to keep such room reasonably free from danger to such children. *Miller v. Geo. B. Peck Dry Goods Co. (Mo. App.) 682.*

manufacturer of a gasoline pear burner, not presently dangerous, *held* bound only to exercise reasonable care to construct it of reasonable strength and fitness, when used in accordance with directions.—*Talley v. Beever & Hindes (Tex. Civ. App.) 23.*

instruction that persons traveling on streets must use "due care" *held* properly refused.—*City of San Antonio v. Talerico (Tex. Civ. App.)*

2. Proximate cause of injury.

voluntary mischance, exposing one to danger prior negligence of another, does not preclude recovery, unless injured person was guilty of negligence.—*Kube v. St. Louis Transit Co. (Mo. App.) 55.*

3. Contributory negligence.

negligence of driver of an ice wagon *held* imputable to a boy who rode with him, and whose duty it was to deliver ice.—*Baxter v. St. Louis Transit Co. (Mo. App.) 70.*

recovery for death of a person killed by a car in negligently run is not defeated by negligence of the driver of the wagon in which he was riding at the invitation of the driver; he was having known of the driver's negligence.—*Marsh v. Kansas City Southern Ry. Co. (Mo. App.) 284.*

an instruction on contributory negligence, requiring such negligence to be the sole direct cause of the accident in order to be a defense, is erroneous.—*Hanheide v. St. Louis Transit Co. (Mo. App.) 820.*

an action against street railway for injuries sustained by a child, *held*, that no negligence of the mother could be imputed to the child, where the child was not negligent.—*Nashville R. v. Howard (Tenn.) 1098.*

one injured by concurrent negligence of his lawful servant and a stranger may recover from the stranger.—*St. Louis Southwestern Ry. Co. v. Texas v. Swinney (Tex. Civ. App.) 547.*

1. Actions.

Where the court cannot say from all the evidence that the only inference is that plaintiff was negligent, the question of contributory negligence is for the jury.—*Mathew v. Wabash Co. (Mo. App.) 271.*

in an action for injuries to a child by falling from a low window, hung on pivots, in the reception room of a department store, whether defendants were negligent in failing to protect the window with bars *held* a question for the jury.—*Miller v. Geo. B. Peck Dry Goods Co. (Mo. App.) 682.*

defendant, in an action for injuries to a child by falling from a window, *held* not entitled to a direction of a verdict.—*Miller v. Geo. B. Peck Dry Goods Co. (Mo. App.) 682.*

in an action for injuries by the bursting of a pear burner, evidence *held* insufficient to establish negligence on the part of the manufacturer in its construction.—*Talley v. Beever & Hindes (Tex. Civ. App.) 23.*

that manufacturers of a pear burner changed the kind of material and form of construction of their cylinders after one of them had exploded and *held* insufficient to establish a want of ordinary care in the manufacture of the exploded cylinder.—*Talley v. Beever & Hindes (Tex. Civ. App.) 23.*

The fact that the top of a pear burner blew off while it was being operated in accordance with the directions *held* insufficient to raise a presumption of negligence in its construction on the part of the manufacturers.—*Talley v. Beever & Hindes (Tex. Civ. App.) 23.*

A general plea of contributory negligence, not excepted to, is sufficient to warrant the submission of the issue raised thereby.—*Stewart v. Galveston, H. & S. A. Ry. Co. (Tex. Civ. App.) 979.*

A plea "that plaintiff was guilty of negligence at and before his injury, which was the direct and proximate cause of same," raises the issue of contributory negligence.—*Stewart v. Galveston, H. & S. A. Ry. Co. (Tex. Civ. App.) 979.*

NEGOTIABLE INSTRUMENTS.

See "Bills and Notes."

NEGROES.

Civil rights of, see "Civil Rights."

NEWLY-DISCOVERED EVIDENCE.

Ground for new trial in civil action, see "New Trial," § 2.

NEW PROMISE.

Within statute of limitations, see "Limitation of Actions," § 3.

NEWSPAPERS.

Under Acts 1894, p. 268, c. 100, art. 5, § 12, as amended by Acts 1898, p. 154, c. 63, § 1, and Acts 1902, pp. 70, 71, c. 32, §§ 1-3, the term of official newspaper in cities of the second class *held* to expire on the first Monday in April following the appointment.—*Democrat Pub. Co. v. Patterson (Ky.) 131.*

A paper *held* not a newspaper of general circulation, in which the statute requires notices of judicial sales to be published.—*Reagan v. Duddy (Ky.) 430.*

NEW TRIAL.

In criminal prosecutions, see "Criminal Law," § 16.

Necessity of motion for purpose of review, see "Appeal and Error," § 7.

Opening or vacating judgment, see "Judgment," § 4.

Presumptions on appeal from order granting or refusing, see "Appeal and Error," § 18.

Review of discretion of court as to granting or refusing, see "Appeal and Error," § 19.

Review of motion for, as dependent on presentation of grounds of review in record, see "Appeal and Error," § 12; "Criminal Law," § 20.

§ 1. Nature and scope of remedy.

Circuit court has the duty to supervise verdicts, and to grant new trials if the verdict is improper.—*Farrell v. St. Louis Transit Co. (Mo. App.) 312.*

The granting of new trials rests in the sound discretion of the trial court.—*Farrell v. St. Louis Transit Co. (Mo. App.) 312.*

§ 2. Grounds.

Facts *held* to entitle plaintiff to a new trial, under Civ. Code, § 518, subsec. 7, for unavoidable casualty, preventing his appearance.—*Gill v. Fugate (Ky.) 188.*

An affidavit on which a motion for a new trial for newly discovered evidence was based *held* to have been properly disregarded.—*City of Richmond v. Martin (Ky.) 219.*

One *held* not to show a right to a new trial, though prevented by illness from attending the trial.—*Prentice v. Oliver* (Ky.) 469.

New trial on ground of newly discovered evidence *held* properly refused.—*Missouri, K. & T. Ry. Co. of Texas v. Huff* (Tex. Civ. App.) 249.

Where defendants were notified of misconduct of a juror before submission of the case, but made no objection, they could not object to an adverse verdict on such ground.—*Clark v. Elmendorf* (Tex. Civ. App.) 538.

New trial for newly discovered evidence *held* properly denied for lack of diligence.—*Pelly v. Denison & S. Ry. Co.* (Tex. Civ. App.) 542.

A new trial will not be granted for newly discovered evidence, where such evidence is cumulative, or for impeachment, or when it is not shown that it came to knowledge of applicant since trial, and could not have been discovered before by exercise of proper diligence.—*Pelly v. Denison & S. Ry. Co.* (Tex. Civ. App.) 542.

§ 3. Proceedings to procure new trial.

On motion for new trial for newly discovered evidence, affidavits as to conversations with plaintiff's husband are hearsay.—*Spalding v. City of Edina* (Mo. App.) 302.

Where plaintiff's son, who acted as her agent, was guilty of misconduct affecting the jury, of which she had no knowledge, it was error to assess a penalty against plaintiff therefor.—*Clark v. Elmendorf* (Tex. Civ. App.) 538.

NEXT OF KIN.

See "Descent and Distribution."

NONSUIT.

Before trial, see "Dismissal and Nonsuit."

On trial, see "Trial," § 6.

NOTES.

Promissory notes, see "Bills and Notes."

NOTICE.

Publication in official newspapers, see "Newspapers."

Of particular facts, acts, or proceedings.

See "Chattel Mortgages," § 2.

Defects or obstructions in streets, see "Municipal Corporations," § 8.

Election contest, see "Elections," § 2.

Execution sale, see "Execution," § 2.

Loss insured against, see "Insurance," § 11.

Public improvements in municipalities, see "Municipal Corporations," § 5.

Sale of public lands, see "Public Lands," § 1.

To particular classes of parties.

See "Principal and Agent," § 3; "Railroads," § 4.

Purchaser of note, see "Bills and Notes," § 2.

Purchaser of realty, see "Vendor and Purchaser," § 3.

Servant, see "Master and Servant," § 3.

NUISANCE.

Duplicity in indictment, see "Indictment and Information," § 2.

Joinder of parties in action for, see "Parties," § 1.

Liability for death of horse caused by maintenance of, see "Animals."

Liability of corporation, see "Corporations," § 4.

§ 1. Private nuisances.

Brick manufacturing establishment *held* to constitute a nuisance.—*Powell v. Brookfield Pressed Brick & Tile Mfg. Co.* (Mo. App.) 646.

That the injury resulted from the reasonable use of the plant *held* to be no defense to an action for damages for maintaining a brick manufacturing plant so as to constitute a nuisance.

—*Powell v. Brookfield Pressed Brick & Tile Mfg. Co.* (Mo. App.) 646.

That defendant's brick kilns were built after the most approved patterns, and that it employed skilled persons in burning the brick, *held* no defense to an action for damages for maintaining a brick manufacturing plant so as to constitute a nuisance.—*Powell v. Brookfield Pressed Brick & Tile Mfg. Co.* (Mo. App.) 646.

Injury to crop by escaping gas from the kilns of a brick manufacturing plant *held* to sustain an action for damages.—*Powell v. Brookfield Pressed Brick & Tile Mfg. Co.* (Mo. App.) 646.

A petition in an action for damages for the maintenance of a nuisance, resulting in injury to crops, need not allege that the acts of which plaintiff complains were unlawfully done.—*Powell v. Brookfield Pressed Brick & Tile Mfg. Co.* (Mo. App.) 646.

§ 2. Public nuisances.

A distillery company's liability for a nuisance created by the feeding of slops to cattle on its premises *held* not avoided by the duty imposed by it on the feeders to prevent the same, where it was manifest that the means provided were inadequate.—*Peacock Distillery Co. v. Commonwealth* (Ky.) 893.

OBJECTIONS.

For purpose of review, see "Appeal and Error," § 5; "Criminal Law," § 19.

To reception of evidence, see "Criminal Law," § 12; "Trial," § 4.

OBLIGATION OF CONTRACT.

Laws impairing, see "Constitutional Law," § 3.

OBSTRUCTIONS.

In streets, see "Municipal Corporations," § 8.

OFFER.

Of reward, see "Rewards."

OFFICERS.

Bribery, see "Bribery."

Mandamus, see "Mandamus," § 1.

Particular classes of officers.

See "Clerks of Courts"; "Judges"; "Justices of the Peace"; "Receivers"; "Sheriffs and Constables."

Bank officers, see "Banks and Banking," § 1.

Collectors of taxes, see "Taxation," § 8.

Corporate officers, see "Corporations," § 4.

Health officers, see "Health," § 1.

Highway officers, see "Highways," § 2.

Municipal officers, see "Municipal Corporations," §§ 3, 8.

State officers, see "States," § 1.

Surveyors of public lands, see "Public Lands," § 1.

§ 1. Appointment, qualification, and tenure.

Under Const. art. 5, § 24, the Court of Civil Appeals was without power to render judgment removing a sheriff from his office, on an appeal in a proceeding for that purpose, though the evidence was conclusive against his right to the same.—*State v. Box* (Tex. Civ. App.) 962.

State v. Box (Tex. Civ. App.) 982.

It is within the discretion of the district judge, in proceedings to remove a county officer, to require the district attorney to conduct the proceedings, or to appoint other attorneys for such purpose.—State v. Box (Tex. Civ. App.) 982.

In a proceeding to remove a sheriff from office, the petition *held* not demurrable on the ground that the proceeding could only be conducted by the district attorney, or some other officer authorized to prosecute suits in the name of the state.—State v. Box (Tex. Civ. App.) 982.

§ 2. Rights, powers, duties, and liabilities.

Successful election contestant *held* not entitled to recover from the state the salary paid contestee during his incumbency of state office.—Nall v. Coulter (Ky.) 1110.

Const. § 235, *held* not to entitle successful election contestant to recover salary paid contestee during his incumbency of state office.—Nall v. Coulter (Ky.) 1110.

OILS.

Right of life tenant as to oil wells, see "Life Estates."

OPENING.

Judgment, see "Judgment," §§ 1, 4.

OPINION EVIDENCE.

In civil actions, see "Evidence," § 11.
In criminal prosecutions, see "Criminal Law," § 6.

OPINIONS.

Of courts, see "Courts," § 2.

ORDER OF PROOF.

At trial, see "Trial," § 4.

ORDERS.

Of court, see "Motions."
Review of appealable orders, see "Appeal and Error."

ORDINANCES.

Judicial notice of, see "Criminal Law," § 6.
Municipal ordinances, see "Municipal Corporations," §§ 2, 3, 5, 6.
Relating to intoxicating liquors, see "Intoxicating Liquors," § 4.
Relating to maintenance of railroad crossings, see "Railroads," § 3.

PARENT AND CHILD.

See "Adoption"; "Bastards"; "Guardian and Ward"; "Infants."
Action for services to parent, see "Work and Labor."
Care required of railroads as to children on or near tracks, see "Railroads," § 7.
Contributory negligence of children injured or killed by operation of railroad, see "Railroads," § 6.
Imputed negligence of parent, see "Negligence," § 3.

contract to pay therefor.—Terry v. Warder (Ky.) 154.

In action for injuries sustained by plaintiff's minor son, owing to alleged negligence of defendant, instructions on the question of damages *held* fair and proper.—Baxter v. St. Louis Transit Co. (Mo. App.) 70.

PARKS.

In municipalities, see "Municipal Corporations," § 5.

PAROL EVIDENCE.

In civil actions, see "Evidence," §§ 5, 10.

PARTIES.

Admissions as evidence, see "Evidence," § 6.
Identity of parties to different actions, see "Abatement and Revival," § 1.
Objections for purpose of review, see "Appeal and Error," § 5.
Parties entitled to allege error, see "Appeal and Error," § 17.
Persons concluded by judgment, see "Judgment," § 8.

In actions by or against particular classes of parties.

See "Carriers," § 2.

In particular actions or proceedings.

Foreclosure, see "Mortgages," § 7.
For compensation for property taken for public use, see "Eminent Domain," § 3.
For dissolution of partnership, see "Partnership," § 3.
For injuries to dower, see "Dower," § 2.
On insurance policy, see "Insurance," § 12.

To particular classes of conveyances, contracts, or transactions.

See "Contracts," § 2.

Usurious contracts, see "Usury," § 1.

§ 1. Defendants.

Two corporations, not connected with each other, and severally operating different copper reducing plants, which polluted the air surrounding them, could not be joined as defendants in an action by an abutting property owner to recover damages resulting from such pollution.—Swain v. Tennessee Copper Co. (Tenn.) 93; Cole v. Ducktown Sulphur, Copper & Iron Co., Id.

§ 2. Defects, objections, and amendment.

Parties summoned to answer or entering appearance to a cross-petition *held* not entitled, after judgment, for the first time to question the procedure.—Page v. Southern Const. Co. (Ky.) 879.

Under Rev. St. 1899, § 672, a judgment for plaintiff cannot be reversed for misjoinder of parties plaintiff.—Tennent Shoe Co. v. Birdseye (Mo. App.) 1036.

PARTITION.

Accrual of action to set aside, see "Limitation of Actions," § 2.

§ 1. By acts of parties.

A distribution of land by parol gift among children *held* to be a valid partition, conferring title.—Bonner v. Bonner (Tex. Civ. App.) 335.

PARTNERSHIP.

See "Associations."

Admissibility of mercantile reports to show partnership, see "Evidence," § 9.

Fraud by credit man of partnership inducing sale, see "Sales," § 1.

Liability of stockholders as partners, see "Corporations," § 3.

Necessity of service of amended petition alleging cause of action against partnership where original set up cause of action against corporation, see "Process," § 1.

§ 1. The relation.

Evidence examined, and *held* to show that a defendant was a member of a firm at the time an indebtedness sued on was created.—*Rhodes v. Lowry & Goebel* (Ky.) 459.

Declarations, made by one sought to be bound as a partner, to the effect that he was not a member of the firm in question, are inadmissible.—*Marks & Stix v. Hardy's Adm'r* (Ky.) 864, 1105.

§ 2. Rights and liabilities as to third persons.

Knowledge acquired by a member of a law firm as to a matter relating to a deed of trust cannot be attributed to his copartner, who was acting as trustee under the deed, and not in the business of the firm.—*Tennent Shoe Co. v. Birdseye* (Mo. App.) 1036.

Neither a law firm, of which the trustee under a deed of trust was a member, nor the trustee's partner, was liable for misconduct of the trustee in foreclosing the deed.—*Tennent Shoe Co. v. Birdseye* (Mo. App.) 1036.

A bank, having loaned money to enable the borrower to purchase an interest in a firm, *held* to have thereby acquired no lien on the firm's assets over partnership creditors.—*Hargadine-McKittrick Dry Goods Co. v. Sappington* (Mo. App.) 1049.

A prior attachment, levied by a creditor of one partner on the firm assets, does not entitle such attaching creditor to priority as against subsequent attaching firm creditors.—*Hargadine-McKittrick Dry Goods Co. v. Sappington* (Mo. App.) 1049.

A judgment against a nonresident firm was unsustainable, where the petition did not allege the names of the partners.—*Perry-Rice Grocery Co. v. W. E. Craddock Grocery Co.* (Tex. Civ. App.) 966.

§ 3. Dissolution, settlement, and accounting.

One of the members of a firm *held* a necessary party to a suit for dissolution.—*Boyd v. Boyd* (Tex. Civ. App.) 39.

PASSENGERS.

See "Carriers," §§ 4-12.

PAYMENT.

See "Compromise and Settlement."

Of judgment as affecting right to appeal, see "Appeal and Error," § 3.

Operating as discharge of surety, see "Principal and Surety," § 2.

Subrogation on payment, see "Subrogation."

Of particular classes of obligations or liabilities.

See "Mortgages," § 5.

Price of land sold, see "Vendor and Purchaser," § 2.

Taxes, see "Taxation," § 7.

PEACE.

Breach of public peace, see "Breach of the Peace."

PENALTIES.

For causing wrongful death, see "Death," § 1.
For failure of sheriff to pay over moneys, see "Sheriffs and Constables," § 2.

For nonpayment of taxes, see "Taxation," § 7.

For offenses by druggists, see "Druggists."

For refusal to release mortgage, see "Mortgages," § 5.

PERJURY.

§ 1. Offenses and responsibility therefor.

On a prosecution for perjury, *held*, that the testimony was not material.—*Maroney v. State* (Tex. Cr. App.) 696.

§ 2. Prosecution and punishment.

On a prosecution for perjury, the materiality of the false testimony must be averred in the indictment, though in general terms.—*Maroney v. State* (Tex. Cr. App.) 696.

On a prosecution for perjury in an action on a fire policy, *held* not permissible under the indictment to show the materiality of the testimony, on the ground that it had tended to show that insured burned his house.—*Maroney v. State* (Tex. Cr. App.) 696.

Perjury may be shown by circumstantial evidence.—*Maroney v. State* (Tex. Cr. App.) 696.

On a prosecution for perjury, the manner of showing the materiality of the testimony stated.—*Maroney v. State* (Tex. Cr. App.) 696.

Where an indictment for perjury charges in general terms that the testimony was on a material issue, it is for the court to determine from the record in testimony the materiality of the issue.—*Maroney v. State* (Tex. Cr. App.) 696.

PERPETUITIES.

Testamentary restraint on alienation *held* valid.—*Smith v. Isaacs* (Ky.) 434.

Under Ky. St. 1903, § 317, trust for educational purposes *held* not void as perpetuity.—*Pullins v. Board of Education of Methodist Church* (Ky.) 457.

Will giving property to be invested, but only interest to be used, *held* not to suspend power of alienation, within Ky. St. 1903, § 2360.—*Pullins v. Board of Education of Methodist Church* (Ky.) 457.

Will providing that testator's real estate shall not be sold or incumbered for 40 years after his death *held* void, under Ky. St. 1903, § 2360, prohibiting perpetuities.—*Fidelity Trust Co. v. Lloyd* (Ky.) 896.

PERSONAL INJURIES.

See "Negligence."

Aider of pleading and waiver of objections, see "Pleading," § 8.

Caused by construction and maintenance of telephone system, see "Telegraphs and Telephones," § 1.

Caused by operation of street railroad, see "Street Railroads."

Credibility of witnesses as question for jury, see "Trial," § 6.

Documentary evidence in action for, see "Evidence," § 9.

Effect of settlement of claim by client on right of attorney, see "Attorney and Client," § 2.

Expert testimony, see "Evidence," § 11.

Harmless error in actions for, see "Appeal and Error," § 21.

Hearsay evidence in action for, see "Evidence," § 8.

Impeachment of witness in action for, see "Witnesses," § 3.

Instructions as to measure of damages, see "Damages," § 5.
 Instructions in action for, see "Trial," §§ 7-12.
 Measure of damages, see "Damages," § 3.
 Relevancy of evidence in action for, see "Evidence," § 4.
 Sufficiency of evidence in action for, see "Evidence," § 12.
 To child, see "Parent and Child."
 To employe, see "Master and Servant," §§ 2-8.
 To infant, see "Infants," § 2.
 To licensee, see "Railroads," § 5.
 To passenger, see "Carriers," §§ 7-9.
 To person on or near railroad tracks, see "Railroads," § 7.
 To traveler on highway, see "Highways," § 3;
 "Municipal Corporations," § 8.
 To traveler on highway crossing railroad, see "Railroads," § 6.
 To traveler on street, see "Municipal Corporations," § 8.
 To trespasser, see "Railroads," § 7.

PEST HOUSE.

Liability of city for unhealthy condition, see "Municipal Corporations," § 8.

PETITION.

Amendment of, see "Pleading," § 3.
 Sufficiency to sustain default judgment, see "Judgment," § 1.
 To widen road, see "Highways," § 1.

PHOTOGRAPHS.

As evidence, see "Evidence," § 9.

PHYSICIANS AND SURGEONS.

Expert testimony, see "Evidence," § 11.
 Impeachment of medical witness, see "Witnesses," § 3.
 Prosecution for violation of license laws, see "Licenses," § 1.

A physician held not within Sayles' Rev. Civ. St. 1897, art. 5049, imposing a tax on medical specialists traveling from place to place.—*Adams v. State* (Tex. Cr. App.) 935.

PLEADING.

Admissions by pleading, see "Evidence," § 6.
 Amendment after limitations, see "Limitation of Actions," § 2.
 Amendment on appeal, see "Appeal and Error," § 16.
 Appealability of order on motion for judgment on pleadings, see "Appeal and Error," § 2.
 Appealability of order sustaining demurrer, see "Appeal and Error," § 2.
 Applicability of instructions to pleadings, see "Trial," § 10.
 Assignment of errors as to rulings on pleadings, see "Appeal and Error," § 13.
 Conformity of judgment to pleadings, see "Judgment," § 2.
 Costs on amendment, see "Costs," § 1.
 Further pleadings on appeal from justice's court, see "Justices of the Peace," § 3.
 Harmless error in pleadings, see "Appeal and Error," § 21.
 Necessity of service of amended pleading, see "Process," § 1.
 Sufficiency of petition to sustain default judgment, see "Judgment," § 1.

ment," § 10.
 City ordinances, see "Municipal Corporations," § 2.
 Contributory negligence of passenger, see "Carriers," § 9.
 Statute of frauds, see "Frauds, Statute of," § 4.

In actions by or against particular classes of parties.

See "Carriers," §§ 2, 3, 8; "Corporations," § 4; "Master and Servant," § 8; "Municipal Corporations," §§ 8, 9; "Partnership," § 2; "Principal and Surety," § 3; "Railroads," § 6; "Trespass to Try Title," § 1.
 Stockholders, see "Corporations," § 3.
 To enforce vendor's lien, see "Vendor and Purchaser," § 4.
 Trustees, see "Trusts," § 3.

In particular actions or proceedings.

See "Forcible Entry and Detainer"; "Negligence," § 4; "Nuisance," § 1.
 For breach of warranty, see "Sales," § 8.
 For city taxes, see "Municipal Corporations," § 9.
 Foreclosure, see "Mortgages," § 7.
 For injury to live stock in transportation, see "Carriers," § 3.
 For negligence in transmission or delivery of telegram, see "Telegraphs and Telephones," § 2.
 For personal injuries, see "Carriers," §§ 8, 9; "Master and Servant," § 8; "Municipal Corporations," § 8; "Railroads," § 6.
 For price of goods sold, see "Sales," § 7.
 For wrongful conversion of goods by carrier, see "Carriers," § 2.
 Indictment or criminal information or complaint, see "Indictment and Information."
 On bill or note, see "Bills and Notes," § 3.
 On insurance policy, see "Insurance," §§ 12, 14.
 On tax collector's bond, see "Taxation," § 8.
 Services, see "Work and Labor."
 Suits to set aside fraudulent conveyances, see "Fraudulent Conveyances," § 2.
 To enforce trust, see "Trusts," § 3.

§ 1. Plea or answer, cross complaint, and affidavit of defense.

Under Rev. St. 1899, § 4499, where defendant pleaded a counterclaim, and plaintiff's amended petition was stricken, after which plaintiff dismissed its original petition, plaintiff was entitled to allege the cause of action pleaded in the amended petition in a replication, as a counterclaim to defendant's counterclaim.—*Morrison Mfg. Co. v. Roach & Green* (Mo. App.) 644.

§ 2. Replication or reply and subsequent pleadings.

Where a counterclaim was alleged to defendant's counterclaim in plaintiff's replication, as authorized by Rev. St. 1899, § 4499, plaintiff was not barred from relief thereon on the ground that the cause was first alleged in a reply, and was not within the general scope of the petition.—*Morrison Mfg. Co. v. Roach & Green* (Mo. App.) 644.

§ 3. Amended and supplemental pleadings and replender.

In an action on a fire policy, the refusal to permit defendant to file an amended answer held not an abuse of discretion.—*Pennsylvania Fire Ins. Co. v. C. D. Young & Co.* (Ky.) 127.

An application to file an amended rejoinder is within the discretion of the trial judge.—*Guthrie v. Guthrie* (Ky.) 474.

An amendment of the petition after judgment held too late.—*Bobannon v. Clark* (Ky.) 479.

Discretion of the court in refusing permission to amend the petition after the case was called for trial *held* not to have been abused.—*Marks & Stix v. Hardy's Adm'r* (Ky.) 864, 1105.

Court *held* to have had no authority to permit amendment of petition.—*Craig v. Welsh-Hackley Coal & Oil Co.* (Ky.) 1122.

Under Rev. St. 1899, § 657, an amended petition, stating a cause of action different from that contained in the original petition, cannot be allowed.—*Purdy v. Pfaff* (Mo. App.) 824.

§ 4. Signature and verification.

In an action on a life policy, where the answer was not verified, the contract as alleged by the petition stood confessed.—*Weber v. Ancient Order of Pyramids* (Mo. App.) 650.

§ 5. Filing, service, and withdrawal.

When defendant failed to offer evidence in support of its cross-action, it thereby abandoned the same.—*Galveston, H. & S. A. Ry. Co. v. Schlather* (Tex. Civ. App.) 953.

§ 6. Motions.

Counts of a petition *held* to state same cause of action for injury in attempting to board street car, so that plaintiff is not required to elect between them.—*Maguire v. St. Louis Transit Co.* (Mo. App.) 838.

Striking out plea of accord and satisfaction *held* no abuse of discretion.—*El Paso Electric Ry. Co. v. Galliher* (Tex. Civ. App.) 7.

§ 7. Issues, proof, and variance.

On a motion to quash an execution levy, an admission of the creditor's attorney *held* to have relieved the debtor from proving the date of the registration of his deed, under which he claimed the land.—*Meyer Bros. Drug Co. v. Bybee* (Mo. Sup.) 579.

An answer to a motion to quash an execution levy *held* an admission of the issuance and levy of the execution, relieving defendant from proof thereof.—*Meyer Bros. Drug Co. v. Bybee* (Mo. Sup.) 579.

§ 8. Defects and objections, waiver, and aid by verdict or judgment.

Failure of the petition, in an action for personal services, to allege a promise of compensation, *held* cured by an answer.—*Dearing v. Moran* (Ky.) 217.

Petition for an injunction *held* so aided by return to rule to show cause as to present a concrete case invoking jurisdiction of the court to issue injunction, and hence prohibition would not lie.—*Schubach v. McDonald* (Mo. Sup.) 1020; *Hirt v. Kinealy, Id.*; *Leonard v. Fisher, Id.*; *Schubach v. Hough, Id.*; *Steiner v. Wood, Id.*; *Wasserman & Co. v. Hough, Id.*

In an action by a servant for personal injuries, a charge of general negligence was sufficient, as against an objection first made on trial.—*Johnson v. Metropolitan St. Ry. Co.* (Mo. App.) 275.

Ruling on motion to dismiss, on ground of departure, after amendment of petition, *held* waived by proceeding with the trial.—*Powell v. Brookfield Pressed Brick & Tile Mfg. Co.* (Mo. App.) 646.

Where the defenses pleaded are inconsistent, so that proof of one will disprove the other, plaintiff must move to strike them out, and cannot raise the objection by an instruction.—*Harper v. Fidler* (Mo. App.) 1034.

POLICE JUDGE.

Authority to appoint receiver, see "Receivers," § 1.

POLICE POWER.

Of municipality, see "Municipal Corporations," § 6.

POLICE REGULATIONS.

Construction of as to constitutionality, see "Constitutional Law," § 1.

POLICY.

Of insurance, see "Insurance."

POLITICAL RIGHTS.

Suffrage, see "Elections."

POSSESSION.

See "Adverse Possession."

Recovery of by execution purchaser, see "Execution," § 2.

POWERS.

Of sale in mortgage, see "Mortgages," § 6.

PRACTICE.

Procedure of particular courts, see "Courts."

In particular civil actions or proceedings.

See "Divorce," § 1; "Ejectment"; "Replevin"; "Trespass to Try Title," § 1.

Condemnation proceedings, see "Eminent Domain," § 2.

To widen road, see "Highways," § 1.

Particular proceedings in actions.

See "Abatement and Revival"; "Appearance"; "Costs"; "Damages," § 5; "Depositions"; "Dismissal and Nonsuit"; "Evidence"; "Execution"; "Judgment"; "Jury"; "Limitation of Actions"; "Motions"; "Parties"; "Pleading"; "Process"; "Removal of Causes"; "Trial"; "Venue," § 6.

Nonsuit, see "Trial," § 6.

Particular remedies in or incident to actions.

See "Attachment"; "Garnishment"; "Injunction"; "Receivers"; "Sequestration."

Procedure in criminal prosecutions.

See "Bail," § 1; "Criminal Law."

For violation of liquor laws, see "Intoxicating Liquors," § 6.

Procedure in exercise of special jurisdictions.

In equity, see "Equity."

In justices' courts, see "Justices of the Peace," § 2.

Procedure on review.

See "Appeal and Error"; "Exceptions, Bill of"; "Justices of the Peace," § 3; "New Trial."

PREFERENCES.

Effect of proceedings in bankruptcy, see "Bankruptcy," § 2.

PREJUDICE.

Ground for reversal in civil action, see "Appeal and Error," § 21.

PRELIMINARY INJUNCTION.

See "Injunction," § 4.

PREMIUMS.

For insurance, see "Insurance," §§ 5, 9.

Of claims against estate of decedent, see "Executors and Administrators," § 4.

PRESUMPTIONS.

- As to capacity of infant to commit crime, see "Infants," § 1.
As to validity of city ordinances, see "Municipal Corporations," § 2.
In civil actions, see "Evidence," § 2.
On appeal or error, see "Appeal and Error," § 18; "Criminal Law," § 22.

PRIMARY ELECTIONS.

Recovery of money bet on primary election, see "Gaming," § 1.

PRINCIPAL AND AGENT.

See "Attorney and Client"; "Brokers"; "Factors."

Admissibility of evidence in action by factor against principal, see "Evidence," § 4.

Admissions by agent, see "Evidence," § 6.

Agency of partner for firm, see "Partnership," § 2.

Insurance agents, see "Insurance," §§ 2, 7.

Subrogation of surety to rights of principal on payment of debt, see "Subrogation."

§ 1. The relation.

Declarations of alleged agent *held* inadmissible to establish the agency.—*Tabet v. Powell* (Tex. Civ. App.) 997.

§ 2. Mutual rights, duties, and liabilities.

A contract authorizing plaintiff to sell defendant's machines in certain territory construed, and *held* not to confer an exclusive right.—*Indiana Road Mach. Co. v. Lebanon Carriage & Implement Co.* (Ky.) 861.

Plaintiff, having a non-exclusive right to sell defendant's machines in certain territory, *held* not to have a right to commissions on sales by defendant to a customer secured by plaintiff.—*Indiana Road Mach. Co. v. Lebanon Carriage & Implement Co.* (Ky.) 861.

§ 3. Rights and liabilities as to third persons.

Evidence in action for failure to deliver goods *held* not to show agency for seller, so as to render contract of purchase binding.—*Kelley & Lysle Milling Co. v. Adams* (Ark.) 49.

Agent's knowledge, acquired in subsequent and distinct transaction from that in suit, *held* not imputable to principal, so as to start limitations.—*Day v. Exchange Bank of Kentucky* (Ky.) 132.

A principal *held* not liable to a transferee of a draft drawn on him by his agent in excess of his authority.—*Gray Tie & Lumber Co. v. Farmers' Bank* (Ky.) 207.

That a contract was apparently within the scope of an agent's authority, and that the alleged principal received the benefits of it, was sufficient evidence to go to the jury on the question of agency.—*A. Booth & Co. v. Bethel* (Ky.) 888.

On the issue of waiver by agent of landlord's statutory lien on crops, evidence as to the apparent scope of the agent's authority *held* admissible.—*Wimp v. Early* (Mo. App.) 343.

Evidence *held* insufficient to sustain finding that bank's agent was authorized to settle or

is not enforceable, where one of the parties had no knowledge that the agent was also acting for the other party.—*Harper v. Fidler* (Mo. App.) 1084.

Information acquired by an agent before the agency existed cannot be imputed to his principal.—*Kyle v. Gaff* (Mo. App.) 1047.

Knowledge of an agent to sell land, which may be imputed to the principal, is only that which he obtains in the course of his own employment.—*Kyle v. Gaff* (Mo. App.) 1047.

That an agent bought the cattle which he sold to plaintiffs before he knew that plaintiffs wanted to buy *held* not to affect principal's liability for the agent's fraud in the transaction.—*Phipps v. Mallory Commission Co.* (Mo. App.) 1097.

Defendant *held* liable for its agent's fraud, though it did not authorize the fraud.—*Phipps v. Mallory Commission Co.* (Mo. App.) 1097.

One dealing with an agent may rely upon principal's representations as to agent's authority.—*Phipps v. Mallory Commission Co.* (Mo. App.) 1097.

A principal's liability for the acts of his agent is not affected by restrictions of authority, where the principal represented that the agent had a wider authority.—*Phipps v. Mallory Commission Co.* (Mo. App.) 1097.

In an action against a principal and his agent, who pleaded that he acted as his principal's surety only, evidence that he had no authority to make the contract, which was contradicted, *held* not to constitute an abandonment of his plea of suretyship, so as to justify judgment against the agent.—*Tabet v. Powell* (Tex. Civ. App.) 997.

In an action on a contract made by an agent, against both the agent and his principal, the principal was not estopped to object that the agent exceeded his authority in making the contract, by his failure to object to the admission of the contract in evidence.—*Tabet v. Powell* (Tex. Civ. App.) 997.

In an action on a contract for attorney's services, evidence *held* to justify a finding that the agent of the person injured had full charge of the "claim," as distinguished from the settlement thereof.—*Tabet v. Powell* (Tex. Civ. App.) 997.

Where a person injured gave his brother full charge of his claim for injuries, the brother had authority to employ an attorney on a contingent fee of one-half, secured by an assignment of one-half of the claim.—*Tabet v. Powell* (Tex. Civ. App.) 997.

PRINCIPAL AND SURETY.

See "Bail"; "Limitation of Actions," § 1.

Liabilities of sureties on bond for costs, see "Costs," § 2.

Liabilities of sureties on bond of indemnity against liens, see "Mechanics' Liens," § 1.

Liabilities of sureties on tax collector's bond, see "Taxation," § 8.

Transfer to secure surety, as fraud on creditors, see "Fraudulent Conveyances," § 1.

§ 1. Creation and existence of relation.

That a wife signed a note on second line for signatures *held* not sufficient to give notice to payee that she signed it as surety.—*Wm. Deering & Co. v. Veal* (Ky.) 886.

§ 2. Discharge of surety.

Secret redeposit of misappropriated funds did not become a payment until accepted by credit-

or as such, and he could then, by agreement with debtor, apply it to funds last misappropriated.—Grant County Building, Loan & Savings Ass'n v. Lemmon (Ky.) 874.

Performance of certain extra work by building contractor *held* not to operate to release surety on his bond.—Snoqualmi Realty Co. v. Moynihan (Mo. Sup.) 1014.

In action on building contractor's bond, surety *held* estopped to set up that the architect did not have authority to authorize the omission of certain excavation called for by the specifications.—Snoqualmi Realty Co. v. Moynihan (Mo. Sup.) 1014.

Under Rev. St. 1899, §§ 4500-4502, failure of payee to sue before principal on note becomes insolvent *held* not to discharge surety.—Burge v. Duden (Mo. App.) 653.

§ 3. Remedies of creditors.

Limitations begin to run against sureties in fidelity bond when fraudulent misappropriation of funds is made by principal.—Grant County Building, Loan & Savings Ass'n v. Lemmon (Ky.) 874.

Judgment for plaintiff on pleadings *held* proper, in action against surety on note.—Burge v. Duden (Mo. App.) 653.

PRINTING.

Contracts between printers as to bids for public work, see "Contracts," § 1.

PRIORITIES.

Of claims against partnership, see "Partnership," § 2

PRISONS.

Escape from, see "Escape."

PRIVATE ROADS.

Rights of way, see "Easements."

PRIVILEGE.

Of witness as to testimony, see "Witnesses," § 2.

PRIVILEGED COMMUNICATIONS.

See "Libel and Slander," § 1.

Disclosure by witness, see "Witnesses," § 1.

PROBATE.

Of will, see "Wills," § 3.

PROCESS.

Effect of appearance, see "Appearance."

In actions against particular classes of parties. See "Corporations," § 4.

Particular forms of writs or other process.

See "Execution"; "Garnishment"; "Injunction"; "Mandamus"; "Replevin"; "Sequestration."

§ 1. Nature, issuance, requisites, and validity.

Where a petition against a nonresident as a corporation was amended to state a cause of action against a partnership, a judgment against it and a garnishee could not be sustained, in the absence of service of such amended petition, under Rev. St. art. 1230, or defendants' appearance.—Perry-Rice Grocery Co. v. W. E. Craddock Grocery Co. (Tex. Civ. App.) 966.

PROMISSORY NOTES.

See "Bills and Notes."

PROOF.

Matters to be proved under pleading, see "Pleading," § 7.

Of loss insured against, see "Insurance," § 11.

PROPERTY.

See "Animals"; "Improvements."

Adverse possession, see "Adverse Possession." Constitutional guaranties of rights of property, see "Constitutional Law," § 5.

Dedication to public use, see "Dedication."

Life estate in personal property, see "Life Estates."

Protection of rights of property by injunction, see "Injunction," § 2.

Taking for public use, see "Eminent Domain."

PROSTITUTION.

Duplicity in indictment for taking female for purpose of prostitution, see "Indictment and Information," § 2.

PROVINCE OF COURT AND JURY.

In civil actions, see "Trial," § 7.

In criminal prosecutions, see "Criminal Law," § 14.

PROXIMATE CAUSE.

Direct or remote consequences of injury, see "Damages," § 2.

Of injury, see "Negligence," § 2.

Of injury to employé, see "Master and Servant," §§ 2, 7.

Of injury to passenger, see "Carriers," § 8.

PUBLIC AID.

To railroads, see "Railroads," § 2.

PUBLICATION.

In official newspapers, see "Newspapers."

PUBLIC DEBT.

See "Counties," § 2; "Municipal Corporations," § 9.

PUBLIC IMPROVEMENTS.

By municipalities, see "Municipal Corporations," § 5.

PUBLIC LANDS.

Admissibility in evidence of certified copies by Land Commissioner, see "Evidence," § 9.

§ 1. Disposal of lands of the states.

Under Rev. St. 1895, art. 4218g, requiring notice by the Commissioner of the Land Office to the county clerk that school land is offered for sale, previous advertisement does not dispense with the statutory requirement.—Boswell v. Terrell (Tex. Sup.) 4.

School land is not subject to sale on the same day that a prior purchase thereof is forfeited, in the absence of notice by the Commissioner to the county clerk, under Rev. St. art. 4218.—Boswell v. Terrell (Tex. Sup.) 4.

That one was entitled to purchase public lands as actual settler *held* not to render valid his purchase of sections as isolated, when in

t connected.—Burnam v. Terrell (Tex. Sup.) 500.

Commissioner of General Land Office, or successor, *held* to have power to rescind sale of public lands made by mistake.—Burnam v. Terrell (Tex. Sup.) 500.

Under 2 Batts' Rev. St. 1895, art. 4218y, abstracts furnished to assessors of taxes *held* not affect rights of purchaser of supposed isolated sections of public lands.—Burnam v. Terrell (Tex. Sup.) 500.

Under 2 Batts' Rev. St. 1895, art. 4218y, determination of Commissioner of General Land Office as to whether sections are isolated *held* ministerial act, and not conclusive.—Burnam v. Terrell (Tex. Sup.) 500.

Invalid sale of lands to lessee cannot be treated as continuation of lease, though payments exceeded amount due under lease.—Burnam v. Terrell (Tex. Sup.) 500.

Sale of connected sections as isolated *held* not rendered valid by subsequent invalid sale of the connecting section.—Burnam v. Terrell (Tex. Sup.) 500.

Under the act of 1895 relative to sale and use of state school lands (Laws 1895, p. 63, 47), and Rev. St. 1895, arts. 2315, 4218p, action of Land Commissioner with reference to part of leased land *held* not to amount to a cancellation of the lease.—Trevey v. Lowrie (Tex. Civ. App.) 18.

Under Laws 1895, pp. 63, 64, c. 47, §§ 3, 8, purchaser of grazing land *held* entitled to purchase additional land.—Trevey v. Lowrie (Tex. Civ. App.) 18.

Under Rev. Civ. St. 1897, art. 4218f, relative to public lands, a mere actual occupant, who is not a bona fide purchaser, *held* to have no right to purchase additional land.—Trevey v. Lowrie (Tex. Civ. App.) 18.

Under Const. 1876, art. 7, § 24, and art. 14, 6, and Sayles' Ann. Civ. St. art. 1482f, the fact that an actual settler on public lands is a minor *held* not to deprive him of the right to purchase additional lands.—White v. Watson (Tex. Civ. App.) 237.

In an action to recover land awarded to defendant as additional school land, the land commissioner's certificate of proof of defendant's settlement on his home section *held* not admissible as against plaintiff.—White v. Watson (Tex. Civ. App.) 237.

A purchase of school lands as an additional purchase, under Batts' Civ. St. 1895, art. 218fff, *held* not forfeited by the purchaser's sale to another.—Miller v. Hallford (Tex. Civ. App.) 239.

Under Acts 1901, p. 294, c. 125, § 4, proof of applications for purchase of land *held* nullified by proof of existence of lease in force at the time.—Valentine v. Sweatt (Tex. Civ. App.) 85.

Under Acts 1901, p. 295, c. 125, § 5, state land *held* to be on market after expiration of 60-day and 30-day periods after expiration of lease.—Valentine v. Sweatt (Tex. Civ. App.) 85.

The district surveyor of one county was not authorized to make the surveys in another county, where that county at that time was attached to a different land district than that to which the surveyor belonged.—Houston & T. C. R. Co. v. De Berry (Tex. Civ. App.) 736.

A survey, made while Pasch. Dig. art. 4573, was in force, was valid, although the bounty certificate was not actually filed in the office of the surveyor.—Houston & T. C. R. Co. v. De Berry (Tex. Civ. App.) 736.

Gen. Laws 1879, p. 48, c. 52, withdrew tracts of land consisting of 640 acres or less in certain

counties from individual appropriation, and rendered locations made within the prescribed limits void.—McCaleb v. Rector (Tex. Civ. App.) 956.

Gen. Laws 1879, p. 48, c. 52, withdrawing from location tracts of unappropriated public land situated in organized counties and containing not more than 640 acres, applied to counties afterwards organized, as well as those already organized when the law was enacted.—McCaleb v. Rector (Tex. Civ. App.) 956.

Conceding that a county organized in 1880 was not within the provisions of Gen. Laws 1879, p. 48, c. 52, withdrawing from private appropriation certain lands in organized counties, it was brought within the provisions of that act by its re-enactment on March 11, 1881 (Gen. Laws 1881, p. 27, c. 35).—McCaleb v. Rector (Tex. Civ. App.) 956.

The fact that the first entry in a surveyor's record book was made in 1882 is not evidence on an issue as to when the surveyor was elected.—McCaleb v. Rector (Tex. Civ. App.) 956.

§ 2. Spanish, Mexican, French, and Russian grants.

Valid grant of public lands by Mexican authorities *held* to vest title in grantee, in absence of evidence of want of acceptance or abandonment.—Peaslee v. Walker (Tex. Civ. App.) 980.

Grant of land by Mexican authorities, pursuant to concession which had already been exhausted, *held* absolutely void.—Peaslee v. Walker (Tex. Civ. App.) 980.

PUBLIC NUISANCE.

See "Nuisance," § 2.

PUBLIC SCHOOLS.

See "Schools and School Districts," § 1.

PUBLIC USE.

Dedication of property, see "Dedication."
Taking property for public use, see "Eminent Domain."

PUBLIC WATER SUPPLY.

See "Waters and Water Courses," § 2.

PUNISHMENT.

See "Larceny," § 1.

QUANTUM MERUIT.

See "Work and Labor."

QUARANTINE.

Liability of county for expenses incurred by board of health, see "Health."

QUASHING.

Execution, see "Execution," § 1.

QUESTIONS FOR JURY.

In civil actions, see "Trial," § 6.
In criminal prosecutions, see "Criminal Law," § 14.

RAILROADS.

See "Street Railroads."

Accrual of action for flooding crop owing to railroad embankment, see "Limitation of Actions," § 2.

As employers, see "Master and Servant."

Carriage of goods and passengers, see "Carriers."

Citizenship of companies for purpose of federal jurisdiction, see "Removal of Causes," § 1.

Duty of as to providing separate coaches for white and colored passengers, see "Civil Rights."

Imputed negligence of person injured by operation of, see "Negligence," § 3.

Injunction to compel restoration of railroad crossing, see "Injunction," § 1.

Joinder of causes of action against, see "Action," § 2.

Judicial power to restrain brokers from dealing in nontransferable railroad tickets, see "Constitutional Law," § 2.

Liability for injuries to traveler on highway, see "Highways," § 3.

Mandamus to enforce compliance with ordinance as to grade at street crossings, see "Mandamus," § 1.

Requests for instructions in actions for personal injuries, see "Trial," § 11.

Restraining sale of nontransferable railroad tickets, see "Injunction," § 1.

Specific performance of contract to donate right of way, see "Specific Performance," § 2.

Subscriptions in aid of, see "Subscriptions."

Sufficiency of instructions in action for personal injuries, see "Trial," § 10.

Taking of or injury to lands or easements for public use, see "Eminent Domain."

Taxation of, see "Taxation," § 3.

Weight and effect of evidence in action for personal injuries as question for jury, see "Trial," § 6.

§ 1. Railroad companies.

Demand by county against railroad for breach of trust in misappropriating subscribed funds by railroad's predecessor in interest *held* stale and unenforceable in equity.—Marion County v. Louisville & N. R. Co. (Ky.) 437.

§ 2. Public aid.

Railroad *held* not to have breached conditions of stock subscription made by county in purchasing ties and rails.—Marion County v. Louisville & N. R. Co. (Ky.) 437.

§ 3. Construction, maintenance, and equipment.

In an action to compel a railroad to restore a crossing over its tracks, plaintiffs *held* estopped to invoke mandatory injunction.—Louisville & N. R. Co. v. Smith (Ky.) 160.

The reasonableness or necessity of an ordinance requiring railroads to conform to grade of streets at crossings *held* not open to question.—Houston & T. C. R. Co. v. City of Dallas (Tex. Civ. App.) 525.

Under the police power, *held*, that railroads may be compelled to conform the grade of their tracks, where they cross streets, to the street grade.—Houston & T. C. R. Co. v. City of Dallas (Tex. Civ. App.) 525.

A city charter *held* to grant specific power to a city council to pass an ordinance compelling railroads to adjust the grade of their tracks, where they intersect streets, to the street grade, at their own expense.—Houston & T. C. R. Co. v. City of Dallas (Tex. Civ. App.) 525.

§ 4. Operation.—Statutory, municipal, and official regulations.

An indictment for obstructing a public street *held* fatally defective for failure to identify the street.—Louisville & N. R. Co. v. Commonwealth (Ky.) 124.

Under Ky. St. 1903, § 1793, requiring railroads to erect and maintain cattle guards at all terminal points of fences constructed along their lines, a contention that such guards are not required to be erected, except at public and private crossings, is without merit.—Parish v. Louisville & N. R. Co. (Ky.) 186.

Under Ky. St. 1903, § 1790, requiring railroads to construct and maintain fences on one-half of the distance of the division line between the right of way and adjoining land, *held* no notice to construct is necessary.—Parish v. Louisville & N. R. Co. (Ky.) 186.

Ky. St. 1903, § 1791, providing for notice to railroads to build fences as required by section 1790, is only for the purpose of setting the criminal law in motion and finding the party in default.—Parish v. Louisville & N. R. Co. (Ky.) 186.

§ 5. — Injuries to licensees or trespassers in general.

Instructions in an action for injury to a person unloading a car *held* to correctly state the law applicable to the case.—Cincinnati, N. O. & T. P. R. Co. v. Vaught (Ky.) 859.

Plaintiff, who was struck by the swinging door of a car which he was unloading, *held* not bound to jump therefrom after it started, and entitled to go to the door as the only means of finding out where he was being carried.—Cincinnati, N. O. & T. P. Ry. Co. v. Vaught (Ky.) 859.

Whether or not plaintiff, who was injured by being struck by the door of a moving car which he was unloading, unnecessarily placed himself in peril, *held* to be a question for the jury.—Cincinnati, N. O. & T. P. Ry. Co. v. Vaught (Ky.) 859.

§ 6. — Accidents at crossings.

It is the duty of a railroad to give signals of an approach of a train to street crossings, and failure in that behalf is actionable negligence.—Sights v. Louisville & N. R. Co. (Ky.) 172.

In an action against a railroad for negligence, resulting in plaintiff's horses taking fright at a crossing, evidence *held* to authorize the submission of the issue of defendant's negligence to the jury.—Sights v. Louisville & N. R. Co. (Ky.) 172.

It is a negligence for a flagman to leave his post, knowing that an engine is approaching the crossing, without giving some signal of danger.—Sights v. Louisville & N. R. Co. (Ky.) 172.

One driving on a street toward a railroad crossing must exercise ordinary care to prevent accident.—Sights v. Louisville & N. R. Co. (Ky.) 172.

Facts *held* insufficient to establish negligence on the part of a railroad company in an action for killing a child at crossing.—Green's Adm'r v. Maysville & B. S. R. Co. (Ky.) 439.

One attempting to cross railway track by climbing over car *held* guilty of contributory negligence.—Illinois Cent. R. Co. v. Broughton (Ky.) 876.

Railway company *held* not liable for injury to one crossing track by climbing over car.—Illinois Cent. R. Co. v. Broughton (Ky.) 876.

Allegations, in plaintiff's complaint in action against railroad for personal injuries, charging negligence in the management of the train which struck plaintiff, *held* sufficient notice to defendant that the method and manner of operating the train would be brought into question.—Louisville & N. R. Co. v. Dick (Ky.) 914.

Charge, in action against a railroad for personal injuries, as to negligence of those in charge of train which struck plaintiff, *held* proper.—Louisville & N. R. Co. v. Dick (Ky.) 914.

Railway company *held* authorized to use right of way, though obstructing view of travelers.—Nashville, C. & St. L. R. Co. v. Witherspoon (Tenn.) 1052.

In an action against a railroad for personal injuries, whether plaintiff was guilty of con-

itory negligence in driving on the track question for jury.—*International & G. N. Co. v. Ives* (Tex. Civ. App.) 38.

ie fact that defendant may have been negligent in obstructing a street with its cars *held* the proximate cause of an injury resulting in an accident in driving around a car to the obstruction.—*Texas & P. Ry. Co. v. y* (Tex. Civ. App.) 372.

vidence in an action for injuries from frighting of plaintiff's horse by railroad car *held* to be contributory negligence a question for the jury.—*International & G. N. R. Co. v. Mercer* (Tex. Civ. App.) 562.

vidence in action for injuries from frightening of plaintiff's horse by railroad car *held* admissible.—*International & G. N. R. Co. v. Mercer* (Tex. Civ. App.) 562.

an action for injuries at a crossing, plaintiff cannot establish negligence complained of showing habitual negligence in same respects.—*Stewart v. Galveston, H. & S. A. Ry.* (Tex. Civ. App.) 979.

7. — Injuries to persons on or near tracks.

an action for negligent death of one standing near railroad right of way, caused by deralement of train, fact that watchman was sent from a crossing *held* immaterial.—*Illinois Cent. R. Co. v. Watson's Adm'r* (Ky.) 175.

an action for negligent death of one standing near railroad right of way, caused by deralement of train, fact that cars were derailed at other places *held* incompetent.—*Illinois Cent. R. Co. v. Watson's Adm'r* (Ky.) 175.

an action for negligent death of one standing near railroad right of way, caused by deralement of train, peremptory instruction for defendant *held* properly refused.—*Illinois Cent. R. Co. v. Watson's Adm'r* (Ky.) 175.

an action for negligent death of one standing near railroad right of way, caused by deralement of train, evidence as to colloquy between witness and engineer *held* incompetent.—*Illinois Cent. R. Co. v. Watson's Adm'r* (Ky.) 175.

A railroad *held* liable for killing a boy three years old on the track, where by ordinary care persons in charge of the train could have seen him and prevented the accident.—*Louisville & N. R. Co. v. Logsdon's Adm'r* (Ky.) 409.

A license to use a railroad track as a thoroughfare does not authorize its use for sleeping and sitting, and persons so using it are trespassers.—*Smith v. International & G. N. R. Co.* (Tex. Civ. App.) 556.

Persons lying or sitting on railroad tracks are guilty of the grossest negligence, and, if not discovered before they are struck by a train, the company is not liable.—*Smith v. International & G. N. R. Co.* (Tex. Civ. App.) 556.

In an action for injuries to a child on a railroad track, an instruction requiring the railroad company to keep a lookout for children on the track was proper.—*Missouri, K. & T. Ry. Co. v. Texas v. Hammer* (Tex. Civ. App.) 708.

In an action for injuries to a child on a railroad track, it was proper to charge that the railroad's failure to keep a lookout for such children was negligence per se.—*Missouri, K. & T. Ry. Co. v. Texas v. Hammer* (Tex. Civ. App.) 708.

Where an infant on a railroad track was of such tender years that it could not be presumed he would leave the track before the train approached, the operatives thereof were bound to use the highest degree of care to stop the train before reaching her.—*Missouri, K. & T. Ry. Co. v. Texas v. Hammer* (Tex. Civ. App.) 708.

In an action for injuries to a child on a railroad track, evidence *held* to justify a finding that the engineer of the train had previously seen children playing on the right of way near a crossing.—*Missouri, K. & T. Ry. Co. of Texas v. Hammer* (Tex. Civ. App.) 708.

In an action for injuries to a child on a railroad track, an instruction withdrawing from the jury the issue of the company's negligence in failing to keep a proper lookout *held* properly refused.—*Missouri, K. & T. Ry. Co. of Texas v. Hammer* (Tex. Civ. App.) 708.

In an action for injuries to a child on track, an instruction that the degree of care required of the railroad company varied according to the probabilities of danger at different portions of the road was not erroneous.—*Missouri, K. & T. Ry. Co. of Texas v. Hammer* (Tex. Civ. App.) 708.

In an action for injuries to an infant on a railroad track, an erroneous instruction on discovered peril *held* not prejudicial.—*Missouri, K. & T. Ry. Co. of Texas v. Hammer* (Tex. Civ. App.) 708.

8. — Injuries to animals on or near tracks.

Where a railroad fails to erect a fence, as required by Ky. St. 1903, § 1790, along its right of way, it is liable to the landowner for injury to cattle resulting from such failure, though the statute does not in terms impose such liability.—*Parish v. Louisville & N. R. Co.* (Ky.) 186.

In an action for killing of animal by barbed wire fence inclosing railroad track, evidence *held* to authorize inferences that animal got on track and was frightened by a passing train.—*Brown v. Missouri, K. & T. Ry. Co.* (Mo. App.) 273.

Railroad company *held* to owe to owner of horse, permitted to pass into adjoining pasture, duty of maintaining lawful right of way fence through such pasture.—*Brown v. Missouri, K. & T. Ry. Co.* (Mo. App.) 273.

A goose is not an animal or obstruction, within Shannon's Code, § 1574, subsec. 4, requiring trains to sound alarm whistle and put down brakes when an animal or obstruction appears on the track.—*Nashville & K. R. Co. v. Davis* (Tenn.) 1050.

In the absence of recklessness or common law negligence, a railroad company is not liable for the killing of geese permitted to run at large, while trespassing on the railroad track.—*Nashville & K. R. Co. v. Davis* (Tenn.) 1050.

2 Batts' Civ. St. art. 4528, *held* to render a railroad company that has not fenced its track absolutely liable for injury to live stock.—*Ft. Worth & R. G. Ry. Co. v. Swan* (Tex. Sup.) 920.

A railroad track *held* not fenced, within 2 Batts' Civ. St. art. 4528, when it is inclosed on two sides and one end, leaving the other open.—*Ft. Worth & R. G. Ry. Co. v. Swan* (Tex. Sup.) 920.

In an action against a railroad for the value of mules killed at a siding, the burden was on plaintiff to prove negligence of defendant's employees.—*Galveston, H. & S. A. Ry. Co. v. Cassinelli & Co.* (Tex. Civ. App.) 247.

Mere fact that passenger train, which killed mules going onto track, was running at high rate of speed, *held* not to show negligence in action for their death.—*Galveston, H. & S. A. Ry. Co. v. Cassinelli & Co.* (Tex. Civ. App.) 247.

9. — Fires.

In an action against a railroad company for firing decedent's building by sparks alleged to have been emitted, a verdict based on circumstantial evidence *held* unsustainable, in the ab-

sence of expert testimony that engines under like circumstances uniformly emitted sparks in such a manner as to fire a building as far distant from the track as decedent's building.—*Gibbs v. St. Louis & S. F. R. Co.* (Mo. App.) 835.

Rule for measure of damage in action against a railroad for damages to plaintiff's grass land from fire originating from sparks from defendant's engine stated.—*Jackson v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 724.

Special instruction, in action against railroad for damage to plaintiff's grass land from fire originating from sparks from defendant's engine, as to the meaning of the word "originate," used in the court's charge, *held* proper.—*Jackson v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 724.

RAPE.

Examination of witnesses, see "Witnesses," § 2.

Harmless error in general, see "Criminal Law," § 22.

Impeachment of witness, see "Witnesses," § 3. Questions for jury in general, see "Criminal Law," § 14.

§ 1. Offenses and responsibility therefor.

To sustain conviction of assault with intent to rape, there must be evidence authorizing the jury to believe that defendant intended to copulate with prosecutrix at all hazards, in face of resistance by her.—*Dina v. State* (Tex. Cr. App.) 229.

The force used *held* not sufficient to show intent, necessary for a conviction of assault with intent to rape.—*Ross v. State* (Tex. Cr. App.) 503.

A request for intercourse, with a threat to injure if it be refused, does not constitute an assault with intent to rape.—*Ross v. State* (Tex. Cr. App.) 514.

§ 2. Prosecution and punishment.

Assault with intent to rape is felony, and punishable under Sand. & H. Dig. § 1866, whether indictment follows statutory or common-law form.—*Bevens v. State* (Ark.) 748.

Indictment for assault with intent to rape need not allege malice aforethought, either at common law or under Sand. & H. Dig. § 1866.—*Bevens v. State* (Ark.) 748.

In a prosecution for assault with intent to rape, evidence *held* insufficient to sustain a conviction.—*Dina v. State* (Tex. Cr. App.) 229.

RATIFICATION.

Of acts of corporate officers, see "Corporations," § 4.

REAL ACTIONS.

See "Ejectment": "Forcible Entry and Detainer," § 1; "Trespass to Try Title."

REAL-ESTATE AGENTS.

See "Brokers."

REASONABLE DOUBT.

Instructions, see "Criminal Law," § 15.

RECEIVERS.

In action to foreclose mortgage, see "Mortgages," 7.

§ 1. Appointment, qualification, and tenure.

Police judge in town of sixth class, in action for forcible detainer, *held* without jurisdiction, after execution of traverse bond, except to return papers to circuit court, and could not appoint receiver.—*Reed v. Taylor* (Ky.) 892.

RECOGNIZANCES.

See "Bail," § 1.

RECORDS.

As evidence, see "Evidence," § 9.

As notice to purchaser of realty, see "Vendor and Purchaser," § 3.

Best and secondary evidence, see "Evidence," § 5.

Presumptions as to matters not shown by record, see "Appeal and Error," § 18.

Transcript on appeal or writ of error, see "Appeal and Error," §§ 11, 12; "Criminal Law," § 20.

Independent of the statute, a court has power to supply its missing papers, records, or files.—*Warder, Bushnell & Glessner Co. v. Libby* (Mo. App.) 338.

REDEMPTION.

Of land sold for assessments for public improvements, see "Municipal Corporations," § 5.

REFRESHING MEMORY.

See "Witnesses," § 2.

REHEARING.

See "New Trial."

REINSURANCE.

See "Insurance," § 13.

REJOINDER.

Amendment of, see "Pleading," § 3.

RELEASE.

See "Compositions with Creditors"; "Compromise and Settlement."

Parol evidence, see "Evidence," § 10.

Of particular classes of rights and liabilities.

See "Mortgages," § 5.

Liabilities of surety, see "Principal and Surety," § 2.

Rights of wife in husband's property, see "Husband and Wife," § 3.

Subscription for corporate stock, see "Corporations," § 2.

§ 1. Pleading, evidence, trial, and review.

Instruction that release of claim for injuries was binding on plaintiff, unless he did not and could not understand its contents, *held* proper.—*Galloway v. San Antonio & G. Ry. Co.* (Tex. Civ. App.) 32.

Instruction that release of claim for injuries is binding, unless defendant falsely represented that it was simply a receipt, *held* proper under the pleadings.—*Galloway v. San Antonio & G. Ry. Co.* (Tex. Civ. App.) 32.

RELEVANCY.

Of evidence in civil actions, see "Evidence," § 4.
Of evidence in criminal prosecutions, see "Criminal Law," § 7.

RELIGIOUS WORSHIP.

Prosecution for disturbing, see "Criminal Law," § 22.

REMAINDERS.

See "Life Estates."
Creation by will, see "Wills," § 4.

REMAND.

Of cause on appeal or writ of error, see "Appeal and Error," § 22; "Wills," § 3.

REMEDY AT LAW.

Effect on right to equitable relief, see "Injunction," § 1.
Effect on right to relief by habeas corpus, see "Habeas Corpus," § 1.

REMOVAL.

From office in general, see "Officers," § 1.
Of sheriff, see "Sheriffs and Constables," § 1.

REMOVAL OF CAUSES.

§ 1. **Citizenship or alienage of parties.**
Compliance by foreign corporation with Ky. St. 1903, § 841, does not prevent it securing a removal of cause against it to federal court.—*Illinois Cent. R. Co. v. Hibbs* (Ky.) 1116.
Motion for removal of cause to federal court should have been sustained, where there was nothing to show that defendant railroad had complied with Ky. St. 1903, § 841, providing for the domestication of foreign railroad companies.—*Illinois Cent. R. Co. v. Hibbs* (Ky.) 1116.

RENT.

See "Landlord and Tenant," § 4.
Collection by administrator, see "Executors and Administrators," § 2.
Liability of sheriff for rent of building used until disposition of goods levied on, see "Sheriffs and Constables," § 2.
Of mortgaged property, see "Mortgages," § 3.
Right to rents of homestead devised to widow, see "Wills," § 5.

REOPENING CASE.

For further evidence, see "Trial," § 4.

REPAIRS.

On streets, see "Municipal Corporations," § 5.
Promise of master to repair defects, see "Master and Servant," § 6.

REPEAL.

Of municipal charter, see "Municipal Corporations," § 1.
Of statutes, see "Levees"; "Statutes," § 3.

REPLEVIN.

Jurisdiction of justices, see "Justices of the Peace," § 1.
Recovery of goods sold, see "Sales," § 8.
§ 1. **Right of action and defenses.**
A lender of wheat to be repaid in kind held not entitled to replevin the amount from the borrower's crop on the latter's failure to keep his agreement.—*Mattison v. Hooberry* (Mo. App.) 642.

REPLICATION.

See "Pleading," § 2.

REPLY.

See "Pleading," § 2.

REPRESENTATIONS.

Fraudulent, see "Fraud," § 1.

REPUTATION.

Knowledge of witness as to, see "Witnesses," § 1.

REQUESTS.

For instructions to jury in civil actions, see "Trial," § 11.

RESCISSION.

Of contract for sale of goods, see "Sales," § 3.
Of sale of public land, see "Public Lands," § 1.

RES GESTÆ.

In civil actions, see "Evidence," § 4.
In criminal prosecutions, see "Criminal Law," § 7; "Homicide," § 4.

RESIDENCE.

Of employé as affecting venue of action for personal injuries, see "Master and Servant," § 8.
Of parties as affecting jurisdiction of justices of the peace, see "Justices of the Peace," § 1.

RES JUDICATA.

See "Appeal and Error," § 16; "Judgment," §§ 7, 8.

RESULTING TRUSTS.

See "Trusts," § 1.

RETURN.

Of execution, see "Execution," § 3.

REVENUE.

See "Taxation."

REVERSIONS.

Of land dedicated to public use, see "Dedication," § 2.

REVIEW.

See "Appeal and Error"; "Criminal Law," §§ 17-22; "Justices of the Peace," § 3.

REVOCATION.

Of letters of administration, see "Executors and Administrators," § 1.

REWARDS.

Reward offered by Governor for arrest of man charged with murder *held* subject to division, pursuant to contract made between detective seeking out the alleged murderer and the officer making the arrest.—*Heather v. Thompson* (Ky.) 194.

As between two persons, one *held* entitled to a reward for apprehension, arrest, and conviction for a murderer.—*Ralls County v. Stephens* (Mo. App.) 291.

RIGHT OF WAY.

See "Easements."

Agreements to contribute land for right of way of railroad, see "Subscriptions."

Specific performance of contract to donate right of way of railroad, see "Specific Performance," § 2.

RISKS.

Assumed by employé, see "Master and Servant," § 6.

Within insurance policy, see "Insurance," § 10.

ROADS.

See "Highways"; "Turnpikes and Toll Roads." Streets in cities, see "Municipal Corporations," §§ 7, 8.

ROBBERY.

Questions for jury in general, see "Criminal Law," § 14.

Sufficiency of evidence in general, see "Criminal Law," § 10.

Evidence in prosecution for robbery *held* to sustain a conviction.—*Kincaid v. Commonwealth* (Ky.) 433.

In prosecution for robbery, certain evidence as to finding stolen property on defendant's premises *held* admissible.—*State v. Hyatt* (Mo. Sup.) 601.

RULES.

Of railroad company as to carriage of passengers, see "Carriers," § 4.

SALARIES.

Of officers in general, see "Officers," § 2.

SALES.

See "Fraud," § 1; "Vendor and Purchaser."

Admissibility of admissions of agent in action for breach of warranty, see "Evidence," § 6.

By assignees, see "Assignments for Benefit of Creditors," § 1.

Conclusiveness of judgment on issue as to making sale, see "Judgment," § 8.

Expert testimony in action for breach of warranty, see "Evidence," § 11.

Of community property, see "Husband and Wife," § 6.

Of dower, see "Dower," § 2.

Of homestead, see "Homestead," § 2.

Of intoxicating liquors, see "Intoxicating Liquors."

Of land for nonpayment of assessments for public improvements, see "Municipal Corporations," § 5.

Of public lands, see "Public Lands," § 1.

On execution, see "Execution," § 2.

On foreclosure of mortgage, see "Chattel Mortgages," § 4; "Mortgages," §§ 6, 7.

Tax sales, see "Taxation," § 9.

§ 1. Requisites and validity of contract.

False representations as to credit to mercantile agency constitute such a fraud on vendor of goods, who relies thereon, that he may rescind the contract and recover goods undisposed of by the buyer.—*Tennent Shoe Co. v. Stovall & Brand* (Ky.) 417.

Partner *held* estopped to assert, in action against firm based on false representations of credit made by him, that he did not know their falsity.—*Tennent Shoe Co. v. Stovall & Brand* (Ky.) 417.

In action on a note, in which counterclaim was filed, evidence *held* to show that plaintiff bought property from defendant as alleged.—*Oliver v. Love* (Mo. App.) 335.

§ 2. Construction of contract.

A writing giving a purchaser a right to reject the article sold within a certain time *held* a part of the contract of sale.—*Watts v. National Cash Register Co.* (Ky.) 118.

Contract for the purchase of fruit trees, to be paid for out of the produce, *held* to call for payment of the interest from date, compounded annually, and not from date of final payment.—*Stark v. Anderson* (Mo. App.) 340.

§ 3. Modification or rescission of contract.

A purchaser having a right to reject an article within 30 days *held* to have ratified the sale by retaining possession for 6 months.—*Watts v. National Cash Register Co.* (Ky.) 118.

§ 4. Performance of contract.

One who delivered hay in partial performance of contract *held* entitled to recover its value, subject to set-off for failure to perform completely.—*Briggs v. Morgan* (Mo. App.) 295.

§ 5. Operation and effect.

Contract for sale of timber *held* executory, and title under it did not pass till inspection was made.—*Deutsch v. Dunham & Nelson* (Ark.) 767.

Evidence *held* to sustain finding that sale to consignee was not for cash on delivery, but that title passed without payment.—*Frazier v. Atchison, T. & S. F. R. Co.* (Mo. App.) 679.

§ 6. Warranties.

Where plaintiff, relying on his own judgment and past experience, bought of defendants, who were dealers in seeds, a specific article, known as "Western German Millet Seed," there was no implied warranty that the seed would germinate, and produce good crops, nor that they were reasonably fit for the purpose to which they were to be applied.—*Gardner v. T. J. Winter & Co.* (Ky.) 143.

Where plaintiff's father purchased a pear burner under a warranty, plaintiff could not enforce the same in an action for injuries sustained by the bursting of the burner.—*Talley v. Beever & Hindes* (Tex. Civ. App.) 23.

A contract for the sale of cane *held* to contain an express warranty.—*Ellis v. Riddick* (Tex. Civ. App.) 719.

§ 7. Remedies of seller.

In an action to recover for yarn sold to defendants, special damages arising from defects therein were properly specially pleaded.—*Wallace v. Knoxville Woolen Mills* (Ky.) 192.

Where defects in yarn sold to manufacturers of hosiery could not be ascertained until used, the acceptance does not preclude a right to counterclaim in an action for the price.—*Wallace v. Knoxville Woolen Mills* (Ky.) 192.

A seller cannot sue a third party, who was paid by the buyer for the property sold and delivered, on such third party's claiming title thereto.—*Martin v. Chouteau Land & Lumber Co.* (Mo. App.) 673.

In an action for the balance due on the price of a concentrating mill, evidence of the amount of ore turned out after the plant was reconstructed *held* admissible.—*Chowning v. Parker* (Mo. App.) 677.

An instruction on express warranty *held* erroneous, in ignoring a contention that the damaged condition of the goods was caused by the purchaser's failure to comply with the contract.—*Ellis v. Riddick* (Tex. Civ. App.) 719.

§ 8. Remedies of buyer.

Buyer of lumber, on breach of executory contract, *held* not entitled to maintain replevin, but remedy was in damages.—*Deutsch v. Dunham & Nelson* (Ark.) 767.

Where plaintiff, relying on his own judgment and past experience, ordered of defendants, who were dealers in seeds, a specific article, known as "Western German Millet Seed," the question, in an action for damages for breach of warranty, whether the seed sold to him actually belonged to that variety, is for the jury.—*Gardner v. T. J. Winter & Co.* (Ky.) 143.

In an action against dealers in seeds for damages for failure of plaintiff's millet crop, two paragraphs of complaint, one counting on breach of express warranty as to the variety, and the other on breach of implied warranty as to quality of the variety ordered, are not inconsistent.—*Gardner v. T. J. Winter & Co.* (Ky.) 143.

Measure of damages for defects in yarn sold to manufacturers of hosiery stated.—*Wallace v. Knoxville Woolen Mills* (Ky.) 192.

Defendant in action for failure to deliver goods sold *held* not entitled to complain of finding of such failure.—*George S. Howell & Co. v. Dickerson* (Mo. App.) 655.

Where plaintiff sued for breach of warranty in a contract of sale of threshing machinery, he was properly confined to the warranties contained in the written contract.—*Standefor v. Aultman & Taylor Machinery Co.* (Tex. Civ. App.) 552.

A purchaser of goods on implied warranty *held* entitled to receive the goods and seek redress for breach of the contract.—*Ellis v. Riddick* (Tex. Civ. App.) 719.

SATISFACTION.

See "Compromise and Settlement"; "Release."
Of mortgage, see "Mortgages," § 5.

SCHOOLS AND SCHOOL DISTRICTS.

Unallotted school lands, see "Public Lands," § 1.

§ 1. Public schools.

Change made by secretary of school district in contract with teacher *held* presumably made with authority.—*School Dist. No. 27 v. Wheat* (Ark.) 755.

In action against a school district on a contract with a teacher, evidence *held* to show that there had been a contract calling for six months' school.—*School Dist. No. 27 v. Wheat* (Ark.) 755.

Cities of the fourth class, having established the graded common school system, *held* exempt from Ky. St. 1903, § 4489, being part of the general law on the subject of common schools, and providing for the compulsory adoption of the graded common school.—*Taylor v. Russell* (Ky.) 411.

78 S.W.—77

Ky. St. 1903, c. 113, art. 10, being part of the general law on the subject of common schools, *held* not to repeal Laws 1891-93, p. 1211, c. 241, relating to cities of the fourth class, and permitting them to adopt the graded common school system.—*Taylor v. Russell* (Ky.) 411.

SCIRE FACIAS.

On forfeited bail bond, see "Bail," § 1.

SEARCHES AND SEIZURES.

Search for, and destruction of, gambling apparatus, see "Gaming," § 2.
Under laws relating to intoxicating liquors, see "Intoxicating Liquors," § 7.

SECONDARY EVIDENCE.

In civil actions, see "Evidence," § 5.
In criminal prosecutions, see "Criminal Law," § 6.

SELECTION.

Of grand jury, see "Grand Jury."
Of guardian by minor, see "Guardian and Ward," § 1.
Of jurors, see "Jury," § 3.

SELF-DEFENSE.

See "Assault and Battery," § 1; "Homicide," §§ 2, 5.

SENTENCE.

Reduction on appeal, see "Criminal Law," § 17.

SEPARATE ESTATE.

Of married women, see "Husband and Wife," § 5.

SEPARATION.

See "Husband and Wife," § 7.

SEQUESTRATION.

Under Rev. St. 1895, arts. 4874, 4876, the damages to be assessed against a defendant in sequestration, who has given bond and retained the property, is the market value of the property at the time of the trial.—*Wood v. Fuller* (Tex. Civ. App.) 236.

An affidavit for a writ of sequestration, alleging that defendants would make use of their possession to waste or convert the revenue of the property, *held* objectionable for duplicity.—*Clark v. Elmendorf* (Tex. Civ. App.) 538.

SERVICES.

See "Work and Labor."

SERVITUDES.

See "Easements."

SET-OFF AND COUNTERCLAIM.

In action by personal representatives, see "Executors and Administrators," § 5.
Pleading matter of set-off or counterclaim, see "Pleading," § 1.
Set-off in action between vendor and vendee of goods, see "Sales," §§ 4, 7.

§ 1. Nature and grounds of remedy.

Claim of holder of legal title against holder of equitable title for taxes paid *held* not a proper subject of set-off, under Civ. Code Prac. § 96,

subsec. 2.—*Montgomery v. Montgomery* (Ky.) 465.

SETTLEMENT.

See "Compromise and Settlement"; "Release." Marriage settlements, see "Husband and Wife," § 2.
Of bill of exceptions, see "Criminal Law," § 20.

SHERIFFS AND CONSTABLES.

Alteration of sheriff's deed, see "Alteration of Instruments."

Liability to account for taxes paid, see "Taxation," § 8.

Necessity that proceedings for removal of sheriff be prosecuted by district attorney, see "Officers," § 1.

Sheriffs as tax collectors, see "Taxation," § 8.

§ 1. Appointment, qualification, and tenure.

Where the county commissioner's court removed a sheriff for failure to file his bond, as required by Rev. St. 1895, art. 4894, their motive in so doing was immaterial.—*State v. Box* (Tex. Civ. App.) 982.

Rev. St. 1895, art. 4894, relating to the execution of bonds by sheriffs, *held* mandatory, and hence the sheriff's failure, without negligence, to execute the bond required, was sufficient to justify his removal.—*State v. Box* (Tex. Civ. App.) 982.

That a sheriff had been appointed to such office, and had given bond before his election, did not preclude his removal for failure to give a new bond thereafter, as required by Rev. St. 1895, art. 4894.—*State v. Box* (Tex. Civ. App.) 982.

§ 2. Powers, duties, and liabilities.

That a sheriff, making a wrongful seizure of goods, in claim and delivery, surrenders them to the true owner without his making the affidavit provided by Civ. Code Prac. § 191, *held* not to prevent action against the sheriff for the wrongful seizure.—*Vaughn v. Justice* (Ky.) 424.

Attorney's fees paid by one whose property is wrongfully seized are not part of the damages he can recover for the wrongful seizure.—*Vaughn v. Justice* (Ky.) 424.

In an action for wrongful seizure of part of a lot of poles, *held*, that an instruction was misleading, so that under it damages might be allowed for loss of poles not seized.—*Vaughn v. Justice* (Ky.) 424.

Sheriff *held* entitled to retain money claimed by different parties, and have question of title thereto determined by the court, and could not be subjected to statutory penalty for failing to pay over the same.—*W. T. Rickards & Co. v. J. H. Bemis & Co.* (Tex. Civ. App.) 239.

Makers of sheriff's indemnity bond *held* entitled to contest right of plaintiffs to recover statutory penalty from sheriff for failure to pay over proceeds of execution sale.—*W. T. Rickards & Co. v. J. H. Bemis & Co.* (Tex. Civ. App.) 239.

Under Rev. St. 1895, art. 2387, imposing liability on officers for failure to return an execution or for making false return, insolvency of defendant in the judgment *held* insufficient to absolve officer from liability.—*Hale v. Bickett* (Tex. Civ. App.) 531.

A sheriff *held* liable for the rent of a building used by him until he disposed of certain goods levied on, without regard to the validity of a sale of the goods by the attachment defendant to plaintiff.—*Hooks & Hines v. Pafford* (Tex. Civ. App.) 991.

SIDEWALKS.

See "Municipal Corporations," §§ 5, 8.

SINKING FUNDS.

For municipal indebtedness, see "Municipal Corporations," § 9.

SLANDER.

See "Libel and Slander."

SLEEPING CARS.

See "Carriers," § 12.

SMALLPOX.

Liability of city for negligently removing and caring for patient, see "Municipal Corporations," § 8.

Liability of city for wrongful death of person suffering from smallpox where death is alleged to have resulted from negligence of city officer removing and caring for patient, see "Death," § 1.

SOCIETIES.

See "Associations."

SPECIAL LAWS.

See "Statutes," § 1.

SPECIFIC PERFORMANCE.

§ 1. Nature and grounds of remedy in general.

Specific performance of contract to leave property to certain person at death *held* not defeated by will devising the property to another.—*Jordan v. Abney* (Tex. Sup.) 486.

§ 2. Contracts enforceable.

After a contract to donate a railroad right of way had been executed on the part of a railroad company, the donor could not object that the contract was not enforceable for uncertainty of parties and of description.—*Curry v. Kentucky Western Ry. Co.* (Ky.) 435.

Offer to donate a railroad right of way *held* enforceable by a railroad company, subsequently organized, which constructed a railroad on the line proposed.—*Curry v. Kentucky Western Ry. Co.* (Ky.) 435.

A person who has signed a contract to convey land cannot escape liability by a subsequent unauthorized alteration made by his agent, with the intent to defraud the purchaser.—*Cable v. Jones* (Mo. Sup.) 780.

Contract by which decedent agreed to leave property to plaintiff by will *held* to entitle plaintiff to specific performance.—*Jordan v. Abney* (Tex. Sup.) 486.

§ 3. Proceedings and relief.

In a suit to enforce a contract to convey land, the chancellor *held* warranted in decreeing a specific performance.—*Cable v. Jones* (Mo. Sup.) 780.

SPEED.

Excessive speed of railroad train as evidence of negligence, see "Railroads," § 8.

Excessive speed of street railroad cars as negligence, see "Street Railroads," § 2.

SPIRITUOUS LIQUORS.

See "Intoxicating Liquors."

STALE DEMANDS.

Against railroad company, see "Railroads," § 1.

See "Appeal and Error," § 16; "Courts," § 2.

STATEMENT.

By witness inconsistent with testimony, see "Witnesses," § 3.
Of case or facts for purpose of review, see "Appeal and Error," §§ 11, 12; "Criminal Law," § 20.

STATES.

Courts, see "Courts."
Legislative power, see "Constitutional Law," § 2.
Public lands, see "Public Lands," § 1.
Right of successful contestant for state office to recover salary paid contestee, see "Officers," § 2.

§ 1. Government and officers.

Governor has no inherent power, either by virtue of his office or by Const. art. 6, § 23, to appoint commissioners, such as members of State Capitol Board chosen for particular purpose.—Cox v. State (Ark.) 756.

Legislature may, in cases not otherwise provided for, exercise appointing power, and hence Acts 1903, p. 249, providing for appointment of State Capitol Board of Legislature, is valid.—Cox v. State (Ark.) 756.

Const. art. 5, § 14, providing for mode of taking vote on legislative appointment of officers, contemplates appointment by Legislature of other officers than those necessary to discharge its own duties, etc.—Cox v. State (Ark.) 756.

STATUTES.

Laws impairing obligation of contracts, see "Constitutional Law," § 3.
Presumptions as to laws of other states, see "Evidence," § 2.

Provisions relating to
See "Agriculture"; "Attac
§ 1; "Bankruptcy," §§
1; "Curtesy"; "Descen
"Elections"; "Intox
"Judges"; "Judgment"
censes," § 1; "Limitati
"Master and Servant,"
Liens"; "Municipal Co
"Public Lands," § 1;
"Schools and School Di
tion," § 3.

Contributory negligence o
ter and Servant," § 7.

Fellow servants, see "M
§ 5.

Official newspapers, see "P
Punishment for subsequ
"Criminal Law," § 23.

Reopening case for fu
"Trial," § 4.

Statute of frauds, see "F

§ 1. General and spe

Acts 1901, p. 27, establ
trict for the purpose of r
lar levee, is not invalid
sult could have been ac
eral act.—St. Louis Sou
Grayson (Ark.) 777.

§ 2. Subjects and tit

Const. art. 4, § 28, p
shall contain but one "su
clearly expressed in the
the title to designate the
—State v. Cantwell (Mo. S

§ 3. Repeal, suspensio revival.

The presumption is tha
not intended to repeal a
though the general act cor
ing all acts inconsistent
Southwestern Ry. Co. v.

STATUTES CONSTRUED.

UNITED STATES.	
CONSTITUTION.	
Amend. 14, § 1.....	777
Art. 1, § 2.....	1065
STATUTES AT LARGE.	
1893, March 2, ch. 196, 27	
Stat. 531 [U. S. Comp.	
St. 1901, p. 3175].....	220
1898, July 1, ch. 541, § 18,	
"e," "f," 30 Stat. 551	
[U. S. Comp. St. 1901,	
p. 3429]	52
1898, July 1, ch. 541, § 21,	
"d," "e," 30 Stat. 552	
[U. S. Comp. St. 1901,	
p. 3430]	53
1898, July 1, ch. 541, § 87,	
subsec. "c," 30 Stat. 564	
[U. S. Comp. St. 1901,	
p. 3449]	485
1898, July 1, ch. 541, §	
87e, 30 Stat. 564 [U. S.	
Comp. St. 1901, p. 3449]	208
REVISED STATUTES.	
§ 5219 [U. S. Comp. St.	
1901, p. 3502].....	42
COMPILED STATUTES	
1901.	
Page 3175	220
Page 3429	52

Page 3430	53	
Page 3449	208, 485	
Page 3502	42	
ARKANSAS.		
CONSTITUTION.		
Art. 5, § 14.....	756	
Art. 6, §§ 3, 23.....	756	364
SANDELS & HILL'S		
DIGEST.		
§ 325	746	10
§ 699	764	96, sub
§§ 1203-1232	777	129, 1
§ 1618	759	191
§ 1866	748	228
§ 4877. Amended by Laws		272
1895, p. 86.....	758	318
LAWS.		
1881, p. 63.....	749	452
1895, p. 86	758	516, 5
1897, p. 107, §§ 2, 3.....	758	518
1899, p. 11.....	770	526
1899, p. 137, § 1.....	758	593
1901, p. 27.....	777	606
1901, p. 114.....	759	747
1903, p. 249.....	756	763
1903, p. 278.....	777	
IOWA.		
McCLAIN'S CODE.		
§ 2002	60	113
		240, 3
		264
		382

§ 350-352	482
§ 391	858
GENERAL STATUTES.	
Ch. 31, art. 36, § 11 (5)...	156
STATUTES 1894.	
§ 2463. Amended by Laws	
1896, pp. 47-49, ch. 29...	882
STATUTES 1899.	
§ 784	439
1403	418
2361	478
2400	430
3509	199

STATUTES 1903.	
Ch. 32, subd. 5	472
Ch. 113, art. 10, § 4489	411
6	446, 481
§ 74-96	185
107	1119
317	457, 471
§ 474-483	188
483	901
639	119
654	166
679	201
768	124
§ 795-801	167
841	1116
900	183
950	137, 465, 870
1256	423
1291	482
1393	899
1403	1119
1407	857
1656	873
§ 1682, 1689	408
1702	178, 1124
1706	178, 916
1707	916, 1124
§ 1790, 1791, 1793	186
1840	852
1884	432
1907a	873
§ 2047-2072	169
2106	1128
2134, 2148	196
§ 2293-2296, 2326, 2327	902, 903
2341	441
2342	179, 880
2356	419
2358a, subsec. 2	873
2360	457, 896
2514	886
2515	166, 851, 906, 1130
2519	906
§ 2525, 2527	166
2551	886
2825	1117
3011	472
3100, 3187	910, 911
3870, 3872, 3884	454
4023, 4035	465
4077	443
4146	432
4203	208
4203-4214	177
4224	460
4241	1105
4313-4344	123
4732, 4748b	852
4846	419
4849	179
LAWS.	
1883-84, p. 1318, ch. 1494	420
1887-88, p. 170, ch. 1071	430
1889-90, p. 889, ch. 902,	
§ 3	1130

1891-92-93, p. 1211, ch.	411
1893, p. 1157, ch. 226, § 44	908
1894, p. 189, c. 83	185
1894, p. 260, ch. 100	1130
1894, p. 268, ch. 100, art.	
5, § 12	131
1896, pp. 47-49, ch. 29	889
1898, p. 154, ch. 63, § 1	131
1902, pp. 70, 71, ch. 32, §§	
1-3	131
1902, p. 355, ch. 128, art.	
10, subd. 3, § 32	871

MISSOURI.

CONSTITUTION.

Art. 2, § 28. Amended by	
Laws 1899, p. 382	788
Art. 4, § 28	569
Art. 6, § 12	77

REVISED STATUTES 1879.

§ 3482	669
--------	-----

REVISED STATUTES 1889.

§ 299	833
§ 2013, 2042	654
2613	273
3526	592
5435	340
5505	654
7846	599

REVISED STATUTES 1899.

Page 2511. St. Louis City	
Charter, art. 6, § 15	615
Ch. 91, arts. 6, 7, §§ 6067-	
6103, 6104	50
Ch. 129	641
§ 130	270
§ 188	656, 657
196	823
197	657
§ 204, 301	833
547	60
§ 642, 613	316
645	1094
657	824
672	1036
§ 728, 748	52
801	315
806	334
865	609, 658
889	69
933	805
1293	1095
§ 1605, 1606	606
1842	588
1886	592
2477	640
§ 2543, 2545	603
2610	591
2642	606
2864	62, 284
2865	62
2866	787
2870	635
2993	641
3014	643
3323	1094
3398	624
§ 3430, 3431	330
3485	833
3616	580
3649	1020
3766	606
§ 3769, 3770	611, 612
3839	689
3854	338
3969	313
4079	657
4123	343
4160	603

CITY CHARTERS.

Kansas City, art. 9, §§ 1, 2,	599
St. Louis, art. 4, §§ 14, 43	782
St. Louis, art. 6, § 15.	
Rev. St. 1899, p. 2511	613

LAWS.

1866, p. 134, ch. 2, §§ 27,	
28	808
1871-72, p. 90, § 35	808
1891, p. 195, ch. 35	808
1893, p. 92, ch. 44, § 110	276
1895, p. 242	808
1899, p. 382	788
1901, p. 192, § 3770a	611, 612
1901, p. 211	569

TENNESSEE.

CONSTITUTION.

Art. 6, § 14	91
--------------	----

SHANNON'S CODE.

§ 1073	111
§ 1574, 3939	1050
§ 5730-5732	110, 111

THOMPSON & STEGER'S CODE.

§ 1298, 1299	426
--------------	-----

LAWS.

Laws 1899, p. 309, ch. 161	91
----------------------------	----

TEXAS.

CONSTITUTION 1876.

Bill of Rights, art. 1, § 10	1066, 1073
Bill of Rights, art. 1, § 15	1066
Art. 1, § 10	934
Art. 5, § 8	15
Art. 5, § 16	953
Art. 5, § 24	982
Art. 6, § 2. Amended by	
Laws 1901, p. 322	492, 922
Art. 7, § 24	237
Art. 10, § 2	548
Art. 14, § 6	237
Art. 16, § 20	349, 928
Art. 16, § 50	980

CODE OF CIVIL PROCEDURE.

Arts. 661, 695, 696	1066
---------------------	------

CODE OF CRIMINAL PROCEDURE.

Art. 887	226, 227,
	231, 234, 346, 517

PENAL CODE 1895.

Art. 46	947
Art. 193	1078

Mere negligence of the plaintiff at a street railway crossing is no defense, if the injury could have been avoided by the motorman by the exercise of reasonable care.—*Hanheide v. St. Louis Transit Co.* (Mo. App.) 820.

§ 2. — Actions.

Peremptory instruction for defendant street car company, in action for injuries from collision between car and plaintiff's wagon, *held* error.—*Thiel v. South Covington & C. St. Ry. Co.* (Ky.) 206.

In an action against a street railway for injuries to team and driver, evidence *held* to show gross neglect, authorizing punitive damages.—*Louisville Ry. Co. v. Teekin* (Ky.) 470.

In an action for injury to a child trespassing on a street railway car, testimony as to the custom of children to so trespass *held* properly excluded.—*Monehan v. South Covington & C. St. Ry. Co.* (Ky.) 1106.

In an action for injuries at a street railway crossing, evidence as to the rate of speed of the car *held* insufficient to establish common-law negligence per se.—*Petty v. St. Louis & M. R. R. Co.* (Mo. Sup.) 1003.

In an action for injuries at a street railroad crossing, evidence *held* to show that plaintiff was guilty of contributory negligence as a matter of law.—*Petty v. St. Louis & M. R. R. Co.* (Mo. Sup.) 1003.

In action against street railway for injuries to child on crossing, evidence *held* to raise a question for jury as to defendant's negligence.—*Kube v. St. Louis Transit Co.* (Mo. App.) 55.

In action against street railway for injuries due to collision between car and wagon on which plaintiff's son was riding, certain testimony of the son *held* not controverted by the physical facts.—*Baxter v. St. Louis Transit Co.* (Mo. App.) 70.

In an action for injuries sustained by a boy, owing to the alleged negligence of defendant, evidence considered, and *held* sufficient to warrant submission to the jury of the question whether there had ever been a second fracture of a bone of the boy's leg.—*Baxter v. St. Louis Transit Co.* (Mo. App.) 70.

Evidence, in an action for personal injuries from collision between defendant's street car and plaintiff's vehicle, *held* not to show contributory negligence as a matter of law.—*Buren v. St. Louis Transit Co.* (Mo. App.) 680.

In an action for injuries in collision with a street car at a crossing, questions of negligence and contributory negligence *held* for the jury.—*Hanheide v. St. Louis Transit Co.* (Mo. App.) 820.

Plaintiff's evidence, in an action for injury to his 12 year old boy by the collision of an electric car with the team he was driving, *held* not to present contributory negligence as a matter of law, so as to relieve defendant of the burden of proof on that issue.—*El Paso Electric Ry. Co. v. Kendall* (Tex. Civ. App.) 1081.

STREETS.

See "Dedication," §§ 1, 2; "Highways"; "Municipal Corporations," §§ 7, 8.

Obstruction of, see "Municipal Corporations," § 6.

STRIKES.

Restraining by injunction, see "Injunction," § 1.

SUBROGATION.

A party voluntarily agreeing to pay, and paying, a debt to the creditor, *held* not entitled to

be subrogated to the rights of the creditor on a bond executed to him by the debtor.—*Orane v. Noel* (Mo. App.) 826.

Where a judgment against a principal and surety was paid by the surety without satisfying the same of record, the surety was subrogated to the lien of the judgment, and he or his assignee could foreclose the same.—*W. T. Richards & Co. v. J. H. Bemis & Co.* (Tex. Civ. App.) 239.

SUBSCRIPTIONS.

In aid of railroads, see "Railroads," § 2.
To corporate stock, see "Corporations," § 2.

The promise of each of several persons signing an agreement to contribute land for a railroad right of way *held* a good consideration for the promise of the others.—*Curry v. Kentucky Western Ry. Co.* (Ky.) 435.

SUICIDE.

By insured, see "Insurance," § 14.

SUIT.

See "Action."

SUMMONS.

See "Process."

SUNDAY.

Computation of time, including Sunday, see "Time."
Sale of liquor on Sunday, see "Intoxicating Liquors," § 5.

SUPERSEDEAS.

On appeal or writ of error, see "Appeal and Error," § 10.

SUPREME COURTS.

See "Courts," § 4; "Criminal Law," § 18.

SURETYSHIP.

See "Principal and Surety."

SURVEYS.

Of public lands, see "Public Lands," § 1.

TAXATION.

Alteration of tax deeds, see "Alteration of Instruments."
Appellate jurisdiction of case involving right to tax, see "Appeal and Error," § 2.
Contribution among co-tenants as to taxes, see "Tenancy in Common," § 1.
Effect of repeal of charter under which taxes were levied on right of city to collect, see "Municipal Corporations," § 1.
Foreclosure for nonpayment of taxes, see "Mortgages," § 7.
Jurisdiction of appeal from order denying motion to quash execution on judgment for taxes, see "Courts," § 4.
Payment of poll taxes as condition of right to vote, see "Elections," § 1.
Set-off of claim for unpaid taxes, see "Set-off and Counterclaim," § 1.

Local or special taxes.

"Drains," § 1; "Municipal Corporations," § 9.
Assessments for municipal improvements, see "Municipal Corporations," § 5.
See taxes, see "Levees."

Occupation or privilege taxes.

"Intoxicating Liquors," § 4; "Licenses," § 1.

1. Nature and extent of power in general.

As Rev. St. U. S. § 5219 [U. S. Comp. St. § 5219, p. 3502], permits taxation by states of the estate only of national banks, such a bank under no legal obligation to render and pay taxes on its stock.—First Nat. Bank v. City of Lampasas (Tex. Civ. App.) 42.

A national bank may be held liable for the taxes on the value of its stock as voluntarily ordered, but an equalization board could not, without its consent, augment its conceded liability.—First Nat. Bank v. City of Lampasas ex. Civ. App.) 42.

2. Constitutional requirements and restrictions.

Where a co-operative insurance company, without stock, was organized under Ky. St. 1903, c. 32, subd. 5, that the property of its members, which was insured, was assessed for taxes, did not render a tax assessed against the corporation's personality double taxation.—German Washington Mut. Fire Ins. Co. v. City of Louisville (Ky.) 472.

An insurance company held not entitled to edit on its ad valorem tax for a license tax levied under a city ordinance.—German Washington Mut. Fire Ins. Co. v. City of Louisville (Ky.) 472.

Under Ky. St. 1903, § 3011, the city of Louisville held authorized to pass an ordinance imposing a license tax on insurance companies doing business within the city, in addition to the ad valorem tax.—German Washington Mut. Fire Ins. Co. v. City of Louisville (Ky.) 472.

3. Liability of persons and property.

Ky. St. 1903, §§ 4077, 4081, relative to taxation of railroad franchises, held to authorize county to tax railroads on the mileage of another road, over which the road taxed runs en route to a terminal, under traffic arrangement with such other road.—Jefferson County v. Board of Valuation & Assessment of Kentucky (Ky.) 443.

Under Laws 1866, p. 134, c. 2, § 27, as modified by Laws 1871-72, p. 90, § 35, by Act April 1, 1891 (Laws 1891, p. 195), and by Act April 9, 1895 (Laws 1895, p. 242), the real estate of banking companies held taxable against the corporation, the personal property held exempt from taxation, and the shares of stock held taxable in the names of the holders.—State ex rel. Miller v. Shryack (Mo. Sup.) 808.

4. Place of taxation.

In an action by a city for personal taxes, evidence held to show that defendant was liable.—City of Lebanon v. Biggers (Ky.) 213.

5. Levy and assessment.

Circuit court held to have no original jurisdiction on appeal from a judgment of the county court, under Ky. St. 1903, § 4241, to assess omitted property for taxation.—Commonwealth v. Morehead (Ky.) 1105.

Judgment held insufficient under Ky. St. 1903, § 4241, to authorize an appeal in an action to compel the listing of omitted property for taxation.—Commonwealth v. Morehead (Ky.) 1105.

Where, in an action to quiet title to land, plaintiff claimed under proceedings to foreclose a deed of trust for nonpayment of taxes, she was not bound to prove that the taxes unpaid

were properly levied.—Clark v. Elmendorf (Tex. Civ. App.) 538.

6. Lien and priority.

Under the Constitution, homestead held subject to lien for taxes thereon, with interest and costs, but not for penalty provided by act of 1897 (Laws 1897, p. 132, c. 102), nor for taxes on other property.—City of Marlin v. Green (Tex. Civ. App.) 704.

7. Payment and refunding or recovery of tax paid.

A national bank held not liable for the penalty for nonpayment of taxes, in an action to recover an amount exceeding that which was legally due.—First Nat. Bank v. City of Lampasas (Tex. Civ. App.) 42.

Sayles' Ann. Civ. St. 1897, art. 5232j, held not to extend the time within which unpaid taxes become delinquent beyond February 1st.—Clark v. Elmendorf (Tex. Civ. App.) 538.

8. Collection and enforcement against persons or personal property.

Settlement with sheriff five years after expiration of term held void, under Ky. St. 1903, §§ 1884, 4146, requiring annual settlement.—Commonwealth v. Moren (Ky.) 432.

Under Ky. St. 1903, §§ 1884, 4146, action held not maintainable on settlement with sheriff made five years after expiration of term.—Commonwealth v. Moren (Ky.) 432.

In a sheriff's state revenue bond, executed prior to the taking effect of the Kentucky Statutes, the sureties are not liable for the county levy.—Commonwealth v. Moren (Ky.) 432.

Petition on sheriff's county levy bond, showing amount of claims allowed greater than amount of taxes in his hands for collection, held defective.—Commonwealth v. Moren (Ky.) 432.

Allegation that county was compelled to pay claims because of sheriff's failure to pay them out of taxes collected held defective.—Commonwealth v. Moren (Ky.) 432.

9. Sale of land for nonpayment of tax.

Defects in warning order in tax sale proceedings under Acts 1881, p. 63, held mere irregularities, which would not invalidate decree on collateral attack.—Clay v. Bilby (Ark.) 749.

10. Tax titles.

Complaint to set aside sale of land for overdue taxes, under Acts 1881, p. 63, held to present stale demand and one without equity.—Clay v. Bilby (Ark.) 749.

TEACHERS.

See "Schools and School Districts," § 1.

TELEGRAPHS AND TELEPHONES.

Admissibility of evidence to support statement of witness in action for delay in delivering message, see "Witnesses," § 2.

Harmless error in action for negligent delivery of message, see "Appeal and Error," § 21.

Liability of city for injuries caused by wires in streets, see "Municipal Corporations," § 8.

1. Establishment, construction, and maintenance.

Telephone company held liable for injuries to a pedestrian, occasioned by the falling of wires in the street.—West Kentucky Telephone Co. v. Pharis (Ky.) 917.

2. Regulation and operation.

Damages from father's failure to be present at son's funeral held recoverable in action against telegraph company for negligent delivery of message.—Western Union Tel. Co. v. Swearingin (Tex. Sup.) 491.

A telegraph company *held* liable for mental suffering resulting from its negligence in failing to deliver promptly a message sent to a nonresident plaintiff.—*Western Union Tel. Co. v. Anderson* (Tex. Civ. App.) 34.

In an action against a telegraph company for negligent delay in transmitting a message, certain evidence of damages for mental anguish *held* inadmissible under the pleadings.—*Western Union Tel. Co. v. Turner* (Tex. Civ. App.) 362.

Proof in action against telegraph company for negligent delivery of message *held* not to exhibit variance from allegation of petition.—*Western Union Tel. Co. v. Roberts* (Tex. Civ. App.) 522.

In an action for delay in delivering telegram, evidence *held* insufficient to justify the submission of an issue as to defendant's negligence in delivering the telegram to plaintiff in time for him to reach his mother before her death.—*Western Union Tel. Co. v. Newnum* (Tex. Civ. App.) 700.

In an action against a telegraph company for delay in delivering a message, *held*, that the parties were in possession of sufficient facts to have brought the damages claimed within their contemplation.—*Western Union Tel. Co. v. Christensen* (Tex. Civ. App.) 744.

In an action against a telegraph company for delay in delivering a message, *held*, that plaintiff's petition did not show on its face that his wife, for whose mental suffering he claimed damages, was in a state of mental anxiety before the message was sent.—*Western Union Tel. Co. v. Christensen* (Tex. Civ. App.) 744.

In an action against a telegraph company for delay in delivering a message, an instruction as to what delivery would constitute a compliance with defendant's duty *held* not erroneous.—*Western Union Tel. Co. v. Christensen* (Tex. Civ. App.) 744.

It is not negligence for a telegraph company to fail to transmit a message during the hours when its offices are closed and not being operated, under its rules as to office hours.—*Western Union Tel. Co. v. Christensen* (Tex. Civ. App.) 744.

In an action against a telegraph company for delay in delivering message, *held* error to sustain a demurrer to the plea, setting up the making of the contract and the breach thereof in another state.—*Western Union Tel. Co. v. Christensen* (Tex. Civ. App.) 744.

In an action against a telegraph company for delay in delivering a message, a contention that the rights of the parties should be governed by the law of Texas *held* untenable, in view of the pleadings.—*Western Union Tel. Co. v. Christensen* (Tex. Civ. App.) 744.

An instruction in an action against a telegraph company for failure to deliver a message *held* erroneous.—*Western Union Tel. Co. v. McNairy* (Tex. Civ. App.) 969.

Certain damages in an action against a telegraph company for failure to deliver a message *held* too remote.—*Western Union Tel. Co. v. McNairy* (Tex. Civ. App.) 969.

TENANCY IN COMMON.

§ 1. Mutual rights, duties, and liabilities of co-tenants.

Under Ky. St. 1903, §§ 4023, 4033, 4035, holder of part of equitable title *held* liable for his share to holder of entire legal title, who paid all the taxes.—*Montgomery v. Montgomery* (Ky.) 465.

A co-tenant in remainder, in possession, *held* not entitled to claim title against his co-tenants by lapse of time during the continuance of the preceding estate.—*Guthrie v. Guthrie* (Ky.) 474.

TERMINATION.

Of trust, see "Trusts," § 1.

TERMS.

Of leases, see "Landlord and Tenant," § 1.

TESTAMENT.

See "Wills."

THEFT.

See "Larceny."

TICKETS.

For carriage of passengers, see "Carriers," § 5.

TIME.

Delay in transportation of live stock, see "Carriers," § 3.

For motion to set aside default judgment, see "Judgment," § 1.

For payment of taxes, see "Taxation," § 7.

Sunday *held* to be included in the computation of the time for the publication of a proposed ordinance for a street improvement, pursuant to Rev. St. 1899, § 5661.—*Barber Asphalt Pav. Co. v. Muchenberger* (Mo. App.) 280.

TITLE.

Appellate jurisdiction in cases involving title to real estate, see "Appeal and Error," § 2.

Color of title, see "Adverse Possession."

Estoppel to assert, see "Estoppel," § 2.

Tax titles, see "Taxation," § 10.

Of statutes, see "Statutes," § 2.

Particular matters affecting title, see "Dedication," § 2; "Public Lands," § 2; "Sales," § 5.

To insured property, see "Insurance," § 12.

TOLLS.

Toll roads, see "Turnpikes and Toll Roads."

TOOLS.

Liability of employer for defects, see "Master and Servant," § 3.

TORTS.

See "Limitation of Actions," § 2.

Causing death, see "Death," § 1.

Contribution among joint tortfeasors, see "Contribution."

Measure of damages, see "Damages," § 3.

By particular classes of parties.

See "Corporations," § 4; "Judges," § 3; "Municipal Corporations," § 8.

Agents, see "Principal and Agent," § 3.

Employés, see "Master and Servant," § 9.

Particular torts.

See "Forcible Entry and Detainer," § 1; "Fraud"; "Libel and Slander"; "Malicious Prosecution"; "Negligence"; "Nuisance"; "Trespass."

In an action for injuries to a building, evidence *held* to justify a finding that the injuries were the result of defendant's acts, and not the result of defects in the building, in connection with a wind storm.—*Cumberland Telephone & Telegraph Co. v. Foster* (Ky.) 150.

TOWNS.

See "Counties"; "Schools and School Districts," § 1.

TRANSCRIPTS.

evidence, see "Evidence," § 9.
record for purpose of review, see "Criminal Law," § 20.

TRANSITORY ACTIONS.

"Venue," § 1.

TRESPASS.

ty of street railroad as to trespassers, see "Street Railroads," § 1.
action of trespasser, see "Carriers," § 10.
injunction restraining, see "Injunction," §§ 1, 4.
injuries to trespassers, see "Railroads," § 7.
liability of street railroad company for injuries to trespassers, see "Street Railroads," § 2.

1. Actions.

A verdict in an action for damages for the cutting and removing of trees, in favor of plaintiff, *held* sustained by the evidence.—Hilton v. Levin (Ky.) 890.

Herding cattle on land of another *held* not justified by permission of one having a lease not running into effect till after the herding.—Tucson and Live Stock Co. v. Everett (Tex. Civ. App.) 535.

TRESPASS TO TRY TITLE.

see "Ejectment."

determination of cause on appeal, see "Appeal and Error," § 22.

1. Proceedings.

From the evidence, *held*, that it would be inferred that the jury, which returned a verdict solely for plaintiff for the land, set off the rights and damages against the improvements. *O'Mahoney v. Flanagan* (Tex. Civ. App.) 245.

Evidence in trespass to try title *held* to raise presumption of a transfer or contract between decedent's heirs, whereby one of them became the owner of one-half of a land certificate to which decedent was entitled.—Booth v. Clark (Tex. Civ. App.) 392.

A tax deed, purporting to convey the land of "unknown owner," *held* inadmissible on the issue raised by a claim of common source in trespass to try title.—Bonner v. Bonner (Tex. Civ. App.) 535.

In trespass to try title, plea of improvements in good faith does not deprive defendant of advantage of defense of outstanding title.—Buckner v. Vancleave (Tex. Civ. App.) 541.

An admission, in a petition of intervention in trespass to try title, *held* to bring a certain issue to the case, and cure a failure of the answer to aver the facts.—Eddy v. Bosley (Tex. Civ. App.) 565.

A petition in intervention in trespass to try title *held* good as against a demurrer.—Eddy v. Bosley (Tex. Civ. App.) 565.

Continuance in possession of land adjudged to belong to another *held* not to affect the conclusiveness of the judgment, as far as title to the land of its rendition is concerned.—Weisman v. Tomson (Tex. Civ. App.) 728.

In an action of trespass to try title by the estate against defendants claiming under a Spanish grant, evidence examined, and *held* sufficient to sustain finding of trial court that defendants were entitled to all the lands held by them under the grant.—State v. Texas Land Cattle Co. (Tex. Civ. App.) 957.

TRIAL.

See "New Trial"; "Witnesses."

Adverse possession as question for jury, see "Adverse Possession," § 3.

Construction of deed as question for jury, see "Deeds," § 2.

Harmless error in instructions, see "Appeal and Error," § 21; "Criminal Law," § 22.

Instructions as to adverse possession, see "Adverse Possession," § 3.

Instructions as to release, see "Release," § 1.

Objections to instructions for purpose of review, see "Appeal and Error," § 5.

Presumptions as to instructions, see "Appeal and Error," § 18.

Questions for jury and instructions as to contributory negligence of passenger, see "Carriers," § 9.

Review of instructions as dependent on preservation of grounds of review in record, see "Appeal and Error," § 12.

Review of instructions dependent on preservation of objections in lower court, see "Criminal Law," § 19.

Trial de novo on appeal from justice's court, see "Justices of the Peace," § 3.

Trial of right to property levied on, see "Attachment," § 2.

Proceedings incident to trials.

Entry of judgment after trial of issues, see "Judgment," § 2.

Right to trial by jury, see "Jury," § 1.

Summoning and impaneling jury, see "Jury," § 3.

Trial of particular civil actions or proceedings.

See "Forcible Entry and Detainer"; "Negligence," § 4; "Trespass to Try Title," § 1.

Boundary suits, see "Boundaries," § 2.

By or against trustee in bankruptcy, see "Bankruptcy," § 2.

For breach of warranty, see "Sales," § 8.

For damages, see "Damages," § 5.

For damages from fire caused by operation of railroad, see "Railroads," § 9.

For failure to deliver or delay in delivery of telegram, see "Telegraphs and Telephones," § 2.

For injunction, see "Injunction," § 3.

For injuries to goods in transportation, see "Carriers," § 2.

For injuries to live stock in transportation, see "Carriers," § 3.

For personal injuries, see "Carriers," §§ 8, 9; "Infants," § 2; "Master and Servant," § 8; "Municipal Corporations," § 8; "Railroads," §§ 5-7; "Street Railroads," § 2.

For price of goods sold, see "Sales," § 7.

For wrongful death caused by operation of railroad, see "Railroads," § 7.

For wrongful seizure by sheriff or constable, see "Sheriffs and Constables," § 2.

On contract of purchase of turnpike, see "Turnpikes and Toll Roads," § 1.

On forfeited bail bond, see "Bail," § 1.

On insurance policy, see "Insurance," § 12.

On note, see "Bills and Notes," § 3.

Suits to try tax titles, see "Taxation," § 10.

Trespass to try title to real property, see "Trespass to Try Title."

Trial of criminal prosecutions.

See "Assault and Battery," § 1; "Burglary," § 2; "Criminal Law," §§ 11-15; "Homicide," § 5; "Larceny," § 1; "Libel and Slander," § 1; "Perjury," § 2.

For offenses against liquor laws, see "Intoxicating Liquors," § 6.

§ 1. Notice of trial and preliminary proceedings.

Civ. Code, § 364, applies to issues of fact, and does not require an issue of law to be completed 60 days before trial.—Hazelwood v. Webster (Ky.) 123.

§ 2. Dockets, lists, and calendars.

In a cause involving a question of law only, *held*, that no substantial right was prejudiced by ordering a cause to trial, when one of appellant's attorneys could not be present.—*Hazelwood v. Webster* (Ky.) 123.

§ 3. Course and conduct of trial in general.

Civ. Code, § 318, authorizing the court to grant a view, authorizes such view in the court's discretion.—*Green's Adm'r v. Maysville & B. S. R. Co.* (Ky.) 439.

In an action against carriers for injuries to a shipment of cotton, remarks of court in excluding certain testimony *held* error.—*Bath v. Houston & T. C. Ry. Co.* (Tex. Civ. App.) 998.

§ 4. Reception of evidence.

A motion to exclude all the testimony of a witness, after objections and exceptions to its admission, *held* not to forfeit the right previously reserved to have the incompetent testimony excluded.—*Elliott v. Campbell* (Ky.) 1122.

The court, in permitting plaintiff in ejectment to introduce in evidence, while defendant was being cross-examined, the record of a deed to him, did not abuse its discretion.—*Patton v. Fox* (Mo. Sup.) 804.

Though evidence, in an action by a trustee in bankruptcy, to show his due appointment, is admitted without objection, its sufficiency may afterwards be questioned.—*Page v. Roberts, Johnson & Rand Shoe Co.* (Mo. App.) 52.

Statements by a husband as to his ownership of the property in controversy, admitted without objection, in an action in which his wife filed an interpleader, *held* entitled to consideration.—*Secrist v. Eubank* (Mo. App.) 315.

Where defendants made no application to supply an affidavit of the testimony of an absent witness, which became lost during the trial, they could not thereafter object that they were injured by such loss.—*Chowning v. Parker* (Mo. App.) 677.

Statutory provision (article 1298, Rev. St. 1895) relative to opening case to admit further testimony *held* directory; and, facts not showing prejudice from opening after argument, so doing was not error.—*Western Union Tel. Co. v. Roberts* (Tex. Civ. App.) 522.

Sustaining an objection to a question whether plaintiff objected to an X-ray examination of his wife's injuries, for which he sued, *held* not error.—*Dallas Consol. Electric St. Ry. Co. v. Rutherford* (Tex. Civ. App.) 558.

Permitting stenographer to read over testimony, and allowing witness to explain it, *held* within discretion of trial court.—*Equitable Life Assur. Soc. v. Maverick* (Tex. Civ. App.) 560.

§ 5. Arguments and conduct of counsel.

Railroad company *held* not entitled to complain of court's ruling on argument of opposing counsel.—*International & G. N. R. Co. v. Mercer* (Tex. Civ. App.) 562.

§ 6. Taking case or question from jury.

The rule relative to direction of verdicts stated.—*St. Louis, I. M. & S. Ry. Co. v. Neal* (Ark.) 220.

In action against a railroad for personal injuries received by plaintiff in attempting to cross defendant's tracks, where the evidence is conflicting on material issues, it is for the jury to determine the weight and effect thereof.—*Louisville & N. R. Co. v. Dick* (Ky.) 914.

On the question as to whether or not there should be a compulsory nonsuit, the evidence should be considered in its most favorable aspect for the plaintiff.—*Duffy v. St. Louis Transit Co.* (Mo. App.) 831.

Whether plaintiff in an action for personal injuries contradicted his testimony given on a

former trial *held* question for the jury.—*International & G. N. R. Co. v. Ives* (Tex. Civ. App.) 36.

Where the evidence in support of issues by one having the burden of proof thereon is so slight that reasonable minds could not arrive at different conclusions in reference thereto, there is no error in instructing a verdict for the other party.—*W. T. Rickards & Co. v. J. H. Bemis & Co.* (Tex. Civ. App.) 239.

In an action for alleged overcharges, the submission to the jury of the reasonableness of the charge for exchange *held* error.—*D. Sullivan & Co. v. Owens* (Tex. Civ. App.) 373.

Inconsistencies between the testimony of a witness and that which he gave in a former trial are matters exclusively for the jury to consider.—*Galveston, H. & S. A. Ry. Co. v. Butchek* (Tex. Civ. App.) 740.

§ 7. Instructions to jury—Province of court and jury in general.

An instruction *held* erroneous, as commenting on the evidence, and making a matter too conspicuous.—*Page v. Roberts, Johnson & Rand Shoe Co.* (Mo. App.) 52.

Instruction that the law presumed that statements by plaintiff against her interest were true *held* properly refused.—*Campbell v. City of Stanberry* (Mo. App.) 292.

It is proper for the court to charge that the jury, in considering the testimony of experts, should take into consideration their professional standing and experience.—*Cosgrove v. Burton* (Mo. App.) 667.

In an action for personal injuries, a charge *held* not erroneous as instructing the jury that certain facts constituted contributory negligence.—*Williams v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.) 45.

The court in its charge has the right to assume facts shown by uncontradicted proof.—*Valentine v. Sweatt* (Tex. Civ. App.) 385.

In an action for injuries to a switchman, a requested instruction *held* properly refused, as on the weight of evidence.—*Missouri, K. & T. Ry. Co. of Texas v. Stinson* (Tex. Civ. App.) 986.

In an action for injuries to a switchman, an instruction *held* not error, as on the weight of evidence, in assuming certain facts as negligence, causing the injury.—*Missouri, K. & T. Ry. Co. of Texas v. Stinson* (Tex. Civ. App.) 986.

In an action for injuries to a switchman, an instruction *held* not erroneous, as assuming existence of certain facts which caused his injury.—*Missouri, K. & T. Ry. Co. of Texas v. Stinson* (Tex. Civ. App.) 986.

In action for injuries to street railway passenger, *held*, on the evidence, not error to assume in the charge that plaintiff was a passenger.—*Dallas Rapid Transit Ry. Co. v. Payne* (Tex. Civ. App.) 1085.

In action for injuries to street railway passenger, *held*, on the evidence, not error to assume in the charge defendant's negligence.—*Dallas Rapid Transit Ry. Co. v. Payne* (Tex. Civ. App.) 1085.

§ 8. — Necessity and subject-matter.

An instruction in which the word "agent" is used is not erroneous for failing to define the word.—*Harper v. Fidler* (Mo. App.) 1034.

In action against carrier for damages to cattle, defendant *held* entitled to have the issue as to whether the damage was due to the condition of the cattle presented in the affirmative.—*Texas & P. Ry. Co. v. Dawson* (Tex. Civ. App.) 235.

plaintiff may recover *held* not error, when both state same cause of action.—*Maguire v. St. Louis Transit Co.* (Mo. App.) 838.

In an action for injuries to a minor, an instruction *held* not objectionable as giving undue prominence to the items of plaintiff's damage.—*Cameron Mill & Elevator Co. v. Anderson* (Tex. Civ. App.) 8.

An instruction on contributory negligence *held* not objectionable, as misleading, in authorizing the jury to consider only defendant's evidence on such issue.—*Cameron Mill & Elevator Co. v. Anderson* (Tex. Civ. App.) 8.

In an action against a railroad company for personal injuries, failure of a paragraph of the charge to refer to contributory negligence and assumption of risk *held* not misleading, in view of other portions of the charge.—*International & G. N. R. Co. v. Mills* (Tex. Civ. App.) 11.

In an action against a railroad company for personal injuries, charge *held* not misleading.—*International & G. N. R. Co. v. Mills* (Tex. Civ. App.) 11.

Charge, in action against railroad for death of a passenger, as to burden of proof, *held* error.—*Crow v. Citizens' Ry. Co.* (Tex. Civ. App.) 13.

It is improper for the court to single out any one fact in a case, and, by too prominently placing the same before the jury, unduly impress them with the idea of its importance.—*Missouri, K. & T. Ry. Co. of Texas v. O'Connor* (Tex. Civ. App.) 374.

In an action against street railway for injuries to a passenger, *held* proper in charge to single out evidence relied on to show contributory negligence.—*Pelly v. Denison & S. Ry. Co.* (Tex. Civ. App.) 542.

It was error to give one instruction that contradicted evidence showed that a certain transfer was for a valuable consideration, and another instruction that the question as to whether a valuable consideration was given was for the jury.—*Eddy v. Bosley* (Tex. Civ. App.) 566.

§ 10. — Applicability to pleadings and evidence.

It is error to give instructions having no foundation in the evidence.—*Center Creek Min. Co. v. Frankenstein* (Mo. Sup.) 785.

Charge relating to set-off claimed by defendant in an action to enforce a mechanic's lien *held* erroneous, as not supported by the evidence.—*Trippensee v. Braun* (Mo. App.) 674.

In an action against a carrier for damages to goods, in which the consignor was impleaded, an instruction making the consignor liable, if the goods were damaged before they reached the carrier, *held* not error.—*Cudahy Packing Co. v. Dorsey* (Tex. Civ. App.) 20.

Charge *held* not objectionable, under the evidence, in not confining jury's consideration to hole in sidewalk described in petition as the one in which plaintiff was injured.—*City of San Antonio v. Talerico* (Tex. Civ. App.) 28.

Charge based on supposition that place where one was injured was not a regular crossing for foot passengers *held* properly refused, in view of the evidence.—*City of San Antonio v. Talerico* (Tex. Civ. App.) 28.

No error can be predicated on the refusal of a charge not supported by evidence in the record.—*Missouri, K. & T. Ry. Co. of Texas v. O'Connor* (Tex. Civ. App.) 374.

Charge, in action against a carrier for injuries by reason of negligence in providing an overcrowded, unlighted, and filthy coach, *held* prop-

§ 11. — Requests or prayers.

There is no error in refusing instructions covered by other ones given.—*Baxter v. St. Louis Transit Co.* (Mo. App.) 70; *Pecos & N. T. Ry. Co. v. Bowman* (Tex. Civ. App.) 22; *Missouri, K. & T. Ry. Co. of Texas v. Stinson* (Tex. Civ. App.) 986.

Instructions embraced in those given by the court in language wholly free from error or ambiguity were properly refused.—*City of Richmond v. Martin* (Ky.) 219.

In an action for injuries to a minor, an instruction precluding recovery for loss of time and services during minority *held* properly refused.—*Cameron Mill & Elevator Co. v. Anderson* (Tex. Civ. App.) 8.

Requested charge *held* covered by charge given, that persons using sidewalks are bound to use ordinary care, and cannot recover for injuries if they do not.—*City of San Antonio v. Talerico* (Tex. Civ. App.) 28.

Plaintiff could not, on appeal, complain of a charge authorizing a recovery only on proof of all the acts of negligence alleged in his petition, in the absence of any request for additional instructions.—*Williams v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.) 45.

A party, withdrawing a requested instruction to correct an omission in the charge, *held* to be treated as not having requested the instruction.—*Keas v. Gordy* (Tex. Civ. App.) 385.

A party desiring correction of the charge, because of an omission which does not constitute positive error, should prepare and request an instruction for that purpose.—*Keas v. Gordy* (Tex. Civ. App.) 385.

A charge that, in operating trains, ordinary care should be used to avoid injuring persons on the track, *held* to apply to all persons, and to render unnecessary its repetition in a special charge defining trespassers and licensees.—*Smith v. International & G. N. R. Co.* (Tex. Civ. App.) 556.

That failure to charge on a subject may be complained of, a charge must have been requested.—*Texas Cotton Products Co. v. Denny Bros.* (Tex. Civ. App.) 557.

In an action for injuries to a servant, a requested instruction *held* sufficient to call the court's attention to an issue on which it had omitted to charge.—*Houston & T. C. R. Co. v. Turner* (Tex. Civ. App.) 712.

Where, after defendant's requests to charge were refused, they were handed to the clerk with directions to file the same, they thereby became court papers, subject to plaintiff's inspection.—*Houston & T. C. R. Co. v. Turner* (Tex. Civ. App.) 712.

Plaintiff *held* not entitled to object to the consideration of defendant's requests on appeal, by reason of defendant's refusal to permit examination of the same before they were filed.—*Houston & T. C. R. Co. v. Turner* (Tex. Civ. App.) 712.

Requested instruction in action against connecting carriers for injury to shipment of live stock, relative to several liability, *held* properly refused, in view of instructions given.—*Texas & P. Ry. Co. v. Murtishaw* (Tex. Civ. App.) 953.

Where plaintiff pleaded defendant's negligence on two theories, and the court submitted the case on one only, plaintiff could not complain, in the absence of a request by him for the submission of the other.—*Stewart v. Galveston, H. & S. A. Ry. Co.* (Tex. Civ. App.) 979.

§ 12. — Construction and operation.

Instruction that, if street car company failed to use utmost care, it is liable, *held* not er-

ronaceous, in not requiring care by passenger injured.—*Louisville Ry. Co. v. Meglemery* (Ky.) 217.

An instruction undertaking to cover the entire case, but omitting special defenses, is not error, where such defenses are fully presented in subsequent instructions.—*Mathew v. Wabash R. Co.* (Mo. App.) 271.

Instruction that one, in crossing street, had right to assume it was in "safe condition," held proper.—*Campbell v. City of Stanberry* (Mo. App.) 292.

Instruction on negligence of city held not erroneous in failing to submit issue of contributory negligence, when otherwise submitted.—*Campbell v. City of Stanberry* (Mo. App.) 292.

In an action against city for injuries resulting from icy sidewalk, erroneous instruction held cured by another.—*Quinlan v. Kansas City* (Mo. App.) 660.

In an action for injuries in a collision with a street car, it was immaterial that one instruction ignored the issue of contributory negligence.—*Hanheide v. St. Louis Transit Co.* (Mo. App.) 820.

If the instructions given for both parties fairly state the law, and the omissions in those of plaintiff are supplied in those of defendant, they are not subject to objections.—*Weston v. Lackawanna Min. Co.* (Mo. App.) 1044.

§ 13. Custody, conduct, and deliberations of jury.

Under Rev. St. 1899, § 748, instructions may, under proper conditions, be given after the jury has retired.—*Page v. Roberts, Johnson & Rand Shoe Co.* (Mo. App.) 52.

TRIAL OF RIGHT OF PROPERTY.

See "Attachment," § 2.

TROVER AND CONVERSION.

Joinder of action for conversion of mortgaged goods with suit for foreclosure, see "Action," § 2.

Wrongful conversion of goods by carrier, see "Carriers," § 2.

TRUSTS.

Charitable trusts, see "Charities."

Conveyances in trust for creditors, see "Assignments for Benefit of Creditors."

Trust deeds, see "Chattel Mortgages"; "Mortgages."

Validity of as affected by restraint on alienation, see "Perpetuities."

§ 1. Creation, existence, and validity.

Certain lands held not to have been burdened with any trust.—*Snell v. Payne* (Ky.) 885.

Resulting trust held capable of being established by parol.—*Row v. Johnston* (Ky.) 906.

A certain contract held a mere personal obligation, and not to have created a trust.—*Dohmen v. Schlieff* (Mo. Sup.) 799.

In proportion as a husband's money is used for the purchase of property by his wife in her own name, she holds same in trust for him, and it may be subjected to a judgment against him.—*Wolfsberger v. Mort* (Mo. App.) 817.

Parol evidence held inadmissible to show that a deed absolute in form was intended to create a trust.—*Boyd v. Boyd* (Tex. Civ. App.) 39.

§ 2. Management and disposal of trust property.

A trust deed held to authorize the trustees to mortgage the property to raise money to pay liens thereon.—*Walter v. Brugger* (Ky.) 419.

Ky. St. 1903, § 2356, held not to preclude a trustee from mortgaging the property under a power in the deed without complying with such section.—*Walter v. Brugger* (Ky.) 419.

The mortgagee of land mortgaged to her by a trustee under a deed of trust held not required to see to the application of the fund loaned, under Ky. St. 1903, § 4846.—*Walter v. Brugger* (Ky.) 419.

§ 3. Establishment and enforcement of trust.

Petition in action for specific performance of contract to leave property by will at death held insufficient to show a trust for the benefit of plaintiff in testator's interest in community property devised by the testator to his widow.—*Jordan v. Abney* (Tex. Sup.) 486.

TURNPIKES AND TOLL ROADS.

Jurisdiction of county court to determine abandonment of road, see "Courts," § 3.

§ 1. Establishment, construction, and maintenance.

Plea of no consideration, in action by turnpike company against county on agreement to purchase road, held not to shift burden of proving consideration from plaintiff.—*Bardstown & L. Turnpike Co. v. Nelson County* (Ky.) 851.

Proposition by fiscal court of county for purchase of turnpike held accepted by company.—*Bardstown & L. Turnpike Co. v. Nelson County* (Ky.) 851.

Turning over a turnpike to county under contract of purchase held not an abandonment thereof, under Ky. St. 1903, § 4732.—*Bardstown & L. Turnpike Co. v. Nelson County* (Ky.) 851.

Under Ky. St. 1903, § 4748b, subsec. 13, certain evidence as to market value of turnpike and turnpike company's stock held inadmissible, in company's action for value of road against county, under contract of purchase.—*Bardstown & L. Turnpike Co. v. Nelson County* (Ky.) 851.

The market value of a turnpike is not a criterion of the actual value, which is the measure of the company's recovery in an action against a county under its contract for the purchase thereof.—*Bardstown & L. Turnpike Co. v. Nelson County* (Ky.) 851.

In an action against a county on its contract to purchase a turnpike, an instruction that a vote in the county only authorized it to obtain the road by gift, lease, purchase, or contract, for the purpose of making the road free, is irrelevant.—*Bardstown & L. Turnpike Co. v. Nelson County* (Ky.) 851.

Instruction in turnpike company's action against county on contract for purchase of its road, permitting finding that the road had no value, held error.—*Bardstown & L. Turnpike Co. v. Nelson County* (Ky.) 851.

ULTRA VIRES.

Affecting validity of municipal ordinances, see "Municipal Corporations," § 8.

In insurance contract, see "Insurance," § 14.

UNDUE INFLUENCE.

Procuring making of will, see "Wills," § 2.

UNITED STATES.

Courts, see "Removal of Causes."

UNLAWFUL DETAINER.

See "Forcible Entry and Detainer."

Power of purchaser under deed of trust to maintain, see "Mortgages," § 6.

ment," § 8.

§ 1. Usurious contracts and transactions.

Where a note bears all the interest the law allows, an agreement for payment of a bonus for forbearance is usurious.—*Missouri Real Estate Syndicate v. Sims* (Mo. Sup.) 1006.

Defense of usury is personal to the debtor and his privies, and cannot be set up by the creditor.—*Missouri Real Estate Syndicate v. Sims* (Mo. Sup.) 1006.

VACATION.

Vacating particular proceedings.

See "Execution," § 1; "Judgment," §§ 1, 4.

Foreclosure sale, see "Mortgages," § 7.

Judgment of justice, see "Justices of the Peace," § 2.

Orders, see "Motions."

Sale on execution, see "Execution," § 2.

VALUE.

Evidence as to value, see "Evidence," § 4.

Limits of jurisdiction, see "Appeal and Error," § 2; "Courts," §§ 3, 4; "Justices of the Peace," § 3.

VENDOR AND PURCHASER.

See "Sales."

Bona fide purchasers of invalid vendor's lien notes, see "Bills and Notes," § 2.

Jurisdiction of county court of action to recover purchase money, see "Courts," § 3.

Purchasers at foreclosure sale, see "Mortgages," § 7.

Purchasers at sale on execution, see "Execution," § 2.

Purchasers at tax sale, see "Taxation," § 10.

Purchasers of mortgaged property, see "Mortgages," § 6.

Requirements of statute of frauds, see "Frauds, Statute of," § 2.

Specific performance of contract, see "Specific Performance."

§ 1. Requisites and validity of contract.

Ky. St. § 2341, providing that any interest in real estate may be disposed of by deed or will, authorizes the conveyance of executory devises.—*Stallcup v. Cronley's Trustee* (Ky.) 441.

§ 2. Performance of contract.

In a suit to obtain the release of a vendor's lien, evidence held to show that the price of the land had been paid.—*Barbour v. Huber's Ex'r* (Ky.) 869.

§ 3. Rights and liabilities of parties.

A title bond gives the vendee equitable title to the land; and, he having conveyed the land by deed recorded during the vendor's life, constructive notice thereof is given purchasers from the vendor's heirs.—*Lewis v. Sizemore* (Ky.) 122.

Purchaser of interest of deceased grantee held put on inquiry from records as to whether decedent had made a will.—*Dalmazzo v. Simmons* (Ky.) 179.

Recital in a deed held sufficient to put one purchasing from the grantee's husband after her death on inquiry as to whether the land was her separate property.—*O'Mahoney v. Flanagan* (Tex. Civ. App.) 245.

Defendant held not charged with notice of an unrecorded conveyance of a part of a tract of land by deeds in defendant's chain of title con-

veyance.—*Keachele v. Henderson* (Tex. Civ. App.) 1082.

Evidence in an action of trespass to try title examined, and held insufficient to show that plaintiff's ancestor was without notice of a prior appropriation of the land in controversy at the time it was patented to him.—*Keachele v. Henderson* (Tex. Civ. App.) 1082.

§ 4. Remedies of vendor.

One holding vendor's lien held estopped from enforcing it against subsequent purchaser for any greater amount than is unpaid on the last purchase.—*North v. Rogers* (Ky.) 165.

The purchaser at decretal sale having paid nothing, and bought at an inadequate price, held not entitled to prevent a new trial.—*Gill v. Fugate* (Ky.) 188.

Facts held to show a purchase of land free of prior debts against it.—*Fellows v. King* (Ky.) 468.

Purchaser's discovery of defect in title held not to prevent maturity of second purchase-money note, on account of prior default in payment of the first note.—*McLean v. Conner-ton* (Tex. Civ. App.) 238.

In action on purchase-money notes and to foreclose vendor's lien, judgment on notes, with stay of execution and order of sale, held to sufficiently protect purchaser's rights on discovery of defect in title.—*McLean v. Conner-ton* (Tex. Civ. App.) 238.

VENUE.

Of action against carrier of live stock, see "Carriers," § 3.

Of action for injuries to employé, see "Master and Servant," § 8.

Of criminal prosecutions, see "Criminal Law," § 4.

§ 1. Nature or subject of action.

Plea of privilege to be sued in county of defendant's domicile held unavailing, under Rev. St. 1895, art. 1194, when brought in county where contract was to be performed.—*Callender, Holder & Co. v. Short* (Tex. Civ. App.) 366.

VERDICT.

Directing verdict in civil actions, see "Trial," § 6.

In criminal prosecutions, see "Criminal Law," § 12.

In proceedings for removal of officer, see "Officers," § 1.

Interest on, see "Interest," § 1.

Review on appeal or writ of error, see "Appeal and Error," § 20; "Criminal Law," § 22.

VERIFICATION.

Of claim against estate of decedent, see "Executors and Administrators," § 4.

Of pleading, see "Pleading," § 4.

VICE PRINCIPALS.

See "Master and Servant," § 5.

VIEW.

By jury in civil actions, see "Trial," § 3.

VILLAGES.

See "Municipal Corporations."

VOIR DIRE.

Examination of veniremen, see "Jury," § 4.

VOTERS.

See "Elections."

WAGERS.

See "Gaming," § 1.

WAIVER.

See "Estoppel."

By agent of rights of principal, see "Principal and Agent," § 3.

Of objections to particular acts or proceedings.

See "Appearance"; "Criminal Law," § 12; "Parties," § 2; "Pleading," § 8.

Error waived in appellate court, see "Appeal and Error," § 16.

Time for filing bill of exceptions, see "Exceptions, Bill of," § 2.

Of rights or remedies.

Exemption of homestead, see "Homestead," § 4. Landlord's lien, see "Landlord and Tenant," § 4.

Medical examination and formal application of applicant for fraternal insurance, see "Insurance," § 14.

Proof of loss insured against, see "Insurance," §§ 11, 12.

Right to appeal, see "Appeal and Error," § 3.

Right to forfeit insurance, see "Insurance," §§ 9, 14.

WARDS.

See "Guardian and Ward."

WARRANT.

Mandamus to compel issuance, see "Mandamus," § 1.

WARRANTY.

By insured, see "Insurance," § 7.

On sale of goods, see "Sales," §§ 6, 8.

WATERS AND WATER COURSES.

See "Drains"; "Levees."

§ 1. Artificial ponds, reservoirs, and channels, dams, and flowage.

In action for damages resulting from construction of embankment across creek bottom, response of court to question of jury as to assessment of damages *held* not open to objection of binding jury by plaintiff's evidence regardless of their judgment thereon.—San Antonio & A. P. Ry. Co. v. Turnham (Tex. Civ. App.) 1086.

§ 2. Public water supply.

Consumer of water *held* not entitled to compel water company to furnish water through one meter for a number of buildings, in violation of its regulations.—Specht v. Louisville Water Co. (Ky.) 142.

WAYS.

Private rights of way, see "Easements."

Public ways, see "Highways"; "Municipal Corporations," §§ 7, 8.

WEAPONS.

Comments of judge on evidence in prosecution for carrying, see "Criminal Law," § 12.

One who is in imminent danger at a place where there are no officers of the law is not guilty of violating the law because he arms himself with a pistol in preference to withdrawing from the vicinity of the danger.—Cunningham v. State (Tex. Cr. App.) 930.

Owner of pistol *held* not guilty of violating law against carrying pistols.—Fields v. State (Tex. Cr. App.) 932.

Evidence of conversations, preceding the discovery that the accused was carrying a pistol, *held* immaterial.—Mumford v. State (Tex. Cr. App.) 1063.

WIDOWS.

Dower, see "Dower."

WILLS.

See "Descent and Distribution"; "Executors and Administrators."

Appointment of guardian ad litem in will contest, see "Infants," § 2.

Charitable bequests and devises, see "Charities."

Construction and execution of trusts, see "Trusts."

Evidence as to admissions in will contest, see "Evidence," § 6.

Forgery, see "Forgery."

Grounds for review in will contest, see "Appeal and Error," § 22.

Restrictions on perpetuities, see "Perpetuities."

Specific performance of contract to devise, see "Specific Performance," § 1.

§ 1. Contracts to devise or bequeath.

A contract between two persons, upon a valuable consideration, that one will, at his death, leave property to the other, is enforceable.—Jordan v. Abney (Tex. Sup.) 486.

§ 2. Requisites and validity.

Where undue influence, inducing the disinheritance of two of testator's sons, permeated two wills executed by him, the fact that such influence was exerted at a period remote from the execution of the second will was immaterial.—Powers' Ex'r v. Powers (Ky.) 152.

Where it was claimed that a will was the result of undue influence exercised over testator by his wife, statements by testator tending to show such influence *held* admissible.—Powers' Ex'r v. Powers (Ky.) 152.

A will cannot be set aside for fraud and undue influence, unless such fraudulent conduct was exercised by the other beneficiaries.—Wetz v. Schneider (Tex. Civ. App.) 394.

Evidence *held* insufficient to warrant a finding setting aside a will for alleged undue influence.—Wetz v. Schneider (Tex. Civ. App.) 394.

§ 3. Probate, establishment, and annulment.

The acceptance of legacies *held* to estop the legatee from contesting the will.—Stone v. Cook (Mo. Sup.) 801.

In the petition of a legatee contesting a will, an allegation of a willingness to pay into court the amount received, or to have it deducted from her share of the estate, if successful, *held* not to bring her within the rule entitling her to contest.—Stone v. Cook (Mo. Sup.) 801.

Proceedings to contest a will *held* to fail with in the rule denying the right to contest where

The duly authenticated record of a foreign will affords no presumption that it was duly proved, so as to dispense with proof of such fact in support of a title to land depending thereon.—Fenderson v. Missouri Tie & Timber Co. (Mo. App.) 819.

Rev. St. 1899, §§ 4634, 4635, *held* to expressly require proof of the probate of a foreign will, in order to prove a transfer of title thereby.—Fenderson v. Missouri Tie & Timber Co. (Mo. App.) 819.

Where, in a will contest, the preponderance of evidence was against a judgment invalidating the will, the Court of Civil Appeals will reverse and remand the cause.—Wetz v. Schneider (Tex. Civ. App.) 394.

§ 4. Construction.

A will construed, and *held* to convey a fee in land to a son.—Hazelwood v. Webster (Ky.) 123.

Will construed, and *held*, that the children of testator did not take an indefeasible fee on the death of the life tenant, but a contingent remainder for life, with remainder in fee to their children.—Jabine v. Sawyer (Ky.) 140.

Under Ky. St. 1903, § 2342, will *held* to vest a fee simple in remainder in certain devisees, except in case of their death prior to death of testator.—Dalmazzo v. Simmons (Ky.) 179.

Remainder interest *held* to have vested in plaintiffs under will duly probated, as required by Ky. St. 1903, § 4849, which was not devested by partition suit to which they were not parties, or by conveyance by life tenant.—Dalmazzo v. Simmons (Ky.) 179.

Will construed, and *held* to vest in testator's children, on arriving at maturity, a fee simple, which was not limited by subsequent clause providing for distribution in event of children's death.—Kephart v. Heatt (Ky.) 425.

Clauses in will construed, and *held* not invalid as repugnant.—Smith v. Isaacs (Ky.) 434.

A will construed, and *held* to give the widow one-eighth of the estate, less the amount due her under an antenuptial contract.—Dowell v. Workman (Ky.) 857.

Under Ky. St. 1903, § 2342, will *held* to vest defeasible fee, which had become absolute in testator's son.—McAdams & Morford v. Norton's Assignee (Ky.) 880.

A devise to three of testator's sons of "the undivided one-third in all my real estate" *held* to be a devise of an undivided one-third to each of the sons.—Meiners v. Meiners (Mo. Sup.) 795.

§ 5. Rights and liabilities of devisees and legatees.

A devisee's voluntary conveyance of land devised to him is no bar to the prosecution of an action to subject the land to a claim against the testator.—Dearing v. Moran (Ky.) 217.

Under testator's will, his widow *held* entitled to rents of the homestead, though she had abandoned it as a place of residence.—Mayer v. Mayer (Ky.) 883.

A devisee under a will has no standing in equity to have set aside a fraudulent conveyance of testator.—Davidson v. Dockery (Mo. Sup.) 624.

WITHDRAWAL.

Of requests for instructions, see "Trial," § 11.

See "Depositions"; "Evidence."

Absence of, as ground for continuance, see "Criminal Law," § 11.

Credibility of, as question for jury, see "Trial," § 6.

Experts, see "Evidence," § 11.

Impeachment of dying declaration, see "Homicide," § 4.

Instruction as to credibility of, see "Trial," § 7.

Opinions, see "Evidence," § 11.

Perjury, see "Perjury."

Testimony of accomplices, see "Criminal Law," § 6.

§ 1. Competency.

Under the express provisions of Code, § 606, one cannot testify for himself as to transactions with a decedent.—United Loan & Deposit Bank of Campbellsburg v. Bitzer (Ky.) 183.

Under Civ. Code Prac. § 606, subsec. 2, testimony of bank cashier *held* admissible in action by bank's assignee against decedent's estate.—Lyon's Ex'r v. Logan County Bank's Assignee (Ky.) 454.

In an action on a note by the payee's administratrix, admissibility of testimony of defendant as to undorsed credits under Code, § 606, relating to proof of transactions with a decedent, determined.—Carpenter v. Rice's Adm'r (Ky.) 458.

In homicide, testimony as to reputation of deceased *held* properly excluded for insufficiency of witness' acquaintance with the subject.—Dean v. Commonwealth (Ky.) 1112.

Defendant *held* incompetent to testify, under Civ. Code Prac. § 606, subsec. 2, as to conversation had with deceased grantor in plaintiff's absence.—Elliott v. Campbell (Ky.) 1122.

A wife *held* competent to make an affidavit supporting information for abandonment.—State v. Bean (Mo. App.) 640.

Under Rev. St. 1899, § 4656, cl. 3, wife, in writing letters for husband, *held* not his agent, so as to authorize her to testify to transactions between him and another.—First Nat. Bank v. Wright (Mo. App.) 686.

A witness, not interested in a suit against an administrator, *held* competent to testify to transactions with the decedent.—Dawson v. Wombles (Mo. App.) 823.

The competency as a witness of prosecutrix, on account of her youth and lack of intelligence, is a matter within the sound discretion of the trial judge.—Ham v. State (Tex. Cr. App.) 929.

A husband, who had married a second time and conveyed to his second wife community property of the first marriage, might testify that, prior to the conveyance, he told her about the existence and interest of the children of the first marriage.—Eddy v. Bosley (Tex. Civ. App.) 565.

§ 2. Examination.

Requiring one to testify over objection that evidence is incriminating *held* not ground for reversal, the other evidence leaving no doubt as to the facts.—Furth v. State (Ark.) 759.

Conviction of rape *held* not reversible for leading questions asked of prosecutrix.—Ham v. State (Tex. Cr. App.) 929.

Under Bill of Rights, art. 1, § 10, one who had been arrested on warrant authorized by Act March 10, 1903, and, while held in custody, summoned as a witness, under Code Cr. Proc. art. 941, *held* not guilty of a contempt in refusing to be sworn.—Ex parte Sauls (Tex. Cr. App.) 1073.

See "Mun

Examinat

See "Elec

See "Gan

See "Est
By agent
and Ag

Of object
See "App
ties," §
Error w
and Er
Time for
tions, i

Exemptio
Landlord
§ 4.
Medical
applica
ance,"
Proof of
§§ 11,
Right to
Right to
9, 14.

See "Gu:

Mandam
mus,"

By insur
On sale

WATER

See "Dr
§ 1. A

In act
struction
response
assessment
of bindi
less of t
A. P. 1
1086.

§ 2. P
Consu
pel wat
one met
tion of
Water (

Private
Public
porati

In an action against a telegraph company for delay in delivering a message, held error to admit in evidence the counter delivery sheet of defendant.—*Western Union Tel. Co. v. Charleston* (Tex. Civ. App.) 744.

§ 2. Credibility, impeachment, contradiction, and corroboration.

Admission relative to impeaching evidence on trial of motion for purpose of will being in dispute.—*Quinn v. Jenkins* (Ky.) 212.

Under Cr. Code § 112, providing for testimony by member of grand jury, where witness makes inconsistent statements on trial, will those made before grand jury be proper to introduce member of grand jury to contradict witness and to ask him further questions.—*Leak v. Commonwealth* (Ky.) 212.

In homicide certain evidence held properly introduced as corroborative of state's witness.—*Leak v. Commonwealth* (Ky.) 212.

In a prosecution for burglary a previous conviction of defendant as a police officer of such nature as to reflect discredit on his testimony as a witness.—*State v. Chapman* (Mo. Sup.) 203.

Where a defendant testified fully as a witness his conviction, based on a former prosecution, in which he had served a term in the penitentiary for his testimony being untrue, was inadmissible for the purpose of impeaching him.—*Leak v. Commonwealth* (Ky.) 212.

Where a witness was called for the purpose of impeaching him, and he testified that he was not the person who committed the crime, his testimony was not admissible.—*State v. Chapman* (Mo. Sup.) 203.

In a prosecution for the same crime with intent to defraud, a witness who testified that he was not the person who committed the crime, his testimony was not admissible.—*State v. Chapman* (Mo. Sup.) 203.

In a prosecution for the same crime with intent to defraud, a witness who testified that he was not the person who committed the crime, his testimony was not admissible.—*State v. Chapman* (Mo. Sup.) 203.

In a prosecution for the same crime with intent to defraud, a witness who testified that he was not the person who committed the crime, his testimony was not admissible.—*State v. Chapman* (Mo. Sup.) 203.

In a prosecution for the same crime with intent to defraud, a witness who testified that he was not the person who committed the crime, his testimony was not admissible.—*State v. Chapman* (Mo. Sup.) 203.

In a prosecution for the same crime with intent to defraud, a witness who testified that he was not the person who committed the crime, his testimony was not admissible.—*State v. Chapman* (Mo. Sup.) 203.

In a prosecution for the same crime with intent to defraud, a witness who testified that he was not the person who committed the crime, his testimony was not admissible.—*State v. Chapman* (Mo. Sup.) 203.

In a prosecution for the same crime with intent to defraud, a witness who testified that he was not the person who committed the crime, his testimony was not admissible.—*State v. Chapman* (Mo. Sup.) 203.

In a prosecution for the same crime with intent to defraud, a witness who testified that he was not the person who committed the crime, his testimony was not admissible.—*State v. Chapman* (Mo. Sup.) 203.

In a prosecution for the same crime with intent to defraud, a witness who testified that he was not the person who committed the crime, his testimony was not admissible.—*State v. Chapman* (Mo. Sup.) 203.

In a prosecution for the same crime with intent to defraud, a witness who testified that he was not the person who committed the crime, his testimony was not admissible.—*State v. Chapman* (Mo. Sup.) 203.

In a prosecution for the same crime with intent to defraud, a witness who testified that he was not the person who committed the crime, his testimony was not admissible.—*State v. Chapman* (Mo. Sup.) 203.

death, in rebuttal of which testified by defendant.—*T. C. E. Co. v. Tucker* 744.

Though a party may not be may prove the truth in direct contradiction to the witness.—*Pittman v. Holmes* (Tex.) 744.

Though a witness does not make a statement out of testimony, such contradiction is not admissible.—*Pittman v. Holmes* (Tex.) 744.

The admission of evidence on cross-examination of testimony to one of the already admitted facts.—*Pittman v. Holmes* (Tex.) 744.

WORK AND

Means for work and money.—*Leak v. Commonwealth* (Ky.) 212.

Services rendered by a witness while residing with the family of the defendant will be admissible.—*State v. Chapman* (Mo. Sup.) 203.

Portion of a witness's testimony which is a question of fact.—*State v. Chapman* (Mo. Sup.) 203.

WRIT

See "Process"

Particular

See "Exemption" 744.

See "Exemption" 744.

See "Exemption" 744.

See "Exemption" 744.

See "Exemption" 744.

See "Exemption" 744.

See "Exemption" 744.

See "Exemption" 744.

See "Exemption" 744.

See "Exemption" 744.

See "Exemption" 744.

See "Exemption" 744.

See "Exemption" 744.

See "Exemption" 744.

See "Exemption" 744.

See "Exemption" 744.

See "Exemption" 744.

See "Exemption" 744.

See "Exemption" 744.

See "Exemption" 744.

See "Exemption" 744.

See "Exemption" 744.

TABLES OF SOUTHWESTERN CASES

IN

STATE REPORTS.

VOL. 176, MISSOURI REPORTS.

S. W. Rep.		Mo. Rep.	S. W. Rep.		Mo. Rep.	S. W. Rep.		Mo. Rep.	S. W. Rep.		Mo. Rep.	S. W. Rep.		Mo. Rep.	S. W. Rep.		Mo. Rep.
Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.	Vol.	Pg.	Pg.
75	451	90	75	586	200	75	633	330	75	1095	452	75	1006	547	75	600	653
75	103	107	75	398	210	75	602	355	75	664	475	75	919	557	75	679	654
75	417	149	75	604	219	75	644	383	75	920	480	75	638	580	75	750	670
75	468	158	75	617	229	75	973	392	75	677	493	75	657	593	75	595	687
75	464	175	75	642	253	75	1102	401	75	764	516	75	608	606	75	613	718
75	591	183	75	611	310	75	914	448	75	636	528	75	672	621	75	755	731
75	597	192	75	606	328	75	920								75		888

VOL. 176, MISSOURI REPORTS.

	Page		Page
steel v. Potter (75 S. W. 597).....	76	Griffin v. McIntosh (75 S. W. 677).....	392
aney v. Louisiana & M. R. R. Co. (75 S. W. 595).....	598	Haller v. St. Louis (75 S. W. 613).....	606
ristopher v. Meyer (75 S. W. 750).....	580	Handler, Ex parte (75 S. W. 920).....	383
lburn v. Yantis (75 S. W. 653).....	670	Hogan v. St. Louis (75 S. W. 604).....	149
rder v. O'Neill (75 S. W. 764).....	401	Johnson v. Fluetsch (75 S. W. 1005).....	452
wan v. Mueller (75 S. W. 606).....	192	Kansas City v. Mulkey (75 S. W. 973)....	229
ow, State ex inf. v. Atchison, T. & S. F. ly. Co. (75 S. W. 770).....	687	Kansas City Loan Guarantee Co., State ex rel. v. Smith (75 S. W. 468).....	44
ow, State ex inf. v. Chicago, B. & Q. ly. Co. (75 S. W. 888).....	718	King's Lake Drainage & Levee Dist. v. Jamison (75 S. W. 679).....	557
ow, State ex inf. v. Chicago, B. & Q. ly. Co. (75 S. W. 888).....	721	Loesch v. Union Casualty & Surety Co. (75 S. W. 621).....	654
ow, State ex inf. v. Chicago, R. I. & P. ly. Co. (75 S. W. 888).....	721	Loving Co. v. Hesperian Cattle Co. (75 S. W. 1095).....	330
ow, State ex inf. v. Chicago & A. Ry. Co. (75 S. W. 888).....	718	Marshall & Michel Grain Co. v. Kansas City, Ft. S. & M. R. Co. (75 S. W. 638).....	490
ow, State ex inf. v. Missouri, K. & T. ly. Co. (75 S. W. 888).....	718	Meddis v. Kenney (75 S. W. 633).....	200
ow, State ex inf. v. Missouri Pac. Ry. Co. (75 S. W. 888).....	721	Meyer v. Christopher (75 S. W. 750).....	580
ow, State ex inf. v. St. Louis, I. M. & S. Ry. Co. (75 S. W. 888).....	718	Moore v. Lindell Ry. Co. (75 S. W. 672)....	528
ow, State ex inf. v. St. Louis, K. C. & C. Ry. Co. (75 S. W. 888).....	718	Murray v. St. Louis Transit Company (75 S. W. 611).....	183
ow, State ex inf. v. St. Louis & S. F. Ry. Co. (75 S. W. 888).....	718	Nichols v. Mutual Life Ins. Co. (75 S. W. 664).....	355
ow, State ex inf. v. St. Louis & S. W. Ry. Co. (75 S. W. 888).....	718	O'Briant, State ex rel. v. Keokuk & W. R. Co. (75 S. W. 636).....	443
ow, State ex inf. v. Wabash R. Co. (75 S. W. 888).....	718	Oliver v. Snider (75 S. W. 591).....	63
ezell v. Fidelity & Casualty Co. (75 S. W. 1102).....	253	Ott v. Medart Patent Pulley Co. (75 S. W. 1130).....	653
odge v. Sherwood (75 S. W. 417).....	33	Phillips v. Jones (75 S. W. 920).....	328
oerr v. St. Louis Brewing Ass'n (75 S. W. 600).....	547	Rice, Stix & Co. v. Sally (75 S. W. 398)...	107
ckrich v. St. Louis Transit Co. (75 S. W. 755).....	621	Scott, State ex rel. v. Smith (75 S. W. 586).....	90
ammons v. Quade (75 S. W. 103).....	22	Seaboard Nat. Bank v. Woesten (75 S. W. 464).....	49
lene v. Kirchoff (75 S. W. 608).....	516	Searcy v. Clay County (75 S. W. 657)....	493
George B. Loving Co. v. Hesperian Cattle Co. (75 S. W. 1095).....	330	Smith, Ex parte (Ex parte Handler, 75 S. W. 920).....	383
		Spratt v. Lawson (75 S. W. 642).....	175

99 MO. APP.—Continued.		Page		Page
Heffernan v. Weir (72 S. W. 1085).....	301	Pinnell v. Meaks (72 S. W. 461).....	20	
Heman v. Franklin (73 S. W. 314).....	346	Poston v. Williams (73 S. W. 1099).....	513	
Heman v. Larkin (73 S. W. 218).....	294	Price v. Clevenger (74 S. W. 804).....	536	
Hess v. D. T. Draffen & Co. (74 S. W. 440).....	580	Reames v. Jones Dry Goods Co. (73 S. W. 935).....	396	
Hewitt v. Price (74 S. W. 414).....	666	Rhinehart v. New Madrid Banking Co. (73 S. W. 315).....	381	
Hiatt v. Fraternal Home (72 S. W. 463).....	105	Rice Bros. v. Davis, McDonald & Davis (74 S. W. 431).....	636	
Hill v. Taylor (74 S. W. 9).....	524	Riffe v. Proctor (74 S. W. 409).....	601	
Hillman v. Grays Point Terminal R. Co. (73 S. W. 220).....	271	Roberts v. Stone (73 S. W. 888).....	425	
Huber Mfg. Co. v. Hunter (72 S. W. 484).....	46	Robertson Bros. v. Winslow Bros. (74 S. W. 442).....	546	
Jeans v. Morrison (73 S. W. 235).....	208	Rowe v. Current River Land & Cattle Co. (73 S. W. 362).....	158	
Jones & Oglebay v. Kansas City Board of Trade (78 S. W. 843).....	433	Rutledge & Kilpatrick Realty Co. v. Neely (73 S. W. 359).....	384	
Joplin Supply Co. v. Brennerman (74 S. W. 405).....	657	Shannon v. Carter (72 S. W. 495).....	134	
Kansas & T. Coal Co. v. Adams (74 S. W. 158).....	474	Smith ex rel. McElhaney v. Rogers (73 S. W. 243).....	252	
Kimball v. St. Louis & S. F. R. Co. (73 S. W. 224).....	335	Southwick v. Southwick (72 S. W. 477).....	156	
Knoepker v. Ahman (72 S. W. 483).....	30	Sparks v. Villa Rosa Land Co. (74 S. W. 120).....	489	
Kobush v. Schmidt (72 S. W. 1087).....	205	State v. Back (72 S. W. 466).....	34	
Krepp v. St. Louis & S. F. R. Co. (72 S. W. 479).....	94	State v. Russell (73 S. W. 297).....	373	
Leech v. First Nat. Bank (74 S. W. 416).....	681	State ex rel. Clement v. Rainey (73 S. W. 250).....	218	
McCauley v. Brown (74 S. W. 464).....	625	State ex rel. Clement v. Stokes (73 S. W. 254).....	236	
McCrary v. Missouri, K. & T. R. Co. (74 S. W. 2).....	518	State ex rel. Fissette v. Sullivan (74 S. W. 417).....	616	
McFarlan Carriage Co. v. Wells (74 S. W. 878).....	641	State ex rel. Jackson v. Mansfield (72 S. W. 471).....	146	
Markham v. Cover (72 S. W. 474).....	83	State ex rel. Livesay v. Harrison (72 S. W. 469).....	57	
Mastin v. Metzinger (74 S. W. 431).....	613	State ex rel. Schneider v. Hull (74 S. W. 888).....	703	
May v. Moore (72 S. W. 476).....	27	State ex rel. Smart v. Wilson (74 S. W. 404).....	675	
Melton v. St. Louis & S. F. R. Co. (73 S. W. 231).....	282	Van Buren County Sav. Bank v. Mills (72 S. W. 497).....	65	
Merton v. J. I. Case Threshing Mach. Co. (74 S. W. 434).....	630	Vandolah v. McKee (73 S. W. 233).....	342	
Metz v. Blattner (72 S. W. 489).....	154	Viertel v. Viertel (75 S. W. 187).....	710	
Meyers v. St. Louis Transit Co. (73 S. W. 379).....	363	Warner v. Donahue (72 S. W. 492).....	37	
Monumental Bronze Co. v. Doty (73 S. W. 234; 78 S. W. 850).....	195	Weber v. Lane (71 S. W. 1099).....	69	
Morris v. Missouri, K. & T. R. Co. (73 S. W. 1004).....	455	Woodsmall v. Mercantile Town Mut. Ins. Co. (73 S. W. 1133).....	472	
Morse v. Bates (74 S. W. 439).....	560	Young & Branson v. Ledford (74 S. W. 443).....	565	
Munroe v. Herrington (73 S. W. 221).....	288	Zartman-Thalman Carriage Co. v. Reid & Lowe (73 S. W. 942).....	415	
Mutual Life Ins. Co. v. Richards (72 S. W. 487).....	88			
New Birdsall Co. v. Keys (74 S. W. 12).....	458			
O'Malley v. Lexington (74 S. W. 890).....	695			
Pepperdine v. Hymes (72 S. W. 1078).....	200			
Perkins v. Independent School Dist. of Ridgeway (74 S. W. 122).....	483			

VOL. 100, MISSOURI APPEAL REPORTS.

Mo. A. Rep.	S. W. Rep.	Mo. A. Rep.	S. W. Rep.	Mo. A. Rep.	S. W. Rep.	Mo. A. Rep.	S. W. Rep.	Mo. A. Rep.	S. W. Rep.	Mo. A. Rep.	S. W. Rep.	Mo. A. Rep.	S. W. Rep.
Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.
1	70	251	105	71	842	269	73	357	347	78	917	479	74
8	71	736	116	73	368	276	73	289	367	73	907	481	74
20	71	1093	133	73	289	278	73	355	374	73	909	490	74
23	71	1093	133	73	326	284	73	339	387	73	890	500	74
30	73	270	153	73	315	289	73	313	400	74	388	504	74
33	71	1107	164	73	346	294	73	318	407	74	5	515	74
45	79	180	184	79	180	302	73	389	414	74	138	518	75
51	72	475	185	74	124	311	73	304	424	74	456	523	74
52	72	482	199	73	321	316	73	365	452	74	168	527	75
56	71	1108	216	73	374	323	73	257	460	74	7	532	74
60	71	780	230	73	307	330	73	298	466	73	1101	540	75
75	73	1134	249	73	342	338	73	292	470	74	5	545	75
78	73	259	258	73	305	341	73	875	473	74	887	551	75
98	72	1081	263	73	373	346	73	1134	474	74	1038	556	75

VOL. 100, MISSOURI APPEAL REPORTS.

	Page		Page
Adolf v. Columbia Pretzel & Baking Co. (73 S. W. 321).....	199	Feller v. McKillip (75 S. W. 379).....	660
Albert Grocery Co. v. Grossman (73 S. W. 292).....	338	Fiske v. Royal Exchange Assur. Co. (75 S. W. 382).....	545
American Guaranty Fund Mutual Ins. Co. v. Mattson (73 S. W. 365).....	316	Fritsch Foundry & Machine Co. v. Goodwin Mfg. Co. (74 S. W. 136).....	414
Andrews v. W. R. Stubbs Contracting Co. (75 S. W. 178).....	599	Garven v. Chicago, R. I. & P. R. Co. (75 S. W. 193).....	617
Arnold v. St. Louis & S. F. R. Co. (74 S. W. 5).....	470	Gates v. Tebbetts (75 S. W. 169).....	590
Arnold v. Sedalia Nat. Bank (74 S. W. 1038).....	474	Golden v. Heman Const. Co. (71 S. W. 1093).....	20
Arthur Fritsch Foundry & Machine Co. v. Goodwin Mfg. Co. (74 S. W. 136).....	414	Goodman v. Kahoka (73 S. W. 355).....	278
Bank of Liberal v. Anderson (75 S. W. 189).....	567	Grayson v. St. Louis Transit Co. (71 S. W. 730).....	60
Brake v. Kansas City (75 S. W. 191).....	611	Grove v. Reynolds (71 S. W. 1108).....	56
Brown v. Current River Land & Cattle Co. (73 S. W. 1134).....	75	Haggerty v. St. Louis, K. & N. W. R. Co. (74 S. W. 456).....	424
Bruer v. Kansas Mut. Life Ins. Co. (75 S. W. 380).....	540	Haines v. Pearson (75 S. W. 194).....	551
Bruner Granitoid Co. v. Klein (73 S. W. 313).....	289	Hemphill v. Kansas City (75 S. W. 179).....	563
Buckman v. Missouri, K. & T. R. Co. (73 S. W. 270).....	30	Herf & Frerichs Chemical Co. v. Lackawanna Line (73 S. W. 346).....	164
Burge v. St. Louis, M. & S. E. R. Co. (74 S. W. 7).....	460	Hill Bros. v. Bank of Seneca (73 S. W. 307).....	230
Caldwell v. Farmers' & Merchants' Bank of Vandalia (71 S. W. 1093).....	23	Hill-O'Meara Const. Co. v. Hutchinson (73 S. W. 318).....	294
Campbell v. American Ben. Club Fraternity (73 S. W. 342).....	249	Horman v. Cargill (73 S. W. 1101).....	466
Carr v. Pacific Mut. Life Ins. Co. (75 S. W. 180).....	602	Houck v. Patty (73 S. W. 389).....	302
Chinn v. Chicago & A. R. Co. (75 S. W. 375).....	576	Kansas City v. Oppenheimer (75 S. W. 174).....	527
City of De Soto ex rel., v. Showman (73 S. W. 257).....	323	Kansas City Paper Box Co. v. American Fire Ins. Co. (75 S. W. 186).....	691
City of Louisiana v. Anderson (73 S. W. 875).....	341	Keet-Rountree Dry Goods Co. v. Mercantile Town Mut. Ins. Co. (74 S. W. 469).....	504
Coggs shall, In re (75 S. W. 183).....	585	Kennedy v. Pierce's Loan Co. (73 S. W. 357).....	269
Cook v. Strother (75 S. W. 175).....	622	King v. Raleigh (70 S. W. 251).....	1
Cornwell v. St. Louis Transit Co. (73 S. W. 305).....	258	Ladd v. Williams (72 S. W. 475).....	51
Cousins v. Bowling (74 S. W. 168).....	452	Long v. Gorman (79 S. W. 180).....	45
Cowan v. MacDonald (79 S. W. 180).....	184	Loy v. Rorick (71 S. W. 842).....	105
Currey v. Joplin Sav. Bank (74 S. W. 1036).....	532	McCormack v. Henderson (75 S. W. 171).....	647
Davison v. Davison (73 S. W. 373).....	263	McCormick v. Finch (75 S. W. 373).....	641
Davison's Estate, In re (73 S. W. 373).....	263	McCormick Harvesting Mach. Co. v. Mackey (74 S. W. 388).....	400
Day v. Farley (75 S. W. 177).....	633	McLain v. St. Louis & S. R. Co. (73 S. W. 900).....	374
Dodd v. Guisefi (73 S. W. 304).....	311	McLean v. Kansas City (75 S. W. 173).....	625
Dover v. Mississippi River & B. T. Ry. (73 S. W. 298).....	330	Maginn v. Lancaster (73 S. W. 368).....	116
Edwards v. Home Ins. Co. (73 S. W. 881).....	695	Milledge v. Kansas City (74 S. W. 892).....	490
Evans v. Marion Min. Co. (75 S. W. 178).....	670	Moore v. Southwest Missouri Electric R. Co. (75 S. W. 176).....	665
Farr v. Adams Exp. Co. (75 S. W. 183).....	574	Morton v. Supreme Council of Royal League (73 S. W. 259).....	76
		New Harmony Lodge, No. 71, I. O. O. F., v. Kansas City, Ft. S. & M. R. Co. (74 S. W. 5).....	407

100 MO. APP.—Continued			Page				Page
Noll v. St. Louis Transit Co. (73 S. W. 907)	367			Smith v. H. D. Williams Cooperage Co. (73 S. W. 315)	153		
101 Live Stock Co. v. Kansas City, M. & B. R. Co. (75 S. W. 782)	674			South Highland Land & Imp. Co. v. Kansas City (75 S. W. 383)	518		
Paden v. Van Blarcom (74 S. W. 124)	185			Sovereign Camp Woodmen of the World v. Wood (75 S. W. 377)	655		
Pannell v. Pannell (73 S. W. 289)	133			Squiers v. Kansas City (75 S. W. 194)	628		
Pepperdine v. Bank of Seymour (73 S. W. 800)	387			State v. Ittner (73 S. W. 289)	276		
P. M. Bruner Granitoid Co. v. Klein (73 S. W. 313)	289			State v. Jacobs (72 S. W. 482)	52		
Quarles v. S. H. Hall & Co. (74 S. W. 883)	523			State v. Riddle (73 S. W. 1134)	346		
Ramlose v. Dollman (73 S. W. 917)	347			State v. Wilson (74 S. W. 887)	473		
Reed v. Morgan (73 S. W. 381)	713			State ex rel. v. County Court of Vernon County (State ex rel. v. Martin, 74 S. W. 886)	479		
Reitz v. Hayward (73 S. W. 374)	216			State ex rel. v. Gray (72 S. W. 1081)	98		
Richmond v. Supreme Lodge, Order of Mutual Protection (71 S. W. 736)	8			State ex rel. v. Taylor (74 S. W. 1082)	481		
Roberts v. Cottey (74 S. W. 886)	500			Stein; Block & Co. v. Hill (71 S. W. 1107)	38		
S. Albert Grocery Co. v. Grossman (73 S. W. 292)	338			Stumbo v. Duluth Zinc Co. (75 S. W. 185)	635		
Shields v. Kansas City Suburban Belt R. Co. (74 S. W. 1116)	515			United States Fidelity & Guaranty Co. v. Foskett-Kessner Feed Co. (73 S. W. 364)	724		
Shotliff v. Modern Woodmen of America (73 S. W. 326)	138			Wendall v. Chicago & A. R. Co. (75 S. W. 689)	556		
				Williams v. Baker (73 S. W. 339)	284		

VOL. 96, TEXAS REPORTS.

Tex. Rep.	S. W. Rep.	Tex. Rep.	S. W. Rep.	Tex. Rep.	S. W. Rep.	Tex. Rep.	S. W. Rep.	Tex. Rep.	S. W. Rep.	Tex. Rep.	S. W. Rep.	Tex. Rep.	S. W. Rep.	Tex. Rep.	S. W. Rep.
Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.
1	69	976	78	70	538	187	71	812	285	72	160	375	73	1	478
3	69	976	86	70	737	187	71	814	287	72	168	380	73	393	479
6	68	813	94	70	789	194	71	845	287	72	580	384	73	525	482
6	69	993	99	70	950	200	71	847	287	72	621	394	73	529	484
18	69	994	102	70	947	206	71	844	295	72	166	411	73	515	493
21	70	17	106	70	75	209	71	814	301	72	165	415	73	517	496
24	67	1078	113	70	18	211	71	956	317	72	375	424	73	520	504
24	69	541	121	70	581	215	71	950	320	72	581	434	73	799	509
39	70	76	135	70	742	228	72	54	327	72	578	437	73	797	513
35	70	79	140	70	945	233	72	161	331	74	530	443	72	580	517
43	70	73	144	70	949	233	72	201	341	72	583	443	73	800	520
48	70	201	148	71	12	250	72	62	345	72	1057	453	73	800	527
57	70	204	154	71	14	255	72	56	349	72	584	457	73	795	532
61	70	200	160	71	270	258	72	59	355	72	835	461	73	951	537
65	70	317	174	71	275	268	72	58	359	72	1059	468	73	950	544
68	70	315	180	71	385	274	73	159	360	73	4	472	73	946	548
72	70	529	180	73	2	279	72	157	364	73	5	472	75	368	559

VOL. 96, TEXAS REPORTS.

			Page				Page
Aetna Life Ins. Co. v. J. B. Parker & Co. (72 S. W. 168, 580, 621)	287			City of El Paso v. Ft. Dearborn Nat. Bank (74 S. W. 21)	496		
Allardyce v. Hambleton (70 S. W. 76)	30			Clark v. West (73 S. W. 797)	437		
August Kern Barber Supply Co. v. Freeze (74 S. W. 303)	513			Cody v. Terrell (74 S. W. 1117)	559		
Bates v. Bratton (72 S. W. 157)	279			Cowles v. Missouri, K. & T. R. Co. of Texas (67 S. W. 1078; 69 S. W. 541)	24		
Bekkeland v. Lyons (72 S. W. 56)	255			Cox v. Thompson (73 S. W. 950)	468		
Betts v. Johnson (73 S. W. 4)	360			Daniel v. Ft. Worth & R. G. R. Co. (72 S. W. 578)	327		
Blaisdell, Jr., Co. v. Citizens' Nat. Bank (75 S. W. 292)	626			Denison & S. R. Co. v. St. Louis S. W. R. Co. (72 S. W. 161, 201)	233		
Blevins v. Terrell (73 S. W. 515)	411			Dority v. Dority (71 S. W. 950)	215		
Boaz v. Powell (69 S. W. 976)	3			D. Sullivan & Co. v. McLane (70 S. W. 949)	144		
Bond v. Carter (72 S. W. 1059)	359			Dulin v. Moore (70 S. W. 742)	135		
Boozer v. Terrell (75 S. W. 482)	635			Dunn & Co. v. Smith (73 S. W. 945)	478		
Bracken v. Bounds (71 S. W. 547)	200			Ellis v. Le Bow (74 S. W. 528)	532		
Brown Hardware Co. v. Indiana Stove Works (73 S. W. 800)	453			Ford v. Brown (74 S. W. 535)	537		
Burton's Heirs v. Carroll (72 S. W. 581)	320			Ft. Worth & R. G. R. Co. v. Southwestern Telegraph & Telephone Co. (71 S. W. 270)	160		
Cammack v. Rogers (73 S. W. 795)	457						
Carothers v. Rogan (70 S. W. 18)	113						
Cable v. Worsham (70 S. W. 737)	86						
City of Austin v. Austin City Cemetery Ass'n (73 S. W. 525)	384						

96 INDEX—Continued.		Page
Galveston, H. & S. A. R. Co. v. Ginther (72 S. W. 186).....	295	509
Galveston & W. R. Co. v. Galveston (74 S. W. 537).....	520	94
Garrison v. Cooke (72 S. W. 54).....	228	
George Scalf & Co. v. State (73 S. W. 441).....	559	
Gossett v. Citizens' R. Co. (69 S. W. 976).....	1	
Gulf, C. & S. F. R. Co. v. Blanchard (75 S. W. 6).....	616	
Gulf, C. & S. F. R. Co. v. Garren (74 S. W. 897).....	905	
Gulf, C. & S. F. R. Co. v. Howard (75 S. W. 805).....	582	
Gulf, C. & S. F. R. Co. v. Shelton (72 S. W. 165).....	301	
Hajjek & Simecek v. Luck (74 S. W. 305).....	517	
Harper v. Terrell (73 S. W. 949).....	479	
Heard v. Thrasher (73 S. W. 893).....	380	
Heil & Schuster v. Martin (71 S. W. 814).....	209	
Hicks v. Galveston, H. & S. A. R. Co. (72 S. W. 835).....	355	
Home Mut. Ins. Co. v. Tomkies & Co. (71 S. W. 812, 814).....	187	
House v. Dallas (74 S. W. 901).....	594	
Houston Cotton Oil Co. v. Trammell (74 S. W. 899).....	598	
Houston E. & W. T. R. Co. v. De Walt (70 S. W. 531).....	121	
Houston & T. C. R. Co. v. Phillio (69 S. W. 994).....	18	
International & G. N. R. Co. v. Clark (72 S. W. 584).....	849	
J. E. Dunn & Co. v. Smith (73 S. W. 945).....	478	
J. S. Brown Hardware Co. v. Indiana Stove Works (73 S. W. 800).....	453	
Kern Barber Supply Co. v. Freeze (74 S. W. 303).....	513	
Kitchens v. Terrell (74 S. W. 306).....	527	
Lasater v. First Nat. Bank (72 S. W. 1057).....	845	
Lentz v. Dallas (72 S. W. 59).....	258	
Lindsey v. State (74 S. W. 750).....	586	
McColpin v. McColpin's Estate (74 S. W. 756).....	560	
McGee v. Corbin (70 S. W. 79).....	35	
Magnolia Park Co. v. Tinsley (73 S. W. 5).....	364	
Matlock, Miller & Dycus v. Smith (71 S. W. 956).....	211	
Merchants' & Planters' Oil Co. v. Burns (74 S. W. 758).....	573	
Missouri, K. & T. R. Co. of Texas v. Eyer (70 S. W. 529).....	72	
Moore v. Rogan (73 S. W. 1).....	375	
Murray v. Gillaspie (72 S. W. 160).....	285	
Neely v. Ft. Worth & R. G. R. Co. (72 S. W. 159).....	274	
New York Life Ins. Co. v. English (72 S. W. 58).....	268	
Nolan v. Moore (72 S. W. 583).....	341	
Norman v. Thompson (72 S. W. 62).....	250	
Patterson v. Terrell (74 S. W. 19).....	509	
Puckett v. McDaniel (70 S. W. 739).....	94	
Railroad Commission of Texas v. Weld & Neville (73 S. W. 529).....	394	
Raymond v. Yarrington (72 S. W. 580; 73 S. W. 800).....	443	
Riggins v. Thompson (71 S. W. 14).....	154	
Roberson v. Sterrett (71 S. W. 385; 73 S. W. 2).....	180	
Rogers v. McGuffey (74 S. W. 753).....	565	
Rosetti v. Lozano (70 S. W. 204).....	57	
St. Louis S. W. R. Co. of Texas v. McArthur (70 S. W. 317).....	65	
St. Louis S. W. R. Co. of Texas v. Ricketts (70 S. W. 315).....	68	
San Antonio Nat. Bank v. McLane (70 S. W. 201).....	48	
San Antonio & A. P. R. Co. v. Addison (70 S. W. 200).....	61	
S. Blaisdell, Jr., Co. v. Citizens' Nat. Bank (75 S. W. 292).....	626	
Scales v. Marshall (70 S. W. 945).....	140	
Scalf & Co. v. State (73 S. W. 441).....	559	
Schneider v. Dorsey (74 S. W. 528).....	544	
Scottish-American Mortg. Co. v. Davis (74 S. W. 17).....	504	
Sibley v. Hayes (70 S. W. 538).....	75	
Singer Sewing Mach. Co. v. Rios (71 S. W. 275).....	174	
Smith v. McLain (74 S. W. 754).....	568	
Southern Kansas R. Co. v. Cooper (73 S. W. 947).....	452	
Spence v. Mitchell (70 S. W. 73).....	43	
Stafford v. Stafford (70 S. W. 75).....	106	
State v. Hart (70 S. W. 947).....	102	
State v. Laredo Ice Co. (73 S. W. 951).....	465	
State v. O'Connor (73 S. W. 1041).....	484	
Storrie v. Shaw (75 S. W. 20).....	618	
Sullivan & Co. v. McLane (70 S. W. 949).....	144	
Texas & P. R. Co. v. Ball (75 S. W. 4).....	622	
Thompson v. Dutton (71 S. W. 544).....	245	
Tolleson v. Rogan (73 S. W. 520).....	424	
Waggoner v. Dodson (68 S. W. 813; 69 S. W. 993).....	6	
Waggoner v. Dodson (73 S. W. 517).....	415	
Waller v. Liles (70 S. W. 17).....	21	
Walraven v. Farmers' & Merchants' Nat. Bank (74 S. W. 530).....	331	
West v. Terrell (74 S. W. 903).....	548	
Western Union Tel. Co. v. Arnold (73 S. W. 1043).....	493	
Western Union Tel. Co. v. Waller (74 S. W. 751).....	589	
Whitmire v. May (72 S. W. 375).....	317	
Williams v. Wiley (71 S. W. 12).....	148	
Willoughby v. Long (71 S. W. 545).....	194	
Wilson v. Elliott (73 S. W. 946; 75 S. W. 368).....	472	
Wooten v. Rogan (73 S. W. 799).....	434	
Young v. Hahn (70 S. W. 950).....	99	

VOL. 29, TEXAS CIVIL APPEALS REPORTS.

Tex. Cv.A. Rep.	S. W. Rep.	Tex. Cv.A. Rep.	S. W. Rep.	Tex. Cv.A. Rep.	S. W. Rep.	Tex. Cv.A. Rep.	S. W. Rep.	Tex. Cv.A. Rep.	S. W. Rep.	Tex. Cv.A. Rep.	S. W. Rep.	Tex. Cv.A. Rep.	S. W. Rep.	Tex. Cv.A. Rep.	S. W. Rep.	Tex. Cv.A. Rep.	S. W. Rep.
Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.	Pg.	Vol.
1	67	892	104	67	890	187	68	311	288	69	213	385	69	441	464	69	456
1	68	721	105	68	297	194	68	196	295	68	56	389	69	255	470	69	459
11	68	732	109	68	1119	201	68	710	298	68	521	395	68	336	478	69	224
12	70	103	111	69	222	203	68	305	306	68	724	396	68	516	477	68	807
20	67	909	115	68	194	207	68	549	311	69	207	397	69	234	483	68	534
25	67	1072	118	68	181	211	68	298	318	69	108	398	68	722	486	69	80
27	68	730	120	68	192	214	68	190	325	68	698	400	68	1019	489	68	528
31	68	739	122	68	200	218	67	1075	328	69	171	405	68	713	491	69	102
38	68	801	124	68	69	221	68	184	333	68	708	407	69	86	494	68	695
40	67	1079	128	68	208	224	68	526	336	69	107	413	68	720	500	68	827
41	67	1102	134	67	1025	228	68	712	337	68	701	415	68	1008	507	69	119
42	68	733	144	68	338	230	69	219	340	69	239	418	68	818	512	68	810
48	68	52	148	67	1071	235	69	200	342	69	89	420	67	550	517	68	295
51	67	1065	149	68	534	240	69	78	345	69	122	425	69	448	520	68	295
54	67	1063	140	67	1038	244	69	100	350	68	836	429	68	745	521	69	92
60	67	925	150	68	291	247	69	191	353	68	551	434	68	711	523	68	302
62	67	1066	151	68	307	253	69	487	356	69	461	435	68	1011	526	69	181
65	69	174	158	67	1078	259	67	773	361	68	548	440	69	233	530	69	420
68	69	106	159	67	1062	264	68	831	368	68	532	443	68	529	532	69	231
73	71	984	163	68	306	268	67	780	364	68	727	445	69	235	536	69	428
80	69	114	166	68	185	270	68	538	368	68	736	448	68	520	539	69	495
83	70	98	168	67	1041	272	68	201	372	68	703	453	68	527	542	66	686
90	69	217	170	68	209	276	69	179	379	68	536	455	69	213	544	69	494
94	69	227	177	67	916	280	68	580	383	69	984	458	68	533	545	69	237
96	69	113	183	68	517	284	68	336	384	68	333	460	69	1013	547	69	244
101	68	192	184	68	58												

VOL. 29, TEXAS CIVIL APPEALS REPORTS.

	Page		Page
American Cent. Ins. Co. v. Heath (69 S. W. 235).....	445	Cage v. Tucker (69 S. W. 425).....	586
American Cotton Co. v. Smith (69 S. W. 443).....	425	Carver v. J. S. Mayfield Lumber Co. (68 S. W. 711).....	434
Anderson v. Carter (69 S. W. 78).....	240	Chew v. Zweib (69 S. W. 207).....	311
Arnall v. Newcomb (69 S. W. 92).....	521	Churchwell v. Sweeney (68 S. W. 185)....	166
Asher v. Jones County (68 S. W. 551)....	353	Citizens' Nat. Bank of Waco v. Strauss (69 S. W. 86).....	407
Bangs v. Crebbin (69 S. W. 441).....	385	City of Dallas v. Martyn (68 S. W. 710)....	201
Barnes v. Scottish-American Mortg. Co. (68 S. W. 529).....	443	City of Houston v. Bartlett (68 S. W. 730) 27	
Beck v. Avindino (68 S. W. 827).....	500	City of Stephenville v. Bower (68 S. W. 833).....	384
Belcher Land Mortg. Co. v. Norris (68 S. W. 548).....	361	Clark v. Smith (68 S. W. 532).....	363
Bell v. Williams (68 S. W. 1119).....	109	Continental Fire Ass'n of Ft. Worth v. Bearden (69 S. W. 982).....	509
Boren v. Boren (68 S. W. 184).....	221	Cooper v. Ford (69 S. W. 487).....	253
Boston v. McMenamy (68 S. W. 201)....	272	Corbett v. Sayers (69 S. W. 108).....	68
Boyce v. Hornberger (68 S. W. 701).....	337	Crosby v. Bonnowaky (69 S. W. 212).....	455
Brown v. Levy (69 S. W. 255).....	389	Dashner v. Wallace (68 S. W. 307).....	151
Bruel v. Liggett & Meyers Tobacco Co. (68 S. W. 718).....	405	Davidson v. Texas & N. O. R. Co. (67 S. W. 1093).....	54
Bull v. Bull (68 S. W. 727).....	364	Davis v. Houston E. & W. T. R. Co. (68 S. W. 733).....	42
Burns v. Skelton (68 S. W. 527).....	453		
Butler v. Holmes (68 S. W. 52).....	48		

29 TEX. CIV. APP.—Cont'd.		Page			Page
Denison & S. R. Co. v. Randell (69 S. W. 1013).....	460		Land Mortg. Bank of Texas v. Voss (68 S. W. 732).....	11	
Dilley v. Ratcliff (69 S. W. 237).....	545		Landrum v. Buford (67 S. W. 1066).....	62	
Direct Nav. Co. v. Anderson (69 S. W. 174).....	65		Lane v. De Bode (69 S. W. 437).....	602	
Dodson v. Ford (68 S. W. 194).....	115		Larsen v. Murray (68 S. W. 295).....	520	
Dupree v. Alexander (68 S. W. 739).....	31		Lattimore v. Province (69 S. W. 222).....	111	
Eastham v. Patty (69 S. W. 224).....	473		Law v. Missouri, K. & T. R. Co. of Texas (67 S. W. 1025).....	134	
Ellis v. Hahn (68 S. W. 336).....	395		Leverett v. Meeks (68 S. W. 302).....	523	
Eskridge v. Louisville Trust Co. (69 S. W. 987).....	571		Levy v. Wagner (69 S. W. 112).....	98	
Essex v. Murray (68 S. W. 736).....	368		Liner v. J. B. Watkins Land Mortg. Co. (68 S. W. 311).....	187	
Fant v. Kenedy Pasture Co. (69 S. W. 420).....	530		Lion Fire Ins. Co. v. Heath (68 S. W. 305).....	203	
Fidelity & Deposit Co. of Maryland v. Seymour (66 S. W. 686).....	542		Loftin v. Sleet (67 S. W. 1102).....	41	
First Nat. Bank of Navasota v. McGinty (69 S. W. 495).....	539		Long v. Long (69 S. W. 428).....	536	
Ft. Worth & D. C. R. Co. v. Gary (68 S. W. 200).....	122		McBane v. Angle (69 S. W. 433).....	594	
Ft. Worth & D. C. R. Co. v. Roberts (69 S. W. 985).....	566		McLane v. Sullivan (69 S. W. 191).....	247	
Ft. Worth & R. G. R. Co. v. Greer (69 S. W. 421).....	561		Magness v. Berry (69 S. W. 987).....	507	
Ft. Worth & R. G. R. Co. v. Reese (68 S. W. 1019).....	400		Maryland Casualty Co. v. Glass (67 S. W. 1062).....	159	
Franklin Fire Proofing Co. v. Dallas (68 S. W. 820).....	448		Milam v. Gordon (68 S. W. 1003).....	415	
Franklin Life Ins. Co. v. Villeneuve (68 S. W. 208).....	128		Milam v. Hill (69 S. W. 447).....	573	
Galveston, H. & S. A. R. Co. v. Abbey (68 S. W. 293).....	211		Miller v. Gray (68 S. W. 517).....	183	
Galveston, H. & S. A. R. Co. v. Jenkins (69 S. W. 233).....	440		Missouri, K. & T. R. Co. v. Mazzie (68 S. W. 56).....	295	
Galveston, H. & S. A. R. Co. v. Jones (68 S. W. 190).....	214		Missouri, K. & T. R. Co. of Texas v. Cowles (67 S. W. 1078).....	156	
Gleed v. Pickett (68 S. W. 192).....	101		Missouri, K. & T. R. Co. of Texas v. Denton (68 S. W. 336).....	284	
Gordon v. Hall (69 S. W. 219).....	230		Missouri, K. & T. R. Co. of Texas v. Folin (68 S. W. 810).....	512	
Grevils v. Smith (68 S. W. 291).....	150		Missouri, K. & T. R. Co. of Texas v. Mayfield (68 S. W. 807).....	477	
Griffin v. Barbee (68 S. W. 698).....	325		Missouri, K. & T. R. Co. of Texas v. Scarborough (68 S. W. 196).....	194	
Gulf, C. & S. F. R. Co. v. Cornell (69 S. W. 980).....	596		Moore v. Graham (69 S. W. 200).....	235	
Gulf, C. & S. F. R. Co. v. Hayden (68 S. W. 530).....	280		Moore v. Swift (67 S. W. 1065).....	51	
Gulf, C. & S. F. R. Co. v. Hill (70 S. W. 103).....	12		Morrow v. Fleming (69 S. W. 244).....	547	
Gulf, C. & S. F. R. Co. v. Jackson (69 S. W. 89).....	342		Moss v. Smith (68 S. W. 533).....	458	
Gulf, C. & S. F. R. Co. v. Leatherwood (69 S. W. 119).....	507		National Guarantee Loan & Trust Co. v. Fly (69 S. W. 231).....	533	
Gulf, C. & S. F. R. Co. v. Mangham (69 S. W. 80).....	486		Neitch v. Hillman (69 S. W. 494).....	544	
Gulf, C. & S. F. R. Co. v. Sandifer (69 S. W. 461).....	356		Northwestern Life Ass'n v. Findley (68 S. W. 695).....	494	
Gulf, C. & S. F. R. Co. v. Steele (69 S. W. 171).....	328		Oxsher v. Houston E. & W. T. R. Co. (67 S. W. 550).....	420	
Halliday v. Lambright (68 S. W. 712).....	226		Palmer v. Harris County (69 S. W. 229).....	340	
Hardin v. Jones (68 S. W. 836).....	350		Parks v. St. Louis S. W. R. Co. (69 S. W. 125).....	551	
Heinemier v. Arlitt (67 S. W. 1038).....	140		Pope v. Anthony (68 S. W. 521).....	298	
Henry v. McNew (69 S. W. 213).....	288		Presidio County v. Walker (69 S. W. 97).....	609	
Hines v. Givens (68 S. W. 295).....	517		Richards v. Minster (70 S. W. 98).....	85	
Hoskins v. Dougherty (69 S. W. 103).....	318		Robinson v. Chamberlain (68 S. W. 209).....	170	
Houston Ice & Brewing Co. v. North Galveston Imp. Co. (67 S. W. 1079).....	40		Roper v. McKay (69 S. W. 459).....	470	
Houston & T. C. R. Co. v. Conner (67 S. W. 773).....	259		Roper v. Scurlock (69 S. W. 456).....	464	
Houston & T. C. R. Co. v. Hollingsworth (68 S. W. 724).....	306		Rucker v. Sherman Oil & Cotton Co. (68 S. W. 818).....	418	
International & G. N. R. Co. v. Branch (68 S. W. 338).....	144		St. Louis S. W. R. Co. v. Johnson (68 S. W. 58).....	184	
International & G. N. R. Co. v. Ing (68 S. W. 722).....	398		St. Louis S. W. R. Co. of Texas v. Sibly (68 S. W. 516).....	396	
International & G. N. R. Co. v. Phillips (69 S. W. 107).....	336		Sanger v. Magee (69 S. W. 234).....	397	
Jones v. Carver (67 S. W. 780).....	268		Shoemaker v. Texas & P. R. Co. (69 S. W. 990).....	578	
Keen v. Featherston (69 S. W. 983).....	563		Sloan v. King (69 S. W. 541).....	599	
King v. Henderson (69 S. W. 487).....	601		Smith v. Abadie (67 S. W. 925).....	60	
Kirkpatrick v. Tarlton (69 S. W. 170).....	276		Sparks v. Hall (67 S. W. 916).....	177	
			Stafford v. Stafford (71 S. W. 984).....	73	
			State v. International & G. N. R. Co. (68 S. W. 534).....	149	
			Stephens v. Porter (69 S. W. 423).....	556	
			Stevens v. Equitable Mfg. Co. (67 S. W. 1041).....	168	
			Steward v. Wagley (68 S. W. 297).....	105	
			Stokes v. Riley (68 S. W. 703).....	373	
			Strnad v. Strnad (68 S. W. 69).....	124	
			Sullivan v. Missouri, K. & T. R. Co. of Texas (68 S. W. 745).....	429	

30 TEX. CIV. APP.—Cont'd.

	Page		Page
Daggett v. Sidney Webb & Co. (70 S. W. 457).....	415	King v. State ex rel. Herbert (70 S. W. 1019).....	320
Denison & S. R. Co. v. St. Louis S. W. R. Co. of Texas (72 S. W. 201).....	474	Kingsbury v. Waco State Bank (70 S. W. 551).....	387
Dick v. Collins (68 S. W. 1015).....	12	Kroeger v. Texas & P. R. Co. (69 S. W. 809).....	87
Dickson v. Holt (70 S. W. 342).....	297	Laufer v. Powell (71 S. W. 549).....	604
Dillingham v. Smith (70 S. W. 791).....	525	Lawson v. Lawson (69 S. W. 246).....	43
Donnan v. Adams (71 S. W. 580).....	615	Livingston v. Ellis County (68 S. W. 723).....	19
Dority v. Dority (70 S. W. 338).....	216	Long v. Long (70 S. W. 587).....	368
Dupree v. Duke (70 S. W. 561).....	360	Luter v. Hutchinson (70 S. W. 1013).....	511
Eastern Texas R. Co. v. Eddings (70 S. W. 98).....	170	Lybrand v. Fuller (69 S. W. 1005).....	116
Eastern Texas R. Co. v. Foley (69 S. W. 1030).....	129	McKnight v. Reed (71 S. W. 318).....	204
Ellis v. Birkhead (71 S. W. 81).....	529	Males v. Sovereign Camp Woodmen of the World (70 S. W. 108).....	184
Ellis v. Houston E. & W. T. R. Co. (70 S. W. 114).....	172	Martin County v. Gillespie County (71 S. W. 421).....	307
Ellis v. Le Bow (71 S. W. 576).....	449	Mason v. Adoue (70 S. W. 347).....	276
Estes v. Turner (70 S. W. 1007).....	865	Missouri, K. & T. R. Co. of Texas v. Cardwell (70 S. W. 103).....	164
Fatis v. Simpson (69 S. W. 1029).....	103	Missouri, K. & T. R. Co. of Texas v. Hawk (69 S. W. 1037).....	142
Flippin v. State Life Ins. Co. (70 S. W. 787).....	362	Missouri, K. & T. R. Co. of Texas v. Warner (70 S. W. 365).....	280
Ft. Worth & D. C. R. Co. v. Lock (70 S. W. 456).....	426	Moore v. Missouri, K. & T. R. Co. of Texas (69 S. W. 997).....	266
Ft. Worth & D. C. R. Co. v. Ramp (70 S. W. 568).....	483	Murphy v. Fleetford (70 S. W. 989).....	487
Ft. Worth & D. C. R. Co. v. Wright (70 S. W. 335).....	284	Myers v. L. B. Menifee & Co. (68 S. W. 540).....	28
Ft. Worth & R. G. R. Co. v. Bowen (68 S. W. 700).....	14	National Loan & Investment Co. of Detroit, Mich., v. Dorenblaser (69 S. W. 1019).....	148
Fullenwider v. Ferguson (70 S. W. 222).....	156	Newland v. Slaughter (70 S. W. 102).....	228
Galveston, H. & S. A. R. Co. v. Courtney (71 S. W. 307).....	544	New Odorless Sewerage Co. v. Wisdom (70 S. W. 354).....	224
Galveston, H. & S. A. R. Co. v. Ginther (70 S. W. 96).....	161	Norman v. Thompson (72 S. W. 64).....	537
Galveston, H. & S. A. R. Co. v. Pendleton (70 S. W. 996).....	431	Oak Cliff Sewerage Co. v. Marsalis (69 S. W. 176).....	42
Galveston, H. & S. A. R. Co. v. Puente (70 S. W. 362).....	246	Olcott v. Smith (70 S. W. 343).....	350
Graham v. Coolidge (70 S. W. 231).....	273	Ostrum v. San Antonio (71 S. W. 304).....	462
Green v. Robertson (70 S. W. 345).....	236	Owen v. Foley (69 S. W. 811).....	86
Gulf, C. & S. F. R. Co. v. Bryant (66 S. W. 804).....	4	Oxford v. Frank (70 S. W. 426).....	343
Gulf, C. & S. F. R. Co. v. Holt (70 S. W. 591).....	330	Pacific Exp. Co. v. Pitman (71 S. W. 312).....	626
Gulf, C. & S. F. R. Co. v. Miller (70 S. W. 25).....	122	Pacific Mut. Ins. Co. of California v. Shafter (70 S. W. 566).....	313
Gulf, C. & S. F. R. Co. v. Shelton (69 S. W. 653).....	72	People's Building, Loan & Sav. Ass'n v. Marston (69 S. W. 1034).....	100
Harper v. Dodd (70 S. W. 223).....	287	Peterson v. Smith (69 S. W. 542).....	139
Harrold v. State (71 S. W. 407).....	524	Pincham v. Dick (70 S. W. 333).....	230
Hildenbrand v. Marshall (69 S. W. 492).....	135	Prichard v. McCord-Collins Co. (71 S. W. 303).....	582
Hipp v. Houston (71 S. W. 89).....	573	Pullman Palace Car Co. v. Hatch (70 S. W. 771).....	303
Hitzfelder v. Koppelman (70 S. W. 353).....	162	Riggins v. Thompson (70 S. W. 578).....	242
Hollimon v. Karger (71 S. W. 299).....	558	Rountree v. Thompson (71 S. W. 574; 72 S. W. 69).....	595
Home Mut. Ins. Co. v. Tompkins & Co. (71 S. W. 812).....	404	St. Louis Expanded Metal Fireproofing Co. v. Dawson (70 S. W. 450).....	261
Houston E. & W. T. R. Co. v. Charwaine (71 S. W. 401).....	633	St. Louis S. W. R. Co. v. Campbell (69 S. W. 451).....	35
Houston & T. O. R. Co. v. Harris (70 S. W. 335).....	179	St. Louis S. W. R. Co. v. Smith (70 S. W. 789).....	336
International & G. N. R. Co. v. Evans (70 S. W. 351).....	252	St. Louis S. W. R. Co. of Texas v. Brown (69 S. W. 1010).....	57
International & G. N. R. Co. v. Hoyt (70 S. W. 1012).....	518	St. Paul Fire & Marine Ins. Co. v. Hodge (70 S. W. 574; 71 S. W. 386).....	257
International & G. N. R. Co. v. Lehman (66 S. W. 214).....	3	San Antonio Traction Co. v. Bryant (70 S. W. 1015).....	437
International & G. N. R. Co. v. Pevey (70 S. W. 778).....	460	San Antonio & A. P. R. Co. v. Jones (70 S. W. 349).....	316
Irion v. Eskrigge (70 S. W. 779).....	466	Scott v. Cox (70 S. W. 802).....	190
Jackson v. Corley (70 S. W. 570).....	417	Shetter v. Ft. Worth & D. C. R. Co. (71 S. W. 81).....	536
Jaeggli v. Phears (70 S. W. 330).....	212	Sibley v. Hayes (71 S. W. 404).....	61
Jarrell v. Crow (71 S. W. 397).....	629	Slaughter v. De Vitt (71 S. W. 616).....	589
Jennings Banking & Trust Co. v. Jefferson (70 S. W. 1005).....	534	Smith v. Ridley (70 S. W. 235).....	158
Johnson v. Cooley (71 S. W. 34).....	576	Smith v. Zesch (70 S. W. 775).....	444
Johnston v. Arrendale (71 S. W. 45).....	504	Snodgrass v. Posey (70 S. W. 984).....	584
King v. Quincy Nat. Bank (69 S. W. 978).....	92		

30 TEX. CIV. APP.—Cont'd.		Page
South Texas Nat. Bank v. Texas & L. Lumber Co. (70 S. W. 768).....	412	Tuggle v. Wakefield Iron (70 S. W. 555).....
Sterling v. Self (70 S. W. 233).....	284	Turner v. Cochran (70 S. W. 582).....
Stone v. Crenshaw (70 S. W. 582).....	394	Walker v. San Antonio Ld. S. W. 555).....
Taylor v. Rose (70 S. W. 1022).....	471	Webb v. Garrett (70 S. W. 555).....
Texas Anchor Fence Co. v. San Antonio (71 S. W. 301).....	561	Webb v. Moseley (70 S. W. 555).....
Texas Cent. R. Co. v. Dorsey (70 S. W. 575).....	377	Western Union Tel. Co. (70 S. W. 229).....
Texas State Fair v. Marti (69 S. W. 432).....	132	Western Union Tel. Co. (70 S. W. 313).....
Texas & N. O. R. Co. v. Hook (70 S. W. 233).....	825	Western Union Tel. Co. (70 S. W. 584).....
Texas & N. O. R. Co. v. Scott (71 S. W. 26).....	496	Western Union Tel. Co. (70 S. W. 439).....
Texas & N. O. R. Co. v. Stewart (71 S. W. 330).....	408	Western Union Tel. Co. (70 S. W. 464).....
Texas & P. R. Co. v. Funderburk (68 S. W. 1006).....	22	Westinghouse Electric Mfg. Co. (70 S. W. 324).....
Texas & P. R. Co. v. Kingston (68 S. W. 518).....	24	Wettermark v. Burton (70 S. W. 324).....
Texas & P. R. Co. v. McKenzie (70 S. W. 237).....	298	Wickes-Nease v. Watts (70 S. W. 324).....
Thatcher v. Tillory (70 S. W. 782).....	327	Willis v. Alvey (69 S. W. 324).....
Tinsley v. McIlhenny (70 S. W. 793).....	352	Wingfield v. Hackney (69 S. W. 324).....
Travelers' Ins. Co. v. Hunter (70 S. W. 798).....	489	Wright v. Ross (70 S. W. 324).....
		Yeary v. Crenshaw (70 S. W. 324).....

